Ministry for the Environment
Manatū Mō Te Taiao

PROACTIVE RELEASE COVERSHEET

Minister	Hon Penny Simmonds Hon Chris Bishop	**Portfolio**	Environment RMA reform
Name of package	Briefings on Freshwater, NPS for Renewable Electricity Generation, NPS on Electricity Transmission	**Date to be published**	

List of documents that have been proactively released		
Date	***Title***	***Author***
14 December 2023	Briefing 3973: Land use, freshwater and the marine environment	Ministry for the Environment
28 June 2022	BRF-1679 – RM reform, delegated decisions on Māori freshwater rights and interests	Ministry for the Environment
15 February 2024	BRF-4158 – Policy decisions on the NPS-REG and NPS-ET	Ministry for the Environment
26 March 2024	Aide memoire: Progressing changes to the freshwater management system	Ministry for the Environment
	Extract from BRF 4651 Aide memoire: Advice on Electrify NZ Cabinet paper – Māori rights and interests	Ministry for the Environment

Information redacted **YES** **NO**

Any information redacted in this document is redacted in accordance with the Ministry for the Environment's policy on proactive release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Summary of reasons for redaction

Some information has been withheld from *[Document title]* under Section [section] of the Official Information Act [reason].

Secondary Briefing: Land Use, Freshwater, and the Marine Environment - Date submitted: 14 December 2023

Tracking number: BRF-3973
Security level: In-Confidence
MfE priority: Not Urgent

Actions sought from ministers		
Name and position	***Action sought***	***Response by***
To Hon Penny Simmonds Minister for the Environment	**Note** the key decisions for your consideration (Appendix 1) **Agree** to meet with officials for further discussion	N/A
CC Hon Chris Bishop Minister Responsible for RMA Reform	For information	N/A

Actions for Minister's Office staff
Forward to Hon Andrew Hoggard, Associate Minister for the Environment if agreed **Return** the signed briefing to Ministry for the Environment (ministerials@mfe.govt.nz) — please send both hard *and* soft copies to ensure we meet our public record obligations.

Appendices and attachments
Appendix 1: Key decisions for the first 100 days

Key contacts at Ministry for the Environment			
Position	***Name***	***Cell phone***	***First contact***
Principal Author	Vicki Addison		
General Manager	Hayden Johnston	022 153 0221	
Deputy Secretary	Nadeine Dommisse	022 034 0311	✓

Minister's comments

Secondary Briefing: Land Use, Freshwater, and the Marine Environment

Key messages

1. New Zealanders have a strong relationship with land, water, and the marine environment – the health and wellbeing of our communities and economy is dependent on the sustainable use of these resources.

2. The quality of our land, water and marine environments has deteriorated over time and is under pressure in some areas – in both urban and rural environments.

3. This briefing provides an overview of the land use, freshwater and marine areas of work. It sets out relevant primary and secondary legislation, as well as work underway – including challenges and opportunities for your consideration. We view this briefing as a starting point for an ongoing discussion about how we can support you to deliver on your priorities.

4. There are some themes in the Coalition Agreements that the land use, freshwater and marine areas of work can support. These themes are around:

    - growing the economy, including the primary sector, while
    - reducing the regulatory burden and compliance costs for farmers.

5. Further advice will be provided on options to achieve these priorities. For example, by giving farmers the tools they need (eg, water storage) and simplifying aspects of existing secondary legislation (eg, stock exclusion).

6. As well as providing policy advice on legislative and regulatory settings, the Ministry for the Environment (the Ministry) supports effective implementation of the system, including through:

    - funding and investment – eg, restoration projects and building capability and capacity of people who engage with the freshwater management system
    - data and evidence – eg, environmental reports, research strategies and data sharing platforms, and monitoring council progress in implementing regulations and national direction
    - partnerships – with iwi/Māori, regional councils, key agencies, sector groups and key stakeholders.

7. Key areas that are likely to require your input in the first three months are outlined in Appendix 1 of this briefing, including:

    - Freshwater Farm Plans – these now apply in Southland and Waikato and will begin to be rolled out in Otago, Horizons (Manawatū-Whanganui), and the West Coast from early 2024. Rollout to other regions will require your decisions.

    - Changes to plan notification timeframes for the National Policy Statement for Freshwater Management 2020 (NPS-FM) and changes to the content and application of the NPS-FM as set out in the coalition agreements.

    - Review of the operation of existing Significant Natural Areas (SNAs) and steps to cease implementation of new SNAs as set out in the coalition agreements.

    - The management and protection of highly productive land – consultation has recently concluded on amendments to the National Policy Statement for Highly Productive Land (NPS-HPL). Proposed changes address restrictions on the construction of new infrastructure (such as solar farms) and intensive indoor primary production. Joint advice from the Ministry and the Ministry for Primary Industries will be provided on the outcome of the consultation with options to consider.

8. Some strategic issues for your consideration over a longer timeframe will be on:

    - Biodiversity – including biodiversity credits and New Zealand's contribution to the Global Biodiversity Framework. The Ministry and the Department of Conservation have recently consulted on biodiversity credits, and the potential role of central government in relation to these. A summary of submissions, and further advice can be provided with options for you to consider.

    - Forestry – including addressing longer-term recommendations from the Ministerial Inquiry into Land Use (MILU) and ensuring that regulatory settings effectively manage land use impacts and risks.

    - Marine – better integrating the different systems that are used to manage activities occurring in the ocean, and progressing commitments to protect marine biodiversity under the Kunming-Montreal Global Biodiversity Framework.

Recommendations

We recommend that you:

a. **note** that key upcoming advice and decisions are outlined for your attention in Appendix 1

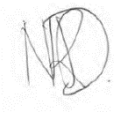
b. **agree** to meet with officials to further discuss the direction of the sustainable land use, freshwater and marine work programmes.

Yes | No

c. **agree** to forward this briefing to your colleague Hon Andrew Hoggard, Associate Minister for the Environment

Yes | No

Signatures



Nadeine Dommisse
Deputy Secretary
Environmental Management

Date
14 December 2023

Hon Penny Simmonds
Minister for the Environment

Date

Hon Chris Bishop
Minister Responsible for RMA Reform

Date

Ministry for the Environment
Manatū Mō Te Taiao

Secondary Briefing: Land Use, Freshwater, and the Marine Environment

Purpose

1. This briefing provides an overview of the land use, freshwater, and marine environment policy settings, and outlines how the Ministry for the Environment (the Ministry) can support you to deliver on the Government's priorities in these areas.

Introduction

2. New Zealanders have a strong relationship with, and reliance on, our land, water, and oceans. The health and wellbeing of our land, water, and oceans is intrinsically linked with the health and wellbeing of our communities and economy.

3. Land use (eg, agriculture, urban development, forestry), and certain land-use practices (eg, intensive winter grazing, forest harvesting), significantly influence the health and resilience of our freshwater and land. As water moves down-catchment, it transports contaminants which concentrate in receiving environments (lakes, wetlands), before discharging into coastal waters (estuaries, lagoons).

4. Environmental reporting shows that the quality of New Zealand's freshwater, soils, estuaries, oceans, and associated biodiversity are under increasing pressure from climate change, land uses, and/or practices that are not well-suited to the geophysical characteristics of the land they take place on.[1]

5. The Ministry has a core function of providing advice to you on environmental matters[2] and developing primary and secondary legislation (including regulations and national direction). We also have a stewardship role to support and review the implementation of environmental legislation.

6. The Ministry is committed to working in partnership with iwi/Māori, other agencies, local government, sector groups and communities to ensure our work is well connected. We work particularly closely with natural resources sector

[1] The latest three reports on Our Freshwater, Our Land and Our Marine.
[2] Environmental matters include, social, economic, aesthetic and cultural conditions in addition to natural and physical resources and ecosystems.

agencies such as the Ministry for Primary Industries (MPI) and Department of Conservation (DOC).

7. Understanding the interconnectedness of our environment is a key consideration in sustainable use, and there are further opportunities to ensure policies mutually re-enforce one another to achieve multiple outcomes, while reducing the cumulative regulatory burden.

8. This briefing sets out:

    - Your Ministerial role and responsibilities
    - Relevant legislation/regulation/national direction in respect of sustainable land use, freshwater and the marine environment
    - How we support implementation and improved outcomes through funding and investment, data and evidence, and our partnerships.

Your Ministerial role and responsibilities

9. The Minister for the Environment has a range of responsibilities and powers under the resource management system that relate to sustainable land use. These include making decisions on secondary legislation, considering proposals of national significance, and fast-track consenting. There are also responsibilities under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act).

10. There are a range of regulatory and non-regulatory levers that are available to the Minister for the Environment to achieve the Government's goals.

11. One lever is legislation and the secondary legislation that is made under it. Secondary legislation varies in whom it applies to, and how it takes effect. Some direct the content of local council planning documents (eg, National Policy Statements). Others set standards that apply directly to resource users and regulate activities by requiring consents or permitting activities subject to specific standards (eg, National Environmental Standards).

12. Some types of secondary legislation apply directly (without resource consent) and are suited to relatively straightforward matters with limited local variation (eg, Resource Management (Measurement and Reporting of Water Takes) Regulations 2010). Whereas others have been designed to provide a flexible, tailored approach to on-farm management of effects (eg, Resource Management (Freshwater Farm Plans) Regulations 2023).

13. It is the role of councils to implement, monitor, and undertake compliance monitoring and enforcement of secondary legislation. The Ministry, in turn, has an oversight and monitoring role of council activities on behalf of the Minister for the Environment.

14. There are a range of non-regulatory ways to support implementation or drive change. These include government funding, strategies, guidance and/or protocols.

15. You can also decide to exercise statutory and discretionary functions such as requesting data/reports from councils on the environment, investigating council performance, or submitting on regional plan content at freshwater plan hearings under the Freshwater Planning Process set out in the RMA.

16. The Ministry's 'Briefing for Incoming Ministers – Environment, Climate Change and RMA Reform' provides further detail on your statutory responsibilities and functions.

Key decisions needed in the near term

17. Some matters will require your consideration and decisions soon, and these are set out in Appendix 1. We can discuss these with you, including timing, and will provide further information as they arise or on request.

Relevant primary and secondary legislation

18. The Ministry, together with our partners, does a wide range of work focused on developing, implementing and reviewing environmental secondary legislation (including regulations and national direction). This work is summarised below in terms of the relevant secondary legislation and opportunities for:

    i. Sustainable land use and land-use practices – including biodiversity

    ii. Human health considerations – for drinking water and recreation

    iii. Improving the quality and management of freshwater ecosystems

    iv. Managing the marine environment.

i. Sustainable land use and land-use practices

Resource Management (Freshwater Farm Plans) Regulations 2023

19. Freshwater farm plans were established under Part 9A of the RMA in 2023 as a tailored but enforceable tool to address on-farm risks to freshwater.

20. The freshwater farm plan system was designed to reduce or replace the need for resource consents related to farming activities. Regional councils remain responsible for setting the regulatory context and monitoring the overall system.

21. Farmers will engage a trained certifier to ensure that planned actions meet regulatory requirements. Auditors will then assess whether those actions are undertaken. Certifiers and auditors will be appointed by regional councils. Farmers and growers can choose which certifier and auditor they engage.

22. Freshwater farm plan regulations do not apply to a region until activated by an Order in Council. To date they have been applied to Southland and Waikato (starting from 1 August 2023) and Otago, Horizons (Manawatū-Whanganui), and the West Coast (starting from early 2024). We (jointly with MPI) will be seeking your decision on the next regions for rollout and will provide you with advice and recommendations on these matters in due course.

23. We understand you may wish to make improvements to the farm planning system to align with the coalition policy that farm environment plans are cost effective and pragmatic. Advice on options to achieve this can be provided to you.

24. Funding has been allocated to support the development of a freshwater farm plan workforce and to monitor system performance. Initiatives are underway to build capability and support practices, provide famers with a dispute resolution process, and streamline how farmers engage with the system within a catchment context. We will continue to update you on progress with the implementation of the regulations.

Forestry is a key consideration in respect of sustainable land use

25. Forestry is a contributor to environmental outcomes, and can support a sustainable, low emission and circular economy. We work closely with MPI and Te Uru Rākau – New Zealand Forest Service on policy advice that relates to forestry matters.

26. For the first time since the 1990s, New Zealand is seeing significant afforestaion. Afforestation rates are driven by Emissions Trading Scheme (ETS) incentives, while the Forestry and Wood Processing Industry Transformation Plan (led by MPI) sets out a pathway for greater value capture and supports domestic value chains. On this important strategic issue, it is likely that you will work closely with your colleagues who hold related portfolios; the Minister of Climate Change and the Minister of Forestry.[3]

27. Different types of forestry can form key parts of a sustainable land-use mix. For example, intensive production forests provide raw materials for a wide range of industries and are economically important to communities in which they operate. In order to minimise the effects on the natural and built environment, they must be located in appropriate places and be well-managed.

28. Other forest models are more appropriate in certain locations. On erosion-prone land, large-scale clear-fell harvest can create unacceptable risks. Permanent cover forest (exotic or native) may be the best way to reduce these risks and provide for other values, such as biodiversity.

[3] The Minister of Climate Change is responsible for the ETS and supports the broader context of transition to a low emissions economy while the Minister of Forestry is responsible for growth and development of the forestry sector.

29. You have a regulatory tool to directly manage some types of forestry practice – the National Environmental Standards for Commercial Forestry 2023 (NES-CF).[4] The NES-CF focuses on providing a consistent regulatory framework for key plantation and permanent forestry activities (eg, afforestation, and harvesting of plantation forests). Amendments in 2023 gave councils the ability to control the location of new forestry, extended coverage to permanent exotic forestry and made operational changes, including new slash management provisions, resulting from a recent review.[5]

30. The NES-CF remains limited in its ability to respond to broader land use issues and may not be adequate to manage forestry in a changing environment. There are several options which would allow you to influence the mix of land uses through regional planning documents and advice can be provided on this.

31. We understand you may wish to make changes around councils' ability to control the location of forestry, to maintain the availability of productive agricultural land. There are a range of possible instruments you could use depending on the outcomes you are seeking to achieve, and officials can provide further advice on this.

32. We also understand you may seek to amend the provisions in the NES-CF around containing and removing post-harvest slash. We would welcome an opportunity to discuss potential approaches, including the impact of the changes to the NES-CF on 3 November 2023, which introduced new requirements to contain and remove post-harvest slash.

33. A Ministerial Inquiry into Land Use (MILU) investigated land use and forestry issues following the damage caused by Cyclones Gabrielle and Hale in Tairāwhiti Gisborne and Wairoa. The response to the MILU to date has prioritised actions to clean up woody debris and to provide support for Gisborne District Council. The longer-term response could consider how to reduce the risk of further events of this nature.

Protecting Highly Productive Land

34. Highly productive land is defined as having fertile soil with a good climate and ideal terrain for cultivation. It generally requires fewer inputs to produce quality food and fibre.

35. Highly productive land is found across New Zealand and is prevalent in our food growing hubs: south of Auckland; Waikato; Hawke's Bay; Horowhenua; and Canterbury. Productive areas are often on the fringes of towns and cities. Urban expansion as well as fragmentation for rural lifestyle development has impacted the availability of highly productive land.

---

[4] Formerly the National Environmental Standards for Plantation Forestry.
[5] https://www.mpi.govt.nz/dmsdocument/44914-Report-on-the-Year-One-Review-of-the-National-Environmental-Standards-for-Plantation-Forestry

36. Approximately 15% of land in New Zealand is highly productive land, with about 5% being on Land Use Capability (LUC) 1-2 land.[6] Between 2002-2019, more than half of all urban growth and rural lifestyle development was on highly productive land. Whilst this represents only 2.6% of the total highly productive land in New Zealand, this varied across regions with it being most evident in the Auckland region (where 8.4% of highly productive land was lost).

37. The National Policy Statement for Highly Productive Land (NPS-HPL) protects land for land-based primary production, by restricting inappropriate use, development, or subdivision. It provides consent pathways for other activities on highly productive land such as infrastructure, and flood control and protection. Other activities (including urban and residential development) may be considered via a resource consent when there are permanent or long-term constraints on that land being used for primary production.

38. Land that was 'identified for future urban development' is excluded from highly productive land. There is a pathway for rezoning highly productive land for urban development where necessary, subject to specific tests (ie, consideration of alternative options for accommodating growth and the costs and benefits).

39. Regional councils are required to map all highly productive land in their regions by October 2025. District councils must update district plan maps no later than 6 months following the regional council update. Since the NPS-HPL's introduction in 2022, issues have been raised regarding:

    - the challenges it presents to constructing *new* specified infrastructure on highly productive land (such as solar farms); and

    - the development and relocation of intensive indoor primary production and greenhouses on highly productive land.

40. Public consultation on proposed changes to address these issues concluded in October 2023. We will provide a summary of the feedback with options for you to consider, including allowing for a broader range of productive rural activities under the NPS-HPL and enabling further housing development on Land Use Capability (LUC) 3 land.

Improving biodiversity outcomes

41. Biodiversity is a unique and critical part of the health of our environment. We have one of the highest proportions of threatened indigenous species in the world – despite ongoing efforts, many of our assessed indigenous species show a declining population trend.[7]

[6] LUC refers to Land Use Capability classification - a system that classifies all rural land into one of eight classes. LUC 1, 2 or 3 is considered as highly productive land for the purpose of the NPS-HPL

[7] More than 75% of indigenous species in reptile, bird, bat, and freshwater fish species groups are threatened with extinction or are at risk of becoming threatened https://www.stats.govt.nz/indicators/extinction-threat-to-indigenous-species/

42. Under section 6 of the RMA, the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna is a matter of national importance. Councils are at different stages and have taken different approaches to giving effect to this.

