

# Regulatory Impact Statement: Excluding the hierarchy of obligations within the National Policy Statement for Freshwater Management from resource consenting

## Coversheet

Purpose of Document	
Decision sought:	<i>Approval to amend the Resource Management Act 1991 (RMA) and national direction</i>
Advising agencies:	<i>Ministry for the Environment</i>
Proposing Minister:	<i>Minister Responsible for RMA Reform</i>
Date finalised:	<i>3 April 2024</i>
Executive Summary	
<p>The coalition Government is taking a phased approach to reforming the resource management system [CAB-23-MIN-0473 refers]. The proposal assessed in this Regulatory Impact Statement (RIS) forms part of this approach and provides for targeted legislative amendments to the Resource Management Act 1991 (RMA) and national direction [CAB-24-MIN-0008 refers].</p> <p>Ministerial and Cabinet direction on commitments within the coalition agreements have shaped policy options and direction on the application of the hierarchy of obligations within the National Policy Statement for Freshwater Management (NPS-FM) to resource consents.</p> <p>This, as well as the pace of reform, has directed the scope of regulatory amendments, and consequently limited the Ministry’s ability to explore all feasible options. The analysis is limited, with a focus on the impacts of the narrow context of each option.</p> <p><i>Context</i></p> <p>Cabinet agreed to review and replace the NPS-FM within this term of government [CAB-23-MIN-0486 refers]. In the interim, Cabinet also wants to address the way it is being applied in resource consenting (applications and decisions).</p> <p>The NPS-FM includes the fundamental concept Te Mana o te Wai, which contains a hierarchy of obligations. The hierarchy of obligations prioritises:</p> <ul style="list-style-type: none"><li>• first, the health and well-being of waterbodies and freshwater ecosystems</li><li>• second, the health needs of people (such as drinking water)</li><li>• third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and into the future.</li></ul> <p>The hierarchy of obligations is also reflected in the NPS-FM’s single objective. It plays a key role in the development of environmental outcomes in regional policy statements and plans looking across all freshwater activities in a catchment. It also informs the content of,</p>	

and guides decision-making on, resource consent applications. The Government is concerned about the impact the hierarchy of obligations is having on consent applicants.

Cabinet agreed 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. Cabinet also directed officials to provide advice in early 2024, on options to amend or exclude the hierarchy of obligations contained in Te Mana o te Wai provisions of the NPS-FM when making decisions on consent applications [CAB-23-MIN-0486 refers].

To implement these Cabinet decisions with certainty requires amendments to both the information requirements for consent applications and decision-making matters for consent authorities set out in the RMA.

To achieve Cabinet's intent, officials have only considered options to exclude the hierarchy of obligations from resource consenting and not to amend the hierarchy itself.

#### *Targeted engagement and feedback received*

Letters were sent by the Minister Responsible for RMA Reform in late December 2023 and late January 2024 outlining the Government's intent. These letters went to iwi (including Post Settlement Governance Entities (PSGEs), and unsettled iwi), plus local government. The January 2024 letter was also sent to primary sector stakeholders, non-government environmental organisations (ENGOS), and practitioners.

Targeted engagement with these groups commenced on 25 January 2024. Not all groups were available to engage with officials within the timeframes available and/or under the given circumstances (e.g., some groups indicated they understood that the policy decisions had already been taken, referencing the letters from the Minister Responsible for RMA Reform to support this view).

Key points conveyed by many iwi and Māori from the limited engagement on the changes include:

- concern about or opposition to the changes, predominantly due to concerns about potential impacts on freshwater quality, as well as impacts on customary rights, and Treaty settlement commitments for some iwi, and
- that the engagement process has been inadequate (for reasons including insufficient information, lack of time, and that decisions appeared to have already been taken).

Local government queried whether the proposal would exclude the hierarchy of obligations contained in regional policy statements, plans, or iwi planning documents (which was clarified by officials).

ENGOS and practitioners were generally opposed to the proposal, citing support for the application of the hierarchy of obligations to consenting, and concern that the proposal is attempting to elevate commercial uses of water over ecological values.

Primary sector stakeholders were supportive of the proposal, emphasising a preference for flexibility and practicality in the application of the hierarchy in consenting processes.

#### *Treaty impact analysis*

In light of the limited engagement and uncertain impact of the proposal on freshwater, it is difficult to assess (for both the proposal and policy development process):

- whether or not the Treaty principles of partnership and active protection have been met

- whether or not general engagement obligations contained in some Treaty settlements have been met
- whether or not processes provided for in certain settlements, such as for the Waikato and Whanganui rivers, have been met
- implications for the Crown’s commitments on Māori freshwater rights and interests.

A summary of the Treaty impact analysis is provided in Section 2 and the detailed analysis is contained in Appendix One.

### *Findings*

Excluding the hierarchy of obligations within the NPS-FM from resource consenting comes with a key trade-off: as the hierarchy would be excluded from resource consenting, consent decisions could be made in a manner that makes trade-offs between freshwater outcomes and activities that affect freshwater. The extent to which this may materialise is difficult to determine for a number of reasons, most notably because the balance of the NPS-FM will continue to be a relevant matter for resource consenting.

### *Recommendation*

Given the findings above, and the issues identified in the Treaty impact analysis, officials do not have a recommended option.

Officials note that, in the interests of certainty and effectiveness, it would be desirable for the hierarchy to be applied consistently to both consent applications and consent decision-making. Alignment between these matters will also mitigate the risk that uncertainty is added to the consenting system while a new national policy statement for freshwater management is being developed.

Officials consider amending the RMA and NPS-FM to exclude the hierarchy of obligations from both consent applications *and* consent decision-making (option four in the analysis below) best achieves the policy objectives and Cabinet’s intent.

