

Policy and Privacy

In-Confidence

Office of the Minister Responsible for RMA Reform

Office of Minister for Agriculture

Office of the Minister for the Environment

Chair, Cabinet

Replacing the National Policy Statement for Freshwater 2020, and addressing its implementation in the interim

Proposal

- 1 We are seeking Cabinet agreement to:
 - 1.1 initiate a work programme to replace the National Policy Statement for Freshwater Management 2020 (NPS-FM) in 2024, as laid out in coalition agreements;
 - 1.2 extend the statutory deadline for when new council freshwater planning instruments must be notified by three years – from 31 December 2024 to 31 December 2027; this will provide time to replace the NPS-FM and allow councils the option of ceasing work on the existing NPS-FM;
 - 1.3 progress legislation that directs councils to stop requiring individual resource consent applicants to demonstrate that their proposed activity is consistent with the hierarchy of obligations contained in the Te Mana o te Wai provisions of the NPS-FM, and do this through the Fast Track Consenting Bill;
 - 1.4 direct officials to provide advice early in 2024, in time for inclusion in the Fast Track Consenting Bill, on options to exclude aspects of the NPS-FM from councils' decision-making on consent applications, in particular disapplying the hierarchy of obligations contained in the Te Mana o te Wai provisions of the NPS-FM; and
 - 1.5 note that the approach outlined in paragraph 1.4 above would enable advice to include the outcome of targeted engagement with iwi/hapū/Māori, including with iwi whose settlements include specific engagement commitments on freshwater policy matters, and with regional councils on technical matters.

Relation to government priorities

- 2 This Government seeks to:
 - 2.1 rebuild the economy and ease the cost of living;
 - 2.2 restore law and order;
 - 2.3 deliver better public services; and

- 2.4 empower local communities.
- 3 The coalition agreements specifically commit to replace the NPS-FM, to exempt councils from their obligations as soon as practicable, and to rebalance Te Mana o te Wai to better reflect the interests of all water users.
- 4 Recent Cabinet agreements noted that there is a planned three-phase programme to improve the resource management system that includes:
 - 4.1 introducing a fast-track infrastructure consenting regime and making other surgical amendments to the Resource Management Act 1991 (RMA);
 - 4.2 amending or developing national direction under the RMA; and
 - 4.3 introducing new resource management legislation into Parliament by the end of this term that will replace the current RMA legislation [CAB-23-MIN-0473].
- 5 This paper relates specifically to the first and second of those phases.

Executive Summary

- 6 The coalition agreements and relevant party manifestos identified that addressing the NPS-FM and replacing it is a priority for the Government. Councils are currently implementing the NPS-FM and have a statutory deadline to notify plans no later than December 2024.
- 7 The Government is committed to improving freshwater health for the benefit of all New Zealanders. However, we are concerned that the NPS-FM is not correctly balanced and will not create the outcomes New Zealanders expect, including environmental, economic, and social outcomes. It needs to be reviewed and replaced as outlined in coalition agreements.
- 8 Our view is that councils continuing to implement the existing NPS-FM would waste resources and the combined effort of councils and communities, when our clearly signalled intent is to replace the NPS-FM. To avoid this, we are seeking Cabinet decisions to:
 - 8.1 extend the statutory deadline, to give us time to replace the NPS-FM and then for councils to implement a new policy;
 - 8.2 communicate to councils and wider interests of our intended way forward, including that we have initiated a process to replace the NPS-FM;
 - 8.3 ensure councils aren't requiring individual consent applicants to demonstrate that their activity adheres to the hierarchy of obligations contained in the Te Mana o te Wai provisions of the NPS-FM;
 - 8.4 also address how certain aspects of the NPS-FM need to be considered by councils when making consent decisions, in particular the hierarchy of obligations.
- 9 Replacing the NPS-FM is a substantial piece of work that requires engagement with stakeholders and iwi/hapū/Māori, including under the terms of some Treaty settlements. Officials advise it is likely to take 18-24 months.

- 10 We will provide further advice to Cabinet early in the new year about our intended process for replacing the NPS-FM. We will seek further Cabinet decisions on timing, process, and iwi/hapū/Māori engagement.