43. The National Policy Statement for Indigenous Biodiversity 2023 (NPSIB) was made to provide local authorities and resource users with a consistent approach to protecting these areas of significant indigenous biodiversity.

44. The NPSIB must be given effect by changes to regional policy statements and/or plans within 5 years of commencement (by 2028) and councils must have a regional biodiversity strategy within 10 years.

45. We understand the Government wishes to urgently receive advice on the operation of existing Significant Natural Areas (SNAs) and steps to cease implementation of new SNAs. An initial briefing on these matters will be with you soon.

46. The Ministry contributes to international work on biodiversity mainly through the Convention for Biological Diversity (CBD), to which New Zealand is a party. We work with the Ministry of Foreign Affairs and Trade (MFAT) and DOC to ensure New Zealand can respond to the CBD's Global Biodiversity Framework which sets 23 global targets to achieve by 2030. This includes the "30x30" commitment to protect 30% of the planet by 2030.

47. The Minister for the Environment has a specific role in considering the human-induced threats to biodiversity from a resource management perspective. As Minister, you will help shape New Zealand's negotiating position and, along with the Minister of Conservation, may represent New Zealand at Conference of the Parties meetings.

48. At a national level, we support Te Mana o te Taiao (the Aotearoa New Zealand Biodiversity Strategy), which provides strategic direction for the protection, restoration, and sustainable use of biodiversity. Te Mana o te Taiao and its action plan is the framework by which New Zealand implements the CBD. DOC is reviewing the framework to identify gaps and to better align with the Global Biodiversity Framework.

49. A voluntary biodiversity credits[8] market is emerging both internationally and in New Zealand, generally as an extension of voluntary carbon markets. This presents one of several opportunities to close the finance gap faced by landowners and project proponents to restore land and ecosystems.

50. We (alongside DOC) have recently consulted on a biodiversity credit system[9] that could incentivise wetland restoration and creation, alongside other biodiversity restoration and protection benefits. We will provide you with advice on the

[8] Biodiversity credits are legal instruments that recognise an action or outcome achieved to support nature.
[9] https://consult.environment.govt.nz/biodiversity/nz-biodiversity-credit-system/

feedback received and discuss how you would like to direct future work on this issue.

ii. Human health considerations – drinking water and recreation

51. Activities on land and in water impact the quality and safety of sources of drinking water and the ability to safely collect food from, and swim at, our rivers, lakes, and beaches.

Drinking water

52. Many hundreds of New Zealanders become ill from drinking contaminated water every year. Taumata Arowai (the water services regulator) reports that in the 2022 calendar year, 188 consumer advisory notices were issued instructing consumers to 'boil water', or 'do not drink' or 'do not use' their tap water. This occurred throughout the country, with more than half of district councils issuing such warnings. Taumata Arowai also received 387 notifications in 2022 that Maximum Allowable Values in drinking water were exceeded.[10]

53. Changes to the National Environmental Standards for Sources of Human Drinking Water 2007 (NES-DW) were consulted on in March 2022. We recognise that you may wish to make further changes and will provide you with more detailed advice on the themes from the consultation process, and potential options for you to consider.

54. There is growing public concern regarding the level of nitrates in drinking water and the potential health impacts. Intensive land use has led to increasing nitrate concentrations across New Zealand in source water, with worsening trends being most prevalent in Canterbury, Southland, Waikato, Hawke's Bay and Wairarapa. The Ministry is a member of a cross-agency working group led by the Ministry of Health (MoH) to monitor the health impacts of nitrates in drinking water and to advise of any further work that may be required.

Swimming

55. Councils must monitor and manage freshwater swimming sites under the National Policy Statement for Freshwater Management 2020 (NPS-FM). Land, Air and Water Aotearoa (LAWA) reported in 2023 that two-thirds of all monitored freshwater swimming sites presented a potential risk to public health.[11]

56. LAWA uses regional council monitoring data. The guidelines for safe levels of bacterial contamination for primary contact (swimming) are based on science that is currently being reviewed and is due for completion by January 2025. We will provide a summary of the findings when available with options to consider. Advice on nationally consistent water quality standards for swimming in coastal waters can also be provided to you.

[10] https://www.taumataarowai.govt.nz/assets/Uploads/Governance-docs/Drinking-Water-Regulation-Report-2022.pdf
[11] Land, Air, Water Aotearoa (LAWA) -

iii. Improving the quality and management of freshwater ecosystems

57. Freshwater is a strategic resource relied on by key sectors of the New Zealand economy, including primary production and processing. Climate change, and an increasing awareness of environmental limits, is placing pressure on freshwater resources.

58. A considerable amount of work and momentum has built around restoring and protecting the health of our waterways over the last decade. This includes significant non-regulatory initiatives (funding) as well as a comprehensive suite of secondary legislation.

59. Some of this secondary legislation addresses high-risk land-use practices with immediate effect. They are supported by a national policy statement for freshwater management designed to reverse declining trends over the longer term by strengthening local government and communities' planning and decision-making.

60. Below is a summary of the key pieces of primary and secondary legislation that work together to support councils, iwi/Māori, farmers, and growers to take action to improve freshwater outcomes in their own catchments. We recognise that changes will be needed across these areas of work, to ensure alignment with Government priorities and commitments.

National Policy Statement for Freshwater Management 2020 (NPS-FM)

61. The NPS-FM is the key driver of the freshwater management framework and primarily takes effect through the rules set by councils in their regional plans.

62. Councils must manage freshwater so that water bodies do not deteriorate beyond a benchmark (referred to as the 'maintain or improve' requirements). There are 22 freshwater attributes (measures) that regional councils must set targets for and monitor against.[12]

63. Some of the attributes also have nationally-defined bottom lines. In locations where water quality is below these, councils must improve water quality to at least the national bottom line. They can do so over long timeframes if necessary to spread the costs to sectors and communities and allow time for change.

64. Councils must engage with communities and tangata whenua to establish the long-term vision sought for local water bodies. Together, they then set objectives, and catchment level targets and 'limits on resource use' (rules on water takes and discharges) to achieve the vision. If improvement on the current state is

[12] Attributes are set out in tables in Appendices of the NPS-FM. Each table has a series of ranges or bands (A-D) which denote thresholds of harm. The threshold between C and D-Band is known as the 'national bottom line'. All attributes have national bottom lines except Dissolved Reactive Phosphorus, Fish (habitat and community) and *E. coli* (average infection risk to swimmers).

desired, it is possible to achieve this over multi-year targets. This spreads costs and acknowledges change takes time.

65. Te Mana o te Wai is a fundamental concept in the NPS-FM, it is about restoring and preserving the balance between the water, the wider environment, and the community. It also creates three priorities for water management, leading with the health and well-being of water bodies and freshwater ecosystems, secondly the health needs of people (such as drinking water) and third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future (NPS-FM clause 2.1).

66. We note the coalition policy to rebalance Te Mana o te Wai to better reflect the interests of all water users and we have provided you with initial advice on the process for how this could be addressed.

67. We note the coalition policy to replace the NPS-FM to allow district councils more flexibility in how they meet environmental limits and to receive advice on exempting councils from obligations under the NPS-FM, we will prepare advice for you on these matters early next year.

Managing land-use practices – winter grazing, stock exclusion and wetlands

68. Other secondary legislation does not require a plan change to take effect, and addresses land-use practices that can impact freshwater quality if not managed appropriately.

69. The National Environmental Standards for Freshwater (NES-F) covers activities resulting in the loss of wetlands and rivers, controls on intensive winter grazing, and a cap on the maximum amount of synthetic nitrogen fertiliser that can be applied to pastoral land.

70. Amendments to the wetland rules in 2022 provided consent pathways for the following purposes: urban development, quarries, mining, landfills, and water storage. These also clarified the application of the national direction in relation to wetland restoration and that the NES-F does not apply to coastal wetlands.

71. The Resource Management (Stock Exclusion) Regulations 2020 do not require consents and apply to any person who owns or controls deer, pigs, dairy support cattle, dairy cattle, and beef cattle. They took immediate effect in 2020 for new pastoral systems, and to existing farms in mid-2023 or mid-2025 depending on stock type and practices. The regulations do not require farmers to fence waterways *per se*, though in many cases this will be the practical option.

72. The stock exclusion regulations were amended in 2023 to provide more flexibility for lower intensity farming. This includes clarifying the application of the low slope map (does not include any land that exceeds 10 degrees in slope), providing an exception from the low slope map for land that is subject to existing controls (eg, pastoral lease or grazing concession) and enabling Otago Regional Council to manage stock access in the Taieri Scroll Plains in lieu of the regulation.

73. One aspect of regulation is that it can be rather blunt when applied at a national scale. We acknowledge the feedback from the primary sector and many councils that highlights support for regulations that provide flexibility while still achieving desired outcomes. There is an opportunity to achieve this by simplifying aspects of existing direction to reduce the cumulative burden on the primary sector. We will discuss potential options for this with you in due course.

Allocation of freshwater – reducing overallocation and managing within environmental limits

74. Allocation of freshwater is a technically and socially complex issue to navigate. Historically, freshwater resources have been allocated by regional councils under the RMA on a "first in, first served" basis with an effective perpetual right of renewal of time-limited consents, and limited ability to review users' consents to meet environmental outcomes. There have also been few transfers of water consents. Despite it being enabled in the RMA, few councils have set rules enabling transfers. This approach has led to water being allocated inefficiently and inequitably, with the same users retaining access – to the exclusion of potential new users who may have higher value uses.

75. In many parts of the country, allocation of freshwater resources has exceeded environmental limits (ie, are overallocated). The NPS-FM requires regional councils to first avoid, then phase out, existing overallocation. Phasing out overallocation makes resources scarcer and heightens the impacts of an inefficient and inequitable approach to allocation.

76. Local decision makers may not be able to move towards more efficient and equitable allocation alone, central government support can help. This could be through providing non-statutory guidance on using existing RMA allocation tools/methods, enabling further allocation methods through amending the RMA, or being more prescriptive through secondary legislation. There are opportunities for setting out efficient and equitable methods for water allocation that provide certainty and make the best use of water resources for all New Zealanders.

77. We can provide further advice on options for:

    - bringing together sector groups, other stakeholders and iwi to navigate these complex issues

    - amending the RMA to better facilitate more efficient and equitable allocation and

    - better measuring freshwater takes and discharges, to help facilitate efficient and equitable allocation methods.

78. We would like to discuss with you the level of central government direction you envisage to support the allocation of freshwater. Depending on what you seek to achieve, this may require further policy development and working closely with iwi/Māori, sector groups, local government and other key stakeholders. Further detail and advice on these matters will be provided.

Māori rights and interests in freshwater

79. In 2012, former Deputy Prime Minister Rt Hon Bill English made assurances to the High Court in the context of mixed ownership model litigation that it acknowledges that Māori have rights and interests in freshwater and geothermal resources.[13] The Crown stated that any recognition must:

> *'Involve mechanisms that relate to the on-going use of those resources, and may include decision-making roles in relation to care, protection, use, access, and allocation, and/or charges or rentals for use. Currently the Ministry for the Environment has responsibility for progressing policy development around these issues.'*[14]

80. Māori rights and interests can be broadly categorised in four dimensions:[15]

    - water quality (mechanisms to improve water quality and the health of ecosystems and give effect to Māori freshwater values)
    - recognition (recognise Māori relationships with particular water bodies)
    - governance / management / decision-making (enhance Māori participation at all levels of freshwater decision-making)
    - economic interests (develop mechanisms to enable Māori to access and use freshwater in order to realise and express economic and development interests).

81. Progress has been made since the 2012 acknowledgement on the first three dimensions of Māori rights and interests through subsequent amendments to the NPS-FM and introduction of the Mana Whakahono ā Rohe provisions in the 2017 amendments to the RMA.

82. The fourth dimension – economic interests – has been the most challenging to address and has seen the least progress between Māori and the Crown. The Freshwater Working Group and related provisions in the NBA set out processes to progress this dimension. We will seek your direction on next steps for the Freshwater Working Group, and can provide advice to support your decision on how you would like to direct future work on this issue.

iv. The marine environment

83. We rely on our ocean and coasts for social, cultural, and economic activity.

84. Iwi/Māori have diverse rights and interests in the marine environment. This includes as kaitiaki of their moana, recipients of rights and assets provided as

[13] New Zealand Māori Council v Attorney-General [2012] NZHC 3338 at [302].
[14] New Zealand Māori Council v Attorney-General [2013] NZSC 6.
[15] Developed in a joint work programme between the Crown and Freshwater Iwi Leaders Group in 2015.

redress under Treaty of Waitangi settlements[16] and the Marine and Coastal Area (Takutai Moana) Act 2011, plus as investors in the blue economy.[17]

85. The ocean is under new and increasing pressure from climate change, land-based and marine activities. The way we use and manage land and water can significantly impact the coastal marine environment. For example, initiatives that reduce sediment loads also protect marine fisheries and near-shore environments.

86. The ocean plays a critical role in regulating the climate. Estimates to date are that the ocean has absorbed about 30% of CO2 emissions (increasing ocean acidification) and 90% of the warming energy in recent decades (causing both a rise in sea level as well as temperature).

87. Management of the marine environment sits with several agencies plus local government and the Environmental Protection Authority (EPA). To support a collaborative approach, an Oceans Secretariat has been set up – hosted by DOC, involving the Ministry and MPI with support from MFAT. You have been provided with a briefing from this secretariat with joint agency advice on the oceans aspects of your portfolio.

88. There is increasing interest in undertaking activities in New Zealand's Exclusive Economic Zone (EEZ) and coastal waters (the territorial sea), such as offshore renewable energy (including offshore wind), and carbon capture and storage. The Ministry for Business, Innovation and Employment (MBIE) is in the process of developing a regulatory framework for offshore renewable energy that would apply to both the territorial sea and EEZ.

89. Aquaculture is regulated primarily under the resource management system. The Ministry and MPI jointly worked on the Resource Management (National Environmental Standards for Marine Aquaculture) 2020 (NES-MA) that set national rules for existing marine farms. The NES-MA provides consistency and certainty for the industry while appropriately managing the effects of aquaculture activities. A review of the implementation of the NES-MA was completed by MPI in August 2023 and further advice will be provided to you on this.

90. Ministers will need to make decisions on New Zealand's contribution to the Kunming-Montreal Global Biodiversity Framework target of at least 30% of coastal and marine areas conserved and managed by 2030. Agencies will provide joint advice to Ministers on this next year, prior to the Conference of the Parties to the Convention on Biological Diversity to be held in October 2024.

---

[16] Treaty of Waitangi (Fishing Claims) Settlement Act 1992, the Māori Fisheries Act 2004, the Māori Commercial Aquaculture Claims Settlement Act 2004, and individual iwi settlements.

[17] The blue economy encompasses all economic activities in the marine space. There are varying definitions, but generally these include sustainable use and maintaining ocean health. The Sustainable Seas National Science Challenge defines the blue economy as "*marine activities that generate economic value and contribute positively to ecological, cultural and social well-being*."

91. Decisions will also be needed on next steps for the Kermadec Ocean Sanctuary Bill (the Bill). Over the last three years, the Ministry led discussions with Te Ohu Kaimoana (and northern iwi) to develop a revised proposal that better recognises Māori rights and interests. In June 2023, iwi organisations voted not to support the revised proposal and the Government decided not to progress the Bill. Te Ohu Kaimoana, on behalf of iwi organisations, has since begun a process to create an indigenous, iwi-led approach to oceans management. Further advice on this will be provided in due course.

Supporting implementation and improved outcomes

92. As part of our stewardship role, we support the implementation of regulatory and non-regulatory initiatives through:

    - funding and investment
    - data and evidence
    - partnerships – with iwi/Māori, agencies, sector groups, communities, and other stakeholders.

Funding and investment

93. Funding and financing are key enablers to improving environmental outcomes and progressing government priorities.

94. The Ministry administers a range of funding schemes to address freshwater management issues. These funds can help communities to address legacy issues. For example, the cross-agency investment package of $1.254 billion for the Jobs for Nature Programme (you will receive a separate briefing on this – BRF-4008 refers).

95. We take a strategic approach to fund what will make the most difference to the environmental management system. A focus on building capacity and capability across local authorities, and those who engage in the resource management system, will generate improved outcomes and cost-savings over the long-term.

Data and Evidence

96. Data and evidence are a cornerstone of effective policy intervention. To fulfil our stewardship role, we need to understand both the short and long-term drivers of environmental degradation to inform the appropriate policy response.

97. Our data and evidence gathering system has gaps. Most environmental monitoring is undertaken by regional councils. Their resources are regionally focused, and unevenly spread. This creates challenges for maintaining a nationally representative monitoring network to inform government decisions.

98. We anticipate improvements in growing our data and evidence base with the implementation of the NPS-FM. It requires regional councils to set targets for 22 compulsory attributes,[18] and to monitor and report on progress against them. This will provide more comprehensive information on state and trends of freshwater health. While the current attributes are all necessary to manage freshwater, additional attributes could be included for groundwater and urban contaminants (eg, heavy metals).

99. We are developing a strategic approach to ensure data and evidence have dedicated resources that produce robust information. We partner with other agencies (eg, MBIE, MPI) and crown entities (eg, NIWA, the National Science Challenge) to align commissioning and funding of data and research (you will receive a separate briefing on this).

Partnerships with Māori, agencies, sector groups, communities and other stakeholders

100. Connecting with key partners is essential for current and future work to be successful. To achieve its goals, the Ministry works alongside, and partners with, other agencies, local government, industry groups, environmental non-governmental organisations (ENGOs), professional bodies and communities.

