

In Confidence

Office of the Minister for the Environment and Minister of Agriculture
Cabinet Environment, Energy and Climate Committee

Resource Management (National Environmental Standards for Freshwater) Amendment Regulations 2022

Proposal

- 1 This paper seeks agreement to:
 - 1.1 amend the intensive winter grazing (IWG) regulations in the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NES-F), and
 - 1.2 authorise submission of the Resource Management (National Environmental Standards for Freshwater) Amendment Regulations 2022 to the Executive Council.
- 2 Amendments address matters which have been identified through ongoing implementation of these regulations.

Relationship to Government priorities

- 3 The NES-F (and IWG regulations within) is a core part of the Government's commitment to improving freshwater health and management through the *Essential Freshwater* work programme [CAB-18-MIN-0296]. The Labour Party 2020 manifesto reaffirms this commitment.

Executive Summary

- 4 In June 2018, Cabinet approved the *Essential Freshwater* work programme [CAB-18-MIN-0296] to stop further degradation of New Zealand's freshwater resources, start making immediate improvements, and reverse past damage within a generation.
- 5 In August 2020, the *Essential Freshwater* regulatory package was gazetted and included the NES-F, designed to achieve early change to the way activities that can pose a high environmental risk are conducted.
- 6 IWG is a farming practice where large numbers of stock are confined over winter to small feeding areas planted with annual forage crops. If done poorly or too extensively, it can result in serious negative effects on animal welfare and the environment.
- 7 The *Essential Freshwater* regulatory package is now being implemented and feedback has been received that IWG regulations within the NES-F may require modification to support effective implementation.

- 8 At the invitation of Ministers, the Southland Intensive Winter Grazing NES Advisory Group (SAG) released a report in December 2020 making several recommendations to adjust IWG regulations, including deferring the regulations until changes are made.
- 9 In early 2021, Cabinet agreed to:
- 9.1 temporarily defer IWG regulations for 12 months [LEG-21-MIN-0041], currently due to come into effect on 1 May 2022, and
 - 9.2 publicly consult on changes to support more effective implementation [CAB-21-MIN-0327].
- 10 The temporary deferral gave time for further improvement in IWG practices, increased monitoring and compliance, and consideration of changes to address the implementation issues.
- 11 We publicly consulted on proposed changes to the IWG regulations over a six-week period, ending on 7 October 2021. These changes were designed to make complying with IWG regulations more practical, while still ensuring the environmental effects of the activity are managed.
- 12 Following public consultation, we have taken policy decisions and instructed Parliamentary Counsel Office to draft the Resource Management (National Environmental Standards for Freshwater) Amendment Regulations 2022 (the amendment regulations), as authorised by Cabinet [CAB-21-MIN-0500].
- 13 We now seek your agreement to authorise submission of amendment regulations to the Executive Council.

Background

- 14 In August 2020, the *Essential Freshwater* regulatory package was gazetted and included the NES-F, designed to achieve early change to the way activities that can pose a high environmental risk are conducted.
- 15 IWG is a farming practice where large numbers of stock (cattle, sheep, deer) are confined over winter to small outdoor feeding areas planted with annual forage crops (eg swedes, kale and fodder beet). Annual forage crops provide feed when there is no or low pasture growth, and IWG is most common in southern regions. If done poorly or too extensively, IWG has serious negative effects on both animal welfare and the environment, particularly freshwater and estuary health. Compared with other farming practices, much larger amounts of soil can be lost from paddocks, ending up as sediment polluting waterways and estuaries, and smothering aquatic life.
- 16 Since being gazetted, the Ministry for the Environment (MfE) and Ministry for Primary Industries (MPI) have been focussed on implementation of the *Essential Freshwater* regulatory package. They have engaged with external stakeholders to identify issues as they arise, and to ensure stakeholders have the support needed to effectively implement the package.

Implementation

17 IWG regulations seek to improve IWG practice by providing three pathways for farmers to undertake it:

17.1 Pathway 1: IWG activities are **permitted if a farmer complies with default conditions** set out in the NES-F, or

17.2 Pathway 2: IWG activities are **permitted if a farmer obtains a certified freshwater farm plan (certified FW-FP)** that achieves an equivalent (or better) outcome.¹

Under this pathway, the certified FW-FP must demonstrate that any adverse effects in relation to the IWG are no greater than those allowed for by the default conditions. (Note this pathway will not be available until FW-FPs are rolled out, which will begin from 2022), or

17.3 Pathway 3: If neither of Pathways 1 nor 2 can be met, a farmer needs to **obtain a resource consent** for IWG activities.

