Regulatory Impact Statement: Managing discharges under s70 of the Resource Management Act

Coversheet

Purpose of Document	
Decision sought:	Changes to the Resource Management Act 1991 to address regulatory uncertainty in the application of s70 (managing discharges as a permitted activity).
Advising agencies:	Ministry for the Environment, Ministry for Primary Industries
Proposing Ministers:	Minister Responsible for RMA Reform, Minister of Agriculture, Minister of Forestry and Associate Minister of Agriculture
Date finalised:	17 September 2024

Problem Definition

Context

The Resource Management Act 1991 (RMA) prescribes how regional councils must manage discharges to land or water. Before a regional council can permit[1] (s70) or issue a consent[2] (s107) for a discharge, it must be satisfied that the discharge is unlikely to result in certain effects in the receiving waters. This includes any significant adverse effects on aquatic life.

Recent court decisions[3] have impacted how councils manage certain discharges under ss 70 and 107. Under the s107 decision, councils cannot consent discharges which are likely to have significant adverse effects on aquatic life, even where consent conditions would result in a reduction in those adverse effects over time. This particularly impacts discharge activities in degraded catchments facing cumulative impacts.

Cabinet agreed changes to s107, to enable consents for these discharges in degraded catchments, provided that consent conditions would contribute to an overall reduction in those adverse effects over time. These discharges would otherwise have been required to stop. See the Draft Supplementary Analysis Report *Amending s107 of the Resource Management Act to improve certainty while protecting freshwater and aquatic life* for more information about the impact of the s107 decision, and the previously agreed changes – **Appendix A** and the relevant Cabinet Minute ECO-24-MIN-0145 – **Appendix C**).

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[1] As a permitted activity rule in a regional plan. Permitted activity rules can allow discharges without the need to obtain a resource consent, subject to any conditions. A resource consent must be applied for when there is no permitted activity pathway.

[2] Resource consents for discharges are referred to in the RMA as discharge permits. To avoid confusion with permitted activity rules, they are referred to here as discharge consents.

[3] *Federated Farmers Southland Incorporated v Southland Regional Council* [2024] NZHC 726 [9 April 2024] (the s70 decision); and *Environmental Law Initiative v Canterbury Regional Council* [2024] NZHC 612 [20 March 2024] (the s107 decision).

Problem definition

Given the court decisions, and the correlation between s70 and s107, there is uncertainty on how to s107 decision will be interpreted and applied to s70 and future regional plans.

We have heard from councils that, without clear direction, they:

i. are likely to interpret s70 as preventing them from making permitted activity rules for discharges that may give rise to significant adverse effects, even if such a rule provided for a requirement for improvement over time

ii. are concerned this will lead to too many consents to process within statutory timeframes and, in turn, mean they cannot cost recover (ie, councils cannot cost recover for consent processing where consents are not decided within statutory timeframes).

A proactive approach to s70 would reduce the regulatory uncertainty created by these recent court decisions and provide councils clear direction on the development of permitted activity rules in their regional plans.

The trade-off in considering changes to s70 to address regulatory uncertainty is between costs associated with consenting, and reduced oversight (from managing discharges as permitted activities rather than through consents).

Executive Summary

Legislative context

Sections 15, 70, and 107 are the core Resource Management Act 1991 (RMA) provisions for protecting freshwater and aquatic life. Section 15 is the primary provision. It prohibits all discharges via land or water from being allowed to contaminate water – except where expressly allowed by:

- a national environmental standard or other regulation
- a rule in a regional plan or proposed regional plan
- a resource consent.

Sections 70 and 107 are secondary provisions that restrict when this permission may be given. Before making discharges a permitted activity in a regional plan rule (s70) or granting a discharge consent (s107), a council must be satisfied that listed effects are unlikely.

The Government's objective is to enable progressive improvement of water quality over time. This recognises the need for continuity of existing economic activities and infrastructure (eg, waste and storm water) in the short to medium term, including in degraded catchments, while changes are made to achieve water quality targets over time for both surface waters and groundwater systems (which are much slower to respond).

Recent court decisions have impacted how councils manage discharges

Recent court decisions[4] have impacted how councils manage certain discharges under ss 70 and 107. Under the s107 decision, councils cannot consent discharges which are likely to have significant adverse effects on aquatic life, even where consent conditions would

[4] *Federated Farmers Southland Incorporated v Southland Regional Council* [2024] NZHC 726 [9 April 2024] (the s70 decision); and *Environmental Law Initiative v Canterbury Regional Council* [2024] NZHC 612 [20 March 2024] (the s107 decision).

result in a reduction in those adverse effects over time. This particularly impacts discharge activities in degraded catchments facing cumulative impacts.

Cabinet agreed to amend s107 to provide a consenting pathway for staged mitigation

Cabinet agreed to amend s107, to provide clarity on managing discharges through consents [ECO-24-MIN-0145 refers – **Appendix C**]. This change is being progressed through the Resource Management (Freshwater and Other Matters) Amendment Bill (RM Bill 1), and is expected to be enacted by the end of 2024. Changes will enable a discharge consent to be granted where the discharge may contribute to significant adverse effects on aquatic life, *if* the council is satisfied that:

a. receiving waters are already subject to significant adverse effects on aquatic life; and

b. consent conditions would contribute to an overall reduction in those adverse effects over the duration of the consent.

More detail on the impact of the s107 decision on consenting, urgency, and the agreed changes, is included in the Draft Supplementary Analysis Report *Amending s107 of the Resource Management Act to improve certainty while protecting freshwater and aquatic life*, included as **Appendix A**.

As Cabinet has decided to make this change, it is part of the counterfactual for this Regulatory Impact Statement (RIS).

Policy problem – how the situation is expected to develop (following the court decisions, and amendments to s107)

With the change to s107, there will now be a consenting pathway for these discharges. Although councils can still permit some discharges, the court decisions have created regulatory uncertainty about the interpretation of s70.

Because the significant adverse effects 'gateway test' is the same in s70 and s107, the court's findings in relation to s107 are likely to be persuasive and inform future interpretations of s70 in regional plan making. That is, the finding that a *discharge consent* cannot be granted (under s107) in certain situations could be inferred to similarly constrain making *permitted activity rules* (under s70) in such situations.

We have heard from councils that, without clear direction, they:

a. are likely to interpret s70 as preventing them from making permitted activity rules for discharges that may give rise to significant adverse effects, even if such a rule provided for a requirement for improvement over time

b. are concerned this will lead to too many consents to process within statutory timeframes

c. are concerned they will be unable to cost recover (ie, councils cannot cover recover for consent processing in situations where consents are not decided within statutory timeframes).

A proactive approach to s70 would reduce the regulatory uncertainty created by these recent court decisions and provide councils clear direction on the development of permitted activity rules in their regional plans.

The trade-off in considering changes to s70 to address regulatory uncertainty is between costs associated with consenting, and costs in terms of reduced oversight (from managing discharges as permitted activities rather than through consents).

Consultation

There has been no direct consultation on the proposals in this RIS.

Proposals to address the policy problem were received through correspondence to the Ministry for the Environment / Minister for the Environment, submissions on RM Bill 1, and discussions with a subset of councils and Te Uru Kahika, the national body for regional councils.

Changes to s70 were proposed by regional councils and the primary sector. Environmental organisations opposed changes being made without wider consultation and public submissions.

Discussions with councils highlighted that, on their interpretation of the case law, they would be restricted from providing permitted activity pathways for certain discharge activities (ie, that may give rise to significant adverse effects on aquatic life, even if effects would be reduced over time). This would exponentially increase the number of resource consents needed, creating large costs for both councils and applicants.

All councils agree it is a practical / cost problem rather than an environmental problem, and note requiring resource consents does not mean better environmental outcomes than would be achieved through permitted activities.

Options considered

The options assessed in this RIS are limited due to the time available and the direct link to s107 changes agreed by Cabinet. Therefore, they may not represent the full range of feasible options.

