In Confidence

Office of the Minister for the Environment

Chair, Cabinet Environment, Energy and Climate Committee

Resource Management Amendment Bill: Matters for inclusion in the Departmental Report to Select Committee

Proposal

1. This paper seeks your agreement to changes to the Resource Management Amendment Bill 2019 (the Bill or RM Bill), to be recommended to the Environment Select Committee (the Select Committee).

Executive summary

2. The RM Bill is an initial set of legislative changes to improve the operation of the Resource Management Act 1991 (RMA), as the first of a two-stage approach to reform the resource management system [CAB-18-MIN-0485.01, CAB-19-MIN-0337.01 and LEG-19-MIN-0146 refer]. The Bill is being considered by the Select Committee, which is currently due to report back to the House on 26 March 2020.

3. This paper seeks agreement for the following further changes to be recommended by the Ministry for the Environment (MfE) in its departmental report to the Select Committee.

Climate Change

4. In light of submissions and the recent enactment of the Climate Change Response (Zero Carbon) Amendment Act 2019 (ZCA), I seek agreement for the RM Bill to address certain climate change issues to ensure consistency with the ZCA.

5. The RMA does not currently provide for climate change mitigation to be considered in plan making or consenting. In fact, it is specifically prohibited from consideration (with some limited exceptions[1]). So a major long-term project could be consented without consideration of its greenhouse gas emissions – for example, a set of coal-fired boilers with a service life of decades; or an aluminium smelter for which the Crown would then assume fiscal responsibility for up to 90 per cent of its emissions.

6. Also, there is now a mismatch between the RMA and the ZCA's mitigation measures, ie its 2050 zero carbon target, emissions budgets and emissions reduction plans – none of which the RMA is explicitly required to have regard to.

7. The Government is reforming the New Zealand Emissions Trading Scheme (NZ ETS) to enable carbon prices float to their appropriate level, but the NZ ETS of itself is not enough to ensure a transition to a low emissions economy. Regulatory measures, including though the RMA, have an important complementary role.

8. I therefore propose to establish a formal link between the ZCA and decision-making under the RMA. The proposed changes will provide a pathway to finally achieving (by 31 December 2021) a coherent basis on which consent authorities can make such decisions

[1] See sections 70A, 70B, 104E and 104F of the RMA.

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relating to climate change mitigation, with ministerial call in being a backstop in the interim. Specifically I propose:

- with immediate commencement upon passage of the RM Bill, removing the constraint on decision-makers appointed by the Minister for the Environment (the Minister) under section 142 when matters of national significance are 'called in', if the Minister believes the application for a resource consent or plan change could give rise to a significant increase, or decrease, in climate changing emissions
- with effect from 31 December 2021, amending sections 61, 66 and 74 to include reference to emissions reduction plans and national adaptation plans under the ZCA
- with effect from 31 December 2021, repealing the statutory bars under sections 70A and 104E (and their exceptions in sections 70B and 104F) prohibiting local authorities from considering climate change mitigation in plan making and consenting decisions.

9. Delaying the date of commencement of these latter two sets of amendments / repeals until 31 December 2021 – by which time the first emissions reduction plan will be gazetted – allows time for national direction under the RMA (likely a national environmental standard, or NES) to also be completed on climate change mitigation, in order to support a consistent approach by local government.

New freshwater planning process

10. I also seek a number of changes to improve the functioning of the new freshwater planning process proposed in the RM Bill, relating to:
    - the two-year freshwater planning timeframes, including the timeframe for council decisions
    - powers for the Chief Freshwater Commissioner to appoint and manage freshwater hearing panel members
    - the response to hearing panel recommendations that are out-of-scope of submissions made to the panel
    - the appointment of a friend of submitter (similar to that used by the Environmental Protection Authority (EPA) for proposals of national significance; and by Auckland Council in the Auckland Unitary Plan process)
    - providing clarity on commissioner remuneration.

Other matters

11. In light of submissions, I also seek agreement for changes to the RM Bill to:
    - allow a change to a regional policy statement to be called in where a matter of national significance is involved
    - amend the regulation making power for the purpose of excluding stock from the margins of water bodies, estuaries, and coastal lakes and lagoons.

Background

12. The RM Bill as introduced proposes amendments to the RMA aimed at reducing complexity, increasing certainty, restoring public participation opportunities, and improving RMA processes. The Bill also supports the urgent need to improve freshwater management and outcomes in New Zealand.

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13. Submissions to the Select Committee closed on 7 November 2019, with 410 (including supplementaries) being received. MfE's departmental report is due to the Select Committee in early March, and the Select Committee is currently due to report back to the House on 26 March 2020.

14. The changes proposed in this paper, if agreed by Cabinet, will be recommended to the Select Committee through the departmental report. The departmental report will, as is normal practice, also recommend a number of minor and technical changes that do not require Cabinet consideration.

Additional decisions sought from Cabinet

Considering climate change under the RMA

Climate Change Response (Zero Carbon) Amendment Act 2019 (ZCA) has been enacted

15. The ZCA was enacted in November 2019, and changed New Zealand's climate change legal architecture. It sets out a framework of enduring institutional arrangements for action that will help keep New Zealand on track to mitigate and adapt to climate change.