18 IWG regulations were originally to commence on 1 May 2021.

19 Regional councils (especially Environment Southland) and the primary sector identified challenges for successfully implementing Pathway 1. Following a meeting with us, the SAG was established to provide practical recommendations for improving implementation of the IWG regulations.

20 The SAG released its report in December 2020 and made several recommendations to adjust the IWG default conditions, particularly those that are weather dependent, such as pugging depth and resowing by a specific date. The SAG also recommended deferring IWG regulations until changes are made.

Deferral and public consultation on changes

21 In April 2021, Cabinet agreed to temporarily defer IWG regulations for 12 months: and they are currently due to come into effect on 1 May 2022 [CAB-21-MIN-0121]. This deferral did not affect the regulations preventing further expansion of IWG, which came into effect on 1 May 2021.

22 The deferral has:

22.1 enabled officials to focus efforts on the development of an IWG module as a tool for farm planning, launched publicly in April 2021

22.2 incentivised the primary sector to demonstrate real practice change for the 2021 winter grazing season, including for animal welfare, while any changes are considered

¹ Certified freshwater farm plans (certified FW-FPs) are part of wider Integrated Farm Planning – but under Part 9A of the RMA will be a regulatory requirement for farmers (unlike modules on biosecurity, animal welfare and employment). Certified FW-FPs will provide a risk-based approach to farm planning to improve freshwater outcomes.

- 22.3 allowed for regional councils to undertake increased monitoring and reporting to ensure measurable improvements by 30 April 2022, with quarterly progress reports by regional councils being provided to us since 1 August 2021, and
- 22.4 allowed time for officials to consider the SAG's recommendations and potential changes to the default conditions in the regulations.
- 23 We publicly consulted on proposed changes to the IWG regulations over a six-week period, ending on 7 October 2021. Those changes were designed to make IWG regulations more practical to comply with, while still ensuring the environmental effects of the activity are managed [CAB-21-MIN-0327].
- 24 Having considered submissions received through public consultation, we have taken policy decisions (detailed below) and instructed Parliamentary Counsel Office to draft amendment regulations, as authorised by Cabinet [CAB-21-MIN-0500].
- 25 We have also tested an exposure draft of the amendment regulations with members of the SAG and other stakeholders to ensure amendments will have the intended effect.
- 26 We now seek your agreement to authorise submission of amendment regulations to the Executive Council.

Policy

- 27 Some of the current default conditions for IWG to be a permitted activity are difficult to comply with in practice (particularly those that are weather-dependent). These include conditions on the mean slope of paddock, pugging extent and depth, excluding stock from sub-surface drains, and resowing by a specific date.
- 28 Under the current IWG regulations, where farmers:
- 28.1 cannot comply with the default conditions
- 28.2 or cannot be confident they will be able to comply in advance,
—they must seek a resource consent to carry out IWG activities.
- 29 Certified FW-FPs will not be available as an alternative pathway when the IWG regulations come into effect on 1 May 2022. Consequently, a potentially large number of resource consents might have to be lodged and processed, by both farmers and regional councils, for this interim period.