The three options considered are:

- **Counterfactual:** s70 remains unchanged. Recent court decisions supplant the pre-existing status quo. Depending on the interpretation of the court decisions, councils may choose not to permit some existing discharge activities under s70. This would mean a resource consent pathway under s107 is the only option (ie, if these discharges are not allowed under permitted activity rules)
- **Option 1:** Mitigation through conditions (amend s70 consistent with the change to s107). This option would amend s70 to enable a permitted activity rule in a regional plan for discharges (both point source and diffuse) in degraded catchments subject to rules requiring a contribution to reductions in adverse effects over time
- **Option 2:** Exempt diffuse discharges under s70. This option would exclude diffuse discharges from the listed effects test for discharges under s70, meaning that s70 only applies to point source discharges.

Recommendation/best option

Ultimately, it is a trade-off between the costs associated with consenting, and cost to the environment (through reduced oversight) as a result of managing discharges as permitted activities.

Of the options assessed, Option 1 is rated the highest against the criteria. In the immediate term, it provides an effective and enduring solution to the issues with the counterfactual. It addresses the regulatory uncertainty by providing clear direction to councils. This enables regional plans to continue to use permitted activity rules to manage discharges, while still ensuring that environmental effects are managed through rules and improved over time.

Providing clear direction for councils to continue to use permitted activity rules to manage discharge activities maintains the options available to councils from what was the status quo prior to the recent court decisions.

However, based on past evidence, there is an implementation risk with Option 1. If mitigation targets are not met, but discharge activities are allowed to continue as a permitted activity, an overall reduction in adverse effects may not be achieved. There are also limitations on compliance monitoring and enforcement for permitted activities.

The approach to making regional plan rules under s70 will remain up to councils. The rules will be subject to submissions and hearings processes during regional plan notification as well as any appeals.

Treaty Impact Analysis

A Treaty impact analysis is outlined in **Appendix B**.

Considering the lack of engagement with iwi, hapū and Māori and the information and analysis in **Appendix B**, it is difficult to assess:

- whether or not the principles of partnership and active protection have been met
- any potential impacts on the Crown's previous commitments on Māori freshwater rights and interests, and
- whether or not some Treaty settlement commitments have been met.

Consultation during the RM Bill 2 process will provide an opportunity for iwi, hapū or Māori groups to provide feedback. Feedback received will inform the Select Committee's consideration of RM Bill 2 and final decisions on any change.

Limitations and Constraints on Analysis

This RIS will support a decision on whether to introduce changes via RM Bill 2 to s70 of the RMA to address the regulatory uncertainty in how s 70 is interpreted. This will then be subject to consultation before final decisions are made (ie, following Select Committee).

The regulatory uncertainty is likely to impede the effective operation of the RMA planning and consenting processes (as demonstrated by the Environment Canterbury (ECan) case study below) but comprehensive, national-level impact analysis has not been completed due to the constraints outlined below.

A proactive approach is necessary to maintain RM system operability.

Time constraints

- The RMA Reform timeline[5] and the recency of the court decisions on s70 and s107 have reduced the time available to prepare a RIS.
- The time constraints have also limited the scope of options considered, level of analysis, collation and review of evidence, and engagement with iwi/Māori, stakeholders and the public.

[5] Cabinet has agreed to a three-phased approach to reform the resource management system in New Zealand. The proposals in this RIS are part of phase two which include making targeted legislative changes to the Resource Management Act 1991 (RMA) in 2024. Phase three will introduce RMA replacement legislation by mid-2025 [ECO-24-MIN-0160 refers].

Assessment of counterfactual

- The 'counterfactual' option presented here is a new scenario. The recent High Court decisions regarding the application of s70 and s107 will require councils to modify the way they deliver their responsibilities under these sections in future. This new scenario has not yet had time to play out, so is presented here as a counterfactual for which the potential impacts are inferred rather than evidence based.
- Cabinet has agreed to make changes to s107. They are being progressed as part of RM Bill 1 and are expected to pass into law by the end of 2024. The counterfactual has been assessed as though the agreed changes to s107 have been made.

Data and evidence

- There has been insufficient time and resource to obtain more council data on how many plans, consents, businesses, and catchments might be affected going forward. Without this data, we have neither been able to provide an economic or cost/benefit analysis nor quantify potential costs to councils, regulated parties, and communities.

Limitations on consultation, testing, and stakeholder engagement

- Timeframes have limited our ability to engage with external parties, and opportunities for feedback from stakeholders, Treaty partners, councils, Environmental Non-Governmental Organisations (ENGOs), or the public. This, combined with the substantial number of changes that may be progressed as part of RM Bill 2, means engagement with PSGEs on how best to uphold Treaty settlement arrangements has not occurred.
- Some of the options presented here were informed by feedback from affected stakeholders and interested parties in letters to Ministers and the Ministry for the Environment, and (as extraneous matters) in submissions on RM Bill 1.

Responsible Manager(s) (completed by relevant manager)

Nik Andic

Manager

Freshwater

Ministry for the Environment

17 September 2024

Quality Assurance (completed by QA panel)

Reviewing Agency:	Ministry for Primary Industries
Panel Assessment & Comment:	The Ministry for Primary Industries Regulatory Impact Analysis (RIA) Panel has reviewed the 'Managing discharges under s70 of the Resource Management Act' regulatory impact statement (RIS) and considers that it fully meets the RIA quality assurance criteria. It clearly sets out the uncertainty created by recent court decisions, and the risks if this uncertainty is not proactively

	managed while acknowledging it is difficult to calculate the potential impact if councils' concerns were realised. While specific consultation has not been undertaken, the Ministry for the Environment has engaged with councils on the concerns created by the potential implications of recent court cases.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

Context

Resource Management Reform (RMA Reform)

1. A three-phased approach to improving the resource management system has been agreed by Cabinet. Phase two is underway and among other priorities, seeks to make targeted legislative changes to the Resource Management Act 1991 (RMA) to achieve reform objectives.[6] The proposals in this Regulatory Impact Statement (RIS) fit within phase two, while also seeking to align with phase three.

2. Phase three will replace the RMA with new resource management legislation and is expected to be introduced by mid-2025. The changes will result in a more enabling resource management system with more certainty, fewer consents that are approved faster, and that is less litigious ECO-24-MIN-0160 refers].

Freshwater quality and management

3. Freshwater quality has worsened in many parts of New Zealand[7] since the RMA came into effect in 1991, despite provisions intended to avoid, mitigate, or remedy adverse effects.

4. Most urban waterways have poor water quality, degraded habitat, and impaired ecological health[8] and 95% of rivers flowing through pastoral land are contaminated to some degree[9]. This is due to elevated levels of nutrients, bacteria, sediment, heavy metals and other contaminants.

5. The contaminants largely come from discharges from agricultural land, road surfaces, logging sites, and construction and maintenance sites. Most take the form of diffuse (or

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[6] The objectives used to guide the work to replace the RMA are:

1. Making it easier to get things done by:
   - 1.1. unlocking development capacity for housing and business growth;
   - 1.2 enabling delivery of high-quality infrastructure for the future, including doubling renewable energy;
   - 1.3 enabling primary sector growth and development (including aquaculture, forestry, pastoral, horticulture, and mining);
2. While also:
   - 2.1 safeguarding the environment and human health;
   - 2.2 adapting to the effects of climate change and reducing the risks from natural hazards;
   - 2.3 improving regulatory quality in the resource management system;
   - 2.4 upholding Treaty of Waitangi settlements and other related arrangements;

[7] Ministry for the Environment. 2023. *Our Freshwater 2023*.

[8] https://ojs.victoria.ac.nz/pq/article/view/5683#:~:text=Urban%20waterways%20represent%20less%20than%201%25%20of%20the,nutrients%20and%20heavy%20metals%20originating%20from%20anthropogenic%20activities.

[9] Ministry for the Environment. 2023. *Our Freshwater 2023*. Issue 2: Water is polluted in urban, farming, and forestry areas | Ministry for the Environment. https://environment.govt.nz/publications/our-freshwater-2020/issue-2-water-is-polluted-in-urban-farming-and-forestry-areas/

non-point source)[10] discharges, with point-source discharges (pipes) making up the balance.