16. Amongst other things, the ZCA requires that the following must be published by the Minister for Climate Change:

    - the first emissions reduction plan (by 31 December 2021), which will set out the policies and strategies for meeting the next emissions budget
    - the first national adaptation plan (no later than two years after the first national climate change risk assessment), which will respond to the national climate change risk assessment, and set out the Government's objectives for adapting to the effects of climate change.

17. The RM Bill was introduced in September 2019, while the Zero Carbon Bill was before the Environment Select Committee. About 60 per cent of the submissions on the RM Bill raised the need to enable climate change mitigation to be adequately considered under the RMA. This was also raised by submitters on the Zero Carbon Bill.

18. With the ZCA having now been enacted, it makes sense to update the RMA in relation to climate change mitigation, including formally linking the RMA with the ZCA to ensure consistency between these two statutes. This can be achieved through some straightforward changes to the RM Bill.

History of climate change mitigation in the RMA

19. The Resource Management (Energy and Climate Change) Amendment Act 2004 (RMAA 2004) inserted sections 70A, 70B, 104E and 104F into the RMA. Sections 70A and 104E removed the ability of regional councils to consider the effects on climate change of greenhouse gas discharges to air (ie climate change mitigation*)* – except where the use and development of renewable energy enabled a reduction in a discharge; or in compliance with national regulations under sections 70B and 104E (from 2005, a national environmental standard or NES).

20. The rationale for this approach was that such discharges were best dealt with through national coordination, using mechanisms such as an NES, or a price on emissions under the NZ ETS – rather than localised RMA decisions which had the potential for duplication, unnecessary costs, and for local controls to conflict with national objectives. However, an NES has never been developed.

21. In *West Coast Ent Inc v Buller Coal Ltd* [2013] NZSC 87, the Supreme Court found that the RMAA 2004 prevented councils (whether regional or territorial) from considering climate change effects that may result from the end use of activities, in that case coal mined for

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export. This decision effectively confirmed that councils could not consider greenhouse gas emissions whether emitted directly or indirectly, including through land use planning decisions.[2]

22. However, councils can still consider adaptation to the effects of climate change (climate change adaptation), for example by introducing development controls in areas at risk of rising sea levels.

23. The price mechanism through the NZ ETS has influenced investment decisions, and the Government is reforming the NZ ETS to enable carbon prices to float to their appropriate level, but the NZ ETS of itself is not enough to ensure a transition to a low emissions economy. Regulatory measures, including though the RMA, have an important complementary role.

Facilitating consideration of climate change mitigation under the RMA

24. The Resource Management Review Panel is considering how climate change should be dealt with in a future resource management system. However, legislation resulting from the Panel's comprehensive review is unlikely to be passed before the end of 2021.

25. Meantime it is desirable that climate change mitigation measures be available under the current RMA, and be aligned with the gazettal of the first emissions reduction plan by 31 December 2021. An NES and/or other national direction under the RMA would be completed by the same date, to support local government with making consistent decisions on climate change mitigation.

26. In essence, prompted by the passing of the ZCA, the changes proposed below will provide (by 31 December 2021) a pathway to finally achieving a coherent basis on which consent authorities can make decisions relating to climate change mitigation, with ministerial call in being a backstop meantime.

Removing limitation on Ministerial call in of climate change mitigation matters

27. Under section 142 of the RMA, the Minister for the Environment[3] can call in a matter, including an application for a resource consent, that is or is part of a proposal of national significance; and refer the matter to a board of inquiry or the Environment Court for decision. In these instances the decision-maker is still constrained by sections 70A and 104E when considering climate change mitigation.

28. I propose that this constraint be removed, with immediate effect, ie that sections 70A and 104E would not apply to an application for a resource consent or plan change called in after the RM Bill passes, if the Minister believes the application could give rise to a significant increase, or decrease, in climate changing emissions.

29. This means that while an emissions reduction plan and national direction are being developed to provide councils with assistance and direction on mitigation issues, a decision-maker appointed by the Minister, under call in, could consider climate change

[2] Earlier, in *Greenpeace New Zealand Inc v Genesis Power Ltd* [2008] NZSC 112, the Supreme Court found that section 104F applies only to consent applications involving renewable energy.

[3] Or the Minister of Conservation where a matter relates wholly to the coastal marine area: s148 of RMA.

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mitigation on a 'matter of national significance' if the Minister believed the decision-maker should.[4]

30. This would also obviate the risk of new projects being brought forward – ahead of national direction being in place – that could lock in significant long-term greenhouse gas emissions – for example, a set of coal-fired boilers with a service life of decades; or an aluminium smelter for which the Crown would then assume fiscal responsibility for up to 90 per cent of its emissions.

Amending sections 61, 66 and 74 of the RMA

31. The ZCA provides that the 2050 zero carbon target, emissions budgets and emissions reduction plans may be taken into account under other frameworks[5], which would include the RMA. While the RMA itself requires local authorities to have regard to plans prepared under other Acts, I propose that the link with the ZCA be formalised by making clear and explicit that emissions reduction plans and national adaptation plans are matters for consideration in RMA decision-making.

32. This will be achieved by amending sections 61, 66 and 74 to add these plans to the list of matters that regional and district councils must consider when preparing or changing regional policy statements, regional plans and district plans.