Background

- 11 The NPS-FM is an important driver of freshwater management in New Zealand. It primarily takes effect through the rules set by regional councils and unitary authorities in their freshwater planning instruments. It has a bespoke planning process set out in the RMA, which specifies that plans or policy statements giving effect to the NPS-FM must be notified by 31 December 2024.
- 12 Councils, along with communities, sector groups and tangata whenua have begun establishing catchment level targets and limits to achieve freshwater outcomes. This is complex and complicated work, requiring an understanding of technical science and balancing diverging interests and outcomes.
- 13 Te Mana o te Wai has been part of the NPS-FM since 2014. Although the 2020 NPS-FM further defined Te Mana o te Wai and gave strong direction on how this concept applies to the management of freshwater.
- 14 Amongst other things, the NPS-FM contains a single objective containing a hierarchy of obligations. This hierarchy means prioritising the health and well-being of water first; the second priority is the health needs of people (such as drinking water); and the third is the ability of people and communities to provide for their social, economic and cultural well-being. The objective is consistent with the description of Te Mana o te Wai in the NPS-FM.
- 15 This Government has committed to rebalance Te Mana o te Wai to better reflect the interests of all water users, and the coalition agreements contain specific provisions to this effect. While the Government is strongly committed to improving water quality and health, the key concern is that, as currently set, national direction on water will not allow other key outcomes that are important to New Zealanders to be achieved. These include renewable energy and addressing climate change, housing, infrastructure, and economic development.
- 16 The Government is committed to improving freshwater health for the benefit of all New Zealanders, and we want to develop a pragmatic and sensible approach to freshwater that will be enduring. We are proposing three key steps:
- 16.1 immediately amend the RMA to give councils and communities more time for this crucial work by extending the current notification date for freshwater planning instruments to 31 December 2027;
- 16.2 begin the process to replace the NPS-FM; and
- 16.3 at the same time, address concerns about how the hierarchy of obligations contained in Te Mana o Te Wai is applied by councils (including requirements on applicants) and consenting decisions.
- 17 Together, these changes will provide the space to review and replace the NPS-FM this term. This can either be progressed as a standalone process or bundled with other regulations as part of the Government's wider programme to amend national direction made under the RMA.

- 18 Many Treaty settlements contain redress that relates to the management of freshwater. The implications for those settlements will need to be considered in respect of any changes to the NPS-FM, including changes to Te Mana o te Wai. Fully understanding implications for Treaty settlements and how relevant arrangements can be upheld requires engagement with post-settlement governance entities (PSGEs). Further Treaty Impact analysis is included under 'Impact Analysis.'
- 19 Some redress also places obligations on the Crown, such as:
- 19.1 requirements to engage on developing or amending national direction or other policy relating to freshwater and coastal marine areas – set out in deeds, accords and relationship agreements. For example, Te Whakakitenga o Waikato Waikato-Tainui Kiingitanga Accord (22 August 2008) provides for co-management of the Waikato River, including early engagement with Waikato-Tainui to enable effective input on statutory, policy and other decisions that may affect the health and wellbeing of the Waikato River; and
 - 19.2 legal obligations to 'have particular regard to', 'have regard to' or 'take into account' certain matters – which are set out in settlement legislation. Those matters include the legal status of natural resources (such as Te Awa Tupua, which is the legal personality that relates to the Whanganui River), specific legal frameworks that have to be applied, and strategy documents prepared under Treaty settlement legislation. Understanding these matters requires engagement with PSGEs. It is unlikely there will be sufficient time to do this as part of a compressed Bill process.

Analysis

Replacing the NPS-FM as part of our resource management priorities this term

- 20 We are seeking Cabinet's agreement to commence the review and replacement of the NPS-FM to, among other things, rebalance Te Mana o te Wai to better reflect the interests of all water users. We intend to undertake a full statutory process for amending national direction as set out in the RMA. This requires engagement with Treaty partners, public consultation, and (if this option is selected) a Board of Inquiry to hear submissions and make recommendations.
- 21 Replacing national direction on freshwater is a major undertaking for the Government and is likely to draw considerable interest. We propose to come back to Cabinet in the new year with an agreed way forward around areas like timing, public consultation processes, engaging iwi/hapū/Māori, and possibly resourcing implications.