6. Point-source discharges from industrial and infrastructural pipes and drains (eg, factories, wool scours, dairy sheds, meat-works, sewage plants, stormwater drains) used to be major contributors, but have been better managed in recent decades.

Legislative context and councils' approach to managing discharges prior to recent court decisions

7. Sections 15, 70, and 107 are the core RMA provisions for protecting freshwater and aquatic life. Section 15 is the primary provision. It prohibits all discharges via land or water from being allowed to contaminate water - except where expressly allowed by:

    a. a national environmental standard or other regulation

    b. a rule in a regional plan or proposed regional plan

    c. a resource consent.

8. Sections 70 and 107 are secondary provisions that restrict when this permission may be given. A council must be satisfied that listed effects are unlikely before making discharges a permitted activity in a regional plan rule (s70) or granting a discharge consent (s107).

9. Regional councils are responsible for making regional plan rules for discharges. Permitted activity rules authorise discharges without the need to obtain a resource consent, subject to any conditions. A resource consent must be applied for when there is no permitted activity pathway.

10. Councils use s70 and s107 to manage all types of discharges (ie, diffuse discharges and point-source discharges).

11. Some councils have made diffuse discharges a permitted activity, subject to compliance with land use rules, land use consents, or other management tools (eg, farm environment plans). Other councils require them to be authorised by a discharge consent with conditions requiring that the effects of the discharge be mitigated over a set time-period. Some councils use a mix of permitted activity rules for some discharges and consents for others.

12. Examples of the use of permitted activity rules to manage diffuse discharges include:

    a. Canterbury Land and Water Regional Plan[11] – Permitted activity rule for incidental discharges, subject to compliance with land use rules. Those land use rules have conditions to manage nitrogen discharges, including requiring progressive leaching reductions over time

    b. Proposed Waikato Plan Change 1[12] – Permitted activity rule for diffuse discharges from lower intensity farming, subject to conditions including implementation of a farm environment plan

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[10] 'Diffuse discharges' (a.k.a. 'non-point source discharges') are those that cannot be traced back to a discrete 'point source', such as a sewage outlet or stormwater pipe.

[11] Rule 5.63

[12] Rule 3.11.4.3 - Decisions Version

c. Auckland Unitary Plan[13] – Permitted activity rule for discharges associated with nitrogen fertiliser. Conditions include applying fertiliser in accordance with best industry practice.

13. The current state for managing discharges across regions is complicated and still evolving.

Recent court decisions on s70 and s107 have impacted how councils manage discharges

14. Two recent court decisions[14] impact on the interpretation of s70 and s107 and how councils manage certain discharges.

15. Under the s107 decision[15], councils cannot consent discharges which are likely to have significant adverse effects on aquatic life, even where consent conditions would result in a reduction in those adverse effects over time. This particularly impacts discharge activities in degraded catchments facing cumulative impacts.

16. The s70 decision[16] applies to regional plan rules and will only have full effect when councils make plan changes. However, as regional plan development occurs over several years, the decision will have some immediate impact on plan development.

17. Discharges likely to have listed effects cannot be permitted activities and will need a discharge consent to continue.

18. When taken together, the decisions mean that some existing discharges may not be permitted (s70) and are unlikely to obtain a new consent (s107), in effect making these discharges prohibited under the RMA.

Cabinet agreed to amend s107 to provide a consenting pathway for staged mitigation

19. Cabinet has since agreed to progress changes to s107, to address impacts of the s107 decision on consenting [ECO-24-MIN-0145 refers]. Changes will enable a discharge consent to be granted where the discharge may contribute to significant adverse effects on aquatic life, *if* the council is satisfied that:

    a. receiving waters are already subject to significant adverse effects on aquatic life; and

    b. consent conditions would contribute to an overall reduction in those adverse effects over the duration of the consent.

20. For more detail on the impact of the s107 decision on consenting, the urgency for change, and details of the changes considered, see the Draft Supplementary Analysis Report *Amending s107 of the Resource Management Act to improve certainty while protecting freshwater and aquatic life*, included as **Appendix A**.

21. As Cabinet has decided to make this change, it is part of the counterfactual for this RIS.

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[13] Rule E35.4.1 A5

[14] *Federated Farmers Southland Incorporated v Southland Regional Council* [2024] NZHC 726 [9 April 2024]: (the s70 decision); and *Environmental Law Initiative v Canterbury Regional Council* [2024] NZHC 612 [20 March 2024]: (the s107 decision).

[15] *Environmental Law Initiative v Canterbury Regional Council* [2024] NZHC 612 [20 March 2024].

[16] *Federated Farmers Southland Incorporated v Southland Regional Council* [2024] NZHC 726 [9 April 2024].

How the situation is expected to develop (following the court decisions, and amendments to s107)

22. With the change to s107, there will now be a consenting pathway for these discharges. However, this change does not address the regulatory uncertainty about how s70 will be interpretated and councils ongoing ability to permit discharges.

23. Because the significant adverse effects 'gateway test' is the same in s70 and s107, the court's findings in relation to s107 may be persuasive and inform future interpretations of s70 in regional plan making. That is, the finding that a *discharge consent (under s 107)* cannot be granted in certain situations (ie, where significant adverse effects on aquatic life are occurring and the discharge would continue these effects), can be inferred to similarly constrain making *permitted activity rules* (under s 70).

24. While noting there is ongoing litigation in relation to s70 that may advance the interpretation of s70,[17] we understand from councils that the inference described above will be highly influential for councils in future planning processes. Councils may remove discharges from permitted activity regimes, and instead require consents. See the 'Consultation' section below for more detail.

Consultation

25. Officials have not consulted directly on the proposals in this RIS. Proposals to address the issue were received through direct correspondence to the Ministry for the Environment /Minister for the Environment; submissions on the Resource Management (Freshwater and Other Matters) Amendment Bill (RM Bill 1); and correspondence and discussions with regional councils. This feedback has been considered when developing the options in this RIS.

26. Regional councils have singularly (ECan) and collectively (Te Uru Kahika) proposed options that would enable staged mitigation for permitted activity status for discharges under s70, subject to plan rules.

27. Primary sector interests, variously representing irrigators, pastoral farmers, and vegetable growers, have generally sought changes to s70 that would enable permitted activity status for diffuse discharges, with no environmental safeguards or mitigation requirements.

28. All environmental organisations oppose any changes to s70 that would enable permitted activity status for discharges with significant adverse effects. They also oppose changes being made without wider consultation and public submissions (eg, through an Amendment Paper to RM Bill 1 rather than through the next Resource Management Amendment Bill (RM Bill 2).

Consultation with councils on their interpretation of s70 following court decisions

29. The recent court decisions and potential changes to s70 were discussed with representatives from Canterbury, Southland, Otago and Bay of Plenty Regional Councils on 29 August. Those in attendance also represent the views of Te Uru Kahika.

30. It was set out clearly during this consultation that regional government is very concerned about how s70 could be applied in light of the recent court decisions.

[17] See further detail here: https://www.eli.org.nz/ecan-pollution-rule, and the initial proceedings here: ELI v Environment Canterbury [2024] NZHC 1669

Specifically, these councils highlighted that, their interpretation meant they would not be able to provide a permitted activity pathway for certain discharges – ie, discharges that may give rise to significant adverse effects, even if such a pathway could show improvement over time (via farm plans for example).

31. These councils suggested that without legislative amendment, they would be required to move almost all discharge activities out of existing permitted activity regimes and into requiring a resource consent. They suggested this would be the majority of farming activities and lead to an exponential increase in the number of resource consents required.

32. These councils noted the number of consents required would be at such a level that they would not be able to process them. They also noted that because these activities had been previously considered permitted activities, they would be under pressure to lower or waive consent processing fees but if they did so it would 'bankrupt' the council.