101. The Ministry is committed in its role as a Māori-Crown partner to deliver in partnership with iwi/Māori. A more detailed description is provided in the Ministry's 'Briefing for Incoming Ministers – Environment, Climate Change and RMA Reform'.

102. When developing policy we connect with interested agencies, Crown entities and departments. Our closest working relationships are with Department of Conservation, Ministry for Primary Industries, Department of Internal Affairs, Taumata Arowai (the water services regulator), Ministry of Business, Innovation and Employment, the Treasury, Ministry of Health, Land Information New Zealand and Ministry of Foreign Affairs and Trade.

Next steps

103. We look forward to meeting with you and discussing how we can best support you to achieve the Government's priorities for improving environmental outcomes relating to sustainable land use, freshwater, and the marine environment.

104. Any additional information can be provided on request.

[18] An attribute is a measurable characteristic (numeric, narrative, or both) of water quality and ecosystem health eg, dissolved oxygen, nitrogen, or macroinvertebrates.

Appendix 1 – Key upcoming advice and decisions

Key decisions	Dates	Notes
How to progress changes to the NPS-FM including rebalancing Te Mana o te Wai	Q4 2023 / Q1 2024	Officials are already working with you on this. Co-lead with MPI
Progress phased rollout for Freshwater Farm Plans	Q1 2024	Decisions needed on rollout to other regions
Advice on implementation of significant natural areas (SNA) and decisions on next steps for Biodiversity Credits	Q4 2023 / Q1 2024	Consultation on credits completed
Decisions on possible amendments to the National Environmental Standards for Commercial Forestry 2023 (NES-CF) and response to the Ministerial Inquiry into Land-Use	Q1 2024	Co-lead with MPI
Decisions on proposed changes to the National Policy Statement for Highly Productive Land (NPS-HPL)	Q1 2024	Co-lead with MPI
Decisions on proposed changes to the National Environmental Standards for Sources of Human Drinking Water (NES-DW)	Q1 2024	Changes proposed in response to the Havelock North Drinking Water Inquiry
Decisions on review of implementation of the National Environmental Standards for Marine Aquaculture (NES-MA) regulations	Q1 2024	Led by MPI with support from MfE
Response to Environment Select Committee Inquiry on seabed mining	Q1 2024 TBC	Dependent on Committee's decision to reinstate inquiry
Response to Environment Committee Briefing on environmental outcomes – freshwater (Cabinet report back required)	Q1 2024 TBC	Cross-agency work underway with MPI, MBIE, DOC, DIA, and LINZ

BRF-1679 RM Reform 190 – Delegated decisions on Māori freshwater rights and interests preservation clause and statutory timeframe

Date Submitted:	28 June 2022	Tracking #: BRF-1679	
Security Level	Legally privileged	MfE's Priority:	Urgent

	Action sought:	Response by:
To Hon David Parker Minister for the Environment	**Indicate** your decisions in relation to a preservation clause and a statutory timeframe	1 July 2022
To Hon Kiri Allan Associate Minister for the Environment	**For decisions**	1 July 2022
Cc Hon Kelvin Davis Minister of Māori Crown Relations: Te Arawhiti	**For consultation**	
CC Hon Megan Woods Minister of Housing and Minister of Energy and Resources	**For consultation**	
CC Hon Nanaia Mahuta Minister of Local Government	**For consultation**	
CC Hon Poto Williams Minister of Conservation	**For consultation**	
CC Hon Damien O'Connor Minister of Agriculture	**For consultation**	
CC Hon Willie Jackson Minister for Māori Development	**For consultation**	

Actions for Minister's Office Staff	Subject to Minister's approval, **forward** to the Ministers of Māori Crown Relations: Te Arawhiti, Housing, Local Government, and Māori Development in their roles as part of the MOG Māori Interests subgroup, and the Ministers of Energy and Resources, Agriculture, and Conservation **for consultation**
Actions for other Offices	Minister Allan's office Provide to your Minister for a decision then return the signed Briefing to Minister Parker's office Offices of the Ministers of Māori Crown Relations: Te Arawhiti, Housing, Local Government, and Māori Development in their roles as part of the MOG Māori Interests subgroup, and the Ministers of Energy and Resources, Agriculture, and Conservation (cc Ministers) Provide to your Minister then provide any feedback/comments to Minister Parker's office
Number of appendices and attachments: 3	Titles of attachments A. Detailed decisions for Māori freshwater rights and interests preservation clause and statutory timeframe B. s 9(2)(h) [redacted] C. Information about rights and interests in natural resources

Ministry for the Environment contacts

Position	Name	Cell phone	1st contact
Principal Author	Emily O'Connell	022 010 9719	
Manager	Lucy Bolton	027 466 4634	
Director	Keita Kohere	021 157 3336	✓

BRF-1679 RM Reform 190 – Delegated decisions on Māori freshwater rights and interests preservation clause and statutory timeframe

Purpose

1. This briefing seeks your decisions in relation to Māori freshwater rights and interests (MRI) proposals for a preservation clause and a statutory timeframe for addressing MRI.
2. This briefing has been updated following direction from Hon Parker received at a meeting with officials on 22 June.

Background

3. At the Ministerial Oversight Group (MOG) #16 meeting on 29 March 2022 you were delegated the joint authority to make further detailed decisions, in consultation with the MOG Māori Interests subgroup and the Ministers of Energy and Resources, Agriculture, and Conservation, in relation to the following proposals relating to MRI:
    - the request by Te Tai Kaha (TTK) for a preservation clause to be included in the Natural and Built Environments Act (NBA) to mitigate the risk of MRI being precluded
    - the request by the Minister for Māori Crown Relations for exploration of a statutory timeframe in the NBA for addressing MRI.
4. Ministers have made a commitment to Māori that the resource management reforms will not preclude options for addressing MRI in the future.[1] In October 2021, Cabinet considered options for progressing work on freshwater allocation and Māori rights and interests in freshwater. Cabinet noted the discussion and invited further consideration to be given to the proposals [CPC-21-MIN-0022 refers].
5. Important context regarding these proposals are that the Crown's assurances before the High Court in November 2012 included that:

> *The Crown acknowledges that Māori have rights and interests in water and geothermal resources …*
>
> *The recognition of rights and interests in freshwater and geothermal resources must, by definition, involve mechanisms that relate to the ongoing use of those resources, and may include decision-making roles in relation to care, protection, use, access and allocation, and/or charges or rentals for use …*
>
> *At the outset of discussions between Ministers and the Iwi Leaders Group, it was agreed that there would be no disposition or creation of property rights or interests in water without prior engagement … with iwi.*[2]

[1] This has been publicly stated. For example, in the Parliamentary paper on the NBA exposure draft in June 2021.
[2] Affidavit of Simon William English in opposition to application for judicial review, 7 November 2012 (filed in Pouakani Claims Trust v Attorney-General, CIV-2012-485-2185), paras 28, 29, 38. While the original affidavit used the phrase 'engagement and agreement', the Crown clarified in a follow-up affidavit that the word 'agreement' was included in error.

6. This acknowledgement by the Crown that Māori had rights and interests in freshwater, and its assurance that it would not take any action that might prejudice these interests, factored into a subsequent assessment by the Supreme Court in 2013 in declining an appeal by the NZMC.

Māori freshwater rights and interests in the context of the NBA

7. While there is no agreed definition of MRI, in the policy context they are typically grouped under four broad 'pou' that have emerged out of policy discussions between Māori and the Crown:[3]

    - water quality (mechanisms to give effect to Māori values in order to maintain and improve freshwater quality)
    - recognition of relationships with water bodies (recognition of Māori relationships with particular water bodies and the uncertainty of supply of potable water on all marae and papakāinga)
    - governance and decision-making (Māori participation at all levels of freshwater decision-making and capacity / capability (including resourcing))
    - access and use for economic development (mechanisms to enable access to freshwater resources for Māori in order to realise and express their economic interests).

8. Each of these pou are affected in some way by the new regulatory framework in the NBA. However, the preservation clause and statutory timeframe proposals should be considered alongside a wider range of features in the NBA relating to MRI including:

    - The Tiriti clause, which will require those exercising powers functions and duties under the NBA to give effect to the principles of Te Tiriti o Waitangi. This applies to development of regulations that go to the heart of MRI, such as national direction on freshwater management and resource allocation. This clause creates obligations even in the absence of a preservation clause or statutory timeframe. The principle of active protection is particularly relevant in this context
    - Te Oranga o te Taiao, which will be a shared environmental ethic in the purpose of the NBA and Spatial Planning Act (SPA), and includes (but is not limited to) the elements of freshwater and the intrinsic relationship between iwi and hapū and te taiao
    - The National Māori Entity which will input to the National Planning Framework (NPF) and have system monitoring and oversight functions, including monitoring of Te Tiriti performance of those who have resource management (RM) functions or responsibilities[4]
    - Enhanced roles in governance and decision-making arrangements across all environmental domains, including freshwater
    - Improvements to Mana Whakahono ā Rohe, Joint Management Agreements and Transfer of Powers tools

[3] These four pou were distilled from a series of over 20 regional hui held by the Iwi Advisors Group in 2014, along with a series of case studies commissioned by MfE, to assemble a comprehensive picture of what FR&I entailed. They subsequently formed the basis of a joint work programme agreed to by the Crown and the Iwi Leaders Group in 2015 (CAB Min (15) 26/10) and were reiterated by Cabinet in July 2018 (ENV-18-MIN-0032).

[4] Through regular monitoring and cyclical national level summary reports which consider ways to address RM Tiriti issues of national importance and/or issues common to multiple regions, agreed at MOG #17, see Annex B of Role, funding and participation of Māori in the RM system: National level (National Māori Entity and National Planning Framework).

- The new resource allocation framework, which in being 'enabling' reduces risks of inadvertently precluding options for addressing MRI. The transitional proposals for resource allocation seek to reduce the risk of resources getting 'locked in' in the interim.

9. Discussions are also currently underway with iwi/Māori groups on the approach to a medium-term work programme to advance MRI.

Proposed clauses from iwi/Māori groups and subsequent discussions

10. Both the National Iwi Chairs Forum (NICF) and TTK have put forward proposals for a preservation clause in letters to the Government. TTK, in their letter to Ministers dated 6 March 2022, expressed that such a clause is needed to give proper substance to the Crown's promises and assurance to not preclude MRI, with the following proposed drafting:

> *This Act shall not compromise, disadvantage or otherwise inhibit or limit any customary rights, any aboriginal title rights or any rights arising under Te Tiriti o Waitangi in respect of freshwater or geothermal bodies.*

11. TTK states that the proposed Treaty clause as currently drafted for the NBA does not achieve this by itself, since tikanga (as law), customary rights, and aboriginal title rights exist independently of and are additional to Te Tiriti rights.

12. The NICF advised the Government on 9 May 2022 that there must be preservation clauses in both the NBA and Water Services Entities (WSE) legislation which provide that nothing in those Acts:

- creates or transfers any proprietary interest in water; or
- extinguishes, undermines or adversely affects any iwi/hapū rights and interests in water.

13. NICF expressed that preservation clauses in the context of the NBA and Water Services legislation are of fundamental importance to ensuring that such reforms do not prejudice the rights and interests of iwi and hapū and enable all options to be explored to address MRI.

14. Subsequent discussions with Freshwater Iwi Leaders Group (FILG) technicians have focused on the underlying intent of a clause. A key issue is that the scope of a clause should include all natural taonga regulated by the NBA, rather than being limited to water. This emerged in the context of discussion in recent weeks about wider allocation delegated decisions proposals. [Note this description of ILG's views has not been approved by them].

15. In subsequent discussions with TTK, officials have heard that they want to see as much wrap around protection for rights and interests as possible to provide certainty that those rights are not limited. They consider the clause should apply to freshwater and geothermal resources (rather than 'water' as in the WSE clause). Regarding the description of the rights holder, they consider 'iwi and hapū', as in the WSE clause, is not an inclusive term and that broader language is necessary (consistent with TTK's views as set out in BRF-1692 Delegated decisions for describing Māori representative organisations and record keeping requirements). The question of widening the scope of the clause beyond water had not emerged at this stage. [Note this description of TTK's views has not been approved by them]

16. In addition to a preservation clause, TTK recommended further mechanisms be put in place while issues of proprietary rights or interests are yet to be resolved, such as those

in the Crown Forest Licensed land regime, and the Treaty of Waitangi (State Enterprises) Act 1988. This is considered in the section on the statutory timeframe proposal below.

17. The views of Ngāi Tahu have been provided in writing:

> *Ngāi Tahu objects to Te Tai Kaha proposal which does not capture the range of interests iwi are arguing for in what is so far an undefined legal space because for Ngāi Tahu rangatiratanga entitlements are not reliant on Te Tiriti. Te Tiriti simply acknowledges the rangatiratanga that already exists.*
>
> *Whilst we reserve the right to respond to the draft Bills at the very least any preservation clause should extend to water and all taonga, and expressly protect iwi and hapū customary authority, rights and interests from being limited or adversely affected.*

Links with a preservation clause in the Water Services Entities Bill

18. An MRI preservation clause has been included in the WSE Bill introduced to the House on 2 June as follows:

> Section 201 Rights or interests in water preserved
>
> (1) The purpose of this section is to achieve both of the following outcomes:
>
> (a) any rights or interests in water are preserved, consistent with assurances given by the Crown to the Supreme Court in 2012, and recorded in New Zealand Māori Council v Attorney-General [2013] NZSC 6, [2013] 3 NZLR 31 at [145]:
>
> (b) this Act, and duties, functions, and powers under this Act, operate effectively.
>
> (2) No legislation in or made under this Act—
>
> (a) creates or transfers any proprietary right or interest in water:
>
> (b) extinguishes or limits any customary right or interest (for example, one founded on, or arising from, aboriginal title or customary law) any iwi or hapū may have in water.
>
> (3) Nothing in this section affects, or affects the lawfulness or validity of the performance or exercise by any person of, any duty, function, or power under this Act.

19. The drafting of the WSE Bill clause was informed by work between relevant agencies seeking to ensure it is legally certain, does not have unintended consequences, and is compatible with any similar provision in the context of the Natural and Built Environments Bill.

20. These issues were explored in an exchange of letters between the Ministers for the Environment and Local Government to ensure that there was scope for alignment between the clauses in the two pieces of legislation. Two areas that were identified as requiring further consideration in the NBA context were:

- the nature of protective action that should be provided, and specifically whether does not “limit” is appropriate in the NBA context (noting the NBA will inevitably affect the way customary rights are exercised, as its purpose is to regulate)
- whether or how to reference the rights holder ie. whether the reference to “iwi and hapū” is the most appropriate description of the rights holder in the context of freshwater and geothermal bodies.

21. In discussions with officials, both FILG technicians and TTK representatives have conveyed that a clause needs to be developed in a way that recognises the purpose and context of the NBA, distinct from the WSE Bill, in that:

    - the WSE Bill relates to water service delivery, whereas
    - the NBA will cover a broad range of natural taonga and its purpose is to regulate activity in relation to those taonga, so will directly affect the manner in which customary rights are exercised.

Relevant RM reform objectives

22. The two RM reform objectives relevant to these proposals are:

    - giving effect to the principles of Te Tiriti and provide greater recognition of te ao Māori, including mātauranga Māori
    - improving system efficiency and effectiveness, and reducing complexity, while retaining appropriate local democratic input.

23. These reform objectives have been drawn on to develop the policy objectives for a preservation clause (below) and have guided the analysis in this briefing.

Advice

Proposed preservation clause

Purpose of a clause

24. In the context of the above RM reform objectives, officials understand the intent of Ministers for a preservation clause is:

    - to preserve the space for Māori and the Crown in future to come to an agreement on how Māori freshwater rights and interests should be recognised
    - to provide legal certainty, in the meantime, that the RM reform via the NBA is intended to not determine or extinguish any proprietary rights, aboriginal title, or customary rights that may be considered to exist
    - to minimise regulatory uncertainty regarding the NBA for those exercising powers under the legislation or those whose activities are regulated.

25. From officials' discussions with the iwi/Māori groups (NICF and TTK), it is evident that a clause is considered to play a critical role as part of a 'jigsaw' of elements to ensure MRI are not precluded by the NBA, alongside the wider features in the NBA outlined above.

26. Officials consider that, from a policy perspective, a preservation clause that is carefully crafted in line with the objectives above could play a useful role in providing clarity for the avoidance of doubt as to the above. Officials also recognise the importance of a clause from a relationship perspective in light of clear statements from NICF and TTK. The letters from both NICF and TTK represent a strong voice from iwi, hapū, and Māori that a concrete mechanism is considered necessary in the NBA to protect underlying rights and interests in freshwater.

Proposal to extend the scope of a preservation clause to all natural taonga

27. The position of FILG technicians and Ngāi Tahu that a clause should extend beyond water to all natural taonga regulated by the NBA should be carefully evaluated. Such a scope could take the Crown into new territory regarding rights and interests.

28. s 9(2)(h) [redacted]

29. While the Waitangi Tribunal has consistently found that Māori have an interest greater than the general public in natural and other resources, the Crown has not acknowledged this position (at a national level) in statements or dialogue to date.

30. s 9(2)(h) [redacted]

31. Further information at **Appendix C** sets out:

- statements from the Waitangi Tribunal about Māori rights and interests in natural resources
- key questions that have been explored when the Crown has previously recognised Māori rights and interests in some natural resources
- a summary of what we know about Māori rights and interests in some natural resources.

32. As the delegated authority for this decision relates to Māori freshwater rights and interests, if Ministers wished to explore a preservation clause with broader scope, consideration would need to be given to the appropriate decision-making process for this (such as Cabinet consideration).