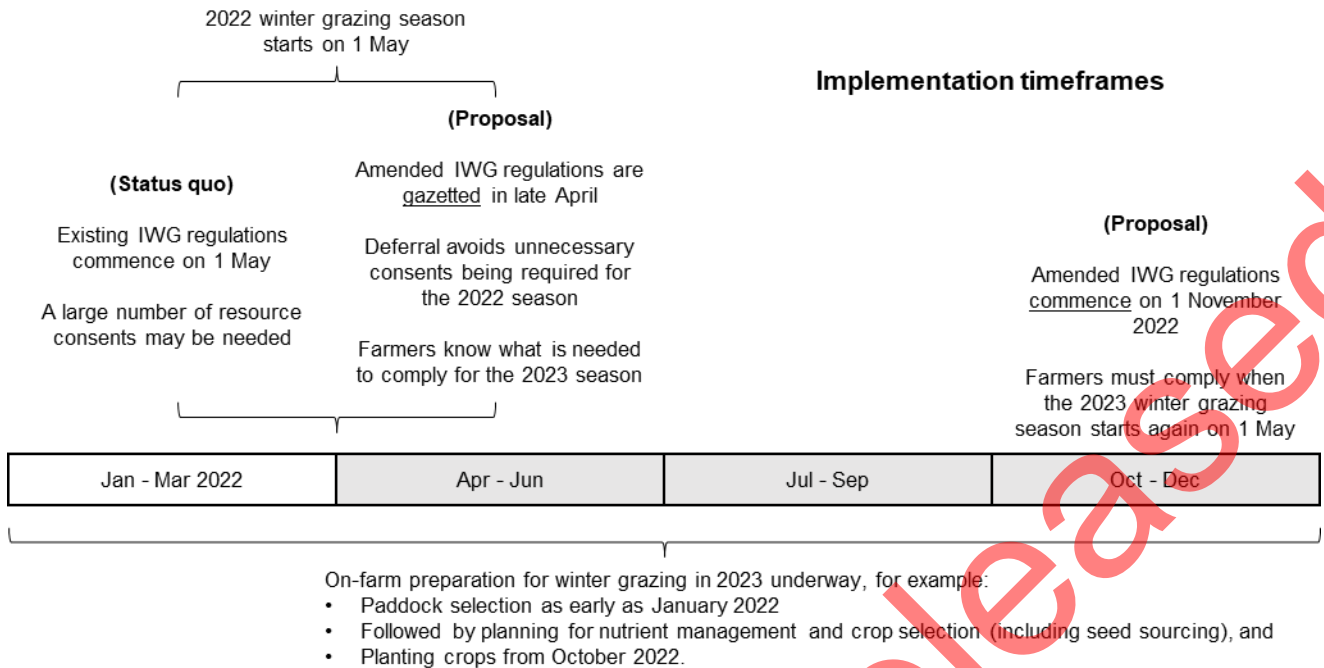
Make complying with the regulations more practical, while still managing environmental effects

- 30 In order to address these implementation issues we propose to amend IWG regulations in the NES-F to:

- 30.1 measure slope as 'maximum slope' (ie the elevation difference across any 20-metre distance) for any area being used for IWG, instead of 'mean slope across a paddock', and retain the existing threshold of 10 degrees
 - 30.2 remove the default condition for IWG to be a permitted activity relating to pugging extent and depth, in favour of a standalone duty which will require farmers to take all reasonably practicable steps to minimise the effects on freshwater from pugging in areas that are used for IWG
 - 30.3 amend the definition of 'drains' to exclude sub-surface drains in relation to IWG
 - 30.4 remove the default condition for IWG to be a permitted activity relating to resowing by a specific date, in favour of a new standalone duty which will always require farmers to establish vegetation as ground cover as soon as practicable in areas that are used for IWG, and
 - 30.5 insert a new default condition for IWG to be a permitted activity, requiring critical source areas to be protected (ie left ungrazed and uncultivated).
- 31 Officials will continue to work with stakeholders to develop guidance and implementation support, and help build an understanding about what is reasonable and practical when undertaking IWG.
 - 32 While standalone duties relating to pugging and resow will not factor into the requirement for a resource consent (ie as default conditions), they would be enforced in the same manner as if they were.

Adjusting implementation timeframes

- 33 Farmers begin making on-farm decisions well in advance of the winter grazing season beginning in May each year. The changes to the IWG regulations proposed here will not have been finalised before those on-farm decisions need to be made for the 2022 winter grazing season.
- 34 We therefore propose a further six-month deferral to the commencement of the IWG regulations (commencing on 1 November 2022). That will provide time for farmers to adjust practices for the 2023 winter grazing season. Amendments will make it clear that existing use rights will not be available for that season and practices will need to comply with the regulations.



35 Note that we do not expect the certified FW-FP pathway (Pathway 2) will be available earlier than 1 November 2022. Although the roll-out of certified FW-FPs is expected to begin from 2022, it will take time before they are available to all farmers nationwide.

Retaining restrictions on the total area available for IWG under the default conditions

36 We did not consult on changing or removing restrictions on the total area available for IWG, and do not propose to do so here. These restrictions are:

36.1 A default condition: The area of the farm that is used for intensive winter grazing must be no greater than 50 ha or 10% of the area of the farm, whichever is greater.