## **Limitations and Constraints on Analysis**

The analysis in this RIS is limited by:

- *Previous Cabinet decisions, Ministerial decisions, and Government commitments:* As detailed in Section 1, the coalition Government outlined its priorities in the 100-day plan and coalition agreements made in December 2023. These commitments are a key driver and have been supported by various Cabinet and Ministerial decisions as the policy problems and options have been developed.
- *Pace of reform:* the Government has agreed to make these policy changes via a Bill and intends that it is enacted by the end of the year. This timeframe has limited the identification of options, level of analysis, collation and review of evidence, and engagement with iwi/Māori and stakeholders.
- *Data and evidence on the impact:* officials have limited information about the extent of the problem as well as understanding the impact of the options. The ability to gain additional insights was further restricted by the timeframe available for engagement. Limited levels of engagement have occurred to date and consequently feedback from stakeholders, Treaty partners, and councils is also limited at this point.

**Responsible Manager(s) (completed by relevant manager)**



Hayden Johnston  
General Manager, Natural Environment Policy  
Ministry for the Environment  
27 March 2024

**Quality Assurance (completed by QA panel)**

Reviewing Agency:	Ministry for the Environment
Panel Assessment & Comment:	<p>A quality assurance panel with members from the Ministry for the Environment and the Ministry for Primary Industries has reviewed the Regulatory Impact Statement. The panel considers that it <b><u>partially meets</u></b> the Quality Assurance criteria.</p> <p>The Regulatory Impact Statement, within the context it is written in, has provided a near complete impact analysis which is clear and concise. While the analysis is balanced, due to the limited time, it could not provide robust evidence to provide a complete analysis of likely impacts. Consultation was limited and stakeholders were not given sufficient time, or a full range of options to consider. The monitoring section is insufficient. We are unconvinced that the proposal for post-implementation monitoring of likely impacts is feasible.</p>

## Section 1: Context

1. The resource management system governs how people interact with natural resources, with the Resource Management Act (RMA) regulating land use, the use of natural resources, and the provision of infrastructure.
2. National direction instruments<sup>1</sup> support local decision-making under the RMA. National policy statements enable the Government to prescribe objectives and policies for matters of national significance which are relevant to achieving the purpose of the RMA<sup>2</sup>. The purpose, content, and statutory process for creating and amending national direction is set out in Part 5 of the RMA.
3. The Government has committed that undertakings made by the Crown through Treaty of Waitangi settlements will be honoured.

### *Drivers for change*

4. In December 2023, the Government commenced its reform of the resource management system with the Resource Management (Natural and Built Environment and Spatial Planning Repeal and Interim Fast-track Consenting) Act, which repealed the Natural and Built Environment Act and the Spatial Planning Act.
5. The proposal in this RIS form part of this approach and provides for targeted legislative amendments to the RMA and national direction [CAB-24-MIN-0008 refers]. The changes support the delivery of the following Government priorities:
  - replace the National Policy Statement for Freshwater Management 2020 to allow district councils more flexibility in how they meet environmental limits and seek advice on how to exempt councils from obligations under the National Policy Statement for Freshwater Management 2020 as soon as practicable<sup>3</sup>
  - replace the National Policy Statement for Freshwater 2020 to rebalance Te Mana o te Wai to better reflect the interests of all water users<sup>4</sup>
  - replace the National Policy Statement for Freshwater Management 2020 and the National Environmental Standards for Freshwater to better reflect the interests of all water users.<sup>5</sup>
6. Ministerial and Cabinet direction on the above commitments have limited and set the scope for policy options, direction, and legislative vehicle to make the changes (primary legislation). This, as well as the pace of reform, has limited this RIS which is an analysis of the options with a focus on the impacts of each option.

### *Background to the NPS-FM (including the hierarchy of obligations)*

7. The current iteration of the National Policy Statement for Freshwater (NPS-FM) took effect in September 2020. It sets out objectives, policies, and implementation requirements that regional councils must give effect to in regional policy statements and plans<sup>6</sup>.
8. The NPS-FM also applies to resource consenting. Resource consent applicants must assess<sup>7</sup>, and consent authorities must 'have regard to'<sup>8</sup>, any relevant provisions of a national policy statement.

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<sup>1</sup> National direction can be either: national policy statement (NPS), national environmental standards (NES), national planning standards, or section 360 regulations.

<sup>2</sup> RMA section 5.

<sup>3</sup> Coalition Agreement between the National Party and ACT Party.

<sup>4</sup> Ibid.

<sup>5</sup> Coalition Agreement between the National Party and New Zealand First.

<sup>6</sup> RMA section 62(3) and section 67(3)(a).

<sup>7</sup> RMA Schedule 4 clause 2(1)(g).

<sup>8</sup> RMA section 104(1)(b)(iii).

9. The NPS-FM includes the concept of Te Mana o te Wai<sup>9</sup> that refers to the fundamental importance of freshwater and recognises that protecting the health of freshwater protects the health and well-being of the wider environment. Te Mana o te Wai has been part of the NPS-FM since 2014 and was strengthened in 2017 and 2020. Most notably, the 2020 iteration of the NPS-FM introduced a hierarchy of obligations.<sup>10</sup>
10. Managing freshwater in a way that prioritises the hierarchy of obligations is the stated (single) objective of the NPS-FM.<sup>11</sup>

#### *Previous Cabinet decisions*

11. Cabinet agreed to review and replace the NPS-FM within this term of Government [CAB-23-MIN-0486 refers]. In the interim, Cabinet wants to address its implementation in respect of the impact the hierarchy of obligations is having on resource consent applications and decision-making.
12. Cabinet agreed 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. It also directed officials to provide advice in early 2024, on options to *amend or exclude* the hierarchy of obligations contained in Te Mana o te Wai provisions of the NPS-FM when making decisions on consent applications and noted that the approach for amending or excluding the hierarchy would include the outcome of targeted engagement [CAB-23-MIN-0486 refers].
13. These Cabinet decisions recognise that the matters a consent applicant must assess, and a consent authority must have regard to, are aligned. Excluding the hierarchy of obligations from consenting with certainty therefore requires amendments to those two parts of the consent process.
14. This RIS assesses the impacts of progressing Cabinet decisions on these matters together as an interim arrangement while a new national policy statement for freshwater management is being developed.
15. The Cabinet decisions on this matter, and timeframes available, have shaped and limited the scope of options that were engaged on and evaluated. To achieve Cabinet's intent, officials have only been able to consider options to exclude the hierarchy of obligations from resource consenting and not to amend the hierarchy itself.
16. The Cabinet decisions relate only to the hierarchy of obligations as contained in specific clauses of the NPS-FM. Provisions (including existing provisions, or new provisions developed after the proposal takes effect) in regional policy statements, plans, or other documents (e.g., iwi planning documents) that contain the hierarchy of obligations will continue to be relevant matters for resource consenting.