Inclusion of clause in the Spatial Planning Act

33. Officials note that the purpose and context of the SPA also has several links to MRI: the powers and functions in the SPA will include governance and decision-making arrangements for developing regional spatial strategies (RSSs) and those RSSs will include implicit allocation decisions by determining the types of development or activities can occur in different places. For example, an RSS may:

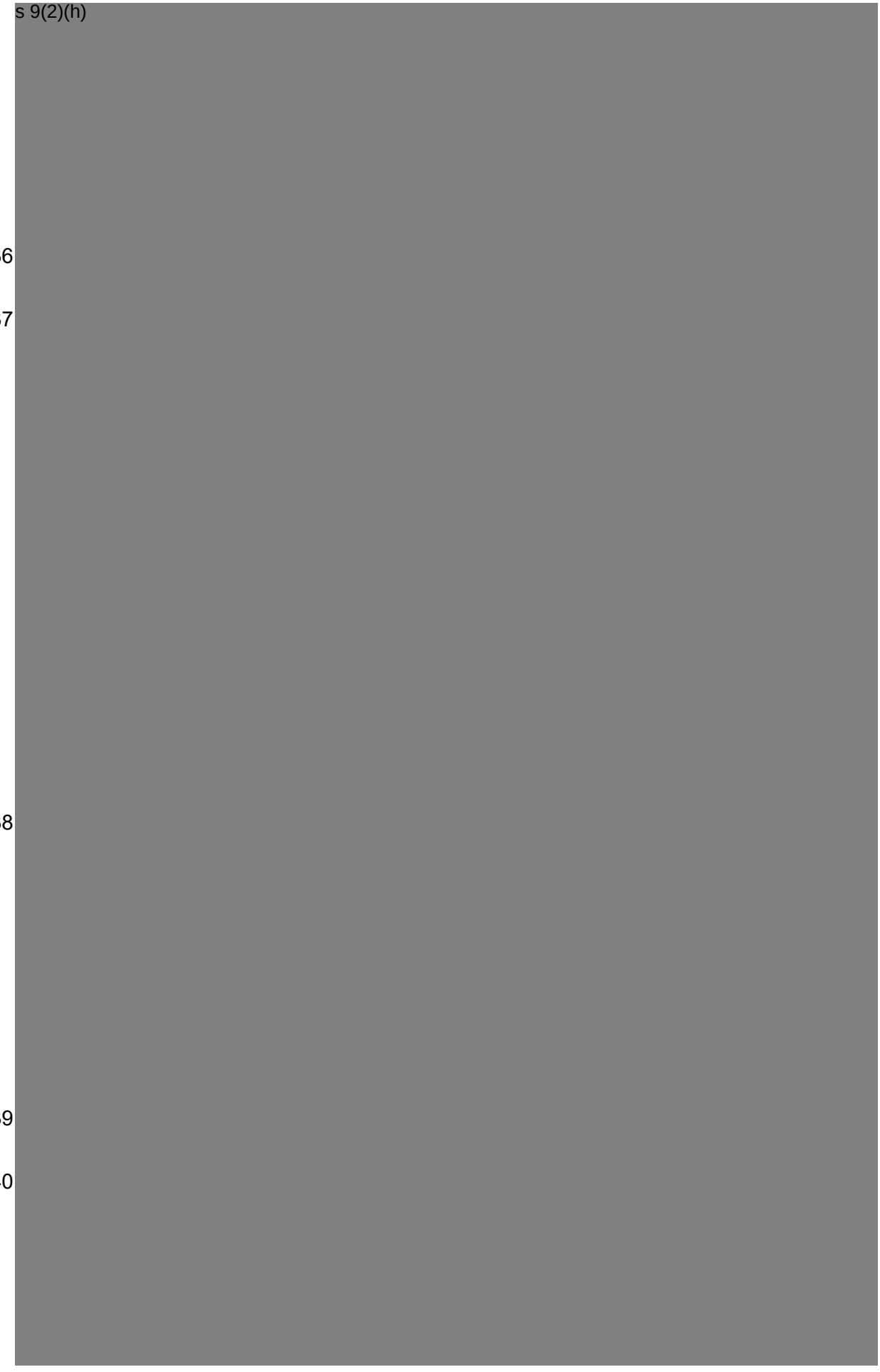
- do high level allocation of freshwater to specific types of use. For example, it may determine that the priority use in a catchment is hydroelectricity rather than irrigation.
- determine patterns of land use that will affect water yield
- drive investment in infrastructure that will increase the potential value and availability of freshwater.

34. Officials have explored this issue in discussions with the iwi/Māori groups and they have verbally indicated that a clause should also be included in the SPA. As such, it is recommended the decisions on a preservation clause for the NBA in this paper are also reflected in the SPA.

Legal advice s 9(2)(h) [redacted]

35. s 9(2)(h) [redacted]

s 9(2)(h)



41. s 9(2)(h)

42.

Proposed elements of a preservation clause in the NBA and SPA

43. s 9(2)(h)

These elements would broadly align with the WSE clause, with some aspects identified that officials consider a different approach given the different regulatory purpose and context.

a. Acknowledgement by the Crown that Māori freshwater rights and interests exist

This element would affirm previous Crown assurances and could reference the statement in the Supreme Court in 2013, similar to subsection (1) of the WSE Bill clause. This statement included freshwater and geothermal bodies.

b. That the Acts do not create or transfer a proprietary right or interests

This element reflects the existing Crown position that in regulating activity in relation to natural resources in these Acts, the Crown is not creating any new rights of a proprietary nature or divesting them. s 9(2)(h) This element is included in the WSE Bill clause.

c. That the Acts do not determine or extinguish rights or interests

- This element makes explicit the existing Crown position that any underlying rights or interests (wider than those of a proprietary nature) are at most 'suspended' and not determined or extinguished by the Acts.
- s 9(2)(h)
- The rights referred to could include customary rights or interests and aboriginal title, consistent with the WSE clause. s 9(2)(h)
- Regarding the rights holder ('iwi or hapū' in the WSE Bill) the clause could be silent in recognition of the different views of the iwi/Māori groups on this point, and that the intent is to preserve the space for future discussion on

s 9

how rights should be defined and provided for. We also note that the Waitangi Tribunal has not indicated a clear view on this matter.[6]

- This element should relate to freshwater and geothermal bodies. The WSE Bill refers to "water", which is appropriate in the context of the three waters services delivery system. The NBA and SPA have a different regulatory scope including a range of forms of water, and consistency with the Crown's statement in the Supreme Court.

d. <u>That the clause does not invalidate actions taken under the Act</u>

Officials recommend a similar clause to the WSE Bill, which states 'Nothing in this section affects, or affects the lawfulness or validity of the performance or exercise by any person of, any duty, function, or power under this Act'. This provides certainty that the regulatory functions under the Act can operate. Importantly, other provisions in the Act are unaffected, including the requirement to uphold Te Oranga o te Taiao and the Tiriti clause.

44. If Ministers agree to a clause with these elements, officials will instruct the Parliamentary Counsel Office (PCO) to draft clauses to be included in the two Acts on this basis.

45. The iwi/Māori groups and Ngāi Tahu have requested to see the drafting of the clause as it is developed. We would like to discuss with Ministers whether once Ministers have reviewed the draft clause, it might (with appropriate approvals) be shared with the groups prior to being finalised for inclusion in the Acts for approval at Cabinet Legislation Committee.

Proposed "statutory timeframe"

Intent of the statutory timeframe proposal

46. MfE has been working with Te Arawhiti to understand the underlying policy intent for this proposal and potential options for Ministers' consideration. We understand Te Arawhiti recommended a statutory timeframe to their Minister because their view is that:

- The unresolved issue of MRI has been straining the Māori Crown relationship for at least 15 years and has already generated litigation in the courts and the Waitangi Tribunal
- The Crown has made repeated unfulfilled commitments to Māori to address the issue
- The Crown needs to demonstrate its genuine intent to address MRI. The medium-term work programme being explored with the iwi/Māori groups and the proposed Accord with FILG is not on its own considered sufficient to provide that signal.

47. We understand that the statutory timeframe idea emerged in the context of discussion about how to ensure that agreement on how to address MRI is reached prior to key NBA implementation steps on important issues such as national direction on allocation through the NPF and allocation components in NBA plans required to be prepared by joint committees. It was considered to be a potential complement to a preservation clause as another mechanism to provide assurance that MRI will not be precluded.

48. MfE shares the view that there is merit in this policy intent. Such a mechanism could be consistent with:

[6] Waitangi Tribunal (2012) Stage 1 Report on the National Freshwater and Geothermal Resources Claim (Wai 2358); Waitangi Tribunal (2019) Stage 2 Report on the National Freshwater and Geothermal Resources Claims (Wai 2358).

- Treaty principles of active protection and good faith
- the RM reform objective of "giving effect to the principles of Te Tiriti and provide greater recognition of te ao Māori, including mātauranga Māori".

49. Depending on the nature and design of the mechanism, it could either enhance (by reducing uncertainty) the RM objective of "improving system efficiency and effectiveness, and reduce complexity, while retaining appropriate local democratic input" – or detract from it.

50. However, as set out more fully below, it has been challenging to establish a recommended approach that reconciles that the statutory timeframe:

- is considered meaningful by iwi, hapū and Māori (feedback from the iwi/Māori groups, expanded below, is that there would need to be consequences or concrete mechanisms attached to such a timeframe)
- is within the scope understood by officials for this proposal (ie. that does not get into the substantive methods or mechanisms of addressing the rights and interests)
- would not have a range of 'fishhooks' that would outweigh the good intent of a timeframe.

Options for a statutory timeframe proposal

51. There are different matters a timeframe could be linked to, such as an 'outcome' (for example, 'addressing MRI') or conducting a 'process' (for example, a review on progress). One of the key considerations is whether such a mechanism would incentivise or create the conditions for meaningful progress.

52. We understand the original statutory timeframe idea was to focus on an 'outcome', which could take following form:

- a commitment from the Crown to Māori that MRI will be "delivered on" prior to key elements of the new RM system being developed (such as any national direction on resource allocation in the National Planning Framework and NBA plans, which are to include allocation approaches) and will be put in place in a timeframe after NBA passage that reflects this commitment
- that this commitment be formalised and reflected in a provision in the NBA
- that the provision would include a specified timeframe (for example, 4 years), relating to the anticipated timing of development of those key elements.

53. There is a shared view between MfE and Te Arawhiti that this kind of option would have a number of "fishhooks" relating to:

- Defining the outcome: The outcome that the timeframe applies to would need to be specified in a legislative provision. The history of Māori-Crown attempts to resolve such interests demonstrates that there is no linear and certain pathway to finding common ground, nor template for what agreement looks like that is appropriate for each context. In theory, the outcome could be an agreement between Māori and the Crown that is reflected in primary legislation. In reality, there would likely be challenges in how the outcome that needs to be achieved in the timeframe is specified, which could inadvertently pre-empt defining the nature of rights and interests. There would also be the question of who needs to be a party to this agreement for iwi, hapū and Māori.

- Ability to deliver: Reaching agreement on addressing MRI is not within the control of the Crown on its own. How these interests are meaningfully and durably addressed will require agreement on both sides of the Tiriti partnership.
- Perception of pressure for Māori to compromise: Such a timeframe could be perceived as putting inappropriate pressure on iwi, hapū and Māori to resolve these important and longstanding issues.
- Meeting a deadline: Having a deadline in legislation is inflexible – what if agreement is not reached but is close at the time the deadline falls?
- Consequences of a deadline being missed: What would the consequences be if a deadline were missed? Would this affect the confidence of the legal status of the development of NPF and NBA plans development subsequently? The consequences would need to be set out clearly in the provision.
- Wider uncertainty: Technical consequences aside, the existence of such a provision, and the widespread understanding of the challenging nature of reaching agreement on MRI, could generate uncertainty for regulators and those subject to the regulatory regime alike as to whether it will be fully enacted (depending on the consequences set out in such a provision). This could from the outset undermine implementation of the NBA.

54. MfE and Te Arawhiti have therefore developed an approach that seeks to address the policy intent but without the above disadvantages, by focusing on a process, rather than an outcome. This approach would require a review process on MRI to commence in specified terms in a specified timeframe. While there are a number of potential permutations of this option, an approach suggested by Te Arawhiti is:

    - The Minister for the Environment be required to commence a review within a certain timeframe. This could be within 4 years of the enactment of the NBA.
    - The review could be required to:
        - consider the nature and extent of rights or interests that are the subject of the preservation clause
        - assess the effectiveness of the NBA in supporting the recognition of any such rights or interests
        - include consideration of the Crown's acknowledgements recorded in the Supreme Court in New Zealand Māori Council v Attorney-General in 2013
        - prepare a report on the findings and table that report in the House within a further timeframe (for example, 2 years) after commencement of the review.

55. This proposal would provide for a "check in" on progress and report back to the legislature on addressing MRI. Officials consider the timing for this review should seek to balance:

    - allowing time for Māori/Crown dialogue to inform key elements of national direction via the National Planning Framework, *but*
    - occur prior to when joint committees will need to have made substantive progress on plans which will include allocation approaches (after this time it will become more difficult for planning regimes to take into account or adapt to reflect any future agreement on MRI).

56. A time-bound statutory requirement to review all or specified provisions of an Act is not an uncommonly used mechanism where it is desirable to "check in" on the operation of the specified provisions. Examples include:

    - Te Ture mō Te Reo Māori 2016/Māori Language Act 2016 (section 44)
    - The Māori Television Service (Te Aratuku Whakaata Irirangi Māori) Act 2003 (section 56).

57. It should be noted that there are also non-statutory actions that could provide assurance or a commitment to progressing MRI in a specified timeframe or prior to key implementation steps under the NBA. These actions include:

    - a public verbal commitment from the Crown to Māori that MRI will be "delivered" on in specified timeframe or prior to key implementation stages/steps, for example, via speeches in the House during passage of the legislation
    - a joint Māori/Crown statement of some form
    - working with iwi/Māori on a mutual commitment along the lines above to be recorded in an accord.

58. Any of these non-statutory options could complement current discussions on a medium-term work programme with FILG and TTK. However, it would be challenging to generate a high degree of trust and confidence that these actions would lead to substantive progress given the unfulfilled commitments to date.

Views of the iwi/Māori groups

59. While it is evident from discussions with FILG technicians, TTK representatives and Ngāi Tahu that mechanisms that lead to progress on MRI are desired, a consistent view was expressed that it would need to include "carrots and sticks", as well as concrete mechanisms to incentivise progress and some practical effect or consequence if progress is not made.

60. Examples of "carrots and sticks" included:

    - mechanisms that might enable compensation (an example given was the Crown Forest Licensed land regime), or safeguards along the lines of memorials provided for in the Treaty of Waitangi (State Enterprises) Act) (as referenced in the letter from TTK to Ministers on 6 March)
    - a process that would generate substantive progress, for example, some form of independence from the Crown and/or representation from both sides of the Treaty partnership.

61. Officials understand these types of processes or mechanisms would go beyond the delegated decision-making authority from MOG #16.

Decision sought on whether to progress a statutory timeframe

62. MfE and Te Arawhiti have not reached a shared view on whether there would be merit in pursuing the kind of 'process' option outlined above, in light of the engagement with the iwi/Māori groups.

63. A decision is sought from Ministers on whether to:

    - include the 'process' approach outlined above in the NBA (supported by Te Arawhiti), and/or
    - explore a non-statutory commitment to addressing MRI in a specified timeframe.

64. If Ministers were inclined to explore any of the types of processes that would generate substantive progress or concrete mechanisms as suggested by the iwi/Māori groups, an appropriate process would need to be considered as this may go beyond the delegated decision-making authority.

65. We recommend that Ministers consider these options in the wider context, including:

- the proposed preservation clause
- the medium-term work programme with the iwi/Māori groups, and the possibility of an accord
- the range of features of the NBA relating to MRI set out at paragraph 7.

66. It is a matter of judgement whether a statutory timeframe in light of the above analysis warrants pursuing, or whether the existing proposals could be sufficient to be considered to provide trust and confidence that risks of MRI being precluded are mitigated.

Primary versus secondary legislation

67. In line with the *Legislation Design and Advisory Committee Legislation Guidelines 2021 Edition* we have assessed that the policy decisions sought through this briefing are likely to be reflected in primary legislation.

Engagement

68. In addition to ongoing policy development with Te Arawhiti and Te Puni Kōkiri, hui were held with officials from the Department of Internal Affairs, Ministry for Primary Industries, Ministry of Transport, Waka Kotahi, and Treasury.

69. Treasury provided feedback that while they support the intent to progress explorations of Māori rights and interests in freshwater, and possibly a preservation clause that does not extend beyond the status quo, officials are of the view that Ministers should strongly consider the need to go to Cabinet:

- If there is intention to expand the scope of the preservation clause beyond the status quo or introduce any material requirements on future governments related to statutory timeframes
- If, by taking a minimalist approach to the decisions in light of feedback from national Māori groups, there could be potential for a significant negative impact on Māori Crown relations.

70. Treasury officials do not believe a statutory timeframe to be the appropriate mechanism for the Crown to demonstrate its genuine intent to address Māori rights and interests in freshwater.

71. Engagement has been undertaken with NICF, TTK, and Ngāi Tahu on the proposals contained in this paper. These are summarised and incorporated throughout the above advice.

Impact of Advice on the Treaty and Māori/iwi

72. The intent of these proposals is to form part of the "jigsaw" of elements to ensure RM reform will not preclude options for addressing MRI in the future.