Repealing sections 70A, 70B, 104E and 104F of the RMA

33. The amendments to sections 61, 66 and 74 will still leave a mismatch between the ZCA and the RMA in relation to climate change mitigation. That is because sections 70A and 104E of the RMA prohibit local government (with some limited exceptions) from considering climate change mitigation; with sections 70B and 104F in effect providing for further exceptions (through NES) though none have actually been added.

34. I propose that sections 70A, 70B, 104E and 104F be repealed from 31 December 2021, to allow time for the first emissions reductions plan to be gazetted, and for national direction (likely an NES) to be completed on climate change mitigation.[6]

35. A national direction package on climate change mitigation could also include other types of standardised rules set by central government, such as a national policy statement and national planning standards. Any national direction measures would be assessed for their complementarity to the NZ ETS. MfE will provide me with advice on options for national direction.

Risks associated with the above proposals

36. There are risks associated with the above proposals. Including a new climate change consideration in the RMA could be seen as adding to the complexity of certain consent processes. Taking a regulatory approach to climate change mitigation through the RMA could potentially double up with the NZ ETS carbon price mechanism, as a means of least-

[4] This arrangement would be superseded with the repeal of sections 70A and 104E on 31 December 2021, because from that date the new climate mitigation regime would apply to all RMA decision-makers.

[5] See new section 5ZN of the Climate Change Response Act 2002.

[6] Sections 70B and 104F would serve no useful continuing purpose, even though they refer to NES standards. The general NES provisions in the RMA (sections 43 to 44A) would provide fully for the making of a climate change mitigation NES.

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cost abatement.[7] Resource consent applicants may be left uncertain as to whether or not a proposal will be declined on the basis of its future emissions.

37. I consider that these risks will be dealt with through the terms of a climate mitigation NES and/or other national direction. Also, the Resource Management Review Panel, which is comprehensively reviewing the resource management system, will provide advice as to how a future resource management system should deal with climate change.

Part 2 amendment deferred

38. It has been suggested that Part 2 of the RMA, Purpose and Principles, be amended to add climate change mitigation to the list of matters of national importance, but I do not consider this to be within scope of this RM Bill. However, it will be part of the advice provided by the Resource Management Review Panel.

Freshwater planning process (clause 72 of the Bill, new Part 4 of Schedule 1)

39. Cabinet has agreed that councils must use the new freshwater planning process for all proposed RPSs or regional plans (or changes) that implement the National Policy Statement for Freshwater Management (NPS-FM) [CAB-19-MIN-0337.01 refers].[8] The process is broadly based on that used for the Auckland Unitary Plan, which was established under the Local Government (Auckland Transitional Provisions) Amendment Act 2013.

40. Through the submission process it has become clear that there are some aspects of the process that would benefit from refinement. Submitters have noted that it will be difficult:
    - to meet the two-year planning timeframe (from notification by 31 December 2023 to decision by 31 December 2025) for larger and complex plan/policy statement changes
    - for councils to make decisions following freshwater hearing panel recommendations within the 20 working day timeframe
    - to undertake 16 concurrent regional planning processes with appropriately skilled commissioners and expert witnesses, given constraints on the supply of such experts.

Providing the Chief Freshwater Commissioner with the ability to extend timeframes

41. I acknowledge that for larger and more complex plans, some councils may need more time than others to complete post-notification processes (eg to provide documentation such as the summary of submissions, compile additional technical evidence to respond to submitters concerns, and to make final decisions). Similarly, there may be situations where freshwater hearing panels recognise that the time required for hearings and/or drafting recommendations will impact on meeting the two year freshwater planning timeframe. Associated with this are practical issues that may arise if 16 regional hearings all occur at the same time.

42. I therefore propose to allow the council and/or chair of a freshwater hearing panel to seek an extension of time from the Chief Freshwater Commissioner for *any part* of the two year planning process (post-notification), up to a cumulative maximum of 12 months. The two year timeframe spans from public notification to final decisions made by the council.[9] The

[7] Some government agencies have expressed this concern, and have noted their view that the suite of climate change policies that the Government is introducing will enable New Zealand to meet its emissions reduction targets at lower cost than using the RMA as a tool for mitigation.

[8] A diagram of the standard planning process and the freshwater planning process has been updated to reflect process changes presented in this paper. This is attached in Appendix 1.

[9] Note that this reflects the current two year timeframe in the RMA for the standard Schedule 1 plan process, which applies from plan notification through to final decisions.

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12 month cumulative maximum extension means that the latest a council would be required to make final decisions on a plan is 31 December 2026.

43. I propose that in order to seek an extension, the council and/or chair of the freshwater hearing panel must apply to the Chief Freshwater Commissioner, setting out the justification and how they intend to meet the new timeframe.

44. I consider these changes will ensure that plans will still be in place in a timely way (noting that previously councils had until 2030 to implement the current NPS-FM) while providing agility within the freshwater planning process to recognise regional differences.

45. In particular this recognises that councils are at differing stages of implementing the current NPS-FM, and will therefore have a greater or lesser amount of work to complete implementation of the new 2020 NPS-FM. The changes I propose will reduce the pressures associated with convening 16 freshwater hearing panels, and assist in ensuring that there are sufficient experts (planners, modellers and commissioners) to support those hearings.

