Environmental Defence Society submission on the Resource Management (Freshwater and Other Matters) Amendment Bill

SUBMITTER DETAILS

FULL NAME: Environmental Defence Society Incorporated
ADDRESS FOR SERVICE: PO Box 91736, Victoria Street West, Auckland 1142
CONTACT: Shay Schlaepfer
EMAIL: shay@eds.org.nz

Introduction

1. The Environmental Defence Society (**EDS**) thanks the Primary Production Select Committee for the opportunity to make a submission on the Resource Management (Freshwater and Other Matters) Amendment Bill (**Bill**).

2. EDS is an apolitical, not-for-profit organisation dedicated to achieving improved environmental outcomes for all New Zealanders. It is active as a litigator, policy think tank, and conference organiser. It has dedicated considerable resource over the past seven years looking at freshwater, indigenous biodiversity and the future of the resource management system in Aotearoa New Zealand.[1] It has become a leading voice in this space.

EDS's position

3. EDS opposes the Bill. Specific reasons are provided in relevant sections below. Generally, EDS opposes the Bill because:

    (a) It is not consistent with evidence-based decision making.

    (b) It will increase the risk of further decline of indigenous ecosystems, habitats and species and degradation of freshwater.

    (c) It is not aligned with Aotearoa New Zealand's climate change commitments, budgets, targets and plans.

    (d) It is likely to be inconsistent with, or breach, several commitments under New Zealand's free trade agreements (with the United Kingdom and Europe), including:

        i. The commitment to provide for a high level of environmental protection and continue to improve environmental protections; and

[1] For a list of EDS's resource management publications see: https://eds.org.nz/our-work/policy/projects/resource-management-reform/

ii. The obligation not to weaken, reduce, waiver, or otherwise derogate from environmental laws to encourage trade or investment; and
iii. The requirement for evidence-based decision making.

(e) It will likely result in less rigorous and participatory decision making.

(f) It will create legal confusion and increase litigation risk for the Government and councils.

Excluding the hierarchy of obligations within the NPSFM 2020 from resource consent application and resource consent decision-making processes

4. EDS opposes proposed changes in the Bill relating to the National Policy Statement on Freshwater Management 2020 (**NPSFM**).

5. The freshwater environment in Aotearoa New Zealand is poor and faces multiple pressures, including land use intensification, wastewater, stormwater and livestock discharges, plastic waste, water diversion and control structures, hydropower and irrigation systems, as well as climate change.[2]

6. The current state of freshwater is putting human health and wellbeing at risk. Between 2016 and 2020 models estimated that 45% of the country's total river length was unsuitable for recreational activities like swimming, due to high risk of *Campylobacter* infection.[3] Additionally, 66% of 364 groundwater monitoring sites failed to meet the Ministry of Health E. coli drinking water standards on at least one occasion between 2014 and 2018. Similarly, 19% of 433 groundwater monitoring sites failed to meet the nitrate-nitrogen drinking water standards during the same period.

7. The state of freshwater also threatens indigenous species. In 2017, 39 of 51 indigenous freshwater species were threatened with extinction or at risk of becoming threatened. Population trends show 63% of freshwater fish species are declining.[4] Indigenous freshwater bird species are similarly affected, with 10 out of 28 species threatened with extinction and 9 at risk of becoming threatened.

8. The Resource Management Act 1991 (**RMA**) requires that consent authorities "have regard to" relevant provisions of the NPSFM when considering resource consent applications.[5] That includes Clause 1.3(5) and Objective 2.1 of the NPSFM which introduce a hierarchy of obligations in Te Mana o te Wai that prioritises:

(a) First, the health and well-being of water bodies and freshwater ecosystems.
(b) Second, the health needs of people (such as drinking water).
(c) Third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

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[2] Ministry for the Environment and Stats NZ, 2023, *New Zealand's Environmental Reporting Series: Our freshwater 2023*
[3] Ibid at 22
[4] Ibid at 23
[5] RMA, s 104(1)(b)(iii)

9. The hierarchy of obligations in Te Mana o te Wai is a real opportunity to turn the state of freshwater around. As the Parliamentary Commissioner for the Environment recently stated:[6]