#### **What objectives are sought?**

17. The policy objectives are to:
  - reduce costs for consent applicants
  - exclude the hierarchy of obligations within the NPS-FM from resource consenting with certainty
  - uphold consent authority decision making on resource consents.

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<sup>9</sup> NPS-FM clause 1.3.

<sup>10</sup> NPS-FM clause 1.3(5).

<sup>11</sup> NPS-FM clause 2.1.

## Section 2: Deciding upon an option

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

18. The criteria below were used to assess whether the option will achieve the policy objectives.

Table 1: Evaluation criteria

Criteria	Explanation
<b>Efficient</b>	Does the option reduce costs for consent applicants?
<b>Effective</b>	Does the option provide fewer information requirements for consent applications?
<b>Certain</b>	Does the option provide a clear and unambiguous regulatory framework for the hierarchy of obligations within the NPS-FM for resource consent applications and decisions?
<b>Safeguards natural resources</b>	Does the proposal uphold the functions of consent authorities to manage freshwater through resource consenting?

### Feedback received during targeted engagement

19. Targeted engagement with iwi, local government, primary sector stakeholders, ENGOs and practitioners commenced on 25 January 2024. Not all groups were available to engage with officials in the available timeframes and/or circumstances (e.g., some groups indicated they understood that the policy decisions had already been taken, referencing the letters from the Minister Responsible for RMA Reform to support this view).
20. A summary of written and verbal feedback received during engagement is provided below.

#### Iwi/Māori

21. A consistent overall theme throughout engagement with iwi/Māori was disappointment and frustration, with some expressing opposition to the proposed changes.
22. Many expressed that the engagement process for the changes was inadequate, particularly given the significance of freshwater and the Te Mana o te Wai framework to iwi, hapū, and Māori.
23. Some expressed that they considered the process and substance of the changes to be a breach of Te Tiriti o Waitangi / the Treaty of Waitangi, and inconsistent with some Treaty settlement commitments.
24. Key issues raised about the engagement process included:
- The sense that the policy decisions had already been taken, and that engagement would not have any impact or influence.
  - The short notice for the engagement meetings offered. Some iwi did not take up the offer of a meeting (some may not have been able to meet in the timeframe, while some indicated they wanted more policy detail in writing before meeting).
  - Many of those met with considered there was insufficient detail on the changes to be able to assess possible impacts. Many requested more information in writing and wanted to engage further once that was available (note – officials indicated that this would occur, which was officials' understanding at that time). A small number of iwi said they would make no comment until that time.
  - Many advised that more time would be needed to work through the implications.

- Some indicated they did not have the legal or technical capacity to understand the implications, including for their settlement(s), particularly in the timeframes. Some requested funding/resources from the government to address this (which officials advised was not available).
  - Some iwi / Māori noted the findings of the Court of Appeal regarding the process for development of the vegetable growing exemptions in the NPS-FM, and expressed the Crown should be following the process outlined by the Court in that case.<sup>12</sup>
25. Key points on the proposal itself included:
- Many iwi and Māori groups engaged with expressed concern about or opposition to the changes, generally due to concerns about potential negative impacts on freshwater quality. Some considered these impacts would be irreversible. While it was explained that the changes would be relatively narrow in scope, many were concerned that in practice the changes would result in commercial uses of freshwater being prioritised over the health and well-being of waterbodies and freshwater ecosystems and the health needs of people. Some groups expressed that there is room for development, but not at the expense of freshwater ecosystem health.
  - Many iwi and Māori groups said that the changes would walk back progress on freshwater quality and/or progress made on the Crown's 2012 commitments<sup>13</sup> on Māori freshwater rights and interests. Many highlighted in this context the work and knowledge contributed by Māori over many years to develop Te Mana o te Wai towards how it is provided for in the NPS-FM.
  - Some expressed that while the changes are limited in scope, Te Mana o te Wai is a holistic framework and that the changes are discordant with the fundamental concept of Te Mana o te Wai, or with other aspects of Te Mana o te Wai (such as the six principles). For example, "if you tutu with the hierarchy, you upset the balance".
  - Some iwi were concerned the changes would affect or diminish tangata whenua involvement in freshwater management, whakapapa-based obligations to the wellbeing of environment, and/or their customary rights generally.
  - Some settled iwi were concerned the changes could impact or be inconsistent with their Treaty settlement (see 'Treaty settlements implications' in Appendix One), and wanted to work through how their settlement could be upheld.
  - Some expressed concern about how the changes would impact decisions on future resource consent renewals for hydroelectricity generation.
  - Some could not see a reason for the changes or said that the changes seemed disproportionate to a relatively small problem, with a range of comments that they had not been aware of the hierarchy being a problem in practice.
26. While officials explained in engagement meetings that existing requirements under RMA, and remainder of the NPS-FM, would continue to be relevant matters for resource consenting, many expressed that this didn't provide comfort to them in the context of the Government's intention to review and replace the NPS-FM. Almost all iwi and Māori groups expressed significant concerns about that process, and the Government's intention to rebalance Te Mana o te Wai.