Increasing the time for council decision-making from 20 to 40 working days

46. The Bill requires a council to publicly notify its decisions on the freshwater hearing panel's recommendations no later than 20 working days after the report is provided [clause 51(4)].

47. Cabinet previously agreed that a regional council could seek an extension to the date by which final decisions must be made on the Panel's recommendations, from the Chief Freshwater Commissioner [CAB-MIN-0337.01, para 21 refers]. The purpose of this is to provide additional time, where warranted, for councils to make final decisions on the freshwater hearing panel recommendations.

48. Some concerns have been expressed about the ability of councils to meet the 31 December 2023 deadline for notifying changes to their freshwater policy statements and plans, which are needed to implement the 2020 NPS-FM. To meet the deadline, central government (particularly MfE) will assist councils in developing and implementing quality freshwater planning provisions. $12 million over four years was allocated in Budget 2019 for this purpose. Support would be provided where the need is greatest, such as to smaller less well-resourced councils.

49. Many submitters, particularly councils, consider 20 working days to be too short, particularly in cases where the council chooses to reject a recommendation and develop an alternative solution (see paragraph 54 below). I agree that 20 working days may be insufficient and propose to extend this to 40 working days.

50. I note that under the proposal referred to in paragraph 42 above (a 12 month extension to any part of the planning process), a council could also seek an extension for decision-making purposes. Increasing the statutory decision-making timeframe to 40 working days will reduce the number of applications the Chief Freshwater Commissioner is likely to receive, and therefore create a more efficient process.

Providing the Chief Freshwater Commissioner with further powers to manage and appoint freshwater hearing panel members

51. The Bill provides for the Minister for the Environment to appoint a Chief Freshwater Commissioner, who will be a current or retired Environment Court judge [clause 62(3)].[10] It

[10] In the Cabinet minute, the Chief Freshwater Commissioner was referred to as the Chair of the Freshwater Commissioners. I made the change in terminology under delegated authority [CAB-MIN-337.01, para 60 refers], to differentiate the Chief Freshwater Commissioner from the Chair of each freshwater hearings panel.

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is the role of the Chief Freshwater Commissioner to appoint members to regional freshwater hearing panels [clause 57].

52. I consider there is a need to specify three further roles for the Chief Freshwater Commissioner. The Bill currently provides for the Minister to appoint and remove freshwater commissioners and accordingly to appoint new members. I propose that the Chief Freshwater Commissioner have similar powers for managing the appointment of regional freshwater hearings panel members as follows:

   - notify members when their appointment to a freshwater hearings panel commences/ceases
   - remove members from a freshwater hearings panel at any time for just cause
   - appoint new members to a freshwater hearings panel.

Response when a freshwater hearing panel's recommendation is out-of-scope of submissions

53. Councils and Local Government New Zealand, commented on a freshwater hearing panel's ability to make recommendations which are outside the scope of submissions. This was considered to be unfair, as participants who have had no opportunity to raise their concerns about an out-of-scope recommendation would also have no right of appeal on the merits.

54. I wish to retain the agility of this provision, particularly for the ability to improve a plan on matters that may not have occurred to submitters, such as plan structure. However, the issue of natural justice raised by submitters is relevant. I therefore propose that submitters be provided with an ability to appeal council decisions on those matters that are outside the scope of submissions as follows:

   - where a council rejects a recommendation which is outside the scope of submissions, *any person who made a submission* may make an appeal on the merits to the Environment Court on the council's alternative solution. (This is consistent with appeal rights where a rejected recommendation is in scope.)
   - where a council accepts a recommendation which is outside the scope of submissions, *any person who made a submission* may make an appeal on a point of law to the High Court.

55. As the Bill stands, appeals would be available only to people who submitted (and on a particular matter they addressed). For an out-of-scope recommendation, there would self-evidently be no submitters on the matter, so I propose to open appeals to anyone who submitted on the plan/policy statement. This will provide for submitters who engaged on other issues to be able to appeal the out-of-scope matter.

56. I also wish to clarify that, where a council rejects a recommendation of the panel which is out-of-scope of submissions, the council must still develop an alternative, which may also be out-of-scope of submissions. This is consistent with the position where a rejected recommendation is in scope. Also, it would not make sense to constrain the council if it is developing an alternative to a recommendation that is out-of-scope of submissions in the first instance.

57. An example might be where the panel recommends a restructure of the plan but no one has raised this through submissions. The council may agree for the most part, but want to make further structural changes for improved workability, and it would not be possible to do so if they were constrained only to matters raised by submitters.

Providing for the appointment of a 'friend of submitter'

58. The Bill enables cross examination during the freshwater hearing process [clause 40(2)]. Some submitters have raised concerns that submitters on freshwater planning instruments

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may be intimidated by cross-examination and be deterred from participating in the freshwater hearing process.

59. The intent of the freshwater hearing process is to enable robust testing of a proposed freshwater planning instrument. This is achieved in part by allowing the panel to permit cross-examination.