33. Overall, these councils agree there is a problem with recent court interpretations of s107 being applied to s70 (which councils are assuming will be the case). Removing the ability to use permitted activity rules for discharge activities will lead to a huge increase in the number of farming activities requiring a resource consent. All councils agree it is a practical / cost problem rather than an environmental problem, and note requiring resource consents does not mean better environmental outcomes than would be achieved through permitted activities.

34. These councils also discussed potential 'solutions' to this problem. Generally, they agreed the solution was an amendment to s70 to allow permitted activity rules even in cases where they may be significant adverse effects on aquatic life, *provided* these effects are reduced over time.

35. These councils did note this solution is trickier to implement than similar changes to s107. They did not support the legislation being directive (for example providing a work around that referred to the use of farm plans). Instead, they supported the legislation being 'general' in allowing councils to formulate their own rules that would meet a new 'reduced effects over time' test.

What is the policy problem or opportunity?

Concern permitted activity rules unable to allow for improvement over time, driving substantial consenting burden

36. Given the court decisions, and the correlation between s70 and s107, there is uncertainty in how the s107 decision will be interpreted and applied to s70 and future regional plans. That could mean councils would be restricted from setting permitted activity rules for discharges in degraded catchments that may give rise to significant adverse effects on aquatic life, even if such a pathway could show improvement over time (via a farm plan for example).

37. Although this would not have an impact until such time as councils make the necessary regional plan changes, there are concerns that discharges currently permitted under s70 rules will not be able to continue in future as a permitted activity.

38. We have heard from councils that this is how they are likely to interpret the case law, and that they will avoid developing permitted activity rules for these discharges.

39. The change to s107 (which enables consents for discharges in degraded catchments subject to reduction in adverse effects over time), would mean these discharges could be managed by consents. However, there is concern about the number of discharges that would need to go through a consent application process.

40. This has created regulatory uncertainty. In the absence of clear direction, councils are concerned that:

    a. the volume of consents subsequently needed for discharges under (amended) s107 will be too large for councils to work through within statutory timeframes, and

    b. councils will not be able to cost recover (ie, councils cannot cost recover for consent processing where consents are not decided within statutory timeframes).

Understanding the regulatory uncertainty

41. We do not have clear data on the numbers of consents that could be needed, with this interpretation and application of s70. We have requested this information from councils. While we cannot quantify the full extent of the impact, it is clear that if this interpretation is applied, there would be an increase in consenting and compliance costs.

42. ECan estimated that, in Canterbury alone (where many discharges are a permitted activity when associated with a permitted or consented land use), thousands of new discharge consents could be required, depending on the council's assessment of their likely effects. Compliance costs would increase for those discharges that had previously not needed a consent. ECan anticipates that the increase in consent applications could also add significant extra load to their systems, potentially compounding consent-processing backlogs (and potential penalty costs).

43. Data from ECan focused on discharge activities from agriculture and horticulture, and onsite wastewater discharges. They estimate that there are around 30,000 activities that fall within these two categories alone that are currently enabled by their permitted activity rules. Without changes to s70, these activities may be required to get a resource consent. This is more than double the number of all resource consents (~ 12,000) currently in effect in Canterbury. The average cost of a consent is $5,000 increasing to $25,000 for notified consents (noting that these are averages and can vary depending on complexity etc.).

44. Data provided by the Bay of Plenty regional council estimates that an additional 3,300 consents might result if discharges can no longer be permitted activities under s70 (there are currently 2,100 discharge consents). Assuming that most new consents are sought in the same year, this would be five-fold increase in the number of consents usually processed annually. A larger number, approximately 100, additional consents staff would be needed. The cost of a simple application for a consent is around $2,500 but this increases depending on the complexity of the consent.

45. While there is limited evidence of the extent and likelihood of this outcome, there clearly is regulatory uncertainty, and any mitigation would need to be put in place proactively to be effective in maintaining RM system operability.

46. Note that because previously agreed changes to s107 will enable consents for these discharges (that is, discharges in degraded catchments which may have significant adverse effects on aquatic life), the counterfactual would not result in these discharges being required to stop[18].

[18] See the Draft Supplementary Analysis Report *Amending s107 of the Resource Management Act to improve certainty while protecting freshwater and aquatic life* for more information about previously agreed changes – **Appendix A**, and the relevant Cabinet Minute ECO-24-MIN-0145 – **Appendix C**.

47. The trade-off in considering changes to s70 to address regulatory uncertainty is between costs associated with consenting, and reduced oversight and potentially more environmental damage because of managing discharges as permitted activities rather than through consents.

Recognising improvements to freshwater quality take time

48. It is well understood that many factors impact freshwater quality, and that previous and existing activities at a catchment scale have an impact on receiving environments. Managing cumulative effects is part of the challenge.

49. The following excerpt from a recent Tasman District Council report discusses the implications of this for groundwater management and for food production:

> *"Council's Senior Resource Scientist Water considers flow-through of some of the Waimea aquifers is likely to result in a prolonged time for recovery of nitrate levels of at least 80+ years. This is over five times the typical water permit duration period used in Tasman. Under the current case law, interpretation of s107 and its application, would render Council unable to grant any consent in this area for water and land use that may produce nitrate discharges, regardless of the improvements in practice to be achieved over the duration of consent. This is clearly contrary to national goals for food security and continued and expanded vegetable production."*

50. The National Policy Statement for Freshwater Management 2020 (NPS-FM) recognises this: while policies require that degraded water bodies improve, and that the health of other water bodies is maintained, it provides for:

    a. desired outcomes for freshwater quality to be worked towards over time; and

    b. councils and communities to determine the appropriate timeframes and methods for achieving desired outcomes and restricting resource use.

Timing of consideration of the policy problem

51. Decisions have already been made on the phasing/timing of RMA Reform. Work is underway on RM Bill 2. Including this proposal within that Bill is the last chance to make a legislative change to the RMA before phase 3 of RMA reform.

52. Progressing proposed changes through RM Bill 2 would provide an opportunity for consultation and further information to be gathered and considered, in terms of options, and nature and scale of the issue, before final decisions.

53. Consideration of changes through RMA phase 3 is explored further below in the options section.

What objectives are sought in relation to the policy problem?

54. The objective is to enable discharges to be managed in a way that does not increase consent burden and enables freshwater improvement to occur over time, even in degraded catchments.

55. This recognises that receiving waters can already be subject to significant adverse effects on aquatic life; that authorising discharges through permitted activity rules can be consistent with improvement; and allows for that improvement to occur over an appropriate timeframe.

56. This also aligns with Cabinet's agreed principles guiding the development of RMA replacement legislation under phase 3 of RMA Reform [ECO-24-MIN-0160 refers]. In particular, the intention to reduce the need for resource consents, as described here:

a. provide for greater use of national standards to reduce the need for resource consents and simplify council plans, such that standard-complying activity cannot be subjected to a consent requirement; and

b. shift the system focus from ex ante consenting to strengthen ex post compliance monitoring and enforcement.

57. The proposed vehicle for this is an amendment to s70 that aligns with the sustainable management purpose of the RMA[19] and the Government's objectives for RMA Reform.[20]

[19] Section 5 of the RMA.

[20] The RMA reform objectives [refer ECO-24-MIN-0022] are: making it easier to get things done by:

(a) unlocking development capacity for housing and business growth

(b) enabling delivery of high-quality infrastructure for the future, including doubling renewable energy

(c) enabling primary sector growth and development (including aquaculture, forestry, pastoral, horticulture, and mining –

while also:

(d) safeguarding the environment and human health

(e) adapting to the effects of climate change and reducing the risks from natural hazards

(f) improving regulatory quality in the resource management system

(g) upholding Treaty of Waitangi settlements and other related arrangements.

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

58. The following criteria are from the Draft Supplementary Analysis Report on s107 – **Appendix A**, and consistent with impact analysis on other matters considered in RM Bill 2.