### Local government, primary sector stakeholders, ENGOs, and practitioners

27. A range of views and themes were expressed. Two key consistent themes overall were:

<sup>12</sup> *Muaūpoko Tribal Authority Incorporated v Minister for the Environment and Te Rūnanga o Raukawa Incorporated* [2023] NZCA 641.

<sup>13</sup> Recorded by the Supreme Court in 2013 (*New Zealand Māori Council v Attorney General* [2013] NZSC 6, [2013] 3 NZLR 31 at [145]). See Appendix One for additional information.



- interest and/or concern about the longer-term replacement of the NPS-FM and the Government's intention to rebalance Te Mana o te Wai
- a desire for broader amendments to the hierarchy of obligations and its use in regional policy statements and plans in the longer-term.

#### *Local government*

28. Feedback from local government was neutral, but specific concerns were raised relating to implementation. In particular:
- whether the proposal would exclude the hierarchy of obligations in regional policy statements, plans, or other documents (including existing, or new instruments developed after the proposal takes effect), which was clarified by officials
  - the need for precise drafting so it is clear that only the hierarchy of obligations contained in specific provisions of the NPS-FM would be excluded.
29. Local government also expressed concern about an additional layer of regulation which could create complexity in the consenting system, and queried what outcome is being sought given that the balance of the NPS-FM would continue to be a relevant consideration for resource consenting (which was clarified by officials).

#### *Primary sector stakeholders*

30. Primary sector stakeholders generally supported excluding the hierarchy of obligations from resource consenting, emphasising a preference for flexibility and practicality in its application in the consenting process.
31. Key points include:
- that the hierarchy of obligations should be applied to the regional planning process rather than individual consent applications
  - that the hierarchy of obligations is not currently being applied to consenting by councils in an integrated way that enables flexibility.

#### *Environmental non-governmental organisations and practitioners*

32. ENGOs and practitioners were generally opposed to excluding the hierarchy of obligations from resource consenting, and queried what outcome is being sought (which was clarified by officials).
33. Key points include:
- concerns that the proposal is attempting to prioritise commercial interests over ecological values
  - that the current hierarchy and its application are supported.
34. In a neutral capacity, practitioners also highlighted the need for clear drafting for ease of implementation and expressed a preference for the information requirements for consent applicants and decision-making matters for consent authorities to be aligned. Practitioners' view was that misalignment between these matters could result in perceived biases in circumstances where consent applicants voluntarily provide information on the hierarchy (even though it could not be taken into consideration by consent authorities).

### **How has feedback influenced the policy proposal?**

35. There is limited scope for the feedback from iwi/Māori to be incorporated into the proposal in a manner that is consistent with Cabinet's intent to exclude the hierarchy from resource consenting (refer to the Treaty impact analysis for an evaluation of Treaty-related impacts).

36. Feedback from local government will assist with the drafting of the Bill to ensure that only the hierarchy of obligations within the NPS-FM is excluded from resource consenting (consistent with Cabinet's intent).
37. Feedback from primary sector stakeholders supports the need for the hierarchy of obligations within the NPS-FM to be excluded from resource consenting and has assisted officials in evaluating options to achieve Cabinet's intent.
38. There is limited scope for feedback from ENGOs to be incorporated into the proposal in a manner that is consistent with Cabinet's intent to exclude the hierarchy from resource consenting.
39. Feedback from practitioners has assisted officials to identify areas where unintended consequences could arise, particularly in relation to perceived biases in consent decisions if information requirements for consent applicants and decision-making matters for consent authorities are not aligned.
40. Officials note that Cabinet will consider this summary of feedback in tandem with making final policy decisions on the proposal.

### What options are being considered?

41. Three options were considered alongside the status quo. Under all options:
  - the proposal would only exclude the hierarchy of obligations contained in clauses 1.3(5)<sup>14</sup> and 2.1<sup>15</sup> of the NPS-FM from resource consenting
  - any provisions (including existing provisions, or new provisions developed after the proposal takes effect) in regional policy statements, plans, or other documents (e.g., iwi planning documents) that contain the hierarchy of obligations would continue to be relevant matters for resource consent applications and decisions
  - the balance of the NPS-FM would continue to be a relevant matter for resource consent applications and decisions
  - consideration of adverse effects would remain central to resource consent applications and decisions.

#### **Option One – The hierarchy of obligations continues to be a relevant consideration for resource consent applications and resource consent decisions (status quo)**

42. Under option one, the hierarchy of obligations in the NPS-FM would continue to be a consideration in resource consent applications and decisions as follows:
  - If relevant, a consent applicant must include an assessment against the provisions of the NPS-FM that contain the hierarchy of obligations in an application for resource consent under RMA schedule 4.
  - A consent authority may request further information from a consent applicant on the provisions of the NPS-FM that contain the hierarchy of obligations to assist with decision-making under RMA section 92.
  - If relevant, a consent authority must have regard to the provisions of the NPS-FM that contain the hierarchy of obligations when considering whether to grant or refuse an application for resource consent under RMA section 104.
43. A summary of the extent to which the hierarchy of obligations has influenced resource consent applications and decisions under the status quo (as understood by officials) is provided below.

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<sup>14</sup> Fundamental Concept – Te Mana o te Wai (hierarchy of obligations).

<sup>15</sup> NPS-FM's single objective.

### *Resource consent applications*

44. There is limited evidence on how the hierarchy of obligations is impacting resource consent applications across the country. Officials are aware that Environment Canterbury, Otago, and Waikato Regional Councils (via internal guidance and consent application forms) are explicitly requiring resource consent applicants to provide an assessment against the provisions of the NPS-FM that contain the hierarchy in applications for resource consent.
45. As national policy statements must be considered in decision making on resource consents under the RMA, officials expect that other consent authorities may be taking similar approaches to the hierarchy in resource consent applications.