60. To minimise submitters feeling intimidated by the prospect of cross-examination, I propose that the chair of each freshwater hearings panel be able to appoint a friend of submitter, in consultation with the relevant council. This friend of submitter role is similar to that used by the Environmental Protection Authority for proposals of national significance; and by Auckland Council in the Auckland Unitary Plan process. The friend would provide submitters with advice and support on the hearing process.

61. The cost of a friend of submitter would be borne by the relevant council, and hence I wish the panel chair to consult with the council on the appointment. This would provide the opportunity for the council to manage costs, eg a council may provide a suitable existing staff member for this role.

Providing clarity on commissioner remuneration under the freshwater planning process

62. The Bill provides for three types of commissioners:
    - a Chief Freshwater Commissioner appointed by the Minister
    - a group of freshwater commissioners appointed by the Minister. The Chief Freshwater Commissioner will appoint freshwater commissioners to specific freshwater hearings panels, and may require them to undertake non-hearing related tasks such as meetings and training
    - commissioners nominated by councils and tangata whenua who will be appointed by the Chief Freshwater Commissioner to a specific freshwater hearings panel. These may be accredited councillors and/or independent commissioners.

63. Cabinet agreed that costs associated with freshwater hearings panels will be met by the relevant council [CAB-19-MIN-0337.01, para 19 refers]. The Bill currently specifies that the relevant regional council is responsible for all hearing costs, which would include remuneration for members.

64. The Chief Freshwater Commissioner's functions focus on managing the successful delivery of the freshwater planning process across the country. I therefore propose that the Bill clarify that the Crown will meet the costs of the Chief Freshwater Commissioner. If, however, the Chief Freshwater Commissioner is appointed to a freshwater hearing panel, then the council would be responsible for those costs.

65. Freshwater commissioners may also have tasks that are not specific to a hearings panel, such as meetings and training as directed by the Chief Freshwater Commissioner. It is appropriate that these costs are met by the Crown rather than the council, and the Bill needs to make this cost sharing arrangement clear. I note that remuneration rates for freshwater commissioners will be the same for both hearing related and non-hearing related tasks.

66. I also propose that the Bill clarifies that Cabinet will set daily rates for all commissioners on a freshwater hearing panel under the Cabinet Fees Framework, except where councillors are appointed. This would apply to Minister-appointed freshwater commissioners assigned to a panel, and to council-nominated and tangata whenua-nominated commissioners (if they are not elected councillors).[11]

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[11] I anticipate the need to seek an exception to daily fees under the Cabinet Fees Framework, to secure commissioners with appropriate skills required for the freshwater planning process.

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67. If councillors are appointed to a panel, councillor rates should continue to be applied as determined by the Remuneration Authority. I note that this would satisfy council submissions on the Bill that sought a cap on commissioner rates as a means of managing costs they will incur from the freshwater planning process.

Other matters

Ability to call in a change to a regional policy statement

68. As noted in paragraph 27 above, under section 142 of the RMA the Minister can call in and refer certain matters to a board of enquiry or the Environment Court for a decision, where a matter of national significance is involved. These include applications for a resource consent, and changes to a regional plan, but not currently a change to a regional policy statement (RPS).

69. In its submission, the Environmental Defence Society asked that the Bill provide for the Minister to call in a change to an RPS.

70. Councils may be required to make changes to an RPS (as well as to their regional or district plans) in order to give effect to, amongst other things, a national policy statement. The issue can arise particularly where a regional plan and an RPS are integrated in the same document, as with Horizons Regional Council's One Plan. It is therefore desirable that a power to call in be consistent between a regional plan and an RPS.

71. Accordingly, I seek Cabinet's agreement to amending the RMA to enable the Minister to call in a change to an RPS (or part of a change); or a request for a change to an RPS (or part of such a request).

Amending the regulation making power for the purpose of excluding stock from the margins of water bodies, estuaries, and coastal lakes and lagoons

72. The Bill currently proposes increasing the maximum infringement fees payable for various infringements under the RMA, including any infringements of stock exclusion regulations that may be made under section 360(1)(hn) of the RMA.

73. In its submission on this point, Environment Canterbury (ECAN) noted that councils could not issue infringement notices for stock entering the margins of water bodies, estuaries and coastal lakes and lagoons, as the section 360 regulation-making power applies only to these features themselves. ECAN asked that this be remedied, and I agree it should.

74. If section 360(1)(hn) is not extended to the margins of these features, any requirement to exclude stock from a margin (the setback area) would need to be made in a national environmental standard. To avoid complexity, it is preferable for all controls regarding stock exclusion be in a single regulation, rather than split between a regulation under section 360 and an NES.

75. I therefore seek Cabinet's approval to amend section 360(1)(hn) so that the regulation-making power extends to the margins of water bodies, estuaries, and coastal lakes and lagoons. Councils could then take enforcement action for any non-compliant presence of stock in any setbacks.

A future potential matter: an amendment relating to farm plans

76. As part of the Essential Freshwater work programme, officials are considering the role of farm plans in improving water quality. This includes whether it would be desirable for farm plans to be enforceable and, if so, how. I will be receiving further advice on this, which may result in a further change being proposed to the Bill.

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Consultation

77. These proposed changes result from issues identified in submissions received by the Select Committee and will be included in the MfE's departmental report to the Committee.