> *"The NPS-FM, with the requirement to give effect to TMOTW, is a management regime that makes sense. The same cannot be said for an inverse management model (i.e. status quo) which prioritises socio-economic values and interests above and to the compromise of freshwater/environmental ones. In fact it's the opposite. Our normative freshwater regime, developed over the lifetime of the RMA (or longer), has resulted in a deficit model with negative cascading effects – which are then responded to through effects-based management.*
>
> *Models have been employed reactively as well, in response to issues associated with adverse effects, or potential effects of human activities. The NPS-FM and TMOTW are an opportunity to turn this model around to focus on abundance."*

10. The Bill seeks to remove the requirement to have regard to the hierarchy when processing resource consent applications so that:

    (a) Councils cannot request further information or commission a report on how the application aligns with the hierarchy of obligations in Te Mana o te Wai;
    (b) Councils must not have regard to the hierarchy of obligations in Te Mana o te Wai when considering an application and any submissions received; and
    (c) An assessment of the activity against the hierarchy of obligations in Te Mana o te Wai is not allowed.

11. EDS opposes the proposed changes for the following reasons:

    (a) The Ministry has limited information about the extent of the problem.[7] It is unclear if there is one.

    (b) The Government has signalled a desire to rebalance the hierarchy of obligations in Te Mana o te Wai to better reflect the interests of all water users. In the absence of an evidential problem definition, the proposed changes appear to be political, on the road to achieving the Government's wider, broader agenda.[8]

    (c) One of the main complaints with application of the hierarchy of obligations to consenting is that it increases costs. The Ministry has not been able to confirm that excluding the hierarchy will reduce costs.

    (d) Conversely, it has been able to state with certainty that the proposed change will not safeguard natural resources.[9]

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[6] Taylor L, 2023, *Te Mana o te Wai, Te Oranga o te Tāngata*, report prepared by E Oho! Awakening Aotearoa for the Parliamentary Commissioner for the Environment, at 116

[7] Ministry for the Environment, 2024, *Regulatory Impact Statement: Excluding the hierarchy of obligations within the National Policy Statement for Freshwater Management from resource consenting*, p 3

[8] https://www.rnz.co.nz/news/political/514993/government-reveals-first-changes-to-resource-management-act

[9] Ministry for the Environment, 2024, *Regulatory Impact Statement: Excluding the hierarchy of obligations within the National Policy Statement for Freshwater Management from resource consenting*, p 13

(e) There is no evidence to suggest that the hierarchy of obligations in Te Mana o te Wai was never intended to apply to resource consents (as stated by Minister Bishop during the Bill's first reading[10]), and thus no evidence to suggest that removing its relevance to consents is merely righting an inadvertent wrong.

(f) Application of the hierarchy of obligations in Te Mana o te Wai is an interim safeguard until the hierarchy can be fully implemented in freshwater plans and policy. The Government has extended the duration for notification of those instruments by three years (to 2027), thus enhancing the importance of the hierarchy in the meantime, not diminishing it.

12. Overall, EDS considers that the proposed changes increase the likelihood of further degradation of freshwater quality.

Other freshwater changes

Amending stock exclusion regulations in relation to sloped land

13. The Resource Management (Stock Exclusion) Regulations 2020 (**Regulations**) limit stock access to water bodies. The Regulations incorporate a map of low slope land to show where exclusions apply.

14. The Bill proposes to repeal requirements for exclusion of non-intensively grazed beef cattle and deer from water bodies (and all stock in relation to wetlands greater than 500 square metres) on low slope land. The intention is that exclusion of affected stock types will instead be managed by freshwater farm plans and/or regional plan rules.

15. EDS opposes the proposed changes for the following reasons:

(a) Stock exclusion measures improve freshwater health and removal of them will increase the likelihood of further degradation of freshwater quality.

(b) The extent to which the map of low slope land captures low intensity farm systems, which should not be subject to costs of implementing stock exclusion regulations due to their low risk to freshwater, is unknown.

(c) Efforts in recent years have significantly improved the map (and associated regulations) and consultation undertaken last year suggested that changes had largely addressed concerns that the map was wrongly capturing some land.

(d) The issue of excluding stock from wetlands, where they are part of lower intensity farming systems, was only identified through consultation as an issue in the Upper Taieri Scroll Plain. It is unnecessary for the Government to repeal national regulations to address a highly localised issue.

(e) Freshwater farm plans have not yet been rolled out nationally (and the deadline for their adoption has recently been extended), and many regional plans have deferred to the stock exclusion regulations for management of stock exclusion. The proposed change will create a lacuna where stock exclusion is unregulated for some time.