### *Resource consent decisions*

46. Officials have reviewed a sample<sup>16</sup> of notified<sup>17</sup> resource consent applications in which the hierarchy of obligations within the NPS-FM has featured in the written decision. In most of these decisions:
  - consent applicants were able to demonstrate that their proposed activity adhered to the hierarchy of obligations, which led to consent being granted
  - consent applicants balanced inconsistency with the hierarchy of obligations against wider considerations, which led to consent being granted.
47. Officials are also aware of two resource consent applications that have been declined where inconsistency with the hierarchy of obligations featured as one of the reasons contributing to those decisions:
  - A groundwater take application in Hawke's Bay was refused in part because it did not sufficiently meet the hierarchy in the NPS-FM's single objective, and Te Mana o te Wai<sup>18</sup>.
  - A discharge permit application in Taranaki was refused with one (of ten) principal reasons being 'the application is inconsistent with Te Mana o te Wai'<sup>19</sup>.
48. In both examples, adverse environmental effects also featured in the decisions and these consents would likely have still been declined irrespective of the hierarchy of obligations.
49. Key benefits of this approach include:
  - It meets the safeguarding natural resources criterion as it maintains the ability for consent authorities to manage freshwater through resource consenting, including in accordance with the hierarchy of obligations in specific clauses of the NPS-FM.
  - It meets the certainty criterion as the matters that a consent applicant must assess under RMA schedule 4, and that a consent authority must have regard to under RMA section 104, are aligned.
50. Key costs associated with this approach include:
  - It does not meet the efficiency or effectiveness criteria as there would be no cost savings, or fewer information requirements, for consent applicants as the hierarchy of obligations within the NPS-FM would continue to be a relevant consideration in resource consenting.

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<sup>16</sup> Not a representative sample. This was a review of seven notified decisions where the NPS-FM (including Te Mana o te Wai and the hierarchy of obligations) was known to be a contributing factor in decision-making.

<sup>17</sup> Substantive written decisions tend to only be prepared for consent applications that are notified.

<sup>18</sup> Hawke's Bay Regional Council: Resource consent application of eight combined applicants to take and use water (known as Ruataniwha Tranche 2 applications). Decision of Hearing Panel 24 February 2023.

<sup>19</sup> Taranaki Regional: Resource consent application of Remediation (NZ) Limited to discharge to land water and air. Decision of Hearing Panel 26 May 2021.

## **Option Two – Amending the information requirements for resource consent applications in the RMA to exclude the hierarchy of obligations**

51. Under option two, resource consent applicants would not be able to provide an assessment against the provisions of the NPS-FM that explicitly contain the hierarchy of obligations in applications for resource consent prepared in accordance with RMA schedule 4.
52. Key benefits of this approach include:
- It meets the safeguarding natural resources criterion:
    - no changes to consent decision making matters for the hierarchy of obligations would be made, which maintains the ability for consent authorities to manage freshwater through resource consenting, including in accordance with the hierarchy of obligations in the NPS-FM.
53. Key costs associated with this approach include:
- It does not meet the efficiency or effectiveness criteria as it does not reduce costs, or provide for fewer information requirements for consent applicants:
    - as the hierarchy of obligations would remain a relevant matter for consent authorities to have regard to when considering consents, a consent authority could request that a consent applicant provide an assessment of their activity against the hierarchy of obligations.
  - It does not meet the certainty criterion as it does not provide a clear and unambiguous regulatory framework for the hierarchy of obligations:
    - the matters that a consent applicant must assess under RMA schedule 4, and that a consent authority must have regard to when considering consents under RMA section 104, would not be aligned. This could create uncertainty about whether an applicant is required to provide an assessment against the hierarchy or not.
    - a consent authority could decline consents due to inadequate information under RMA section 104(6) if a consent applicant does not provide an assessment against the hierarchy if requested during the processing of a consent.

## **Option Three – Amending resource consent decision making requirements in the RMA to exclude the hierarchy of obligations**

54. Under option three, consent authorities would be precluded from having regard to the provisions of the NPS-FM that explicitly contain the hierarchy of obligations when considering resource consent applications under RMA section 104.
55. Key benefits of this approach include:
- It may meet the efficiency criterion and reduce costs. This is difficult to assess for a number of reasons. Most notably because the balance of the NPS-FM will continue to be a relevant consideration in resource consenting.
  - It meets the effectiveness criterion by providing fewer information requirements for consent applicants:
    - the hierarchy of obligations would not be able to be considered by consent authorities, which means an assessment against it is unlikely to be required of a consent applicant in an application for resource consent or requested by a consent authority to assist with decision-making.
56. Key costs associated with this approach include:
- It does not meet the certainty criterion:

- the matters that a consent applicant must assess under RMA schedule 4, and that a consent authority must have regard to under RMA section 104, would not be aligned. This could create uncertainty about whether an applicant is required to provide an assessment against the hierarchy or not.
- there is the potential for perceived biases in consent decision making in circumstances where consent applicants include an assessment against the hierarchy (even though it could not be taken into consideration by consent authorities).
- It does not meet the safeguarding natural resources criterion:
  - a hierarchy for how freshwater should be managed would be excluded from resource consent decision making, which could result in resource consent decisions being made in a manner that makes trade-offs between freshwater outcomes and activities that affect freshwater.

**Option Four – Amending the information requirements for resource consent applications and decision-making requirements in the RMA to exclude the hierarchy, and amending the NPS-FM**

57. Under this option:

- Resource consent applicants would not be able to include an assessment against the provisions of the NPS-FM that explicitly contain the hierarchy of obligations in applications for resource consent prepared in accordance with RMA schedule 4.
- Consent authorities would be precluded from:
  - requesting information from a consent applicant on the provisions of the NPS-FM that explicitly contain the hierarchy of obligations under RMA section 92.
  - having regard to the provisions of the NPS-FM that explicitly contain the hierarchy of obligations when considering consents under RMA section 104.
- The NPS-FM would also be amended to affirm that the provisions that contain the hierarchy are not relevant to applications for resource consent.