Extending the notification date for planning instruments to give effect to the NPS-FM

- 22 Cabinet recently agreed that the Minister of Agriculture, Minister for the Environment and Associate Minister of Agriculture (Animal Welfare, Skills) will make a public statement on the Government's intent relating to freshwater prior to Christmas 2023 [CAB-23-MIN-0473].
- 23 To provide certainty to councils and communities over the Christmas period we are seeking Cabinet agreement to extend the notification date for planning instruments giving effect to the NPS-FM by three years to 31 December 2027 through the NBE & SPA Repeal Bill prior to Christmas.

- 24 This requires a change to the RMA as the notification requirements for freshwater planning instruments giving effect to the NPS-FM are contained in the specific planning process for freshwater under s80A of the RMA.
- 25 In terms of drafting, this is a simple change and need not risk the progress of the bill through Parliament under urgency before Christmas. It would mean there is no longer a legal imperative for councils to notify planning instruments that give effect to the NPS-FM by December 2024, and making the change before Christmas will provide councils and communities with some relief and certainty over this period.
- 26 Including this amendment in the NBE & SPA Repeal Bill means that the select committee and public consultation phase is by-passed. In addition, there is also no time to engage with partners, which means that requirements to engage with PSGEs under Treaty settlement arrangements will not be complied with, and an assessment of potential implications for Treaty settlements and general Treaty impact analysis has not been undertaken.
- 27 Recognising these issues, our view remains that this is both a necessary and sensible amendment given the Government's mandate and stated intention to replace the NPS-FM. Not doing so risks councils, iwi/Māori, communities and businesses wasting significant resources and effort implementing national direction that will be replaced. We are not however, proposing measures that would require councils to halt implementation. That will remain a decision for each council.

Two existing extensions remain

- 28 Two extensions for freshwater planning have already been progressed for Hawke's Bay (2027) and Tairāwhiti/Gisborne (2026) through Orders in Council under the Severe Weather Emergency Recovery Legislation Act 2023 (SWERLA). We propose that the Tairāwhiti/Gisborne deadline be extended to 2027 and that Hawke's Bay remain unchanged so that all councils are aligned with the extended 31 December 2027 deadline.

Providing clarity on the application of the NPS-FM on consenting decisions

Applications for a resource consent and hierarchy of obligations in Te Mana o te Wai

- 29 We have concerns about how some councils appear to be applying Te Mana o te Wai to individual consent applications, particularly if councils are placing the onus on applicants to demonstrate how their proposed activity adheres to the hierarchy of obligations for freshwater (consistent with the description of Te Mana o te Wai) without clear direction in a plan on how to do so.
- 30 Officials have advised us that the focus of the NPS-FM, including Te Mana o te Wai, is to drive plan content and that meeting the hierarchy is an obligation on councils looking across all freshwater management activity. However, even in the absence of plan changes that implement the NPS-FM within the planning matrix, consent authorities must have regard to the NPS-FM, including Te Mana o te Wai, in making consent decisions. Although this may sometimes be relevant due to directive policies in the NPS-FM (for example when considering cumulative effects and overallocation) we do not believe that there was ever an intent for individual consent applications to adhere to the hierarchy of obligations in Te Mana o te Wai, and indeed in most cases this would be nonsensical.

- 31 We seek Cabinet's agreement to clarify that councils cannot require applicants to show how they consider the proposed activity is consistent with the hierarchy of obligations as soon as possible. We seek to make these changes via the Fast Track Consenting Bill, at this stage.

Council consent decision-making and the application of the hierarchy of obligations in Te Mana o te Wai

- 32 We are also aware that when making consent decisions, councils are applying the hierarchy of obligations in Te Mana o te Wai in ways that will not result in the outcomes that local communities and most New Zealanders seek and consider reasonable.
- 33 Unlike the discussion above, changing the way the NPS-FM is considered by councils in consenting decisions is a substantiative policy change. It triggers the engagement commitments in some Treaty Settlements.
- 34 We recommend signalling an intent to address this issue now, and then undertaking targeted engagement with iwi/hapū/Māori, including with iwi whose settlements include specific engagement commitments on freshwater policy matters, before taking final decisions. The intention would be to have final decisions made in time for any legislative provisions to be included in the Fast Track Consenting Bill.