73. The preservation clause and statutory timeframe proposal advice has been developed reflecting in particular the Crown's duty under the active protection and good faith Treaty principles. The active protection duty is, in the view of the Court of Appeal, 'not merely passive but extends to active protection of Māori people in the use of their lands and waters to the fullest extent practicable'.[7] In the context of RM reform, this has been evaluated in light of other features that relate to MRI and the regulatory purpose to govern in 'the interests of the nation and the best interests of the environment'.[8] How to reconcile these considerations has been the subject of engagement with the iwi/Māori groups and legal advice.

74. Other Treaty Impact Analyses across the suite of RM reform proposals have informed consideration of these issues, including in particular:

- MOG #17 Paper 3 - NBA decision-making framework
- MOG #17 Paper 2 - Role funding and participation of Māori in the RM system
- MOG #16 Paper 2 - Resource allocation and user charges.

75. This paper does not consider or address wider Treaty settlement redress in relation to these proposals; protected customary rights or customary marine title under the Takutai Moana Act; rights under Ngā Hapū o Ngāti Porou Act; or commitments already made through existing natural resource arrangements with Māori under the RMA. Upholding these rights and interests is a matter being addressed by separate workstreams in engagement with our Treaty partners, and may require some specific exemptions or provisions to ensure these rights are upheld in the new system. For the avoidance of doubt, none of these policy proposals are intended to impact upon those rights, which must be upheld in the new system.

Next steps

76. On the preservation clause, if Ministers agree to a clause limited to water, with the elements proposed at recommendation (4), officials will instruct PCO to draft a clause to be included in the two Acts on this basis. Officials would like to discuss with Ministers the approach to further engagement with the iwi/Māori groups.

77. If Ministers would like to explore a preservation clause including all natural taonga, further advice would be provided on possible next steps, noting that a decision on this would likely go beyond the delegated authority.

78. On the statutory timeframe proposal if Ministers decide to include in the NBA a requirement for a review process on MRI as at recommendation (5)(b), a provision could be drafted for Ministers consideration. If Ministers decide to explore a non-statutory commitment to addressing MRI in a specified timeframe (instead of or in addition to a statutory review provision), officials would seek guidance from Ministers as to next steps,

[7] New Zealand Māori Council v Attorney-General [1987] 1 NZLR 641 (CA), 664.
[8] Waitangi Tribunal (2012) The Stage 1 Report on the National Freshwater and Geothermal Resources Claim (Wai 2358) p 78.

including informed by any recent discussions between Ministers and the iwi/Māori groups.

Recommendations

79. We recommend that you:

a. **note** that MOG #16 delegated decisions on this topic jointly to the Minister for the Environment and Associate Minister for the Environment (Hon Kiri Allan), in consultation with the Ministers of Māori Crown Relations: Te Arawhiti, Housing, Local Government, and Māori Development in their roles as part of the MOG Māori Interests subgroup, and the Ministers of Energy and Resources, Agriculture, and Conservation

Yes/No

b. **agree** to forward this briefing to the Ministers of Māori Crown Relations: Te Arawhiti, Housing, Local Government, Māori Development, Energy and Resources, Agriculture, and Conservation for feedback

Yes/No

c. **agree** to the specific recommendations in **Appendix A**, indicating your decisions in that appendix

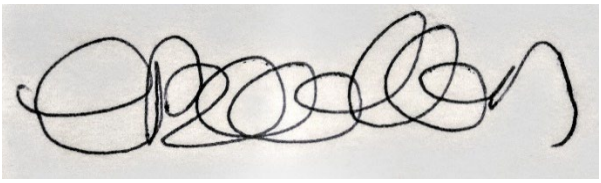
Yes/No

d. **note** the policy recommendations in this briefing are likely to be reflected in primary legislation, subject to decisions of Parliamentary Counsel Office

e. **authorise** officials to instruct the Parliamentary Counsel Office to draft based on the matters agreed in **Appendix A**

Yes/No

Signature



Lucy Bolton
Manager, Natural and Built System
Ministry for the Environment **27 June 2022**

Hon David Parker
Minister for the Environment **Date**

Hon Kiri Allan
Associate Minister for the Environment **Date**

Appendix A: Detailed decisions for Māori freshwater rights and interests preservation clause and statutory timeframe

Topic	Proposal	Advice	Impact of advice on the Treaty and Māori/iwi, and significant impacts on Natural environment, Development, Adaptation and mitigation, and System efficiency	Recommendations	Decision
Preservation clause	To include a preservation clause in the NBA	Officials consider a carefully crafted preservation clause would support the following objectives, which are derived from applying RM reform objectives relating to Te Tiriti and system effectiveness to the MRI context: • To preserve the space for Māori and the Crown in future to come to an agreement on how Māori freshwater rights and interests should be recognised • To provide legal certainty, in the meantime, that the RM reform via the NBA is intended to not determine or extinguish any proprietary rights, aboriginal title, or customary rights that may be considered to exist • To minimise regulatory uncertainty regarding the NBA for those exercising powers under the legislation or those whose activities are regulated.	The iwi/Māori groups have indicated that a preservation clause plays a critical role as part of the 'jigsaw' of elements to ensure MRI are not precluded by the NBA, alongside wider relevant features in the NBA. The analysis in this paper is guided by: • key relevant Treaty principles of active protection and good faith • the regulatory purpose to govern in 'the interests of the nation and the best interests of the environment'. How to reconcile these considerations requires evaluating the views of the iwi/Māori groups, the policy intent for the NBA, and legal advice; and is the basis of these recommendations.	1. **Agree** to include a Māori rights and interests preservation clause in the NBA	**Yes/No**
	That a preservation clause also be included in the SPA	Officials recommend the clause be included in the SPA, as the purpose and context of the Act has several links to MRI: the powers and functions in the SPA will include governance and decision-making, and RSSs will include implicit allocation decisions. The iwi/Māori groups have verbally indicated they agree with this judgement.		2. **Agree** that a Māori rights and interests preservation clause also be included in the SPA	**Yes/No**
	Whether to limit the scope of a clause to water	The original proposals from TTK and NICF were for a clause that related to water. Such a clause could be drafted in such a way that reflects the current Crown legal position. FILG technicians and Ngāi Tahu have now indicated that a preservation clause should extent to all natural taonga. This proposal should be carefully evaluated, noting that such a scope could take the Crown into new territory regarding rights and interests. s 9(2)(h) [redacted] The delegated authority relates to Māori freshwater rights and interests, so to explore a preservation clause with broader scope, consideration would need to be given to the appropriate decision-making process for this (such as Cabinet consideration).		3. **Agree** that the scope of the clause is limited to **water** (being freshwater and geothermal bodies)	**Yes/No**
		The proposed elements reflect a reconciling of considerations including from engagement with the iwi/Māori groups, the policy intent for the NBA, and legal advice. They reflect: • the Crown's existing position, and • align broadly with the WSE Bill preservation clause, except where a different approach is appropriate given the different regulatory purpose and context of the NBA and SPA. This proposal provides certainty that the regulatory functions under the Act can operate, while noting that other provisions in the Act are unaffected, including the requirement to uphold Te Oranga o te Taiao and the Tiriti clause.		4. **Agree** that the clause include the following elements: a. Acknowledgement by the Crown that Māori freshwater rights and interests exist, including reference to the Crown's statement in the Supreme Court in 2013 b. That the Acts do not create or transfer a proprietary right or interest c. That the Acts do not determine or extinguish any customary right or interest (for example, one founded on, or arising from, aboriginal title or customary law) that may exist in freshwater and geothermal resources	**Yes/No**

				d. That the clause does not affect the lawfulness or validity of the performance or exercise by any person of, any duty, function, or power under this Act	
Statutory timeframe		Officials consider there is merit in the policy intent behind the statutory timeframe proposal, being to create the impetus for progress on this important and challenging issue prior to key implementation of the NBA, and as another mechanism to provide assurance that MRI will not be precluded. However, it has been challenging to establish a recommended approach that reconciles that a timeframe: • is considered meaningful by iwi, hapū and Māori (feedback from the iwi/Māori groups is that there would need to be consequences or concrete mechanisms attached to such a timeframe) • is within the scope understood by officials for this proposal (ie. that does not get into the substantive methods or mechanisms of addressing the rights and interests) • would not have a range of 'fishhooks' that would outweigh the good intent of a timeframe. A statutory option has been developed to mitigate the 'fishhooks' identified in the analysis. The Minister for the Environment could be required to commence a review within 4 years of the enactment of the NBA. This review provision could require: • consideration of the nature and extent of rights or interests that are the subject of the preservation clause • assessment of the effectiveness of the NBA in supporting the recognition of any such rights or interests • include consideration of the Crown's acknowledgements recorded in the Supreme Court in New Zealand Māori Council v Attorney-General in 2013 • preparation of a report on the findings and table that report in the House within a further timeframe (for example, 2 years) after commencement of the review. It is a matter of judgement whether a timeframe for this type of review process in the NBA warrants pursuing, or whether the existing proposals could be sufficient to be considered provide sufficient trust and confidence that risks of MRI being precluded are mitigated. A non-statutory commitment to a timeframe for addressing rights and interests (for example in a speech or relationship document) could be an alternative or complement to the statutory review option. If Ministers agree to recommendation (5)(b), a provision could be drafted for Ministers' consideration.		5. **Agree**: a. To explore a non-statutory commitment to addressing MRI in a specified timeframe **AND/OR** b. To include in the NBA a requirement that a review process on MRI commence in specified terms in a specified timeframe	**Yes/No** **Yes/No**

Appendix B

s 9(2)(h)

Appendix C Information about rights and interests in natural resources

The Crown's understanding of the nature of rights and interests is much clearer in some resources than others:

- The Crown has acknowledged that Māori have rights and interests in freshwater and geothermal resources, and indicated its intent to address them, and has spent considerable time and effort working with Māori to define them in a policy context
- Separate legislative processes exist for recognising aquaculture rights and interests, and customary title / protected customary rights in the coastal marine space
- Several Māori groups have been granted title to river and lake beds, and recent freshwater proceedings have highlighted that aboriginal title may still exist in various non-navigable riverbeds throughout the country
- There have been no substantive discussions between Māori and the Crown that officials are aware of about the nature of any Māori rights and interests in air pollution or the assimilative capacity of the environment more generally.

Waitangi Tribunal statements on Māori rights and interests in natural resources

The Waitangi Tribunal has consistently found that the Treaty of Waitangi guaranteed Māori an interest greater than the general public in natural and other resources. This is summarised in the Tribunal's report on the allocation of radio frequencies as follows:

> As we see it, the ceding of kawanatanga to the Queen did not involve the acceptance of an unfettered legislative supremacy over resources. Neither Treaty partner can have monopoly rights in terms of this resource. Māori interests in natural resources are protected by the distinctive element of tino rangatiratanga. The Treaty granted sovereignty and the delegation to govern but subject to the limitations of the special interests of tino rangatiratanga. This means that consultation between partners is vital to the Treaty itself and to its spirit.
>
> There is a hierarchy of interests in natural resources based on the twin concepts of kawanatanga and tino rangatiratanga. First in the hierarchy comes the Crown's obligation or duty to control and manage those resources in the interests of conservation and in the wider public interest. Secondly comes the tribal interest in the resource. Then follows those who have commercial or recreational interests in the resource.[9]

The Tribunal has also found on several occasions that Māori have a right to develop their properties and taonga by any means they consider appropriate. The Central North Island inquiry report noted that this includes:

- Intangible as well as tangible taonga
- 'Other properties' not necessarily specified in either of the Treaty texts
- The right of Māori property owners to develop or profit from resources in which they can be shown, on the facts, to have had a proprietary interest under Māori custom, even when the nature of that property right is not recognised or has no equivalent in British law.[10]

Crown recognition of Māori rights and interests in some natural resources

Māori interests have been a key consideration in the allocation of a number of natural resources since the late 1980s, including commercial fisheries, aquaculture and the foreshore

[9] Waitangi Tribunal (1990) *Report of the Waitangi Tribunal on claims concerning the allocation of radio frequencies* (Wellington: GP Publications) p 42.
[10] Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Part IV: A Treaty development right* (Wellington) p 912.

and seabed.[11] This usually followed Waitangi Tribunal inquiries into the nature and extent of the Māori interest in a particular resource.

Addressing Māori interests in each of these resources has posed its own unique challenges, including:

- The nature of the resource (is it comprised of fixed quantities or 'units', or does it vary over time?)
- The extent of existing and overlapping use rights (have others been granted rights in the resource? How were these rights allocated? Is the resource fully- or over-allocated?)
- How the resource, and associated assets such as compensation, can be best administered and distributed to Māori (how should the resource be divided between Māori groups? Are there established bodies at-place to receive the resource? Are there disputes over who should receive the resource? How should the resource be managed while these questions are resolved?)

Custom legislation has typically been passed to give legal effect to agreements to address Māori interests in a natural resource. Financial compensation and a share of the resource (typically 20%) are common forms of 'settlement'. In some cases, national bodies have been established to administer settlement assets and transfer them to iwi / hapū (ie. the Māori Fisheries Commission and its successors, Crown Forestry Rental Trust, the Takutai Trust).

Summary of what we know about Māori rights and interests in some natural resources

Taking or diverting of, and discharging to, freshwater	The Crown has acknowledged that Māori have rights and interests in freshwater, and that their recognition: • Must involve mechanisms that relate to the ongoing use of those resources • May include decision-making roles in relation to care, protection, use, access and allocation, and/or charges or rentals for use. The Crown also agreed that there would be no disposition or creation of property rights or interests in water without prior engagement with iwi.[12] Māori rights and interests in freshwater have been a priority subject for almost two decades. Māori, the Crown and local authorities have devoted significant time and effort to define and (to some extent) provide for them.[13] Māori rights and interests in freshwater are also the subject of considerable Waitangi Tribunal jurisprudence.[14] Two Māori groups have had ownership rights in water recognised.[15]

[11] And the allocation of other resources, such as the disposal of broadcasting assets and the auction of spectrum rights.
[12] Affidavit of Simon William English in opposition to application for judicial review, 7 November 2012 (filed in *Pouakani Claims Trust v Attorney-General*, CIV-2012-485-2185), paras 28, 29, 38. While the original affidavit used the phrase 'engagement and agreement', the Crown clarified in a follow-up affidavit that the word 'agreement' was included in error.
[13] At a national level this includes the NPSFM, Mana Whakahono ā Rohe and Treaty settlements involving water bodies. At a local level this includes the Lake Taupō cap and trade scheme, the reservation of water rights for the irrigation of Māori perpetual lease lands in the Tasman Resource Management Plan, and enabling the development of ancestral lands under Waikato Regional Plan Change 1.
[14] Particularly the stage one and two reports for the national freshwater and geothermal resource inquiry (Wai 2358)
[15] The trustees of the Māori reservations for Lake Ōmāpere and Waikuku Lagoon.

Energy and heat from geothermal	The Crown has acknowledged that Māori have rights and interests in geothermal resources, and that their recognition: • Must involve mechanisms that relate to the ongoing use of those resources • May include decision-making roles in relation to care, protection, use, access and allocation, and/or charges or rentals for use.[16] The RMA includes an exception for Māori to take or use geothermal water, heat or energy in accordance with tikanga for the communal benefit of the tangata whenua of the area and provided it does not have an adverse effect on the environment.[17] Māori rights and interests in geothermal resources are also the subject of considerable Waitangi Tribunal jurisprudence.[18]
Occupation of coastal marine space	Separate legislative processes exist for recognising aquaculture rights and interests, and customary title / protected customary rights in the coastal marine space.[19]
River and coastal marine area materials (such as gravel and sand)	Several Māori groups have been granted title to river and lake beds (either via the courts or through Treaty settlements). Other Treaty settlements include the right to extract material from riverbeds for customary purposes without a resource consent (such as hāngi stones). Recent freshwater proceedings have highlighted that aboriginal title may still exist in various non-navigable riverbeds throughout the country (including the resources located thereon, such as gravel), and that the extinguishment of aboriginal title in navigable riverbeds may have been via a 'sidewind'.[20]
Navigation rights on the surface of rivers, lakes, and in the sea	The Tūwharetoa Māori Trust Board own the water column in respect of Lake Taupō, tributaries flowing into Lake Taupō and the Waikato River from the outlet of Lake Taupō to the Rock of Tia (inclusive of Huka Falls).

[16] Affidavit of Simon William English.
[17] RMA sec 14(3)(c).
[18] Particularly the Ngāwhā geothermal resources inquiry (Wai 304), the Te Arawa geothermal resources inquiry (Wai 153) and the report on the Central North Island claims (Wai 1200).
[19] The Māori Commercial Aquaculture Claims Settlement Act 2004 and the Marine and Coastal Area (Takutai Moana) Act 2011.
[20] *Paki & Ors v Attorney-General* [2014] NZSC 118; *Re Ngāti Pāhauwera* [2021] NZHC 3599.

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

Ministry for the Environment
Manatū Mō Te Taiao

BRIEFING

Policy decisions on the National Policy Statement for Renewable Electricity Generation and the National Policy Statement on Electricity Transmission

Date:	15 February 2024	**Priority:**	Medium
Security classification:	In Confidence	**Tracking number:**	MBIE 2324-1977 MfE BRF-4158

Action sought		
	Action sought	**Deadline**
Hon Chris Bishop **Minister Responsible for RMA Reform**	**Agree** to the recommendations in this briefing **Agree** to jointly meet with officials from MBIE and MfE **Forward** this briefing to the Associate Minister for Energy and the Minister of Conservation	23 February 2024
Hon Simeon Brown **Minister for Energy**		23 February 2024
Hon Penny Simmonds **Minister for the Environment**		23 February 2024

Contact for telephone discussion (if required)				
Name	**Position**	**Telephone**		**1st contact**
Justine Cannon	General Manager, Energy Markets	04 901 8597	s 9(2)(a)	✓
Susan Hall	Policy Director	04 896 5304		

Contact for telephone discussion (if required)			
Name	**Position**	**Telephone**	**1st contact**
Liz Moncrieff	General Manager, Urban and Infrastructure Policy	s 9(2)(a)	✓
Stephanie Gard'ner	Principal Adviser, Urban and Infrastructure Policy		

The following departments/agencies have been consulted

The Department of Conservation has been consulted and has provided a comment.