[10] https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb_20240528_20240528_28

Repealing intensive winter grazing regulations

16. The Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (**NES-F**) permits intensive winter grazing if it can met certain conditions, and requires consent if it cannot. The Bill proposes to repeal these rules.

17. EDS opposes the proposed changes for the following reasons:

    (a) The intensive winter grazing regulations are currently working. The Regulatory Impact Statement (**RIS**) acknowledges the substantial uptake of better intensive winter grazing practices and, as a corollary, the promising reduction of intensive winter grazing on more significantly sloped land (from 20,783ha in 2018 to 12,313 ha in 2021).

    (b) Removal of the intensive winter grazing regulations has the potential to be much worse for animal welfare and the environment, including from increased sedimentation, pollution, and surface erosion.

    (c) The Bill may lead to the perverse outcome of intensive winter grazing requiring resource consent under s 15 of the RMA (if discharges are not expressly permitted by the NES-F and there is no applicable regional plan rule). Farm plans cannot authorise an activity that requires resource consent.

    (d) The Bill may increase the risk for farmers of enforcement action for illegal discharges.

Modifying local authority obligations under the NPSIB to identify new SNAs and include them in district plans for three years

18. EDS opposes proposed changes in the Bill relating to the National Policy Statement for Indigenous Biodiversity 2023 (**NPSIB**) and Significant Natural Areas (**SNAs**).

19. Biodiversity is in crisis. Globally, and in New Zealand, species, habitats and ecosystems are being lost at high rates. New Zealand is particularly vulnerable to this loss due to its high rate of endemism. It has the highest proportion of threatened or at-risk indigenous species in the world, more than 4,000 of them.[11]

[11] Te Mana o Te Taiao Aotearoa New Zealand Biodiversity Strategy 2020

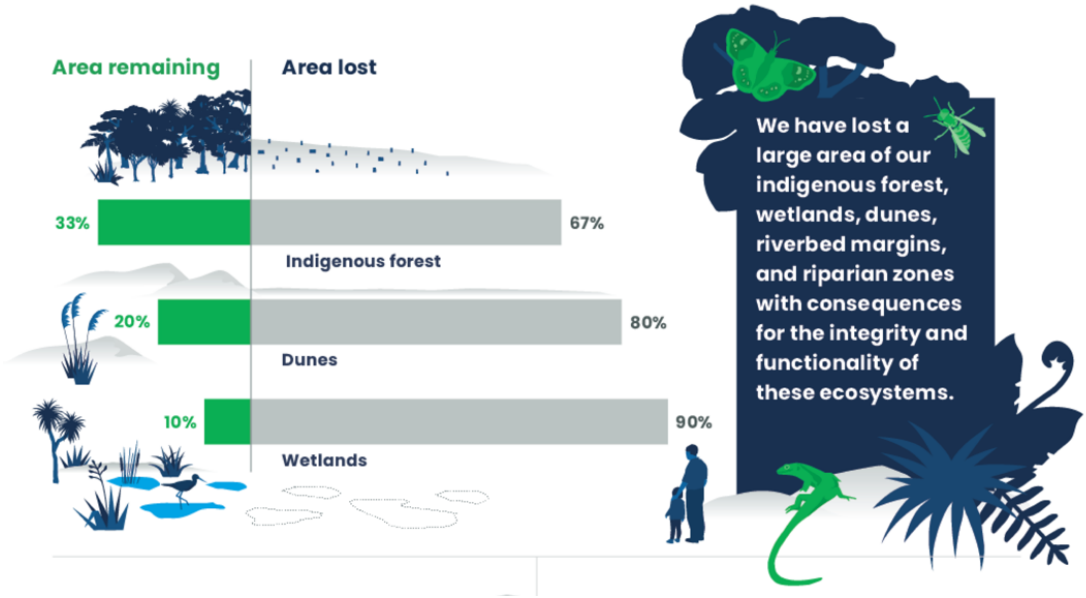

Figure 1. State of our Land[12]

20. Private land hosts a quarter of the remaining native vegetation nationwide, including 17% of native forest types that are under-represented in legally protected land.[13]

21. Section 6(c) of the RMA requires, as a matter of national importance, that decision-makers recognise and provide for "the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna". Councils are specifically tasked with maintaining indigenous biological diversity.[14] These directives have largely been implemented via vegetation clearance rules and, increasingly, via the identification and mapping of SNAs and associated regulatory response.