36.2 A temporary additional restriction: Until a regional council notifies plan changes that give effect to the National Policy Statement for Freshwater Management 2020 (required by 31 December 2024), expansion of IWG beyond historic use is prevented by regulation 29 of the NES-F which requires:

36.2.1 land on the farm must have been used for intensive winter grazing in the reference period, and

36.2.2 at all times, the area of the farm that is used for intensive winter grazing must be no greater than the maximum area of the farm that was used for intensive winter grazing in the reference period (1 July 2014 to 30 June 2019).

37 Changing or removing these restrictions would necessitate additional controls to ensure larger areas are not used too intensively, and would risk further complicating implementation for councils and farmers (eg, through additional default conditions).

- 38 The temporary additional restriction was introduced to prevent further intensification while regional councils develop the limits needed to achieve desired outcomes (eg for sedimentation and nutrients) – which may in turn mean IWG is subject to additional local constraints.
- 39 Farmers will be able to undertake IWG over larger areas where the effects will be managed through a certified FW-FP (Pathway 2) or resource consent (Pathway 3). We believe this is both appropriate and necessary to ensure the effects of large-scale IWG are managed.

Submitter comments on the enforceability of the proposed changes

- 40 We understand some submitters, including regional councils, are concerned it will still be difficult to enforce default conditions that depend on what is reasonable or practicable (ie those relating to pugging and resow). This would require case-by-case assessment, and regional councils' ability to undertake compliance monitoring and enforcement will be limited as a result.
- 41 Given the diversity of farming practices and natural conditions in New Zealand, we do not think increasingly specific conditions can address this. The specificity of the default conditions has, in large part, driven the implementation issues now being addressed.
- 42 While compliance, monitoring and enforcement will be a challenge, we believe the changes presented here are preferable to having no conditions that manage the pugging and bare earth created by IWG.

Our longer-term vision for managing IWG through certified FW-FPs

- 43 Eventually all farmers will need a certified FW-FP regardless of IWG regulations, and we believe this will be the most appropriate tool to manage the effects of IWG.
- 44 We understand there is widespread agreement within the farming community on this point. Certified FW-FPs will enable farmers to develop bespoke mitigations and the ability to manage the effects of IWG in a range of other ways – as an alternative to complying with the default conditions.
- 45 Longer term, once certified FW-FPs are available and being implemented successfully, we will look at phasing out the permitted activity pathway based on default conditions (Pathway 1) altogether. However, it is too early to take these steps now. The changes we propose here are focused on addressing implementation issues in the short term before certified FW-FPs are available.

Timing and 28-day rule

- 46 We seek a waiver of the 28-day rule so that the amendment regulations can come into force as soon as possible, and prior to existing regulations commencing on 1 May 2022.
- 47 We believe this is necessary to avoid the purpose of the regulations being defeated (ie the permitted activity pathway for IWG is not able to be

implemented as intended, and current regulations are likely to drive a larger-than-intended number of resource consent applications).

- 48 This would mean amended regulations come into force on Gazettal after Cabinet decisions, noting that they will not commence until 1 November 2022 as described.

Compliance

- 49 We confirm the regulations comply with each of the following:

- 49.1 the principles of the Treaty of Waitangi
- 49.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993
- 49.3 the principles and guidelines set out in the Privacy Act 2020
- 49.4 relevant international standards and obligations, and
- 49.5 the Legislation Guidelines (2018) maintained by the Legislation Design and Advisory Committee.

Statutory requirements

- 50 Section 46A of the RMA outlines the process for creating or amending a national environmental standard (NES). It requires that the Minister for the Environment choose between using a board of inquiry or a process that meets similar standards, including adequate consultation. The Minister for the Environment chose the latter process under section 46A(3)(b).
- 51 The statutory prerequisites that apply to creating or amending an NES are detailed in sections 43-44A of the RMA. As the Minister for the Environment, I consider that the statutory requirements have been met, as outlined below.