- **Effectiveness –** Extent to which the proposal achieves its core RMA purpose while accommodating other high-level objectives, including the RMA Reform objectives, and upholding Treaty Settlements.
- **Efficiency –** Extent to which the proposal achieves the intended outcomes/objectives for the lowest cost burden to regulated parties, the regulator and, where appropriate, the courts. The regulatory burden (cost) is proportionate to the anticipated benefits.
- **Certainty –** Extent to which the proposal ensures that regulated parties have certainty about their legal obligations and the regulatory system provides predictability over time. Legislative requirements are clear and able to be applied consistently and fairly by regulators. All participants in the regulatory system understand their roles, responsibilities and legal obligations.
- **Durability & Flexibility –** Extent to which the proposal enables the regulatory system to evolve in response to changing circumstances or new information on the regulatory system's performance, resulting in a durable system. Regulated parties have the flexibility to adopt efficient and innovative approaches to meeting their regulatory obligations.
- **Implementation Risk –** Extent to which the proposal presents implementation risks that are low or within acceptable parameters (eg, Is the proposal a new or novel solution or is it a tried and tested approach that has been successfully applied elsewhere?). Extent to which the proposal can be successfully implemented within reasonable timeframes.

What scope will options be considered within?

59. Due to the time available and the direct link to s107 changes agreed by Cabinet, the options assessed in this RIS may not represent the full range of feasible options.

60. There has been limited opportunity for formal consultation and submissions on options due to the timeframes associated with the introduction of RM Bill 2 (the agreed instrument for any legislative changes).

61. It is intended that further information will be sought up to, and during, the Select Committee process to inform final decisions on the preferred option.

62. As noted above, this RIS is only analysing options to amend s70. There is previous impact analysis on changes to s107 (see **Appendix A**).

What options are being considered?

63. The options considered are:

    a. **Counterfactual:** s70 remains unchanged

    b. **Option 1:** Mitigation through conditions (amend s70 consistent with the change to s107)

    c. **Option 2:** Exempt diffuse discharges under s70.

Counterfactual – *s70 remains unchanged*

64. This option would maintain the counterfactual. This would mean that, depending on the interpretation of the court decisions, some existing discharges could not be permitted under s70. Dischargers would need a consent (ie, if their activity was not allowed under permitted activity rules).

65. Maintaining the counterfactual would not address immediate concerns about the consenting burden and may result in sole reliance by councils on the consent pathway under s107 to permit these discharges.

66. Previously agreed changes to s107 means that dischargers can obtain a new consent (under s107) even if significant adverse effects on aquatic life are likely as long as:

    a. receiving waters are already subject to significant adverse effects on aquatic life, and

    b. consent conditions would contribute to an overall reduction in those adverse effects over the duration of the consent.

67. Although these discharges could be consented under s107, there remain concerns that the consenting burden would be too great if they could not be permitted under s70.

68. A staged approach to RMA reform is being taken. One of the principles to guide the development of proposals to replace the RMA is to provide for greater use of national standards to reduce the need for resource consents and simplify council plans [ECO-24-MIN-0160 refers].

69. The RMA replacement legislation being developed in phase 3 would address consenting concerns; however, the detail and timing of these changes are not yet known.

70. Changes to permitted activity rules as a result of the court decisions will only occur as new plans are developed by councils. Existing rules continue to apply in the interim. Many councils had started a review of their plans in anticipation of notifying NPS-FM compliant plans by December 2024 – this deadline has now been changed to December 2027.

Option One – Mitigation through conditions (amend s70 consistent with change to s107)

71. This option is to amend s70 to enable a permitted activity rule in a regional plan for discharges (both point source and diffuse) where significant adverse effects on aquatic life are likely, *if* the council is satisfied that:

    a. receiving waters are already subject to significant adverse effects on aquatic life, and

    b. rules would contribute to an overall reduction in those adverse effects over time.

72. This leaves some uncertainty, as councils would determine what such a rule would look like.

73. This option does mean discharges could occur with reduced oversight (relative to consenting). That is, unless a rule specifically provides otherwise, it is not possible to know who is carrying out a permitted activity. Compliance monitoring and enforcement, and management of cumulative effects become more difficult as a result.

74. This option would not oblige a council to permit discharges, and they may still choose to require consents – for example, to impose more specific conditions and/or manage the cumulative effects of discharges in a catchment.

75. There are some safeguards as councils are still required under s70(2) to be satisfied that the inclusion of that rule is the most efficient and effective means of preventing or minimising those adverse effects on the environment. Plan rules would also be scrutinised through submissions and hearings during plan notification, as well as any appeals.

76. The benefit of this option would be increased regulatory certainty about the number of consents likely to be required under s107. This would alleviate council concerns about the potential volume of consents needed under s107 without a permitted activity pathway, and associated concerns about processing high volumes of consents within statutory timeframes (councils are unable to cost recover for consents that are not processed within the required timeframe).

77. There are unlikely to be additional environmental impacts compared to the counterfactual, as the activities would be able to be consented under the amended s107 provision regardless. Although protection would vary, as with consents under s107, depending on the timeframe for a reduction in adverse effects (s107 requires reduction of adverse effects over the duration of consent).

Option Two – *Exempt diffuse discharges under s70*

78. This option (as proposed by pastoral farming interests) is to exclude diffuse discharges from the listed effects test for discharges under s70. This would mean that s70 only applies to point source discharges.

79. Councils would not be prevented from including a rule in a plan that permits diffuse discharges. In developing permitted activity rules, councils would still be subject to relevant plan development processes, and national direction. Councils could only minimally mitigate adverse environmental effects in the permitted activity rules while still permitting the activity to go ahead.

80. This option would address the consenting burden, by bypassing the need for consents authorised by s107 in relation to diffuse discharges. However, it is unclear how improvement over time and consideration of cumulative effects would be achieved, as diffuse discharge activities would be enabled without mitigation.

81. Given the scale of diffuse discharges and their dominant contribution to freshwater degradation, this option carries the greatest risk of not achieving the Government's environmental objectives. It would magnify the risk of adverse freshwater outcomes and would mean that s70 has little to no effect as a safeguard, particularly in the context of agricultural discharges.

82. This option would weaken councils' ability to ensure that diffuse discharges are sustainably managed and that water bodies are sufficiently safeguarded from contaminants generated by human activity.

83. A variation of this option would be to exclude diffuse discharges associated with commercial vegetable growing (as proposed by Horticulture NZ in relation to s107) from the application of s70. We have not considered this option here.

How do the options compare to the status quo/counterfactual?

	Counterfactual – *s70 remains unchanged*	Option One – *Mitigation with conditions*	Option Two – *Exempt diffuse discharges*
Effectiveness Extent to which the proposal achieves its core RMA purpose while accommodating other high-level objectives, including the RMA Reform objectives, and upholding Treaty Settlements[21]	0 The counterfactual maintains current rules for discharges on the environment. Costs will increase for councils and any farms and businesses if discharges which have listed effects can no longer be permitted under s70. While it would achieve the core RMA freshwater objective, the counterfactual risks doing so at a social and economic cost that aligns neither with the Government's objectives for RMA reform nor with the approach to freshwater improvement set out in the NPS-FM (which provides for improvement over time).	+ This option would allow for improvement to happen over time, while enabling farms and businesses to discharge without undue cost and disruption. Allowing permitted activity rules with mitigations in already degraded catchments may perpetuate discharge effects and cumulative effects, if the mitigations are not effective. This option reduces the risk of significant social and economic costs that would occur if every discharge required a consent. This option appears to be more effective than the counterfactual at balancing environmental and economic risk to achieve both the RMA's freshwater objective and the Government's RMA reform objectives, in accordance with the NPS-FM's enabling approach to freshwater improvement.	0 This option would address the concern about the large volume of consents required, for diffuse discharges. However, by providing a permitted activity pathway for diffuse discharges with listed effects, this option could lead to worse environmental outcomes than the counterfactual. Given the scale of diffuse discharges and their dominant contribution to freshwater degradation, this option carries the greatest risk of not achieving the government's environmental objectives. While councils could include mitigations in plan rules, there is no requirement in this option for mitigations to be imposed. Because of the enhanced environmental risk and potential social and economic impacts, this costs that would occur if every discharge required a consent.

[21] The extent to which the proposals uphold Treaty settlements is addressed in **Appendix B**.