58. Key benefits of this approach include:

- it may meet the efficiency criterion and reduce costs. This is difficult to assess for a number of reasons. Most notably because the balance of the NPS-FM will continue to be a relevant consideration in resource consenting.
- it meets the effectiveness and certainty criteria by providing fewer information requirements for resource consent applications, and providing an unambiguous regulatory framework for the hierarchy of obligations within the NPS-FM:
  - there would be no requirements for consent applicants (in applications) or consent authorities (in consent decision-making) relating to the provisions of the NPS-FM that explicitly contain the hierarchy of obligations.
  - the matters that a consent applicant must assess under RMA schedule 4, and that a consent authority must have regard to under RMA section 104, would be aligned.

59. Key costs associated with this approach include:

- it does not meet the safeguarding natural resources criterion:
  - a hierarchy for how freshwater should be managed would be excluded from resource consent applications and resource consent decision making, which could result in resource consent decisions being made in a manner that makes trade-offs between freshwater outcomes and activities that affect freshwater.

## How do the options compare to the status quo?

Criteria	Option One Status quo	Option Two Amending information requirements	Option Three Amending decision making matters	Option Four Amending both
Efficient	0	-	+	+
Effective	0	-	+	+
Certain	0	-	-	0
Safeguards natural resources	0	0	-	-
<b>Overall assessment</b>	0	--	-	+

**Key for Qualitative assessment:**

- ++ 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 summary

60. Refer to Appendix One for the full Treaty impact analysis.
61. The key relevant Treaty principles are to act in partnership and good faith, and the Crown’s duty of active protection in respect of freshwater, which is a taonga for Māori.
62. Key points conveyed by many iwi and Māori from the limited engagement process on the changes (see the section ‘Feedback received during targeted engagement – Iwi/Māori’ in the body of this RIS for the full summary) include:
  - concern about or opposition to the changes, predominantly due to concerns about potential impacts on freshwater quality, as well as impacts on customary rights, and Treaty settlement commitments for some iwi, and
  - that the engagement process has been inadequate (for reasons including insufficient information, lack of time, and that decisions appeared to have already been taken).
63. Key issues identified in this analysis include:
  - Whether or not the engagement process has met general engagement obligations contained in some Treaty settlements (see the section ‘Treaty settlement implications’ in Appendix One).
  - Whether or not processes provided for in certain settlements, such as those relating to the Waikato and Whanganui rivers have been met (see the section ‘Treaty settlement implications’ in Appendix One).
  - The role of Te Mana o te Wai in progressing Crown commitments recorded in the Supreme Court in 2013 on freshwater rights and interests (see the section ‘Māori freshwater rights and interests’ in Appendix One).
  - The health and wellbeing of water bodies and freshwater ecosystems is a key dimension of rights and interests. While the balance of the NPS-FM will continue to be a relevant consideration, it is difficult to assess the potential impact of the

changes on future resource consenting decisions, and consequently on freshwater quality. (See the section 'Potential impact of changes on resource consenting decisions' in Appendix One).

- The changes will reduce the scope of matters in the NPS-FM that can be considered by iwi or hapū that have roles in consent decision-making under a joint management agreement (JMA) under section 36B of the RMA or under a Treaty settlement (see the sections 'Treaty settlement implications' and 'Other instruments under the RMA' in Appendix One).
64. It is important to note that the hierarchy will continue to be relevant to resource consent decision-making in some circumstances, including where the hierarchy is contained in an iwi planning document under the RMA or document with a statutory obligation under the RMA provided for in Treaty settlement legislation (see the section 'Potential impact of changes on resource consenting decisions' in Appendix One).
65. Overall, in light of the limited engagement and the issues identified above, it is difficult to assess whether or not the Treaty principles of partnership and active protection have been met.

### **What option is likely to best achieve the policy objectives?**

66. Excluding the hierarchy of obligations within the NPS-FM from resource consenting with certainty requires amendments to both the information requirements for consent applications and decision-making matters for consent authorities (option four).
67. Amendments to either of those aspects of the consent process in isolation (options two and three) are unlikely to reduce costs for consent applicants, or exclude the hierarchy with certainty as:
- if only information requirements are amended – the hierarchy could still be considered by consent authorities in consent decisions, and information requested on it; or
  - if only decision-making matters are amended – there would be some residual uncertainty as to whether it applies due to misalignment between consent application and decision-making matters.
68. Excluding the hierarchy of obligations within the NPS-FM from resource consenting comes with a key trade-off. This being, that while it potentially reduces costs for consent applicants, consent decisions could trade-off achieving freshwater outcomes with authorising activities that impact freshwater.
69. However, the extent to which this may materialise is difficult to determine for the following reasons:
- the balance of the NPS-FM will continue to be a relevant consideration for resource consent applications and decisions, including (but not limited to):
    - the remaining parts of Te Mana o te Wai and direction under Policy 1
    - policy 5, which specifies that freshwater is managed to ensure that the health and well-being of degraded waterbodies and freshwater ecosystems is improved, and the health and well-being of all other waterbodies and freshwater ecosystems is maintained
    - policy 11, which specifies that all existing over-allocation is phased out, and future over-allocation is avoided.
  - when applying Part 2 of the RMA to consent applications, consent authorities may still prioritise the health and well-being of waterbodies and freshwater ecosystems, and the health needs of people (ie, the first and second priorities of the hierarchy) over other uses of water in consent decisions.
  - consideration of adverse effects will continue to remain central to resource consenting.