Consultation

- 52 Throughout 2020 and 2021, officials continued to engage with external stakeholders to identify issues as they arose during the implementation of the *Essential Freshwater* package. Feedback was received that some aspects of the NES-F relating to IWG may require modification to support effective implementation and achieve improved environmental outcomes.
- 53 We publicly consulted on proposed changes to the IWG regulations over a six-week period, ending on 7 October 2021. In addition to public consultation, we have tested an exposure draft of the amendment regulations with members of the SAG and other stakeholders to ensure amendments will have the intended effect.
- 54 We are satisfied the public and iwi authorities were given notice of proposed changes to IWG regulations and the reasons for those, and had adequate time and opportunity to make a submission.

Considerations

- 55 Following public consultation, officials have prepared:
- 55.1 a report and recommendations in accordance with section 46A(4)(c) of the RMA (Appendix 1) and summary of submissions (Appendix 2), and
 - 55.2 an evaluation report in accordance with section 32 of the RMA (Appendix 3).
- 56 Prior to recommending the amendment regulations presented here, the Minister for the Environment has considered the report and recommendations and submissions, and had particular regard to the section 32 evaluation report.
- 57 In accordance with section 44(1)(d), the Minister for the Environment has publicly notified the report and recommendations made under section 46A(4)(c) before recommending amendment regulations to the Governor-General.

Regulations Review Committee

- 58 We are confident that there are no grounds for the Regulations Review Committee to draw these instruments to the attention of the House of Representatives under Standing Order 319.

Certification by Parliamentary Counsel

- 59 The Resource Management (National Environmental Standards for Freshwater) Amendment Regulations 2022 have been certified by the Parliamentary Counsel Office as being in order for submission to Cabinet.

Impact Analysis

- 60 Treasury's Regulatory Impact Analysis Team has determined that a Regulatory Impact Statement (RIS) is required.
- 61 A Regulatory Impact Assessment Panel from the Ministry for the Environment has reviewed the Regulatory Impact Statement "Intensive Winter Grazing" (Appendix 4). The Panel confirms that the level of information provided meets the quality assessment criteria.

Publicity

- 62 We will make a public announcement following Cabinet approval, confirming the amendments to IWG regulations.

Proactive release

- 63 We will release this paper following Cabinet decisions, including any redactions as appropriate under the Official Information Act 1982.

Consultation

- 64 Proposed changes to IWG regulations and the amendment regulations presented here have been jointly developed by officials from MfE and MPI.
- 65 The following were provided opportunity to comment and, where comments were received, they have been reflected in this paper:
- 65.1 Te Tari o te Pirimia me te Komiti Matua – Department of the Prime Minister and Cabinet
 - 65.2 Te Papa Atawhai – Department of Conservation
 - 65.3 Hkina Whakatutuki – Ministry of Business, Innovation and Employment
 - 65.4 Te Tūāpapa Kura Kāinga – Ministry of Housing and Urban Development, and
 - 65.5 Te Waihanga – New Zealand Infrastructure Commission.
- 66 Consultation with public and stakeholders is described further above as this is also a matter for compliance with statutory requirements.

Recommendations

The Minister for the Environment and Minister of Agriculture recommend that the Cabinet Environment, Energy and Climate Committee:

- 1 **note** that in June 2018, Cabinet approved the *Essential Freshwater* work programme [CAB-18-MIN-0296] to stop further degradation of New Zealand's freshwater resources, start making immediate improvements, and reverse past damage within a generation
- 2 **note** that in August 2020, the *Essential Freshwater* regulatory package was gazetted and included the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NES-F), designed to achieve early change to the way activities that can pose a high environmental risk are conducted
- 3 **note** that IWG is a farming practice where large numbers of stock are confined over winter to small feeding areas planted with annual forage crops. If done poorly or too extensively, it can result in serious negative effects on animal welfare and the environment
- 4 **note** that the *Essential Freshwater* regulatory package is now being implemented and feedback has been received that IWG regulations within the NES-F may require modification to support effective implementation

- 5 **note** that the Southland Intensive Winter Grazing NES Advisory Group released a report in December 2020 making several recommendations to adjust IWG regulations, including deferring the regulations until changes are made
- 6 **note** that in early 2021, Cabinet agreed to:
- 6.1 temporarily defer IWG regulations for 12 months [LEG-21-MIN-0041], currently due to come into effect on 1 May 2022, and
- 6.2 publicly consult on changes to support more effective implementation [CAB-21-MIN-0327]
- 7 **note** that the temporary deferral gave time for further improvement in IWG practices, increased monitoring and compliance, and consideration of changes to address the implementation issues
- 8 **note** that following a six-week public consultation until 7 October 2021, we have taken policy decisions and instructed Parliamentary Counsel Office to draft the Resource Management (National Environmental Standards for Freshwater) Amendment Regulations 2022 (the amendment regulations), as authorised by Cabinet [CAB-21-MIN-0500]

