Submission on: *Resource Management (Freshwater and Other Matters) Amendment Bill*

To: Primary Production Committee

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Submitter details

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The Parliamentary Commissioner for the Environment

The Parliamentary Commissioner for the Environment was established under the Environment Act 1986. As an independent Officer of Parliament, the Commissioner's role is to review the environmental management system. They have broad powers to investigate environmental concerns and make recommendations to improve environmental outcomes. The Commissioner is wholly independent of the government of the day. The current Parliamentary Commissioner for the Environment is Simon Upton.

Introduction

This Bill proposes to change the way Ministers provide national direction under the Resource Management Act. It also seeks to make specific changes to two pieces of existing national direction - the National Policy Statement for Indigenous Biodiversity (NPSIB) and the National Policy Statement for Freshwater Management (NPSFM) and related regulations.

The proposed changes to existing national direction concern the degree of environmental protection that should be accorded to indigenous biodiversity and water. The proposed changes to the process whereby national direction is promulgated concern the speed, robustness, and transparency with which Ministers can promote far-reaching regulations.

While any regulatory interventions under the Resource Management Act will have environmental consequences, at the heart of this change is a debate about Executive power, and the extent to which Ministerial decision making should be subject to scrutiny. This is an important matter because national direction sits at the top of the regulatory hierarchy and affects all subordinate levels of government, and both Māori and private property rights.

I shall deal with the system wide change first, followed by the proposed amendments to the two aforementioned national policy statements.

Preparing and amending national direction

National direction sits at the top of the RMA's regulatory hierarchy. All council plans, objectives and rules must be consistent with national direction. National direction is just that – national – and can affect the use and enjoyment of both public and private property everywhere. Given its reach, any national direction needs to be subject to robust and transparent processes.

The RMA currently provides two processes for preparing or amending national direction – a board of inquiry process, or steps for the Minister to follow. The Bill proposes that from here on there should only be a Ministerial process that is designed both for making changes to national direction and preparing new proposals.

The board of inquiry process proposed for repeal has been described as redundant. No explanation for this 'redundancy' has been offered. The fact that it hasn't been used for a long time doesn't necessarily make it redundant. Issues may well arise in the future of such gravity that a government may prefer a board to gather evidence from the public before finalising a policy response. No harm is done by retaining the option, and I would suggest that the Government consider retaining the mechanism, given that there is no requirement to use if it doesn't wish to.

If the board of inquiry option is removed, then the amended ministerial process will be the sole way in which national direction can be provided. It is vital that the preparation of any national direction is rigorous and that any process of evaluation is subject to unambiguous criteria. Otherwise, poor direction will leave its imprint on resource management decisions across the country as it cascades down to regional and local government.

The steps in the process for preparing and amending national direction have been amended by clause 11(9) of the Bill. The clause repeals section 51(1) of the Act, which requires the person preparing the report and recommendations for the Minister to consider certain matters. Those matters include Part 2 of the Act. In addition to the purpose of the Act, Part 2 contains requirements for persons exercising functions and powers to recognise and provide for matters of national importance, have regard to other matters, and take into account the Treaty principles. The reasoning behind the repeal of section 51(1) is unclear. But if it is an attempt to deliberately exclude Part 2 matters from the Minister's consideration, and decision-making, it fails. Part 2 matters apply to the exercise of any function under the Act and the Minister's obligation to act consistently with Part 2 remains intact.

It is also worth mentioning one further change to the process for preparing or amending national direction. Section 46A(4)(b) currently provides that those notified (the public and iwi) must be given adequate time and opportunity to make a submission. The Bill changes that to "those notified must be given *what the Minister considers to be* adequate time and opportunity to make a submission… (my emphasis). The change suggests that an objective test of reasonable time has been replaced by the subjective view of the Minister. I see no

reason to relieve the Minister of having to meet an objective test of what is reasonable and recommend that the wording remain unchanged.

The Bill also proposes a new evaluation process specifically for national direction (clause 7 proposes a new section 32AB), rather than being subject to the existing section 32 evaluation requirements. This evaluation is required prior to the Governor-General approving the regulation. For the evaluation to be useful, it should be undertaken at a point in the process when it can still influence the final form of the national direction that is sent to the Executive Council for promulgation. I recommend an amendment to that effect.

The proposed section 32AB attempts to simplify and apply plain language to the current requirements of section 32. That is potentially no bad thing. Section 32 as it stands is lengthy and, in the absence of clear direction about what sort of analysis is useful, has led to tedious reports that have a box ticking quality that cannot substitute for serious scrutiny. Unfortunately, the plain language proposed for the new section 32AB is potentially worse than what it replaces. The proposed wording is so broad and vague that almost anything could be claimed to meet its requirements.