22. The NPSIB was promulgated to assist councils with the latter, and in response to recognition that the status quo was replete with litigation on the same issues region by region and that a national response to indigenous biodiversity was required. Its development was informed by the Biodiversity Collaborative Group (**BCG**), a stakeholder-led group established to create cross-sector, consensus-based national level policy for indigenous biodiversity. The shared goal was simply to ensure no further decline in indigenous biodiversity.

23. EDS, Federated Farmers, iwi and others were members of the BCG. The Group developed what it considered a "pragmatic" package, including a draft NPSIB (**BCG Draft**) that recommended (by consensus):[15]

    (a) Objective and independent assessments of places by suitably qualified ecologists against evidence-based criteria and ecosystem attributes for each criterion.
    (b) Consistent application of these criteria, with SNAs identified, described and mapped across the motu.

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[12] Ministry for the Environment and Stats NZ, 2024, *New Zealand's Environmental Reporting Series: Our land 2024*, p 24
[13] Ibid at p 28
[14] RMA, ss 30 and 31
[15] Report of the Biodiversity Collaborative Group 2018

(c) Management and protection of SNAs and other indigenous biodiversity to ensure no further loss while enabling new and existing land-use activities, providing certainty for industry, communities, iwi and other stakeholders.

24. The Ministry adopted the substance of many of these consensus-based recommendations in its 2019 draft NPSIB. After further minor amendments, the current NPSIB was gazetted in 2023.

25. The Bill proposes to:

(a) Suspend the requirement for councils to identify new SNAs for three years;
(b) Extend the deadline for councils to publicly notify policy statements or plans mapping SNAs to 2030;
(c) Remove the requirement for councils to assess SNAs when doing plan reviews;
(d) Change the legal status of SNAs included in plans and policies during the next three years so they are not to be treated as SNAs; and
(e) Allow the Minister to make changes to the NPSIB if there is actual or potential inconsistency between the NPSIB and the Bill, or to clarify the relationship between the two.

26. The proposed changes are to give effect to the National-Act coalition agreement to cease implementation of new SNAs and to seek advice on the operation of existing SNAs as part of the Government's programme to reform the RMA to better provide for private property rights.

27. EDS opposes the changes for the following reasons:

(a) There has been no regulatory impact statement on the proposed changes. They are not evidence-based.

(b) As articulated in the Bill's explanatory note:

> "*The NPSIB 2023 directs local authorities on how to discharge RMA requirements regarding indigenous biodiversity. It provides a consistent framework and assessment criteria for councils to identify and include SNAs within their policy statements and plans, and to manage the effects of development on SNAs. It also specifies time frames for those actions*."

It is an eminently sensible method of implementing the RMA's indigenous biodiversity directives.

(c) A nation-wide stocktake of indigenous biodiversity is essential to understanding the state of species, habitats and ecosystems. Key government priorities, such as that outlined in its Draft Minerals Strategy to 2040, cannot be effectively implemented without this knowledge. As stated in the Strategy, "[p]roduction growth will not come at the expense of environmental outcomes", but how can that be assessed in the absence of information and data on indigenous biodiversity?

(d) The Government's concerns relating to SNA identification under the NPSIB (e.g., that it captures too much land) are misplaced and inaccurately informed. The following

aspects of the NPSIB largely reflect the collaborative and science-based BCG Draft, which multiple stakeholders agreed to:[16]

i. The SNA identification criteria;
ii. The assessment principles for each criterion;
iii. The attributes of each criterion against which areas are assessed; and
iv. The manner and form of assessment, including most information requirements and the requirement for the assessment to be undertaken by a suitably qualified ecologist.

(e) The NPSIB is not overly restrictive with respect to activities that can occur within SNAs. Avoidance of specified effects on SNAs is limited. Other effects are managed in accordance with the effects management hierarchy, which provides pathways for offsetting and compensation. The NPSIB provides pathways for specific land-uses to circumvent 'avoid' requirements. Such activities include: [17]

i. Use or development required to address a high risk to public health or safety;
ii. Construction or upgrade of specified regionally or nationally significant infrastructure;
iii. Mineral extraction that provides significant national public benefit; and
iv. Aggregate extraction that provides significant national or regional public benefit.