			This option is no more effective than the counterfactual at balancing all the relevant RMA and Government objectives.
Efficiency Extent to which the proposal achieves the intended outcomes/objectives for the lowest cost burden to regulated parties, the regulator and, where appropriate, the courts. The regulatory burden (cost) is proportionate to the anticipated benefits.	0 Regulated parties incur the costs of mitigating listed effects and/or the costs of either having to cease the discharging activity or obtain a consent. All these costs are likely to increase in comparison to the pre-existing situation. The cost to councils will also increase if they are required to assess and issue consents where they previously relied on permitted activity rules.	+ This option would be efficient, as it would essentially be a return to previous practice, as understood and applied by councils and consent holders prior to the court decisions. Current costs for regulated parties would continue, as it is essentially a continuation of the situation that preceded the status quo. It is therefore lower cost than the counterfactual. Councils and courts too would incur less cost, as there would likely be less litigation around permitted activities and less consenting under s107. Overall, this option has less regulatory burden than the counterfactual.	+ This option would be less costly than the counterfactual for diffuse discharges. It does not solve the problem for point source discharges, including for infrastructure waste and stormwater discharges. Overall, this option has less regulatory burden than the counterfactual.
Certainty Extent to which the proposal ensures that regulated parties have certainty about their legal obligations and the regulatory system provides predictability over time. Legislative requirements are clear and able to be applied consistently and fairly by regulators. All participants in the	0 The court decision on s107 reduced regulatory certainty in how to apply s70. There is also further litigation underway regarding the application of s70. One area of significant uncertainty is the extent to which council assessments of likely listed effects will be litigated and	+ This option would provide a high level of regulatory certainty, as a return to past practice prior to the recent court decisions reduces uncertainty around potential litigation. This is because the council's assessment of likely effects would have less costly implications, requiring only that discharges are managed through conditions to	0 This option would not provide a complete or enduring solution. It would provide high regulatory certainty, but significant uncertainty around potential litigation. This is because the council's assessment of likely effects would have costly implications for discharges not covered by

regulatory system understand their roles, responsibilities and legal obligations.	whether rules to permit discharges will continue per the status quo.	achieve improvements over time, rather than being eliminated immediately, or all progressing to a consenting process under s107.	the exclusions in this option (ie, point source discharges). This could include industrial activities and infrastructure projects.
Durability & flexibility Extent to which the proposal enables the regulatory system to evolve in response to changing circumstances or new information on the regulatory system's performance, resulting in a durable system. Regulated parties have the flexibility to adopt efficient and innovative approaches to meeting their regulatory obligations.	0 The economic impacts of this option would likely limit its durability, resulting in legislative changes to limit effects once their magnitude is apparent. The counterfactual provides little room for flexibility in the decisions that councils can make around plan rules.	+ This option rates higher than the counterfactual option on both durability and flexibility criteria. It enables mitigation solutions to be included in rules, giving councils and dischargers considerable flexibility in achieving both environmental and economic objectives. The option's durability has been demonstrated over the past decade, where it has become a familiar and accepted approach to managing discharges.	0 This option would not provide a complete or enduring solution. It would enable more flexible mitigation solutions for diffuse discharges covered by plan rules, but not other discharges. Though the rules still need to be legally viable and are subject to plan submissions, hearings and appeals.
Implementation risk Extent to which the proposal presents implementation risks that are low or within acceptable parameters (eg Is the proposal a new or novel solution or is it a tried and tested approach that has been successfully applied elsewhere?). Extent to which the proposal can be successfully implemented within	0 There is a risk that many discharges that are not permitted will continue unlawfully, instead of ceasing or obtaining a consent. This would impose an additional burden on council monitoring and enforcement. There is also more burden on the consenting process under s107 to enable these discharges. There may be risks associated with large volumes of applications and reduced ability to process	0 This option has the potential for less implementation risk than the counterfactual. There is risk that the mitigations may not achieve the outcomes required by rules. This risk is not inevitable, however, and is contingent on councils' rule making, monitoring and enforcement practice, and the rate of change required. This option does mean discharges could occur with reduced oversight when	- This option has the implementation risks presented by both the counterfactual and Option 1. For diffuse discharges, there is a risk of mitigations not being effective.

reasonable timeframes.	(and cost recover) within statutory timeframes.	compared to consenting. That is, unless a rule specifically provides otherwise, it's not possible to know who or how many individuals are carrying out a permitted activity. Compliance monitoring and enforcement, and management of cumulative effects becomes more difficult as a result. However, this option would not oblige a council to permit discharges, and they may still choose to require consents – for example, in order to impose more specific conditions and/or manage the cumulative effects of discharges in a catchment.	
Overall assessment	0 The counterfactual does not address the regulatory uncertainty arising from the court decisions and depending on how s70 is interpreted will increase costs for councils and applicants if there is no permitted activity pathway for discharges.	+ This option addresses the immediate issues with the counterfactual by providing a way for discharges to be allowed while still managing environmental effects through rule requirements. This option ranks well on all criteria compared to the counterfactual. Although it carries significant implementation risk, so does the counterfactual. Options to mitigate the risk are not addressed here but could be part of future work or left up to councils with the safeguards of the planning process (eg, submissions, hearings and appeals).	- This option falls between the counterfactual and Option 1 on most criteria. This option is targeted at just one aspect of the underlying issue, diffuse discharges. Given the scale of diffuse discharges, it would magnify the risk of adverse freshwater outcomes and would mean that s70 has little to no effect as a safeguard, particularly in the context of agricultural discharges. This option would weaken councils' ability to ensure that diffuse discharges are managed and that water bodies are safeguarded to the extent possible from contaminants generated by human activity.

Example key for qualitative judgements:

++	much better than doing nothing/the status quo/counterfactual
+	better than doing nothing/the status quo/counterfactual
0	about the same as doing nothing/the status quo/counterfactual
-	worse than doing nothing/the status quo/counterfactual
- -	much worse than doing nothing/the status quo/counterfactual

Treaty Impact Analysis

84. A Treaty Impact Analysis is outlined in **Appendix B**. The analysis assesses the Treaty impacts of Option 1 and covers the following matters:

    a. Relevant Treaty principles

    b. Engagement to date on proposed change

    c. Potential impact of proposed change on freshwater quality

    d. Māori freshwater rights and interests

    e. Treaty settlements overview

    f. Overall assessment of Treaty impacts of Option 1.

85. Considering the lack of engagement with iwi, hapū and Māori, and the information and analysis detailed in **Appendix B**, it is difficult to assess:

    a. whether or not the principles of partnership and active protection have been met

    b. any potential impacts on the Crown's previous commitments on Māori freshwater rights and interests, and

    c. whether or not some Treaty settlement commitments have been met.

86. Consultation during the RM Bill 2 process will provide an opportunity for iwi, hapū or Māori groups to provide feedback. Feedback received will inform the Select Committee's consideration of RM Bill 2 and final decisions on any change.

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

87. Of the options assessed, Option 1 rates highest against the criteria.

88. In the immediate term, it provides an effective and enduring solution to the issues with the counterfactual, by enabling plans to include permitted activity rules for discharges, while still ensuring that environmental effects are managed through conditions and improved over time.

89. It would achieve the full range of objectives more effectively, at less cost, than the other options. It would be the most durable and flexible option that addresses the issue now (rather than in stage 3 of the RMA reform).

90. However, based on past evidence, there is an implementation risk with Option 1. If mitigation targets are not met, but discharge activities are allowed to continue as a permitted activity, an overall reduction in adverse effects may not be achieved. There are also limitations on compliance monitoring and enforcement for permitted activities.

91. Both the counterfactual and Option 1 are supported by the analysis, and it is ultimately a trade-off between the additional cost of consenting and the robustness and added oversight for environmental benefits through managing consents.

92. As outlined in the policy problem section, we have limited information about the problem, but it is clear there is a risk. We do not recommend waiting for the risk to eventuate before making changes to address it, by which time it would be too late to mitigate.