Implementation

- 35 Extending the deadline for council notification of freshwater planning instruments and signalling that a replacement of the NPS-FM is imminent will have implications for regional and unitary councils that are now part way through developing freshwater planning instruments. However, this will also provide an opportunity for councils to hold-off from some work while a replacement NPS-FM is developed.
- 36 Two councils have notified freshwater planning instruments that are with Freshwater Hearings Panels. These councils will remain under a statutory obligation to complete the freshwater planning process unless the notified instruments are withdrawn by the councils.
- 37 Changing freshwater planning instruments to give effect to a new NPS-FM will require additional resourcing from councils. Engaging in planning processes is also time-consuming for communities, ENGOS, industry groups and iwi/Māori, who may have an expectation that their input to date will result in plan provisions for improved freshwater outcomes.

Legal risks - Legally Privileged

s 9(2)(h)

s 9(2)(h)



s 9(2)(h)

Financial Implications

- 42 There are no immediate financial implications for the Government, though further advice will be provided to Cabinet about the resourcing implications of replacing the NPS-FM. There may also be implications for regional councils in terms of recent Long-Term Planning and financial delegations made based on existing timeframes and expectations for implementation.

Legislative Implications

s 9(2)(h)

s 9(2)(h)

- 47 Once the NPS-FM is replaced, consequential changes to the RMA as well as other legislation that reference Te Mana o Te Wai may be required. For example, the Taumata Arowai Act 2020 and Water Services Act 2021 both reference Te Mana o Te Wai and will require consequential amendments if Te Mana o Te Wai is removed from the NPS-FM and/or reviewed if amended.

Impact Analysis

Regulatory Impact Statement

- 48 Cabinet's impact analysis requirements apply to the proposal to extend the deadline for regional councils to publicly notify freshwater planning instruments to 31 December 2027, which are not part of the 100-Day Plan at this time. The Ministry for the Environment has notified the Treasury's Regulatory Impact Analysis (RIA) team that it was not able to prepare an accompanying Regulatory Impact Statement (RIS) due to time constraints.
- 49 The Treasury's RIA team and the Ministry for the Environment have agreed that decisions to change the deadline will be subject to post-implementation assessment in line with other 100-day Plan initiatives, and when Cabinet makes further decisions relating to commitments to replace the NPS-FM.

Treaty Impact analysis

- 50 What follows is a limited Treaty analysis given the time available.
- 51 The Crown acknowledgement that Māori have rights and interests in freshwater in the High Court in 2012. The NPS-FM partially addresses Māori interests in water. Policy development in previous versions of the NPS-FM have involved engagement with the ILG and Māori. During replacement or amendments to the NPS-FM a good faith engagement process with Māori will help mitigate risk of challenge.
- 52 Treaty settlement deeds, legislation and accords require specific engagement requirements to be met. There are legal and relationship risks should the Crown's process to appeal or amend the NPS-FM not include significant engagement with Māori.
- 53 The recommendation to extend the notification date for freshwater planning instruments is unlikely to be supported by some iwi/Māori, as longer implementation timeframes could result in further degradation of freshwater, which may be considered an impact on the principle of active redress. However, there could be support from Māori landowners if these changes alleviate possible immediate land-use impacts on them.
- 54 Regarding the options for providing clarity on the application of the NPS-FM on consenting applications and decisions, iwi/Māori may be concerned about any changes to or weakening of the effect of Te Mana o te Wai or the NPS-FM. These changes may also trigger engagement obligations under Treaty Settlements.

Climate Implications of Policy Assessment

55 s 9(2)(g)(i)

Consultation

56 The following agencies were informed of the content of this paper: Department of Prime Minister and Cabinet, the Treasury, Department of Internal Affairs, Department of Conservation, Te Puni Kokiri; Te Arawhiti, Ministry of Business, Innovation and Employment.

Communications

57 The Minister of Agriculture and the Minister for the Environment intend to publicly announce the proposals in this paper following Cabinet approval.