78. In addition, the following departments have been consulted: Te Puni Kōkiri, Ministry for Culture and Heritage, Department of Conservation, Department of Internal Affairs, Department of Prime Minister and Cabinet, Office for Māori Crown Relations – Te Arawhiti, Ministry of Justice, Ministry of Transport, Ministry of Health, Land Information New Zealand, Ministry of Primary Industries, Ministry of Business, Innovation and Employment, Ministry of Housing and Urban Development, Treasury, Ministry of Education, Department of Corrections, New Zealand Defence Force, Environmental Protection Authority, and State Services Commission.

79. Broad agency comments on the changes proposed have been discussed in the relevant sections of this paper, or discussed and clarified directly with relevant agencies. Some agency comments will be dealt with at the drafting stage or national direction making stage (such as how a water body margin would be defined for a stock exclusion regulation making power). Other technical changes have been reflected in this paper.

Financial implications

80. There are no new financial implications in these proposals in relation to the freshwater planning process. Rather, they clarify where existing costs fall.

81. MfE will use baseline funding from within its climate change appropriation to develop national direction to support decision-makers with considering climate change mitigation under the RMA, and will not be seeking additional funding at this time. MfE has an internal prioritisation process to allocate the use of this funding.

Legislative implications

82. The policies and associated legislative changes agreed here will be recommended to the Select Committee by MfE in its departmental report on the Bill.

Treaty of Waitangi/Te Tiriti o Waitangi implications

Submissions from iwi/Māori

83. There were 14 submissions from iwi/Māori organisations, most of which supported the Government's Essential Freshwater programme. There was significant support for the freshwater planning process in principle, though there was criticism of the process used to develop it. In relation to specific Treaty settlement commitments, some submissions said there had been a lack of engagement, inconsistent with such commitments. These points will be responded to in MfE's departmental report.

84. The freshwater planning process is crucial to progressing the Government's Essential Freshwater programme, the objectives of which include stopping further degradation of our freshwater and reversing past damage. Without this new process, it could take until 2030 or later for new regional freshwater plans to be in place, and improvements in water quality would take even longer. Such a delay is unacceptable. The Bill provides an opportunity to deal with this, by introducing a freshwater plan making process that requires plans to be in place by 31 December 2025 (or 31 December 2026 at latest).

85. I established advisory groups to provide the Government with advice on the programme, including Te Kāhui Wai Māori whose particular purpose is to facilitate engagement between the Crown and Maori, as agreed by Cabinet [ENV-18-MIN-0032]. During the 16 recent hui that took place as part of the Action for Healthy Waterways public engagement, the

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freshwater planning process was identified as core to delivering the freshwater outcomes envisaged by this package.

Waitangi Tribunal

86. The Waitangi Tribunal, in its report on the Wai 2358 claim, made a suite of recommendations on the management, governance and allocation of freshwater. The new freshwater planning process in the Bill has direct relevance to the Wai 2358 recommendation that the Government review the timeframes for implementing the NPS-FM. The Bill achieves this by (generally) requiring plans to be in place by 31 December 2025. However, this stage 1 Bill does not respond to broader recommendations of the Waitangi Tribunal, including around governance structures of local government and broader iwi/Māori engagement in RMA processes.

Accommodating Treaty-related processes, including settlement legislation

87. The intent is that the freshwater planning process can accommodate current and future Treaty settlement arrangements, joint management agreements and Mana Whakahono a Rohe, in the same manner as they would under the standard planning process under Part 1 of Schedule 1 of the RMA.

88. There may need to be consequential amendment/s to the RM Bill to make this clear in relation to Treaty settlement arrangements. Particular settlements that may need to be accommodated are outlined below.

Te Awa Tupua (Whanganui River Claims Settlement) Act 2017

89. Under section 15 of this Act, decision-makers under the RMA (and a range of other Acts) must state how requirements outlined in section 15 have been met. Those decision-makers must recognise and provide for, or have particular regard to, the status of Te Awa Tupua (as a legal person) and the intrinsic values (Tupua te Kawa).

90. Under the Act, Te Pou Tupua acts and speak on behalf of the Te Awa Tupua to uphold its status and Tupua te Kawa. Te Pou Tupua would therefore expect to be involved in relevant panel member selection, to ensure that the panel is convened in a manner consistent with the Act. The freshwater planning process would continue to allow Horizons Regional Council to fulfil its statutory obligations under section 15.

Ngāti Rangi Claims Settlement Act 2019

91. Similar to Te Awa Tupua, under section 109 of the Ngāti Rangi Claims Settlement Act 2019 decision-makers under the RMA must state how the requirements outlined in the Act have been met. In relation to the Whangaehu River, those decision-makers must recognise and provide for, or have particular regard to, Te Mana Tupua and Ngā Toka Tupua (the intrinsic values). The freshwater planning process would continue to allow councils to fulfil their statutory obligations under section 109.

Waikato and Waipa rivers

92. Under section 17 of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, section 18 of the Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010, and section 8 of the Nga Wai o Maniapoto (Waipa River) Act 2012, persons exercising functions and powers under the RMA must have particular regard to the vision and strategy for the Waikato and Waipa Rivers.