93. Introducing a proposal through RM Bill 2 for consultation would enable further information to be gathered, and consultation on the proposal, before making final decisions.

What are the marginal costs and benefits of the option?

Affected groups *(identify)*	**Comment** *nature of cost or benefit (eg, ongoing, one-off), evidence and assumption (eg, compliance rates), risks.*	**Impact** *$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.*	**Evidence Certainty** *High, medium, or low, and explain reasoning in comment column.*
Additional costs of the preferred option compared to taking no action			
Regulated groups All dischargers including: -farmers -horticulturalists -forestry companies - infrastructure providers (eg, stormwater, wastewater) -industrial and processing activities	Reduced uncertainty and no additional costs for regulated groups. A permitted activity pathway via s70 could reduce costs associated with consenting under s107 (needed in all cases without permitted activity rules under s70)	Low	High. It is reasonable to conclude that having a permitted activity pathway for discharges will incur less cost than utilising the consent pathway under s107
Regulators Regional and unitary councils	Reduced uncertainty and no additional costs for regulators; enforcement is charged on a cost recovery basis	Low	High
Others - NZ public - rural communities - Treaty partners - ENGOs - recreational groups	Amending s70 to permit discharges which may adversely affect freshwater for a time will impose a range of externality costs on the wider community (eg, the costs of ecological restoration, species recovery, tourism impacts, health impacts, reduced amenity and cultural opportunities)	Unknown. The scale of the externality cost will depend on how effective the mitigation regime is in practice; this will likely vary between plan approaches	High. While the externality costs to the environment cannot be calculated with any precision, it is reasonable to conclude that they will not be greater under the s70 amendment than under the counterfactual scenario, as there is a consenting pathway for discharges under s107 if it is not permitted

Total monetised costs	N/A	N/A	N/A
Non-monetised costs	Environmental externality costs from discharge effects	High	High. The lack of hard data means that the scale of costs and benefits cannot be quantified. However, their existence can be inferred with a high degree of certainty
Additional benefits of the preferred option compared to taking no action			
Regulated groups	System continuity. Certainty, stability, familiarity. Avoids an increase in cost and time to obtain resource consents for previously permitted activities	High	High Consent processes are onerous and costly
Regulators	System continuity. Certainty, stability, familiarity Avoids an increase in consenting burden on councils	High	High Councils have indicated that any increase in consents would severely impact their financial viability and ability to process the increased volume
Others (eg, wider govt, consumers, etc.)	N/A	N/A	N/A
Total monetised benefits	N/A	N/A	N/A
Non-monetised benefits	Avoided costs and burden associated with consenting. Amending s70 will allow discharges to be a permitted activity, subject to conditions, and address concerns about the increased consenting cost and burden	High	High

94. The costs and benefits of amending s70, and of the counterfactual, cannot be monetised due to lack of data. However, they can be conceptualised relatively clearly and their relative merits assessed (see comparison of options above).

95. Overall, amending s70 will retain the ability for councils to allow discharges to be a permitted activity, subject to conditions, and address concerns about the increased consenting burden. Costs to regulated parties will be avoided if they are not required to obtain a consent for activities that were previously permitted.

Section 3: Delivering an option

How will the new arrangements be implemented?

96. The proposed option will make changes to primary legislation (the RMA) that will enable councils to set permitted activity rules for certain discharges while still ensuring that environmental effects are managed through conditions and improved over time.

97. Councils will remain responsible for setting rules in their regional plans. The process for councils to develop a regional plan is set under Schedule 1 of the RMA. It requires consultation and evidence to support the inclusion of policies, objectives and rules for their region. Councils also have responsibility for compliance monitoring and enforcement.

98. The changes to the RMA will come into effect immediately after receiving Royal Assent (by mid-2025). This will provide certainty to councils that they can set permitted activity rules for these discharges. Changes to permitted activity rules will only occur as new plans are developed. Existing rules continue to apply in the interim. Many councils have already started a review of their plans in anticipation of notifying by December 2024 – this deadline is now December 2027.

99. This proposed change provides clarity to councils and, in many cases, will support permitted activity rules and associated conditions. For example:

    a. Permitted activity rules that authorise discharges subject to compliance with land use rules (eg, in Canterbury) or subject to conditions to not worsen water quality (eg, in Hawke's Bay)

    b. Permitted activity rules for lower intensity farming, with conditions to implement farm environment plans/freshwater farm plans to reduce impacts on water quality (eg, proposed rules in Waikato PC1, draft rules in Otago).

How will the new arrangements be monitored, evaluated, and reviewed?

100. Systems are in place for councils to monitor, evaluate, and review policies, objectives and rules in plans. Regional plans are typically reviewed every 10 years.

101. State of the environment reporting provides insights into environmental trends, but these insights cannot be directly linked to specific rules or legislation. Critical gaps in knowledge that need to be filled include detailed understanding of pressures on freshwater and their causes, and how they interact and intensify over time.[22]

102. Controls on land use and the requirement for best practice mitigation are the primary tools used by councils to manage the impact of discharges to land that may enter water. This can lead to improvements over time (as evidenced by research, monitoring and modelling).[23]

[22] Our freshwater 2023 | Ministry for the Environment

[23] For example, Monaghan et al, 2021, Quantifying contaminant losses to water from pastoral land uses in New Zealand II. The effects of some farm mitigation actions over the past two decades.

Glossary of technical terms

Rule	Rules are made by councils and have the legal effect of a regulation
Permitted activity	Means that a particular activity regulated by the RMA can be undertaken without a resource consent.
Resource consent	Authorises activities under the RMA, where they are not a permitted activity
Diffuse discharge	Refers to the discharge of contaminants that do not come from a point or single source (eg, sediment loss from farming land)
Point-source discharge	Refers to the discharge of contaminants from a single source (eg, a pipe)
Staged mitigation	An approach to progressively reduce discharges of contaminants (eg, nitrogen) over time
Cumulative effects	The concept that individual activities may have small or insignificant adverse effects, but that in combination with each other, and over time, become significant.
Farm environment plans	Tools used by councils to identify and manage adverse environmental effects of farming activities.

Glossary of abbreviations

ALIL	Ashburton Lyndhust Irrigation Limited
RM Bill 1	Resource Management (Freshwater and Other Matters) Amendment Bill
RM Bill 2	A second proposed resource management Bill being developed by the Government
ECan	Environment Canterbury
RIS	Regulatory Impact Statement
RMA	Resource Management Act 1991
PSGE	Post Settlement Governance Entities
ENGO	Environmental Non-Government Organisation
ELI	Environmental Law Initiative
NPS-FM	National Policy Statement for Freshwater Management

Appendix A: Draft Supplementary Analysis Report – Amending s107 of the Resource Management Act to improve certainty while protecting freshwater and aquatic life

Appendix A - Draft Supplementary Analysis Report - Amending s107 of the Resource Management Act to improve certainty while protecting freshwater and aquatic life.pdf

Appendix B: Treaty Impact Analysis

Introduction

1. This analysis assesses the Treaty impacts of Option 1 outlined in the main Regulatory Impact Statement (RIS) and covers the following matters:

    a. Relevant Treaty principles
    b. Engagement to date on proposed change
    c. Potential impact of proposed change on freshwater quality
    d. Māori freshwater rights and interests
    e. Treaty settlements overview
    f. Overall assessment of Treaty impacts of Option 1.

2. The proposed change in Option 1 would enable a discharge to be a permitted activity under s70, even where significant adverse effects on aquatic life are likely, if the council is satisfied that:

    a. receiving waters are already subject to significant adverse effects on aquatic life, and

    b. rules would contribute to an overall reduction in those adverse effects over time.

3. Section 70 of the Resource Management Act 1991 (RMA) would be amended to achieve this. Full background to this proposal is outlined in the main RIS.