- It is unclear what "the effectiveness of the proposal" is being judged against.
- It is unclear what consideration must be had of impact on the environment or economy, and whether any robust analysis is required to determine it.
- There is no specific mention of cost/benefit analysis. It is important that any process for preparing or evaluating proposed national direction should include an analysis of costs and benefits, and the methodology used to conduct analysis should be transparent.

These changes are being applied solely to national direction, and not more broadly to other planning and policy documents, which will still be dealt with under section 32. I would like to be able to support change to section 32 in a way that greatly increases the rigour with which regulatory interventions under the RMA are initiated. But this is not the way to do it. Proceeding with the proposed amendment will not only usher in a new world of uncertainty but will further increase the complexity of the patchwork of obligations that the Act imposes with different rules for Ministers at the national level and those who implement the Act regionally. This proposal perpetuates a chronic *ad hoc*-ism that has afflicted the Act for too long.

The proposed new section 32AB should not proceed, at least not now. If there is a desire for change in this area – and a strong case can be made for it – it should be considered as part of the broader reform the Government has foreshadowed.

More concerningly still, clause 10(4) amends section 44(3) to extend the reasons for the Minister to make direct amendments to national direction, without following the normal process set out in section 46A. Qualifying changes would avoid the otherwise required notification (public and iwi authorities), and the provision of reasons why the change is

consistent with the purpose of the Act. It also removes the possibility of public participation through submissions.

While some of the proposed changes might be sensible when purely technical changes are proposed that will not affect the substance, effectiveness, or efficiency of the national direction being amended, other proposed additions to the exceptions list go beyond inconsequential matters:

- The addition of section 44(3)(d) permits the Minister "to change the time frame for implementation of any part of a national environmental standard". This power is also extended to national policy statements and national planning standards. Timeframes are critical to the effectiveness of a proposal – particularly where a delay to implementation of standards may risk environmental harm. Changing timeframes should be subject to the ordinary process for amending national direction.

- Similarly, the proposed additions of section 44(3)b) (alignment with international obligations) and 44(3)(c) (give effect to emissions reduction or adaptation plans) are likely to change the substance of national direction, which may adversely impact on its effectiveness and efficiency and the wider resource management system. Those changes too should be subject to the ordinary process for amending national direction.

Parliament needs to decide how much power it grants to Ministers to change the rules of the game without reference to the public. While such flexibility may appeal to Ministers who see themselves promoting speedy changes they are happy to defend, they should consider how they would view the situation if another Minister in a future government used the same power to speedily impose changes with which they strongly disagreed.

It is in this sense that the proposed changes raise fundamental issues about how much unsupervised ministerial discretion Parliament should mandate. As Parliamentary Commissioner for the Environment, taking into account the need for good environmental stewardship, I would recommend that Ministers exercising authority under the Act should, beyond minor technical matters, be required to observe the existing standard of notification and disclosure set out in section 46A.

Legislative Changes to Existing National Direction

The state of the environment, including in rural areas, is continuing to decline and in some areas is perilous. For context, as the committee considers changes to the National Policy Statement for Indigenous Biodiversity (NPSIB) and the National Policy Statement for Freshwater Management (NPSFM), it should consider the following sobering statistics:

- By 2008 the area of wetlands had been reduced to 250,000 hectares or roughly 10% of their original extent. Wetland loss has continued since then, with the area of freshwater wetland decreasing by 3,018 hectares (1.2%) between 2008 and 2018.

- Our waterways are polluted: 21.8% of catchments have excessive sediments loads; 14.5% have excessive total nitrogen; 7.0% have excessive phosphorous; and 1.3% of catchments have excess levels of all three contaminants. ('Excess' means all these catchments have loads above the levels that could be mitigated under existing land uses).
- In addition to the loss of wetlands, between 2012 and 2018 12,869 hectares of indigenous vegetation were lost, and with them, important habitat for indigenous species, many of which are under threat. The table below provides a round-up of the current state of threat to our various lifeforms.