- consent authorities make decisions on consents on a case-by-case basis.
70. The Treaty impact analysis concluded it is difficult to assess (for both the proposal and policy development process) whether or not Treaty principles have been met, whether or not some Treaty settlement obligations have been met, and implications for the Crown's commitments on Māori freshwater rights and interests.
  71. Given the potential implications on consent decision making outlined above, and the issues identified in the Treaty impact analysis, officials do not have a recommended option.
  72. Officials note that in the interests of certainty and effectiveness, it would be desirable for consent application and decision-making matters for the hierarchy to align. Alignment between these matters will also mitigate the risk that uncertainty is added to the consenting system while a new national policy statement for freshwater management is being developed.
  73. To that end, Option four best achieves the policy objectives and Cabinet's intent. A limited analysis of the costs and benefits of Option four is provided in Table 2 below.
  74. Officials also note that there is an opportunity cost of progressing the proposal in contrast to the status quo. While the Government is concerned about the impact the hierarchy of obligations in the NPS-FM is having on consent applicants, there is limited evidence available about this impact. Continuing with the status quo would enable a more fulsome evidence base to be established to inform the longer-term replacement of the NPS-FM.



## What are the costs and benefits of the proposal?

Table 2: Costs and benefits of Option Four

Affected groups	Comment	Impact	Evidence certainty.
<b>Additional <u>costs</u> of the preferred option compared to taking no action</b>			
Regulated groups	Initial costs for industry comprehending the regulatory changes and preparing guidance.	Low	Low
Regulators	Initial costs for consent authorities comprehending the regulatory changes.	Low	Low
Wider government	Initial policy development costs and costs for producing guidance to support implementation.  Costs for monitoring the implementation of the proposal and potentially intervening before the NPS-FM is replaced (if unanticipated consequences arise).	Low	Low
Iwi/Māori	Refer to the Treaty impact analysis		
<b>Total monetised costs</b>	Not available	Not applicable	Not applicable
<b>Non-monetised costs (e.g., environmental, social)</b>	Key environmental and social costs are outlined in the options analysis.	Low to medium	Low
<b>Additional <u>benefits</u> of the preferred option compared to taking no action</b>			
Regulated groups	Potentially reduced costs for consent applicants in the short term as option four reduces the information required for consent applications.  Increased certainty for consent applicants in terms of the information required in applications for resource consent.	Low	Low  It is difficult to quantify the relative cost savings due to the limited information available on the extent to which the hierarchy of obligations has impacted resource consent applications.  It is also difficult to know the number of consent applications that will be lodged during the period that the proposal applies that will benefit.

Affected groups	Comment	Impact	Evidence certainty.
Regulators	Potentially reduced costs for consent authorities in the short term as option four reduces the information consent authorities will need to consider.	Low	Low It is difficult to quantify the relative cost savings due to the limited information available on the extent to which the hierarchy of obligations has impacted resource consent applications.
Wider government	Not available	Not applicable	Not applicable
Iwi/Māori	Refer to the Treaty impact analysis.		
<b>Total monetised benefits</b>	Not available	Not applicable	Not applicable
<b>Non-monetised benefits (e.g. environmental, social)</b>	Not available	Not applicable	Not applicable

## Section 3: Delivering an option

### How will the new arrangements be implemented?

75. It is anticipated that the amendments to the RMA and national direction will receive Royal Assent in 2024 and come into force shortly afterwards.
76. Councils, resource consent applicants and consent authorities more broadly will be required to implement the proposal.
77. The Ministry for the Environment will produce guidance documents to assist resource consent applicants and consent authorities implement the proposal.

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

78. The Ministry for the Environment will monitor the effect of the proposal by liaising with regional councils and consent authorities more broadly as part of business-as-usual conduct to determine whether:
  - it has been effective at addressing the Government's concerns
  - any unintended consequences have arisen.

## Appendix One: Treaty impact analysis

1. This Treaty impact analysis covers:

- Relevant Treaty principles
- Potential impact of changes on resource consenting decisions
- Māori freshwater rights and interests
- Treaty settlements
- Other instruments under the RMA
- Overall assessment of proposed changes against Treaty principles
- Current Waitangi Tribunal claims and legal proceedings.

### *Relevant Treaty principles*

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

- 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.<sup>20</sup>
- 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”.<sup>21</sup> 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.<sup>22</sup>

3. The Crown in carrying out its obligations is not required, in protecting taonga, to go beyond taking such action as is reasonable in the prevailing circumstances. If, however, 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’.<sup>23</sup>

4. The Waitangi Tribunal assessed the application of Treaty principles to freshwater management in detail in two reports in 2012 and 2019, prior to inclusion of the hierarchy of obligations in the NPS FM.<sup>24</sup> 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.<sup>25</sup>

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<sup>20</sup> New Zealand Māori Council v Attorney-General [1987] 1 NZLR 641, and affirmed by the Privy Council New Zealand Māori Council v Attorney-General [1994] 1 NZLR 513.

<sup>21</sup> Ibid.

<sup>22</sup> See *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553.

<sup>23</sup> *New Zealand Maori Council v Attorney-General* [1994], above n 24.

<sup>24</sup> 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).

<sup>25</sup> Waitangi Tribunal, *Whaia te Mana Motuhake* (Wai 2417, 2014) at p42, cited in Waitangi Tribunal (2019) above n 28 at p17.

### *Potential impact of changes on resource consenting decisions*

5. In conducting this Treaty impact analysis, it is difficult to assess the potential impact of the proposal on future resource consenting decisions, for the following reasons:
  - The balance of the NPS-FM and other aspects of Te Mana o Te Wai will continue to be a relevant consideration, including (but not limited to):
    - Policy 1 directing freshwater to be managed in a way that gives effect to Te Mana o te Wai, and the six principles in the Te Mana o te Wai framework (mana whakahaere, kaitiakitanga, manaakitanga, governance, stewardship, care and respect) at 1.3(4). The principle of governance directs those with authority for making decisions about freshwater to do so in a way that prioritises the health and well-being of freshwater now and into the future.
    - Policies regarding tangata whenua involvement (policy 2), freshwater quality is maintained or improved (policy 5), avoiding or phasing out overallocation (policy 11).
  - When applying Part 2 of the RMA to consent applications, consent authorities may still prioritise the health and well-being of waterbodies and freshwater ecosystems, and the health needs of people (ie, the first and second priorities of the hierarchy) over other uses of water in consent decisions.
  - Where the hierarchy is contained in a regional policy statement, plan, or any other document (including for example, iwi planning documents or a document with a statutory obligation under the RMA provided for in Treaty settlement legislation), they will continue to apply to resource consenting as at present.
  - Consideration of adverse effects in section 104(1)(a) of RMA will continue to be central to resource consent decision-making.
  - Consent authorities make decisions on a case-by-case basis.
6. Based on notified resource consents that have been reviewed by officials, no decisions to decline a resource consent have been identified where the decision has been based solely on inconsistency with the hierarchy.