Relevant Treaty principles

4. There are two key Treaty principles of particular relevance in this context:

    a. The principle of partnership: this principle, with the duty for the Crown and Māori to act towards each other 'with the utmost good faith', was articulated by the Court of Appeal in the *Lands* case in 1987[24]

    b. The principle of active protection: this duty of the Crown was stated by the Court of Appeal to be "not merely passive but extends to active protection of Māori people in the use of their lands and waters to the fullest extent practicable".[25] The quality of the Crown's engagement in order to "satisfy its obligation to actively protect the interests of Māori" is relevant to this principle.[26]

5. Regarding the Crown's obligation to protect taonga under the Treaty principles, the Privy Council confirmed "the Crown in carrying out its obligations is not required…to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time".[27] If a taonga was in a vulnerable state – particularly if that state was due to past breaches – then the Crown may have to take 'especially vigorous action'.[28]

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[24] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, and affirmed by the Privy Council (PC) *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513.

[25] Ibid.

[26] See *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553.

[27] *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513.

[28] Ibid.

6. The Waitangi Tribunal assessed the application of Treaty principles to freshwater management in detail in its freshwater and geothermal inquiry and associated reports in 2012 and 2019.[29] The Waitangi Tribunal found that, in respect of freshwater, the principle of partnership may require a collaborative agreement between the Crown and Māori in the making of law and policy.[30]

Engagement to date on proposed change

7. No engagement has occurred to date with iwi, hapū or Māori groups (including Post Settlement Governance Entities (PSGEs)) on the proposed change in Option 1. Letters were sent to PSGEs describing the potential scope of the next Resource Management Amendment Bill (RM Bill 2). These letters referred to the Government's intent to consider how discharges are managed under the RMA, among a substantial number of other changes that could be progressed as part of that Bill.

8. This means it is not possible to fully assess the Treaty impacts, including the specific impacts on Treaty settlements and other relevant arrangements.

9. There is likely to be interest in the change from iwi, hapū or Māori groups. This interest could arise from, for example, concerns about impacts on freshwater quality, economic interests and more.

10. Consultation during the RM Bill 2 process will provide an opportunity for iwi, hapū or Māori groups to provide feedback. Feedback received will inform the Select Committee's consideration of RM Bill 2 and final decisions on any change.

Potential impact of the proposed change on freshwater quality

11. The counterfactual[31] (following court decisions) has no immediate environmental impacts for freshwater and aquatic life, as changes to s107 would enable discharge activities to be consented. The benefits of Option 1 relate to efficiency of permitting rather than consenting, to enable permitted activity rules for discharges where adverse effects on aquatic life would be reduced over time. This is consistent with improving freshwater quality over time as provided for under the National Policy Statement for Freshwater Management 2020 (NPS-FM).

12. The following further mitigations would also continue to apply:

    a. the NPS-FM would be a relevant consideration in developing rules, including directing freshwater to be managed in a way that gives effect to Te Mana o te Wai (Policy 1), that freshwater quality is maintained or improved (Policy 5), and that existing over-allocation is phased out, and future over-allocation avoided (Policy 11)[32]

    b. consent authorities must consider actual and potential effects on the environment when making rules, under section 68 before including rules in a regional plan

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[29] Waitangi Tribunal, The Stage 1 Report on the National Freshwater and Geothermal Resources Claims (Wai 2358, 2012), and Waitangi Tribunal The Stage 2 Report on the National Freshwater and Geothermal Resources Claims (Wai 2358, 2019).

[30] Waitangi Tribunal, *Whaia te Mana Motuhake* (Wai 2417, 2014) at p42.

[31] The counterfactual prohibits the setting of permitted activity rules that have significant adverse effects on aquatic life.

[32] Noting that the Resource Management (Freshwater and Other Matters) Amendment Bill would exclude the hierarchy of obligations in the NPS-FM from resource consenting, except where it is contained in a regional policy statement, plan, or other document such as an iwi planning document.

relating to discharges, councils must have regard to the nature of the discharge and the receiving environment and other alternatives, including a rule requiring the observance of minimum standards of quality of the environment (under section 70(2))

c. consent authorities develop plans based on their specific local challenges and objectives, meaning future decisions about rules in the context of the proposed change cannot be anticipated

d. the development of rules will be subject to submissions and hearings processes during plan notification as well as any appeals

e. this option would not oblige councils to permit discharges, and they may still choose to require consents (for example, to impose more specific conditions and/or manage the cumulative effects of discharges in a catchment).

Māori freshwater rights and interests

13. The Crown acknowledged Māori have rights and interests in freshwater and geothermal resources in the High Court in 2012 and committed to progressing this acknowledgement. This was subsequently recorded by the Supreme Court in 2013.[33]

14. While there are a range of ways that Māori aspirations with respect to freshwater are articulated, they have been summarised as having the following four dimensions: (1) improving water quality and the health of ecosystems and waterways, (2) governance/management/decision making, (3) recognition of iwi/hapū relationships with particular freshwater bodies, and (4) economic development.[34]

15. As regarding the first dimension listed above, it is difficult to assess whether Option 1 would satisfy Māori aspirations for improving water quality due to the lack of engagement.

16. In relation to the economic dimension to rights and interests, iwi, hapū or Māori groups could use permitted activity rules under s70 and may derive economic benefit from the proposed change. It has not been possible to assess this yet due to time and engagement constraints.

Treaty settlements overview

17. Treaty settlements and other arrangements provide for PSGEs and other Māori representative groups to have varying degrees of influence on decisions made under the RMA. Most Treaty settlements create an expectation of engagement as they include an apology and promise by the Crown to enter in a new relationship based on Treaty principles.

18. Some Treaty settlements contain specific engagement obligations in the development of freshwater legislation and policy, for example:

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

[34] *Shared Interests in Freshwater: A New Approach to the Crown/Māori Relationship for Freshwater*, Ministry for the Environment and Māori Crown Relations Unit, 2018.

a. There are a number of Treaty settlements that require engagement on matters concerning water (often for specific water bodies) and aquatic life in the policy/legislation making process[35]

b. The Waikato River settlement includes a Crown commitment to "a new era of co-management in respect of the Waikato River", with "the highest level of good faith engagement". Its implementation includes the development of policy and legislation that may potentially impact on the health and wellbeing of the Waikato River.[36]

19. There are also a few settlements that have specific obligations, outside of engagement, that relate to water/aquatic life and matters relevant in consent decision-making. For example, settlements that require persons exercising functions and powers under the RMA to have particular regard to the habitat of tuna.[37]

20. While the proposed change will give councils the ability to continue to make permitted activity rules for certain discharges, it does not mean that councils *must* do so. Councils must still consider agreements and other matters that they have with PSGEs and other Māori representative groups as required in Treaty settlements and similar arrangements, such as:

a. Joint Management Agreements

b. Joint Entity documents

c. The Waikato and Waipā River, Te Awa Tupua and other similar arrangements (eg, the earlier outlined requirement to have particular regard to the habitat of tuna).

21. It is difficult to fully assess whether the general and specific commitments provided for in Treaty settlements and other relevant arrangements have been met as there has been no engagement, including with PSGEs and other Māori representative groups, on the proposed change. However, given that councils must still consider redress and other relevant arrangements during plan development, as they do now, analysis suggests that redress which involved PSGEs and other Māori representative groups in the plan development process, or matters relevant to decisions-making, remain unaffected.

Overall assessment of Treaty impacts of Option 1

22. Considering the lack of engagement with iwi, hapū and Māori and the information and analysis in the preceding sections, it is difficult to assess:

a. whether or not the principles of partnership and active protection have been met

b. any potential impacts on the Crown's previous commitments on Māori freshwater rights and interests, and

c. whether or not some Treaty settlement commitments have been met.

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[35] Examples from Treaty settlement legislation include but are not limited to: Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (s12, s17), Nga Wai o Maniapoto (Waipa River) Act 2012 (s8, s22), Maniapoto Claims Settlement Act 2022 (subpart 9, s125), Ngāti Tūwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010 (s18), Ngāti Rangi Claims Settlement Act 2019 (Whangaehu river) (s109), Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (s11, s15, s37).

[36] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, schedule 1 cl 4.

[37] Ngāti Manawa Claims Settlement Act 2012 S125, Ngāti Whare Claims Settlement Act 2012 s129.

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