Minister's office to complete:

- ☐ Approved
- ☐ Noted
- ☐ Seen
- ☐ See Minister's Notes
- ☐ Declined
- ☐ Needs change
- ☐ Overtaken by Events
- ☐ Withdrawn

Comments

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

Ministry for the Environment
Manatū Mō Te Taiao

BRIEFING

Policy decisions on the National Policy Statement for Renewable Electricity Generation and the National Policy Statement on Electricity Transmission

Date:	15 February 2024	**Priority:**	Medium
Security classification:	In Confidence	**Tracking number:**	MBIE 2324-1977 MfE BRF-4158

Purpose

To seek your confirmation of the objectives reflected in Electrify NZ, provide you with advice on changes to the NPS-REG and NPS-ET and seek key policy decisions.

Executive summary

This is one of two briefings you are receiving on Electrify NZ and the resource management system: this briefing provides advice on changes to the National Policy Statement on Renewable Electricity Generation (NPS-REG) and the National Policy Statement on Electricity Transmission (NPS-ET) which contain objectives and policies under the Resource Management Act 1991 (RMA).

The NPS-REG and NPS-ET are quite weakly worded and developments in case law have made them less effective over time. There is also a complex set of provisions across national direction that apply to REG and ET which lack coherency.

s 9(2)(f)(iv)

s 9(2)(f)(iv)

Minister Bishop is receiving advice this week on the overall work programme for reform of the resource management system [MfE BRF-4029]

s 9(2)(f)(iv)

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

a **Note** that a revised National Policy Statement for Renewable Electricity Generation and National Policy Statement on Electricity Transmission are key commitments in Electrify NZ

Noted

s 9(2)(f)(iv)

Confirmed / Not confirmed

s 9(2)(f)(iv)

s 9(2)(f)(iv)

Noted

e **Note** that the Minister for Resource Management Reform has received advice on a wider resource management national direction work programme [MfE BRF-4029] which will impact on timing of the above options, particularly option 2.

Noted

s 9(2)(f)(iv)

l **Forward** this briefing to the Associate Minister for Energy and the Minister for Conservation.

E. Moncrieff

Liz Moncrieff
General Manager
Urban and Infrastructure Policy, MfE

15 / 2 / 2024

Justine Cannon
General Manager
Energy Markets, MBIE

15 / 02 /2024

Hon Chris Bishop
Minister Responsible for RMA Reform

..... / ..... / .....

Hon Simeon Brown
Minister for Energy

..... / ..... / .....

Hon Penny Simmonds
Minister for the Environment

..... / ..... / .....

Background

2. This is one of two briefings you are receiving on Electrify NZ and the resource management system: this briefing provides advice on changes to the National Policy Statement for Renewable Electricity Generation (NPS-REG) and the National Policy Statement on Electricity Transmission (NPS-ET) which set out objectives and policies under the Resource Management Act 1991. The companion briefing sets out a proposed work programme to deliver the commitments in Electrify NZ [MBIE 2324-1792, MfE BRF-4123].

s 9(2)(ba)(i)

3. We consulted on draft versions in May and June last year and received submissions on those drafts. s 9(2)(ba)(i)

s 9(2)(ba)(i)

Reform of the resource management system is underway and this will impact on decisions sought on the NPS-REG and NPS-ET

5. Minister Bishop has received advice [BRF-4029] on establishing a three-year work programme for improvements to the resource management system.. s 9(2)(f)(iv) It will be important that decisions about the NPS-REG and NPS-ET are made within that wider context to ensure that there is as much regulatory certainty as possible, and that change is efficient.

s 9(2)(f)(iv)

The fast-track consenting process is likely to be attractive to many large-scale developments, but a strong RMA framework will still be important to achieving your objectives

7. Fast-track consenting is likely to be attractive to renewable electricity developers and Transpower for large-scale consenting applications. However, there are likely to continue to be applications for smaller generation activities and many maintenance, reconsenting and upgrading consent applications that are unlikely to be suitable for or accepted into the fast-track consenting process. Therefore, an enabling regulatory framework in the RMA and through national direction will still be important.

Analysis

8. There is a significant increase needed in renewable generation and transmission to transition away from fossil fuels and achieve the objectives in Electrify NZ. The policy framework needs to both:

    a. enable the development of new generation capacity and the expansion of the transmission network.

b. protect and maintain existing generation capacity, transmission and infrastructure.

The existing NPS-REG and NPS-ET are not fit for purpose

9. The current decision-making framework under the NPS-REG and ET will not be fit for purpose to achieve the objectives in Electrify NZ.

10. The existing NPS-REG was developed in 2011 through a Board of Inquiry process and the NPS-ET in 2008. The 2023 consultation document noted that both are quite weakly worded in comparison to the directive provisions in other national policy statements.

11. As case law has developed on the interpretation of national policy statements, the NPS-REG and NPS-ET have become less effective (strongly directive language tends to take priority in decisions). For instance, the strong 'avoid' definitions in policies 11, 13 and 15 of the New Zealand Coastal Policy Statement (NZCPS) and the effects management hierarchy in the National Policy Statement for Freshwater Management (NPS-FM) are much more directive than the general language in the NPS-REG and NPS-ET.

12. The existing set of national policy statements must all be interpreted alongside each other. These have been developed at different points with differing policy objectives, and as a result there are conflicting provisions across them. This means there is a complex set of provisions which apply to REG and ET that lacks coherency.

13. These issues create uncertainty for REG developers and Transpower about whether and how they will be able to progress projects, and it also increases the likelihood of costly and lengthy consenting processes.

s 9(2)(f)(iv)

Objectives for the NPS-REG and NPS-ET

s 9(2)(f)(iv)

19. We propose that the two overarching objectives for the NPS-REG and NPS-ET should be to:

- better enable REG and ET activities to support climate transition and resilience; and
- make efficient use of and better protect existing generation capacity, networks and infrastructure.

Options for the interaction of the NPS-REG and NPS-ET with other national direction

20. These objectives need to be supported by more direction on how the NPS-REG and NPS-ET relate to other national direction. This will help to provide greater certainty for developers and operators on plan provisions and how applications will be assessed.

s 9(2)(f)(iv)

[redacted]

[1] Responsibilities for this national direction have been delegated to Simon Court, the Parliamentary Under-Secretary to the Minister Responsible for RMA Reform.

s 9(2)(f)(iv)

Analysis of options

s 9(2)(f)(iv)

34. The assessment of the options against these criteria are set out in Annex 1.

35. Another important consideration will be ensuring that the preferred option does not undermine the Government's work programme for the resource management system or create unnecessary regulatory uncertainty for consent applicants. The wider work programme is covered in the advice to Minister Bishop.

s 9(2)(f)(iv)

[2] The New Zealand Coastal Policy Statement is approved by the Minister of Conservation while all other national policy statements are approved by the Minister for the Environment.

s 9(2)(f)(iv)

Your preferred approach

s 9(2)(f)(iv)

47. We recognise the complexities and trade-offs in the decision, and we are available to support a joint meeting to discuss the options put forward.

s 9(2)(f)(iv)

s 9(2)(f)(iv)

[redacted]

[3] Hon Bill English summarised the Crown position as being that it acknowledges that Māori have "rights and interests in water and geothermal resources" … This occurred in proceedings related to the Crown's policy to sell up to 49 percent of shares in four state-owned power companies. It was recorded in the Supreme Court in 2013. *New Zealand Māori Council v Attorney-General [2013] NZSC 6, [2013] 3 NZLR 31 at [145].*

[4] Engagement with Māori between 2014-2018 resulted in freshwater rights and interests being groups under broad categories. These include water quality, recognition of relationships with water bodies, governance and decision-making, and access and use for economic development.

[5] The Tribunal, claimants and interested parties will be updated once policy decisions have been made for the NPS-REG and NPS-ET.

s 9(2)(f)(iv)

56. As part of the 2023 consultation on the NPS REG and NPS-ET, we sought feedback on whether the electricity transmission provisions that apply to the national grid should be extended to also cover high-voltage transmission lines not owned by Transpower (these are commonly referred to as sub-transmission assets). s 9(2)(ba)(i)

57. Sub-transmission assets typically operate at 33kV, 66kV and above, and they often face the same consenting constraints as the national grid because they are often required to extend through sensitive environments. A large majority of connection enquiries for new generation would use the sub-transmission network (which are not included under the current NPS-ET).

s 9(2)(f)(iv)

Engagement and consultation

s 9(2)(f)(iv)

Te Tiriti analysis

62. Current Te Tiriti, Treaty settlement and other arrangements analysis on the proposal has been completed by MfE and can be summarised as the following:

a. Core principles of Te Tiriti have been well established through the courts and Waitangi Tribunal[6]. Those of particular relevance in this context include the principle to act in partnership and good faith[7], and the Crown's duty of active protection to Māori in respect of freshwater, which is a tāonga for Māori[8].

b. These proposals may have connections with the Crown's 2012 acknowledgement of Māori rights and interests in freshwater and geothermal resources and current and upcoming matters before the Waitangi Tribunal and the Courts[9].

c. Many Treaty settlements contain redress that relate to the development of national direction and some place direct obligations on the Crown including engagement obligations (refer to Annex 2).

s 9(2)(f)(iv)

Legal issues (legally privileged)

Option 1

s 9(2)(h)

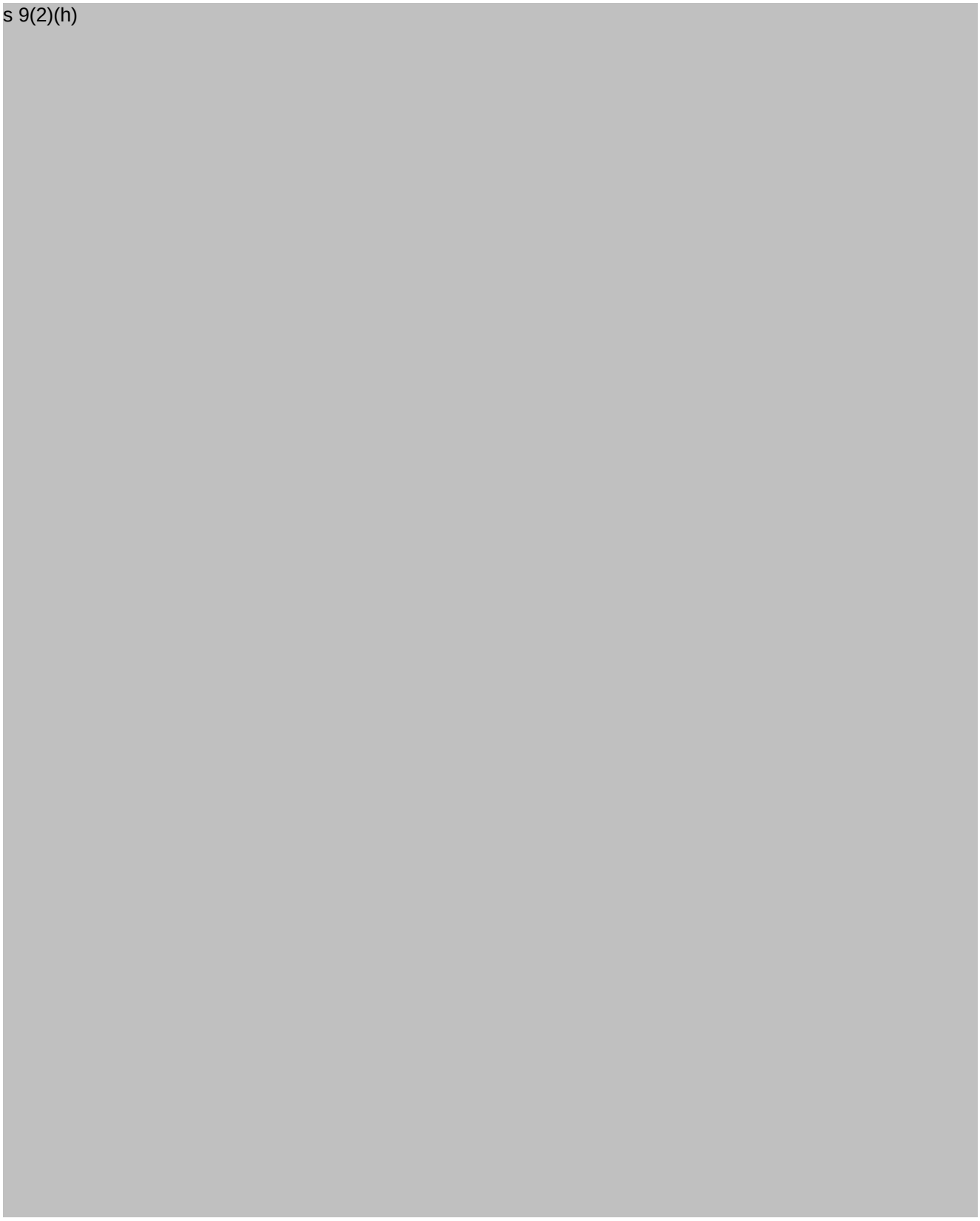
[6] More detail on Treaty principles and considerations, the Crown's obligations, and Treaty breaches are set out in the two Waitangi Tribunal reports in the Wai 2358 inquiry (*Waitangi Tribunal (2012) The Stage 1 Report on the National Freshwater and Geothermal Resources Claims (Wai 2358) and Waitangi Tribunal (2019) The Stage 2 Report on Wai 2358 Vol 2*).

[7] The duty for the Crown and Māori (with partnership founded in the Treaty) to act towards each other 'with the utmost good faith' was stated by the Court of Appeal in the *Lands* case *(New Zealand Māori Council v Attorney-General [1987] 1 NZLR 641)*

[8] The Te Tau Ihu Waitangi Tribunal stated that the Crown's duty of active protection is '*not merely passive and extends to active protection of Māori people in their use of their lands and waters to the fullest extent practicable'*. They note that this requires honourable conduct by, and fair processes from, the Crown, and full consultation with those whose interests are to be protected (*Waitangi Tribunal, Te Tau Ihu Report, Vol 1, page 4*).

[9] Māori have highlighted opposition to renewable energy generation activities where they may impact relationships with ancestral lands, cultural values, cultural landscapes and wāhi tapu. The case is before the Court of Appeal. *Te Korowai o Ngaruahine Trust v Hiringi Energy LTD and Balance Agrinutrients LTD [2022] NZHC 2810 [31 October 2022].*

s 9(2)(h)



Next steps

73. The next steps will be to begin drafting the revised NPS-REG and NPS-ET based on your decisions. We will also prepare the supporting material (including a consultation document, a regulatory impact analysis and a s46a report). We will seek more detailed decisions on specific drafting matters (the timing of this will depend on which option you wish to pursue).

74. After that, we will prepare a draft Cabinet paper for you to take to Cabinet seeking approval to consult on the draft NPS-REG and NPS-ET.

Other agency views

75. s 9(2)(f)(iv) However, we recognise the potential tensions with other national direction. Case law, including the Port Otago decision, tells us how to reconcile policy statements in these circumstances. s 9(2)(f)(iv)

Annexes

Annex One: Assessment of options against criteria

Annex Two: Treaty settlement commitments

Annex One: assessment of options against criteria

s 9(2)(f)(iv)

Annex Two: Crown obligations for Treaty settlements and other legislative arrangements relating to national direction

The below table outlines Crown obligations regarding national direction under Treaty settlements and other legislative arrangements including the Marine and Coastal Area (Takutai Moana) Act 2011 and Ngā Rohe Moana o Ngā Hapū o Ngāti Porou (NHNP) Act 2019.

This is an initial analysis of commitments relating to national direction, officials will provide you with a more fulsome analysis, such as implications on Treaty settlement and other arrangements for offshore wind, in the next briefing.