93. It is intended that planning instruments developed through a freshwater planning process affecting these rivers conform to the vision and strategy and have regard to integrated river management plans established under those Acts, as they would in a standard RMA

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planning process, and that freshwater planning processes accommodate joint management agreements as appropriate.

Regulatory impact analysis

94. The Regulatory Impact Analysis (RIA) requirements apply to the proposals in the Bill. Regulatory Impact Statements (RIS) have been prepared by the MfE and provided to Cabinet previously for proposals in this Bill [CAB-MIN-19-0485.01 and CAB-MIN-0337.01 refer].

95. An addendum to the previous RIS for the proposed freshwater planning process has been prepared to reflect the associated proposals detailed in this paper, and is attached as Appendix 2.

    - MfE's Regulatory Impact Assessment Panel (RIAP) assessed this, and considered the level of information provided is appropriate to the additional and technical nature of the proposals, and that this meets the quality assurance criteria.

96. A separate RIS has been prepared for the climate change proposal, and is attached as Appendix 3.

    - RIAP has reviewed this RIS, and considers it partially meets the quality assurance criteria.
    - RIAP considers "the RIS clearly explains the rationale for the proposed amendments to the RMA, which repeal amendments made to the Act in 2004, on the basis of a changed policy framework in favour of a comprehensive set of domestic policies that complement emissions pricing through the Emissions Trading Scheme (ETS). There are risks to proceeding with this change to primary legislation without formal consultation that cannot be adequately mitigated by means of future consultation on a supporting National Environmental Standard. Stakeholder consultation and engagement would have significantly strengthened the options analysis and economic assessment and given greater confidence about the benefits of the proposal. The further policy measures will need to be subject to consultation for a full perspective, careful analysis and subsequent evaluation of their impacts in practice."

97. A separate RIA will be undertaken for any stock exclusion regulations (if developed) to be considered as part of the Essential Freshwater programme.

Climate impacts policy assessment (CIPA)

98. The CIPA requirements do not apply to this proposal as the threshold for significance is not met. While emission reductions are likely to result from this proposal, these are not yet quantifiable. MfE will quantify the emissions impacts, where appropriate, in later Cabinet decisions for national direction.

Human rights, gender implications and disability perspective

99. There are no human rights, gender or disability implications associated with this paper.

Proactive release and publicity

100. I am proposing to delay the release of this paper until the Select Committee reports back to the House, beyond the usual 30 business days after the paper has been approved by Cabinet.

101. There will be an announcement on the Beehive website after the Bill is passed.

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Recommendations

The Minister for the Environment (the Minister) recommends that the Committee:

1. **note** that Cabinet has agreed to a set of amendments to the Resource Management Act 1991 (RMA) to reduce complexity, increase certainty, restore previous public participation opportunities and improve processes, in advance of a more comprehensive review of the resource management system [CAB-18-MIN-0485.01 refers]

Considering climate change under the RMA in light of the Climate Change Response (Zero Carbon) Amendment Act 2019 being enacted

2. **note** that the RMA does not currently provide for climate change mitigation to be considered in plan making or consenting (with some limited exceptions), and that there is now a mismatch between the RMA and mitigation measures (including emissions reduction plans) under the Climate Change Response (Zero Carbon) Act 2019 (ZCA)
3. **note** that the New Zealand Emissions Trading Scheme is not enough to ensure a transition to a low emissions economy and that regulatory measures, including though the RMA, have an important complementary role
4. **note** that it is desirable to remedy the mismatch that now exists between the RMA and ZCA, and to develop a coherent basis on which RMA planning and consent authorities can make decisions relating to climate change mitigation, with ministerial call in being a backstop in the interim
5. **agree** to amend the RMA, with immediate commencement upon passage of the Resource Management Amendment Bill 2019 (the RM Bill), to remove the constraint on decision-makers under section 142 of the RMA when matters of national significance are 'called in', if the Minister believes an application for a resource consent or plan change could give rise to a significant increase, or decrease, in climate changing emissions
6. **agree** that, to give effect to recommendation 5, sections 70A and 104E of the RMA would not apply to such an application (pending the repeal of those sections per recommendation 9)
7. **note** that the first emissions reduction plan will be gazetted by 31 December 2021
8. **agree** to amend sections 61, 66 and 74 of the RMA, with effect from 31 December 2021, to provide for councils to explicitly consider emissions reductions plans and national adaptation plans under the ZCA when making or amending regional policy statements, regional plans and district plans
9. **agree** to repeal sections 70A and 104E of the RMA, and associated sections 104E and 104F, with effect from 31 December 2021
10. **note** that the 31 December 2021 commencement date, referred to in recommendations 8 and 9, allows time both for the first emissions reduction plan to be gazetted, and a national environmental standard (NES) and/or other national direction to be developed under the RMA on climate change mitigation
11. **agree** that such an NES and/or other national direction be completed by 31 December 2021, to support local government with making consistent decisions regarding climate change mitigation
12. **note** that officials will provide the Minister with advice on options for national direction

Freshwater planning process

13. **note** that on 1 July 2019, Cabinet agreed to amend the RMA to provide for a new freshwater planning process and that regional and unitary councils will use this process