	Total Species	Threatened	Risk of being threatened	Data deficient
Terrestrial birds	105	33 (31%)	45 (43%)	2 (2%)
Bats	5	2 (40%)	2 (40%)	1 (20%)
Frogs	4	1 (25%)	2 (50%)	1 (25%)
Reptiles	124	49 (40%)	67 (54%)	3 (2%)
Vascular plants	2,744	403 (15%)	850 (31%)	107 (4%)
Seabirds	96	30 (31%)	56 (58%)	-
Shorebirds	17	8 (47%)	6 (35%)	-
Marine mammals	45	7 (16%)	3 (7%)	30 (67%)

NPS-IB and SNAs

Section 6 of the RMA requires all persons exercising functions and powers under it to, *inter alia*, recognise and provide for the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna. The NPS-IB, and its provisions regarding significant natural areas (SNAs), provide direction and guidance to councils on how to carry out that duty. In short, councils are required to:

- Identify, using prescribed criteria, areas of vegetation and habitat that qualify as SNAs and identify them in the relevant RMA plan.
- Adopt plans and rules that ensure *existing activities* do not increase in scale or intensity and do not result in loss or degradation of the SNA.
- Avoid adverse effects on the SNA of any *new use or development*, although there are 'compliance' pathways for various activities such as infrastructure; mineral and aggregate extraction; and certain subdivisions which by their nature can only be conducted in the location in which the resource is found.

New section 78 is added by clause 21, suspending the compliance obligations of local authorities in respect of SNAs for 3 years. In addition to suspending their obligations to enforce SNA requirements, local authorities can no longer use the identification and regulation of SNAs as a method for ensuring the sustainable management of areas within

their responsibility. New section 78(5) requires that any SNA included in a policy statement or plan (or one that is proposed), after the commencement of this Bill, is not to be treated as an SNA.

This represents a fresh example of central government overriding the ability of local government to determine how best they discharge their RMA obligations. I can understand that the Government might wish to make the use of the mechanism optional, but if a council considers that SNAs are useful and they can find a way to make them stick that is acceptable to the community, it is hard to argue that they should be prohibited from doing so.

The bigger problem with this change, however, is that the Bill does not propose any alternative guidance or direction to councils to help them meet their duty to protect significant vegetation and habitat. That duty – set out in section 6(c) requiring "the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna" – continues in force. The Bill would create a vacuum that makes it more likely that significant sites and biodiversity will be lost.

I am aware that the process of having councils drawing lines on maps identifying SNAs is seen to be a significant invasion of property rights, by farmers and by Māori landowners alike. I do not subscribe to the view that landowners have a 'right' to destroy elements of the landscape that harbour significant natural features. But regardless of your view on that matter, we have reached a stage in the country's development where the gains from any such destruction are very marginal and the loss of ecological services – in terms of water, soil and biodiversity – is often very significant.

If the Government doesn't wish to regulate it could consider, instead, developing a mechanism to pay for the ecological services such areas provide. It costs real money to fence such areas and keep pests and weeds under control. A mechanism for payment could secure the most important remaining areas in a mutually agreed way with landowners. My recent report, *Going with the Grain*, canvases some of the options that would enable this in some detail.

Developing a different approach to safeguarding SNAs is worth pursuing but would take time. In the meantime, I would recommend continuing with some degree of regulation in the interim to prevent further loss. At the very least, councils should remain free to choose how they identify and protect locally significant biodiversity.

Finally, I note that new section 78(7) empowers the Minister for the Environment to make any changes to the NPSIB that are necessary to remove inconsistency between the NPSIB and these amendments, if the Minister is satisfied that they are required. It is unclear what the constraints are on the Minister's application of this power. The Minister can amend the NPSIB under the existing arrangements for amending national direction, and can do so directly where they are minor or technical, which is sufficient to meet the policy intent of consistency. If this additional power to amend is designed to enable the Minister to make changes that go beyond mere technical inconsistencies, they should use the normal

process for amending national direction. I recommend that new section 78(7) should be removed as it is unnecessary.

Changes to coal mining provisions

Protection for SNAs and wetlands is set out in the NPSFM, NES-F and NPSIB, but there are specific consent pathways for mineral extraction activities that have adverse effects on these areas. Coal extraction is currently subject to additional controls: the consent pathway is only available for the operation or extension of existing mines (effectively precluding any new mines), and the pathway for thermal coal expires on 31 December 2030. This Bill removes the additional controls to align coal mining with the consent pathways for other mineral extraction so that new coal mines, or thermal coal mines operating beyond December 2030, may access consenting.

The current provisions seem to conflate two types of environmental effects: the impact of mining activities on the surrounding area (e.g. loss of biodiversity, impact on local water quality etc) and the impact of burning coal (i.e. greenhouse gas emissions). There is a policy logic to separating the two, so that all mineral extraction has the same consenting pathway to manage local environmental effects and dealing with other effects, not relevant to the national direction in question (e.g. emissions), separately. For that reason, I am not opposed to the Bill's intent of allowing a consenting pathway for coal mines.

If politicians want to ban coal mining, for which I think there is a defensible argument from a climate perspective, they should do so explicitly in legislation rather indirectly through national direction.