Policy

- 9 **note** that some of the current default conditions for IWG to be a permitted activity are difficult to comply with in practice (particularly those that are weather-dependent), and a potentially large number of resource consents might be lodged and processed, at a cost to both farmers and regional councils
- 10 **agree** to amend IWG regulations within the NES-F to:
- 10.1 measure slope as 'maximum slope' (ie the elevation difference across any 20-metre distance) for any area being used for IWG, instead of 'mean slope across a paddock', and retain the existing threshold of 10 degrees
- 10.2 remove the default condition for IWG to be a permitted activity relating to pugging extent and depth, in favour of a standalone duty which will require farmers to take all reasonably practicable steps to minimise the effects on freshwater from pugging in areas that are used for IWG
- 10.3 amend the definition of 'drains' to exclude sub-surface drains in relation to IWG
- 10.4 remove the default condition for IWG to be a permitted activity relating to resowing by a specific date, in favour of a new standalone duty which will always require farmers to establish vegetation as ground cover as soon as practicable, and
- 10.5 insert a new default condition for IWG to be a permitted activity, requiring critical source areas to be protected (ie left ungrazed and uncultivated)

- 11 **note** that farmers make on-farm decisions well in advance of the winter grazing season beginning in May each year, and changes to the IWG regulations proposed here will not have been finalised before those on-farm decisions need to be made for the 2022 winter grazing season
- 12 **agree** to defer IWG regulations by a further six months, so they commence on 1 November 2022, to provide time for farmers to adjust practices for the 2023 winter grazing season, and clarify that existing use rights will not be available for that season
- 13 **note** that the amendment regulations give effect to these policy decisions
- 14 **authorise** submission of the amendment regulations to the Executive Council

Timing and 28-day rule

- 15 **note** that a waiver of the 28-day rule is sought:
- 15.1 so that the amendment regulations can come into force as soon as possible, and prior to existing regulations commencing on 1 May 2022, and
- 15.2 on the grounds that it is necessary to avoid the purpose of the regulations being defeated (ie the permitted activity pathway for IWG is not able to be implemented as intended, and current regulations are likely to drive a larger-than-intended number of resource consent applications)
- 16 **agree** to waive the 28-day rule so that the amendment regulations can come into force on Gazettal after Cabinet decisions, noting IWG regulations will not commence until 1 November 2022 as described

Compliance with the RMA

- 17 **note** that section 46A of the RMA outlines the process for creating or amending a national environmental standard (NES), and that the Minister for the Environment chose a process to amend IWG regulations within the NES-F under section 46A(3)(b)
- 18 **note** that statutory prerequisites that apply to creating or amending an NES are detailed in sections 43 to 44A of the RMA and that the Minister for the Environment is satisfied these requirements have been met as outlined below
- 19 **note** the public and iwi authorities were given notice of proposed changes to IWG regulations and the reasons for those, and had adequate time and opportunity to make a submission
- 20 **note** that following public consultation, officials have prepared:
- 20.1 a report and recommendations in accordance with section 46A(4)(c) of the RMA (Appendix 1) and summary of submissions (Appendix 2), and

- 20.2 an evaluation report in accordance with section 32 of the RMA (Appendix 3)
- 21 **note** that prior to recommending the amendment regulations presented here, the Minister for the Environment has considered the report and recommendations and submissions, and had particular regard to the section 32 evaluation report
- 22 **note** that in accordance with section 44(1)(d), the Minister for the Environment has publicly notified the report and recommendation made under section 46A(4)(c).

Authorised for lodgement

Hon David Parker
Minister for the Environment

Hon Damien O'Connor
Minister of Agriculture

Proactively Released

Appendix 1: Report and recommendations on intensive winter grazing amendments

Proactively Released

Appendix 2: Managing intensive winter grazing: Summary of submissions

Proactively Released

Appendix 3: Amendments to intensive winter grazing regulations: Section 32 report

Proactively Released

Appendix 4: Regulatory Impact Statement: Intensive winter grazing

Proactively Released