Proactive Release

58 The Minister for the Environment, as the responsible Minister, intends to delay the release beyond 30 days to allow for the introduction of the Fast Track Consenting Bill. Note proactive release is subject to redaction as appropriate under the Official Information Act 1982.

Recommendations

The Minister Responsible for RMA Reform, Minister for Agriculture and the Minister for the Environment recommend that Cabinet:

Background

1 **note** that the National Policy Statement for Freshwater Management 2020 (NPS-FM) is a key driver of how freshwater is managed and takes effect through the policies and rules set by regional councils in freshwater planning instruments, as well as influencing resource consent decisions prior to councils developing those rules and policies

2 **note** that the NPS-FM has a bespoke planning process set out in the Resource Management Act 1991 (RMA), which specifies that planning instruments giving effect to it must be notified by 31 December 2024

3 **note** that councils, along with communities, sector groups and tangata whenua have begun establishing catchment level targets and limits to achieve freshwater outcomes

4 **note** the coalition agreements include commitments to replace the NPS-FM to rebalance Te Mana o Te Wai to better reflect the interests of all water users

5 **note** that implications for Treaty settlements will need to be considered in the replacement of the NPS-FM to meet our commitments to honour the undertakings made by the Crown through historical Treaty settlements, and that a meaningful engagement process will be required to achieve this

Replacing the NPS-FM as part of our resource management priorities this term

- 6 **agree** to review and replace the NPS-FM in this term of Government

Extending the notification date for planning instruments to give effect to the NPS-FM

- 7 **agree** to amend the RMA through the NBE & SPA Repeal Bill, to extend the date that requires councils to notify their freshwater planning instruments by three years, from 31 December 2024 to 31 December 2027

- 8 **authorise** the Minister for the Environment to issue drafting instructions to the Parliamentary Counsel Office to implement recommendations in this paper

- 9 **agree** that the Minister Responsible for RM Reform and the Minister for the Environment will write to post-settlement governance entities and other relevant Māori groups and local government informing them of the date change

Two existing extensions remain

- 10 **note** that two extensions to the notification date have already been progressed for Hawkes' Bay (to 2027) and Tairāwhiti/Gisborne (to 2026) through Orders in Council under the Severe Weather Emergency Recovery Legislation Act 2023 (SWERLA)
- 11 **agree** that Tairāwhiti/Gisborne date be extend to 2027 and that the Hawke's Bay date remain unchanged

Providing clarity on NPS-FM and its application to resource consents

- 12 **note** that we have concerns about how some councils appear to be applying Te Mana o Te Wai in individual consent applications
- 13 **note** that we do not believe that individual consent applicants should have to demonstrate how their activity does or does not adhere to the hierarchy of obligations contained in Te Mana o Te Wai and that this was not the intent of the NPS-FM
- 14 **agree** to clarify that councils should not be requiring individual resource consent applicants to demonstrate that their proposed activity adheres to the hierarchy of obligations contained in Te Mana o te Wai provisions of the NPS-FM, and that this clarification should be made through the Fast Track Consenting Bill, at this stage
- 15 **agree** to direct officials to provide advice early in 2024, in time for inclusion in the Fast Track Consenting Bill, on options to exclude the hierarchy of obligations contained in the Te Mana o te Wai provisions of the NPS-FM when making decisions on consent applications
- 16 **note** that the approach set out in recommendation 15 would allow advice to include the outcome of targeted engagement with iwi/hapu/Māori, including with iwi whose settlements include specific engagement commitments on freshwater policy matters and regional councils on technical matters

Implementation

- 17 **note** that extending the deadline for council notification of freshwater planning instruments and signalling that a replacement of the NPS-FM is imminent will have implications for regional councils that are now part way through developing

freshwater planning instruments, but will also provide councils with the option of halting work on implementing the existing NPS-FM while a replacement is developed

Communications

- 18 **note** that, following Cabinet approval, the Minister of Agriculture and the Minister for the Environment intend to publicly announce the proposals in this paper.

Authorised for lodgement

Hon Chris Bishop

Minister Responsible for RMA Reform

Hon Todd McClay

Minister of Agriculture

Hon Penny Simmonds

Minister for the Environment