Legislation	Obligation	Example
Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 (NHNP Act)	Section 31 Effect on other resource management documents The Minister for the Environment must consider the environmental covenant when preparing a proposed national policy statement that directly affects ngā rohe moana (as outlined under the NHNP Act). A board of inquiry is appointed to inquire into a proposed national policy statement, and any other person who prepares a report and recommendations for a proposed national policy statement, that directly affects ngā rohe moana must treat the environmental covenant as a relevant matter. Environmental Relationship Instrument (Schedule 2, Part C, 3.4- deed of agreement) Where the Minister decides to issue a national policy statement relating to the common marine or coastal area in general, or solely to ngā rohe moana o ngā hapū o Ngāti Porou, the Minister will seek and consider the views of ngā hapū o Ngāti Porou before preparing the proposed national policy statement.	s 9(2)(f)(iv)
Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010	12 Effect of vision and strategy on Resource Management Act 1991 planning documents Te Ture Whaimana (The vision and strategy for the Waikato River) prevails over any inconsistent provision in -	

	(a) a national policy statement issued under section 52 of the Resource Management Act 1991; and (b) a New Zealand coastal policy statement issued under section 57 of the Resource Management Act 1991; and (c) a national planning standard published under section 58F of the Resource Management Act 1991, to the extent that it contains provisions referred to in section 58C(1)(b) of that Act (which refers to matters that may be included in a national policy statement).	s 9(2)(f)(iv)
Ngāti Koroki Kahukura Claims Settlement Act 2014	The Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 extends the co-management afforded to Waikato-Tainui to cover the Ngāti Koroki Kahukura area of interest (the sub-catchment) so that Ngāti Koroki Kahukura will be involved in the co-management of the Waikato River through Waikato-Tainui. *(Te Ture Whaimana obligations apply)*	
Nga Wai o Maniapoto (Waipa River) Act 2012	S8 Vision and Strategy S8 provides that section 18 of the Ngati Tūwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010 applies to the Waipā River, that is, any person carrying out functions or exercising powers under the RMA in relation to the Waikato River or activities in the catchment that the Waikato River must have particular regard to Te Ture Whaimana o Te Awa o Waikato (Waikato River vision and strategy). This applies to the Minister when the Minister prepares and recommends national direction under Part 5 of the RMA. *(Te Ture Whaimana obligations apply)*	
Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010	Section 18 Duty to have particular regard to vision strategy Under section 18 of the Ngati Tūwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010 any person carrying out functions or exercising powers under the RMA in relation to the Waikato River or	

	activities in the catchment that the Waikato River must have particular regard to Te Ture Whaimana o Te Awa o Waikato (Waikato River vision and strategy). This applies to the Minister when the Minister prepares and recommends national direction under Part 5 of the RMA.	s 9(2)(f)(iv)
Ngāti Hauā Claims Settlement Act 2014	The partnership arrangements allow for the exercise of powers through the Waikato Raupatu River Trust and Schedule 7 of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, and Schedule 5 of the Ngāti Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010.	
Ngāti Rangi Claims Settlement Act 2019 (Whangaehu River)	Section 109 Legal effect of Te Mana Tupua and Ngā Toka Tupua Section 109 imposes an obligation on the Crown when making decisions on proposals within a NPS that relate to the Whangaehu River, or an activity within its catchment that affects the Whangaehu River, to 'have particular regard' to the Te Mana Tupua o Te Waiū-o-Te-Ika (legal person status) and the intrinsic values of the Whangaehu River (Ngā Toka Tupua), and they must state how these requirements have been complied with.	
Te Arawa Lakes Settlement Act 2006 (Rotorua Lakes)	Environment protocol in the Schedules to Deed of Settlement If the Minister for the Environment decides to issue an NPS, consultation is required with the Governance Entity (in accordance with section 46(a) of the RMA) before preparing the proposed NPS. In the case of an NPS relating to lakes or freshwater bodies in general, the Minister will balance Te Arawa's views with those of other persons with interests in lakes or freshwater bodies.	
Te Awa Tupua (Whanganui River Claims Settlement) Act 2017	15 Legal effect of declaration of Te Awa Tupua status Under section 15 of Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 decision-makers on national direction must 'have particular regard' to Te Awa Tupua (Whanganui River)	

	and Tupua te Kawa (the natural law and value system of Te Awa Tupua), and te Heke Ngahuru (the Te Awa Tupua Strategy) and they must state how these requirements have been complied with. Under 11 (1), Te Pā Auroa is a relevant consideration in the exercise of all statutory functions, powers, and duties in relation to the Whanganui River or to activities in its catchment that affect the Whanganui River.	s 9(2)(f)(iv)
Ngāti Maru (Taranaki) Claims Settlement Act 2022	80 Maru Taio plan may be lodged with relevant department Under section 80 of the Ngāti Maru (Taranaki) Claims Settlement Act 2022, the relevant department with which a Maru Taiao plan is lodged must have regard to the plan when exercising any of its powers or performing any of its functions that relate to the purpose of the Maru Taiao plan within the Maru Taiao area. This could potentially include national direction prepared under the RMA.	
Maniapoto Claims Settlement Act 2022	Subpart 9 Maniapoto interest in part of exclusive economic zone 1) The Maniapoto interest in the part of the exclusive economic zone described in subsection (2) includes— (a) the Maniapoto commercial fishing rights and interests; and (b) the Maniapoto cultural relationship with the marine environment; and (c) the recognition of, and provision for, mātauranga and Maniapoto values in the management of the marine environment; and (d) the role of Maniapoto as rangatira and kaitiaki of the marine environment and their ability to exercise kaitiakitanga and rangatiratanga… ….	

Ngāi Tahu Claims Settlement Act 1998	Section 12 Mahinga kai 12.16.3 Resource Management Act 1991 The Crown acknowledges and agrees that the Minister for the Environment and the Minister of Conservation, after deciding to exercise any monitoring function prescribed in either of sections 24 or 28 of the Resource Management Act 1991 relating to management of Coastal Marine Areas within the Ngāi Tahu Claim Area, shall, before exercising such functions, consult with Te Rūnanga and have particular regard to its views with respect to the manner in which the functions will be carried out.	

Ministry for the Environment
Manatū Mō Te Taiao

Aide memoire: Progressing Changes to the Freshwater Management System

Date submitted: 26 March 2024
Tracking number: BRF-4460
Security level: In-Confidence

Actions sought from ministers	
Name and position	***Action sought***
To Hon Chris BISHOP **Minister Responsible for RMA Reform**	Forward to Hon McClay, Simmonds, and Hoggard

Appendices and attachments
Appendix 1: Freshwater National Direction and Regulations System Overview Appendix 2: BRF-3974 - Overview of Māori Freshwater Rights and Interests

Key contacts at Ministry for the Environment			
Position	***Name***	***Cell phone***	***First contact***
Principal Author	Shannon Wallace	022 023 4929	
Responsible Manager	Nick Martelli	022 016 1873	
General Manager	Hayden Johnston	022 153 0221	✓

Progressing Changes to the Freshwater Management System

Purpose

1. This aide memoire sets out matters for Ministers to consider and discuss to progress changes to the freshwater management system and the review and replacement of NPS-FM:

    i. The current freshwater management system

    ii. Setting the objectives of the review

    iii. Key considerations

    iv. Potential challenges and complexities

    v. Establishing a work programme and Ministerial responsibilities

    vi. Māori rights and interests and Treaty settlement obligations.

The current freshwater management system

2. The current freshwater management system (the system) sits within the Resource Management Act 1991 (RMA) and its purpose to promote sustainable management of natural and physical resources. Most of the specific freshwater requirements sit within national direction and regulations made under the RMA:

    i. The National Policy Statement for Freshwater Management (NPS-FM)

    ii. The Freshwater Planning Process (FPP)

    iii. The National Environmental Standards for Freshwater (NES-F)

    iv. Resource Management (Freshwater Farm Plans) Regulations 2023 (Farm plans)

    v. Resource Management (Stock Exclusion) Regulations 2020 (Stock exclusion).

3. There are other pieces of national direction that are relevant and form part of the system, although their primary purpose is not the management of freshwater, such as:

    i. Resource Management (National Environmental Standards for Sources of Human Drinking Water) Regulations 2007 (NES – Drinking water)

    ii. National Policy Statement for Renewable Electricity Generation 2011 (as it impacts freshwater through hydroelectricity generation activities)

    iii. Resource Management (Measurement and Reporting of Water Takes) Regulations 2010 (water metering regulations).

4. These instruments are required to be given effect to by Regional Council planning and resource consenting processes, which is where decision making ultimately impacts freshwater users.

5. The interaction between national instruments, and between national and regional instruments is complex, and changing one part will impact other parts of the system. It therefore makes sense to consider changes to these instruments as part of a coherent package.

6. More information on each of the instruments and system overview diagrams are provided in **Appendix 1**.

The NPS-FM is central to the freshwater management system

7. The NPS-FM's main function is to direct regional councils' plan making and management of freshwater (though some provisions also apply to territorial authorities). The first NPS-FM was made in 2011 and it has been substantially revised since then in 2014, 2017 and 2020. It rose from concerns that councils were not effectively managing cumulative effects, diffuse discharges and urban water.

8. The provisions apply to all freshwater bodies in both rural and urban settings. Urban water tends to be significantly more degraded than rural waterbodies, though urban catchments make up a very small proportion of freshwater.

9. The NPS-FM requires councils to set environmental limits through three key provisions:

    i. **At least maintain** requirements – councils cannot set targets that are worse than the 'current' state (eg, cannot degrade). This has been a requirement since 2014 and is driven by section 30 in the RMA which requires councils to "maintain or enhance" waterbodies.

    ii. **National bottom lines** (NBLs) – when councils set targets they must be at or above the NBLs. The number of attributes with NBLs were expanded in 2020, including some attributes without NBLs, but the framework itself was introduced in 2014. Two of the most impactful NBLs (periphyton which relates to nitrogen and *E. coli* which relates to human health) are currently the same as when they were first introduced in 2014, (noting that the *E. coli* attribute has had some refinements in how and where it applies). Major hydro schemes and water with naturally high contaminants are exempt (note the exemption from NBLs in specified vegetable areas was quashed by the court of appeal, 9(2)(h)

    iii. **Councils' choice** following engagement with communities and tangata whenua. Councils can set their own targets/limits following engagement – and there is evidence that some communities are wanting higher standards than the status quo or NBLs.

10. The NPS-FM also requires councils to:

    - avoid overallocation both for water quantity and quality (defined as exceeding a limit)
    - develop ecological flow and water take regimes (as opposed to a simple low-flow cease take level for example)
    - involve tangata whenua in all decision-making processes (emphasis added)

- include ecological health, human health, mahinga kai, and threatened species as mandatory freshwater values that must be managed for.

11. There is no set timeframe for when targets/limits must be achieved. This is a choice for councils along with communities and tangata whenua. The NPS-FM includes direction that timeframes must be 'ambitious but reasonable'.

12. Te Mana o Te Wai was amended and strengthened in 2020 version of the NPS-FM. The hierarchy of obligations was added and that hierarchy became the single objective of the NPS-FM, along with direction on how councils should give effect to it.

13. Te Mana o Te Wai will likely influence decisions on where targets/limits are set, as well as timeframes to achieve limits. Te Mana o Te Wai and the hierarchy has also been influential in some consent decisions, though Cabinet has agreed to disapply the hierarchy from individual consents.

14. Importantly, removing Te Mana o Te Wai provisions or changing the hierarchy would not, of itself, relieve the pressure on many farming communities or necessarily allow more primary industry, infrastructure, housing or renewable energy to be developed. That is because:

    - there are areas of New Zealand where waterbodies are well below NBLs and improvement to meet NBLs is required overtime, albeit they can choose long timeframes

    - the 'at least maintain' requirement will mean "headroom" may need to be created before developments that increase impacts on water can occur or the effects of the development will need to be fully mitigated creating costs (eg, managing the effects of stormwater)

    - councils must "have regard" to the NPS-FM when considering resource consent applications, including direction to avoid overallocation for example.

15. Fast-Track approvals, once available, will likely address some of these issues for some projects, since Fast-Track is designed to prioritise the purpose of that legislation over considerations other relevant legislation (such as national direction).

16. Māori have been heavily involved in policy development to date and have a high interest in the NPS-FM. 9(2)(h) [redacted]

Setting the objectives of the NPS-FM review

17. The Cabinet Economic Policy Committee has agreed a set of objectives for the wider reform of the resource management system (ECO-24-MIN-0022 refers):

    making it easier to get things done by:

    - *unlocking development capacity for housing and business growth;*

- *enabling delivery of high-quality infrastructure for the future, including doubling renewable energy;*
- *enabling primary sector growth and development (including aquaculture, forestry, pastoral, horticulture, and mining);*

while also:

- *safeguarding the environment and human health;*
- *adapting to the effects of climate change and reducing the risks from natural hazards;*
- *improving regulatory quality in the resource management system;*
- *upholding Treaty of Waitangi settlements and other related* arrangements;

18. Alongside the objectives above officials have identified existing Cabinet decisions, coalition agreements and party manifesto commitments that relate to the freshwater management system.

Coalition agreement commitments

- *Rebalancing Te Mana o Te Wai to better reflect the interests of all water users*
- *Providing flexibility to councils in achieving environmental limits*
- *Enabling* water storage.

Wider Manifesto Commitments: Primary Sector Growth Plan and Getting Back to Farming[1]

- *Reviewing wetland provisions to ensure these align with housing and development objectives and ensuring new wetlands are permitted*
- *Making vegetable growing a permitted activity*
- *Aligning stock exclusion regulations to local conditions*
- *Deferring intensive winter grazing requirements and aligning these to better fit local conditions*
- *Options for nationally consistent coastal water quality standards*
- *Options* to simplify the rules and requirements for fish passage and culverts.

19. Work on some of these proposals is already underway. Ministers should consider if the above proposals will be included in the scope of the NPS-FM review and any additional matters to be included. Ministers may also want to consider if certain parts of the NPS-FM can be ruled out of scope early to provide clarity on the direction of travel (eg, ruling out changing certain national bottom lines) or whether all aspects of the NPS-FM are to be reviewed.

Key considerations

20. In choosing what to prioritise and progress through the freshwater work programme, you may want to consider:

[1] National Party policy documents "Primary Sector Growth Plan" and "Getting back to farming"

- The overall balance and messaging a revised package of freshwater policies sends – to farmers, businesses, Māori, the general public, councils and internationally.

- Whether a resulting package is likely to be durable. Freshwater policy has been characterised by near constant change sending mixed signals to communities and investors. For example, it is possible that people invest based on one set of policies now, only for those policies to change in future.

- What level of change across what settings is needed to achieve your highest priorities – for example, to what extent do new instruments like Fast-Track or possibly spatial planning allow targeted adjustments to achieve specific objectives.

- What do you wish to adjust now and what might be left for Phase Three of RMA reform. This is especially relevant in respect of some aspects of Māori rights and interests and could help disentangle what you want to achieve from changes to national direction with other matters like allocation of freshwater takes and discharges.

- You may also want to consider a wider plan to make improvements to New Zealand's freshwater. Regional councils have been concerned that in many areas they do not have the tools, policy levers or capacity to address these issues on their own.

- It may be possible - working with councils, businesses, landowners and Māori - to integrate policies for climate change, biodiversity, adaptation and freshwater and achieve better outcomes for all parties.

Potential challenges and complexities

21. Officials will provide further advice on proposed changes to the system. However, there are general challenges that are likely to be faced in any review process:

    - **Rebalancing Te Mana o Te Wai** – Given how Te Mana o Te Wai is woven through the NPS-FM, there are a range of potential approaches to this work. There is a significant intersection with Māori rights and interests in freshwater, discussed further below 9(2)(h)

    - **Different vehicles for 'on farm' regulation** – Both the NES-F and Freshwater Farm Plans set requirements at an 'on-farm' level. The NES-F provides alternative pathways to some activities that require Freshwater Farm Plans to be in place. Changes to either the NES-F or Freshwater Farm Plans need careful alignment and Ministers may want to prioritise or emphasise one approach or the other.

    - **Aligning with other national direction and government priorities** – There is concern from Councils that current national direction does not provide sufficient certainty or clarity (for example do freshwater or housing outcomes come first?). Where national direction requires matters to be balanced this often leads to plans requiring more resource consents, instead of plans that set clear direction between

priorities. Ministers should consider the trade-off between providing certainty vs flexibility and the potential for additional consent requirements.

- **Relationship between national policy setting and local government implementation –** Developing freshwater plans is complicated and expensive for regional councils, change imposes additional cost. Councils have their own ambitions for freshwater, and where these do not align with government direction it can cause tension. Because of the previous 2024 deadline many councils have already invested time and money in to developing new freshwater plans.

Draft work packages and Ministerial decision making

22. Once Ministers have settled the scope of changes to the freshwater system it may be beneficial to divide this up into themes with a responsible Ministerial lead, for example:

    - **Overall system improvements and coherence / making it easier to get things done** (rebalancing Te Mana o Te Wai, flexibility for Councils in limit setting, consistent costal water standards, aligning wetland provisions with housing outcomes, culverts) – *Led by Minister Responsible for RMA Reform*

    - **Primary sector changes** (vegetable growing, stock exclusion, intensive winter grazing, water storage) – *Led by Minister for Agriculture*

23. Most changes to these instruments would be progressed through the RMA process to amend national direction. Officials can advise you on this and how it can be progressed alongside changes to other national direction instruments.

24. The RM Reform process establishes an RMA Reform Ministerial Group to provide Ministerial oversight and co-ordination. You may wish to consider if this is the appropriate group to oversee the NPS-FM review given the wide range of Ministers involved.

Māori rights and interests and Treaty settlement obligations

25. The review and replacement of the NPS-FM engages previous Crown commitments on Māori freshwater rights and interests2 and obligations contained in specific Treaty settlements3. These commitments have been outlined in several recent briefings.[4]

[2] As recorded in the Supreme Court in 2013 (*New Zealand Māori Council v Attorney General* [2013] NZSC 6, [2013] 3 NZLR 31 at [145]).
[3] Including, but not limited to, Treaty settlement redress for the Waikato and Whanganui rivers.
[4] See Appendix 4 (BRF-3974 "Overview of Māori freshwater rights and interests"), BRF-4323 and BRF-4420 (regarding proposals on freshwater consenting, stock exclusion and intensive winter grazing for the first RMA amendment bill).