That said, coal mining might still not be permitted to proceed. Under the amendments it would need to pass the gateway test set out in the NPSFM, which demands that "the extraction of the mineral will provide significant national or regional benefits". Despite being a relatively weak threshold, in my view most coal, and in particular thermal coal, would not pass the threshold if a proper cost/benefit were undertaken.

The policy rationale relied on in the RIS for giving coal a chance is that coal is required for food production, energy security, and industrial production (steel manufacturing). Except for the last point (steel manufacturing), I find the analysis unconvincing for three main reasons:

1. The domestic market for coal to use in low-to-medium temperature industrial heat is highly uncertain as it is already in the process of being replaced by gas, biomass and electricity.
2. It is unlikely that New Zealand could compete pricewise with imports of low-quality coal for thermal use from elsewhere; and
3. If the cost of ecosystem damage were included in the consenting decision it is highly unlikely that extracting low value coal would be in the national interest. Given that over 90% of New Zealand's wetlands are lost, I would suggest that losing any more significant wetlands would come at a considerable cost.

All of this would come to light if a proper cost/benefit analysis were undertaken in respect of each proposal. This requires environmental damages to be evaluated and, where possible, quantified. Obtaining reliably accurate numbers for each physical setting would be challenging, but using approximations that give an order of magnitude is plausible and would be a useful addition to the decision-making tools currently used.

While rigorous cost/benefit analysis should be required as part of any overhaul of section 32, if the Bill is to proceed, I recommend that the gateway test of "significant benefits" in the NPSFM and NPSIB should be elaborated to specify the elements that should be included in an appropriate cost/benefit analysis.

Stock exclusion and Intensive winter grazing Regulations

The Bill proposes changes to both the *Resource Management (Stock Exclusion) Regulations 2020* and the *Resource Management (National Environmental Standards for Freshwater) Regulations 2020*. The proposed amendments would:

- Allow beef cattle and deer to enter waterways on low sloped land and allow all stock to enter natural wetlands (greater than 500 m^2). It does that by deleting the existing definition of low sloped land and repealing the relevant provisions that required stock to be excluded from those areas; and
- Allow intensive winter grazing without restriction.

Both the stock exclusion and the intensive winter grazing regulations were put in place to help reduce local water pollution (nutrient, sediment and bacteria), which is particularly high-risk for these practices. It provides clear guidance to farmers on how they can meet their statutory obligations not to pollute. Whether those regulations are workable and practical, and therefore effective, is a matter of political debate.

I note, however, that if the provisions are repealed, farmers will still have a general duty under the RMA not to pollute waterways. Section 15 of the Act provides as follows:

> (1) No person may discharge any—
>
> (a) contaminant or water into water; or
>
> (b) contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water; or
>
> (c) …
>
> (d) …
>
> unless the discharge is expressly allowed by a national environmental standard or other regulations, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent.

In the absence of promulgating further guidance, it has left farmers under a general obligation, without any guidance on what is or isn't acceptable.

I gather that it is intended that both stock exclusion requirements and intensive winter grazing will be dealt with through freshwater farm plans and/or rules in regional plans. Farm plans are currently only operative in some regions as there is a phased approach to their introduction. Furthermore, the Government has signalled the possibility of pausing the current requirements to complete freshwater farm plans.[1]

The net effect is that that the management of the environmental impacts of stock proximity to waterbodies will be at best uncertain and uneven across the country. If there is confidence that farm plans can deliver the same environmental protection as the regulations, then I would recommend that the regulations remain in place until farm plans have been brought into effect, with allowance made for their progressive removal as regions bring the plans on stream.

The select committee may be aware that I have recently issued a major report on how we deal with several environmental pressures caused by farming, including diffuse pollution from animal husbandry. My report *Going with the Grain* sees a place for farm plans in the context of much better information and more active management through catchment groups.

Farm plans as currently envisaged could become lengthy box-ticking exercises without necessarily making any real difference to environmental outcomes. If they are to be effective, there has to be real ownership of what is in them, and accountability for outcomes. Farm plans also have to make sense collectively in the context of the issues faced by the catchment. I am happy to acknowledge the serious challenges of trying to develop national regulation to govern farm settings that are, by definition, hugely variable. But rejecting national regulation should not be substituted with something bureaucratic, and potentially unenforceable.

This is not easy policy terrain. But if the certainty that current regulation provides is replaced with uncertainty, and a reluctance to hold individuals accountable for outcomes, we will simply be moving backwards. I do not sense that anyone wants that.

Rt Hon Simon Upton
Parliamentary Commissioner for the Environment
Te Kaitiaki Taiao a Te Whare Pāremata

[1] https://www.rnz.co.nz/news/country/513952/fresh-water-farm-plans-rollout-to-be-reviewed-work-underway-may-be-halted