### *Māori freshwater rights and interests*

7. 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.<sup>26</sup> While there are a range of ways that the dimensions of rights and interests have been articulated by Māori, improving water quality and the health of ecosystems and waterways has consistently been identified as the most important issue.<sup>27</sup>
8. The introduction of the hierarchy of obligations in Te Mana o Te Wai in 2020 addressed, in part, the Waitangi Tribunal's recommendation to give stronger recognition of Māori values in the NPS-FM.<sup>28</sup> The initial inclusion of Te Mana o Te Wai in the 2014 NPS-FM and later policy developments (in 2017 and 2020) followed extensive engagement with Māori.

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<sup>26</sup> See *New Zealand Māori Council v Attorney General* [2013] NZSC 6, [2013] 3 NZLR 31 at [145].

<sup>27</sup> Waitangi Tribunal (2019) above n 28.

<sup>28</sup> Ibid.

9. While it is difficult to assess the likely impact of the changes on freshwater quality, the changes will remove from resource consenting an element of the NPS-FM that has been regarded as contributing to progressing rights and interests.

#### *Treaty settlements*

10. Most Treaty settlements include an apology and promise by the Crown to engage with the iwi in a new relationship based on Treaty principles. Some settlements contain specific obligations for engagement in the development of freshwater legislation and policy, including:
  - The Waikato River settlement, which 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.<sup>29</sup>
  - The Whanganui River settlement, which describes “the beginning of a renewed and enduring relationship between Whanganui Iwi and the Crown that has Te Awa Tupua at its centre and is based on mutual trust and cooperation, good faith and respect for the Treaty of Waitangi and its principles”.<sup>30</sup> In developing national direction, the Crown must have particular regard to Te Awa Tupua status and other instruments in the settlement that require engagement.<sup>31</sup>
11. Based on the limited engagement that was undertaken, it is difficult to evaluate whether or not the general and specific commitments provided for in Treaty settlements have been met.
12. The changes will reduce the scope of matters in the NPS FM that can be considered by iwi or hapū that have roles in consent decision-making under a joint management agreement (JMA) under section 36B of the RMA or under a Treaty settlement. This will apply to new JMAs or Treaty settlements with similar provisions in the future while these provisions are in force.
13. Examples of such arrangements include:
  - iwi representation on the Taranaki Regional Council’s Consent and Regulatory committee under the Taranaki Iwi Settlement Act 2016,<sup>32</sup> and
  - the JMA between Te Runanganui o Ngāti Porou Trustee and Gisborne District Council signed in 2015<sup>33</sup>.
14. Some Treaty settlements contain redress that enables those iwi and/or hapū to identify values or produce documents that apply to freshwater resource management processes that could include the hierarchy – these will continue to apply.

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<sup>29</sup> Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, sch 1 cl 4.

<sup>30</sup> Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, section 70.

<sup>31</sup> Whanganui River Deed of Settlement ‘Ruruku Whakatupua - Te Mana o Te Iwi O Whanganui’ 2014.

<sup>32</sup> See sections 97-101.

<sup>33</sup> Accessible at [https://www.gdc.govt.nz/\\_\\_data/assets/pdf\\_file/0018/6057/jma-waiapu-catchment.pdf](https://www.gdc.govt.nz/__data/assets/pdf_file/0018/6057/jma-waiapu-catchment.pdf).

### *Other relevant instruments under the RMA*

15. Other instruments that have been considered as part of this analysis are iwi planning documents provided for under the RMA.<sup>34</sup> The inclusion of these instruments in resource management has been regarded as one of the elements to progress the Crown's 2012 commitments on Māori freshwater rights and interests. Any such instruments (current or future) that contain the hierarchy will continue to apply as at present.
16. Two examples of such instruments that contain the hierarchy are:
- Ngāruahine Kaitiaki Plan 2021, which states: 'Allocation of freshwater shall... be consistent with the hierarchy of Te Mana o Te Wai – the health and wellbeing of the wai comes first'.<sup>35</sup>
  - Ngāti Awa Environment Plan 2020, which sets out their articulation of the hierarchy of obligations in the first objective for freshwater.<sup>36</sup>

### *Overall assessment of proposed changes against Treaty principles*

17. It is difficult to assess whether or not the principles of partnership and active protection have been met (for both the proposal and policy development process) in light of the information and analysis in the preceding sections, specifically:
- the limited engagement with iwi/Māori
  - the nature of feedback received through that engagement (including that there was insufficient time or detail on the changes to be able to assess possible impacts)
  - the nature of some Treaty settlement commitments (including engagement obligations)
  - the uncertainty about the potential impact of the changes on freshwater
  - the context of the Crown's previous commitments on Māori freshwater rights and interests.

### *Waitangi Tribunal and freshwater litigation*

18. The proposal may be relevant to current and upcoming matters before the Waitangi Tribunal and the Courts. This includes the National Fresh Water and Geothermal Resources Inquiry (Wai 2358) that has been progressed in stages by the Waitangi Tribunal and current freshwater litigation against the Crown by a range of iwi and Māori entities.

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<sup>34</sup> See sections 61(2A)(a), 66(2A)(a), 74(2A)(a).

<sup>35</sup> Te Korowai o Ngāruahine Trust, Ngāruahine Kaitiaki Plan 2021.

<sup>36</sup> Te Rūnanga o Ngāti Awa, Ngāti Awa Environment Plan 2020.