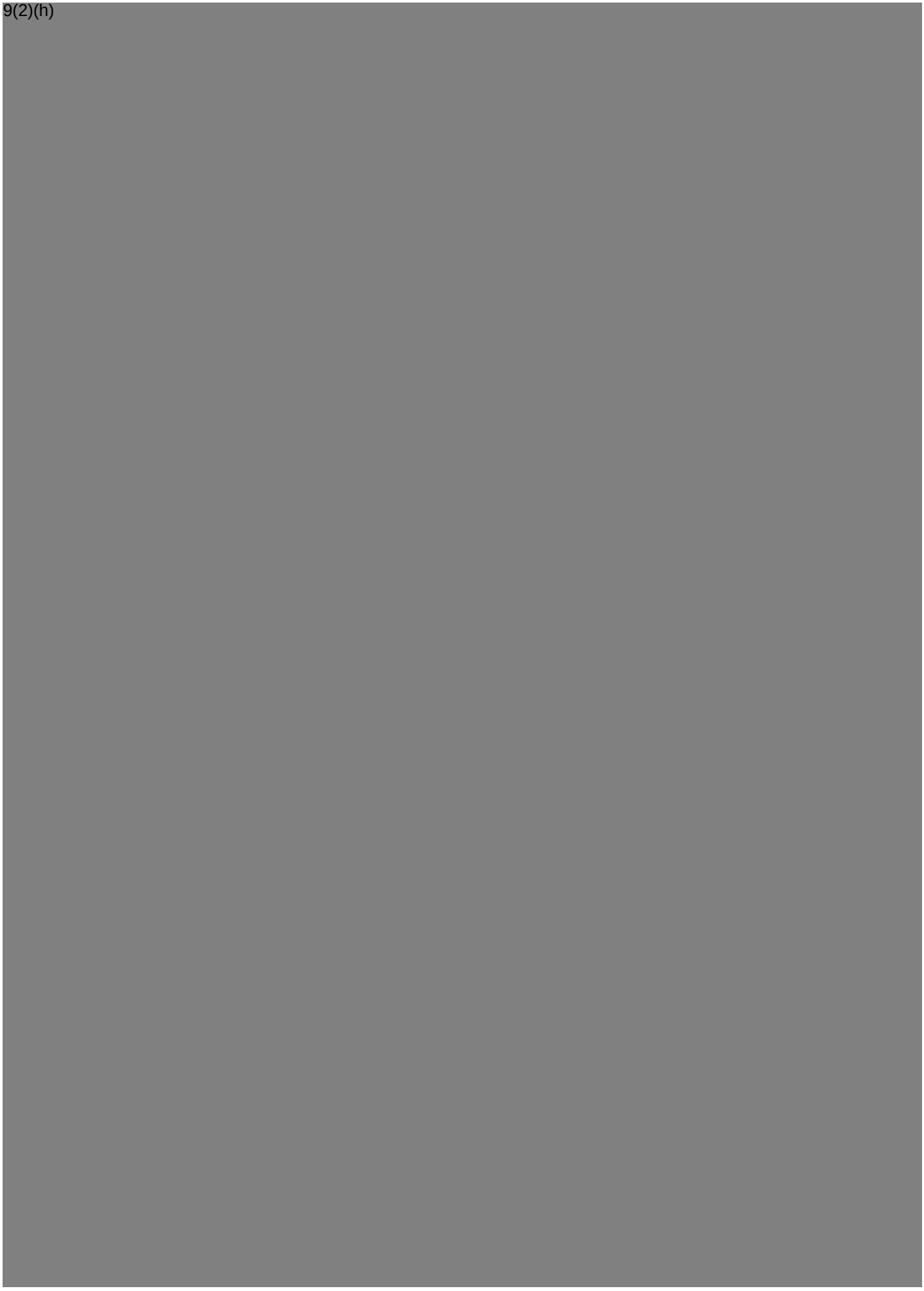
26. Concern and/or opposition from some iwi and Māori to "rebalancing" of Te Mana o te Wai has already been documented in letters to the Government.[5] Key context around development of Te Mana o Te Wai is included in Appendix 1.

27. Well-planned, early engagement with iwi and Māori provides the best opportunity to uphold these commitments in a manner that achieves your objectives for the NPS-FM, as well as supporting your wider RM reform agenda. Officials can provide a briefing to support this, which would include commitments in Treaty settlements and other arrangements with specific engagement or process requirements.

9(2)(g)(i) [redacted]

9(2)(h) [redacted]

9(2)(h)



Next steps

38. Following Ministers' discussions, officials will prepare advice confirming the objectives, scope, timeline, Ministerial decision making arrangements, and approach to Māori engagement.

39. We will also prepare a Cabinet paper setting out these matters, aiming for a Cabinet date in late April.

Signatures

Hayden Johnston
General Manager
Natural Environment Policy
26/03/2024

Hon Chris BISHOP
Minister Responsible for RMA Reform
Date

Appendix 1: Freshwater National Direction and Regulations System Overview

The National Policy Statement for Freshwater Management (NPS-FM)

NPS-FM is the cornerstone of the freshwater management system and requires regional councils to update regional policy statements and plans to give effect to it. First introduced in 2011 the NPS-FM has been significantly amended since then, with major amendments in 2014, 2017 and 2020.

NPS-FM contains one objective which is to ensure natural and physical resources are managed in a way the prioritises:

> *(a) first, the health and well-being of water bodies and freshwater ecosystems*
>
> *(b) second, the health needs of people (such as drinking water)*
>
> *(c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.*

Te Mana o Te Wai is articulated as the fundamental concept of the NPS-FM 2020. The concept includes the hierarchy of obligations (see the priorities above), and six principles of mana whakahaere, kaitiakitanga, manaakitanga, governance, stewardship, and care and respect.[1] Policy 1 of the NPS-FM requires freshwater to be managed in a way that gives effect to Te Mana o te Wai. A set of directions to councils are provided as to how the concept is to be implemented.

The initial inclusion of Te Mana o Te Wai in the 2014 NPS-FM and its further development (in 2017 and 2020) followed extensive engagement with iwi and Māori. This occurred in the context of Crown commitments recorded in the Supreme Court in 2013 regarding Māori freshwater rights and interests.[2]

The NPS-FM contains 14 further policies which must all be given effect to, these range from broad policies about insuring freshwater in managed in an integrated way, to specific provisions for the protection of trout and salmon habitat.

NPS-FM requires councils to set long term visions for their region and involve tangata whenua in all decision making. The NPS-FM contains a directive process Councils must follow in updating regional plan, known as the National Objectives Framework process (NOF), which requires the setting of limits to achieve environmental outcomes.

The Freshwater Planning Process (FPP)

RMA amendments in 2020 require that 'freshwater plans' must be progressed through the FPP rather than the standard plan making process, it also required Council to do this by December 2024 (now amended to 2027).

[1] These principles are defined at 1.3(4) of the NPS-FM.

[2] See *New Zealand Māori Council v Attorney General* [2013] NZSC 6, [2013] 3 NZLR 31 at [145].

FPP has fewer appeal rights, is governed by the Chief Freshwater Commissioner, decision making panels are made of freshwater commissioners (appointed by the Chief) and panels have a broader scope to recommend changes to plans.

The National Environmental Standards for Freshwater (NES-F)

The NES-F set requirements for carrying out certain activities that impact freshwater and freshwater ecosystems. The regulated activities include winter grazing, agricultural intensification, and some works in and around wetlands, amount other things.

Anyone carrying out these activities needs to comply with the standards and they override existing Council plan provisions.

Freshwater Farm Plans (FW-FP)

Part 9A of the RMA established freshwater farm plans as a regulatory tool that supports farmers and growers to identify, manage, and reduce on-farm risks to freshwater, in a way that is tailored to their individual farm and catchment needs.

Freshwater farm plans can be used as an alternative to resource consents. Currently, farmers can use a FW-FP to undertake intensive winter grazing (rather than get a consent).

Stock Exclusion Regulations

The stock exclusion regulations require stock to be excluded from specified wetlands, lakes and rivers more than one metre wide.

Dairy cattle, dairy support cattle and pigs must be excluded from the water bodies, regardless of the terrain. For other animals there are specific requirements depending on the slope of the relevant land.

Implementation of the freshwater system

Regional Councils are responsible for the implementation and enforcement of most of the system, including updating plans to give effect to NPS-FM and enforcing the specific requirements of stock exclusion regulations and NES-F.

There are some specific requirements of district councils but generally freshwater requirements of district councils flow from regional plans and policy statements.

The two below diagrams shows the interactions between the different parts of the wider resource management system (figure 1) and the specific parts of the freshwater management system (figure 2).

Figure 1: Freshwater management system

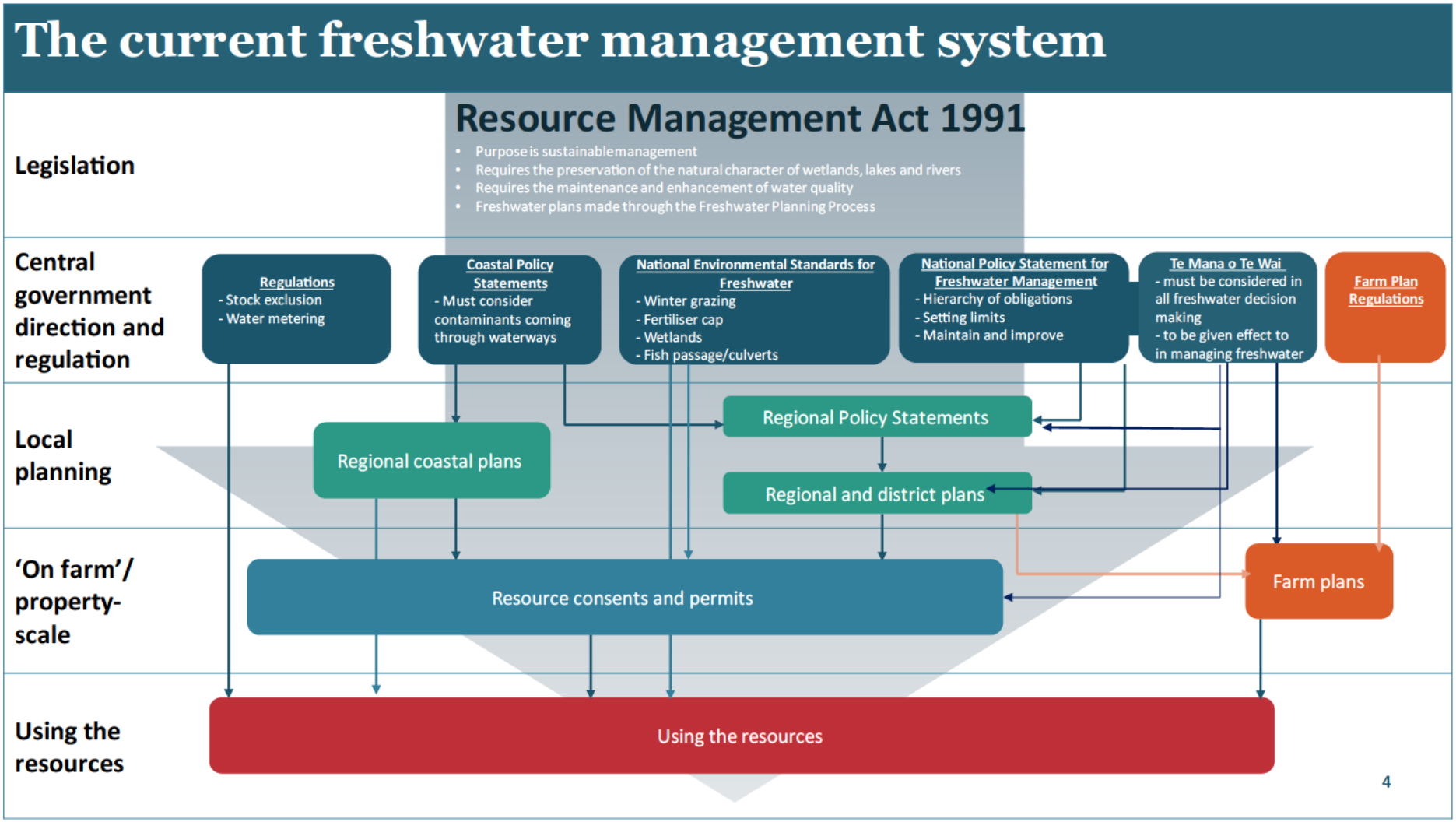
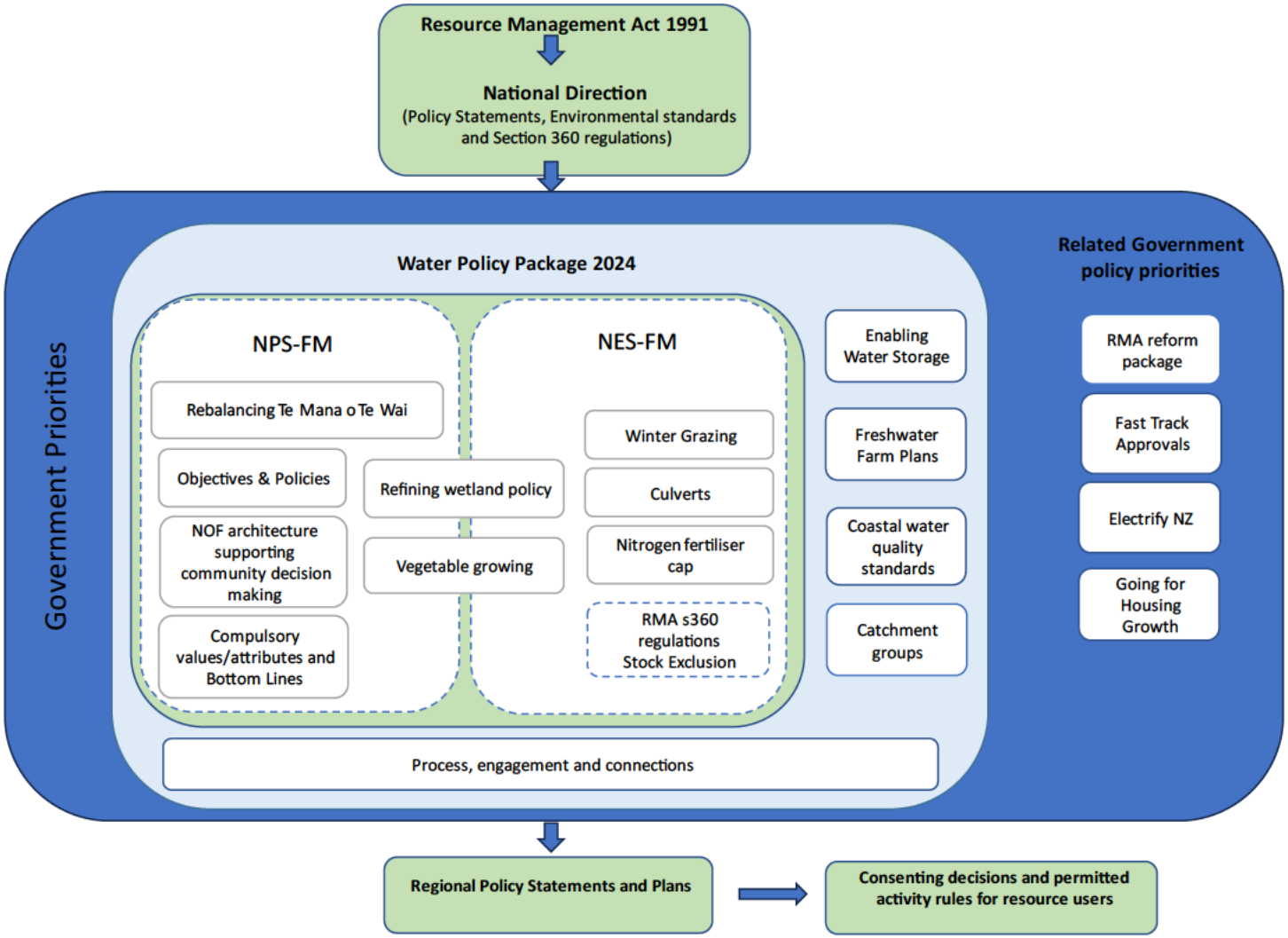


Figure 2: Draft Water policy package



Ministry for the Environment
Manatū Mō Te Taiao

Attachment 4: Extract from BRF 4651 Aide memoire: Advice on Electrify NZ Cabinet paper – Māori rights and interests

The Crown position on Māori freshwater rights and interests in the Courts

22. A key Crown commitment that has underpinned subsequent dialogue between Māori and the Crown occurred in 2012, where Deputy Prime Minister Rt Hon Bill English acknowledged in an affidavit to the High Court, on behalf of the Crown, that Māori have rights and interests in freshwater and geothermal resources. This was in proceedings related to the Crown's policy to sell up to 49 percent of shares in four state-owned power companies. This acknowledgement was recorded in the Supreme Court in 2013 as follows:

> *Mr English summarised the Crown position as being that it acknowledges that Māori have "rights and interests in water and geothermal resources"...The Crown position is that any recognition must "involve mechanisms that relate to the on-going use of those resources, and may include decision-making roles in relation to care, protection, use, access and allocation, and/or charges or rentals for use. Currently the Ministry for the Environment has responsibility for progressing policy development around these issues." The Court should accept that it is not an empty exercise.*[1]

23. The Crown told the Court that it was open to discussing (among other things) the possibility of Māori proprietary rights in water, short of full ownership, as a means of better recognising Māori rights and interests in freshwater. The Supreme Court dismissed the appeal.

24. Successive governments have been addressing how to put the 2012 acknowledgement into practice. Subsequent policy and legislative developments have been seen as progressing over time the Crown's commitment in the areas of; water quality; involvement in governance and decision-making; and recognition of the relationship of specific iwi and hapū with particular water bodies (e.g. Te Awa Tupua, Waikato river).

25. Issues around economic or "proprietary" interests have seen the least progress. s 9(2)(g)(i) [redacted]

26. The focus has generally been on freshwater as a priority due to the complexity of the resource and issues around scarcity, rather than trying to progress geothermal issues simultaneously.

[1] *New Zealand Māori Council v Attorney General* [2013] NZSC 6, [2013] 3 NZLR 31 at [145].