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to implement a new National Policy Statement for Freshwater Management (NPS-FM) [CAB-19-MIN-0337.01 refers]

Providing the Chief Freshwater Commissioner with the ability to extend timeframes

14. **agree** to rescind the part of the previous Cabinet decision that councils may seek from the chair of the freshwater commissioners (ie the Chief Freshwater Commissioner) an extension to the timeframe for final approval of regional planning documents [CAB-MIN-0337.01 para 21.1 refers]

15. **agree** to allow a council and/or the chair of a freshwater hearing panel to apply to the Chief Freshwater Commissioner to extend any timeframe during the two year freshwater planning process post-notification, up to a cumulative maximum extension of 12 months

16. **agree** to require the council and/or the chair of a freshwater hearing panel to apply in writing setting out the justification for why any such extension is warranted and how they intend to meet the new timeframe

17. **agree** to enable the Chief Freshwater Commissioner to grant or decline any such extension upon application from the council and/or chair of the freshwater hearing panel

18. **note** that at the latest, final decisions must be made by 1 December 2026

Increasing the time for council decision-making from 20 to 40 working days

19. **agree** to rescind the part of the previous Cabinet decision that councils must make decisions following receipt of the freshwater hearing panel recommendations in 20 working days [CAB-MIN-0337.01, para 20 refers]

20. **agree** that the default timeframe for councils to make decisions following receipt of the freshwater hearing panel recommendations be 40 working days

Providing the Chief Freshwater Commissioner with further powers to manage and appoint freshwater hearing panel members

21. **agree** to rescind the previous Cabinet decision that the group of freshwater commissioners will support regional freshwater planning by convening freshwater hearing panels to run hearings in each region and form the core of each panel [CAB-MIN-0337.01 para 10 refers]

22. **note** that the role of the Chief Freshwater Commissioner includes appointing regional freshwater hearing panels

23. **agree** to allow the Chief Freshwater Commissioner to:

    23.1. notify members when their appointment to a freshwater hearings panel commences/ceases

    23.2. remove members from a freshwater hearings panel at any time for just cause

    23.3. appoint new members to a freshwater hearings panel

Response when a freshwater hearing panel's recommendation is out-of-scope of submissions

24. **agree** that where a council rejects a recommendation that is outside the scope of submissions and provides an alternative solution, any person who made a submission on the freshwater planning instrument may make an appeal on the merits to the Environment Court on the council's alternative solution

25. **agree** that where a council accepts a recommendation that is outside the scope of submissions, any person who made a submission on the freshwater planning instrument may appeal on a question of law to the High Court

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26. **agree** that where a council rejects a recommendation which is beyond the scope of submissions, the council may develop an alternative solution which may also be beyond the scope of submissions

Providing for the appointment of a 'friend of submitter'

27. **agree** to enable the chair of a freshwater hearings panel to appoint a friend of submitter, where they consider this is appropriate, in consultation with the relevant council

Providing clarity on commissioner remuneration under the freshwater planning process

28. **agree** that costs of the Chief Freshwater Commissioner will be met by the Crown, except where he/she is appointed to chair a freshwater hearings panel, in which case the relevant regional council will be responsible for those costs

29. **agree** that costs of freshwater commissioners that are not specific to a hearings panel, such as meetings and training as directed by the Chief Freshwater Commissioner, will be met by the Crown

30. **agree** that the remuneration rates for freshwater commissioners will be the same for both hearing related and non-hearing related tasks

31. **agree** that daily hearing rates will be set by Cabinet under the Cabinet Fees Framework for the Chief Freshwater Commissioner, Minister-appointed freshwater commissioners, council-nominated commissioners and tangata whenua nominated commissioners, except where any of these is an elected councillor

32. **agree** that existing councillor rates set by the Remuneration Authority will continue to apply to any councillors appointed to a freshwater hearing panel

Treaty settlement legislation and the freshwater planning process

33. **note** that there may need to be consequential amendment/s to the RM Bill to make clear that Treaty settlement arrangements relating to the standard planning process under Part 1 of Schedule 1 of the RMA also apply to the freshwater planning process

Ability to call in a change to a regional policy statement (RPS)

34. **agree** to enable the Minister to call in, if it is a matter of national significance, a change to a regional policy statement (or part of a change); or a request for a change to an RPS (or part of such a request)

Amending regulation making power for the purpose of excluding stock from the margins of water bodies, estuaries, and coastal lakes and lagoons

35. **agree** to amend section 360(1)(hn) of the RMA to extend the regulation making power to prescribing measures for the purpose of excluding stock from the margins of water bodies, estuaries, and coastal lakes and lagoons

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A potential future matter: an amendment relating to farm plans

36. **note** that as part of the Essential Freshwater work programme, the Minister will be receiving advice on whether farm plans should be enforceable

37. **note** that this advice may result in a further change being proposed to the RM Bill.

Authorised for lodgement.

Hon David Parker

Minister for the Environment

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Appendix 1.

Updated diagram of standard planning process and freshwater planning process

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Appendix 2.

Impact Summary: Cabinet paper for policy decisions for Resource Management Amendment Bill Departmental Report and other minor and technical matters

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Appendix 3.

Impact Summary: Linking the Zero Carbon Act 2019 with the Resource Management Act 1991

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