The NPSIB is also permissive with respect to existing activities on SNAs (like farming),[18] requiring councils to enable established activities to continue where certain conditions are met (and if conditions cannot be met, the existing activity is managed as if it were a new subdivision, use or development).

Compared to the BCG Draft and 2019 draft NPSIB, the approach outlined above is more permissive. In those drafts, SNAs were classified as either 'medium' or 'high' value, with the above pathways for certain activities provided only for those activities affecting medium value SNAs. In other words, 'high' value SNAs were almost completely off the table.

The NPSIB does not distinguish between high and medium value SNAs and provides pathways for land-use activities no matter the level of significance of SNA values.

(f) The NPSIB brings national consistency to the identification and protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna, as required by s 6(c) of the RMA and by councils' regulatory functions. These legal directives are unchanged by the Bill. Thus, councils are still legally required to recognise and provide for SNAs and maintain indigenous biological diversity. The Bill delays implementation of an evidentially-based and collaboratively developed process for doing so.

(g) The Bill has the potential to confuse councils as to their legal responsibilities with respect to SNAs, creating significant legal risk.

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[16] Report of the Biodiversity Collaborative Group 2018, Appendix 1
[17] NPSIB, clauses 3.10 and 3.11
[18] NPSIB, clauses 3.15 and 3.17

(h) In fulfilling their ongoing legal obligations with respect to SNAs, the Bill has the potential to create uncertainty for councils about what significance criteria should be used.

(i) The Bill creates an artificial divide between SNAs currently in plans/policies and proposed plans/policies and those introduced into these instruments after the Bill is enacted. The former are to be treated as SNAs, the latter are not. This ignores the reality of these areas having met the significance criteria and creates significant legal uncertainty about the legal status and application of such areas.

(j) The Bill may lead to the perverse outcome of a return to vegetation clearance rules that apply everywhere, rather than targeted rules for SNAs only.

28. Overall, EDS considers that the proposed changes increase the likelihood of further decline of indigenous biodiversity and litigation.

Aligning the consenting pathway for coal mining with other extractive activities across national direction

29. The NPSFM, NES-F and NPSIB provide a consenting pathway for the operation or expansion of *existing* coal mines in or around natural inland wetlands and SNAs.[19] Provision for such mines is only provided until 2030, after which date only applications for the operation or expansion of coking coal can be considered.[20]

30. There is no consenting pathway for *new* coal mines.

31. The Bill seeks to reverse this by:

(a) Allowing new coal mines in or around natural inland wetlands and SNAs; and
(b) Removing the sunset clause that limits the consenting pathway for thermal coal beyond 2030.

32. EDS opposes these proposed changes for the following reasons:

(a) They lack a clear evidence-base. As set out in the Ministry's Supplementary Analysis Report (**SAR**), there is insufficient evidence that legislative amendments are required to enable increased domestic coal production or that the proposed amendments would in fact increase production (i.e. address the perceived issue of lack of domestic supply).

(b) Providing for new coal mining is inconsistent with Aotearoa New Zealand's climate change commitments and emissions reduction targets, budgets and plans.

(c) Aotearoa New Zealand needs to reduce its reliance on coal while developing renewable alternatives to meet long-term emissions targets.[21] The proposed amendments do not promote the necessary transition away from a reliance on fossil

[19] NES-F, reg 45D(7); NPSFM, cl 3.22(1)(e)(i); and NPSIB, clauses 3.10(2) and 3.11(1)(a)(ii)
[20] NES-F, reg 45D(8); and NPSIB cl 3.11(1)(a)(iv)
[21] Ministry of Business, Innovation and Employment, 2024, *Supplementary Analysis Report: Amending the consenting pathway for coal mining in or around wetlands and significant natural areas*, p 11

fuels. Indeed, they do the opposite by providing for long-term increased extraction and consumption of coal.

(d) They undermine protections for areas with high conservation and biodiversity values (i.e. wetlands and SNAs). The SAR acknowledges that mineral extraction can cause "significant destruction to the sites in which they occur" and there is a "risk of irreparable damage to, and loss of, natural wetland area if a consent pathway is to be provided".[22] Mining activities have directly contributed to declines in indigenous ecosystems, habitats and species. For example, coal mining near Westport led to the destruction of critical habitat for the critically endangered *Powelliphanta augusta* or 'Mount Augustus snail'.[23] Surviving snails are now kept in fridges due to lack of suitable habitat.

(e) The proposed amendments would enable an applicant to seek resource consents for coal mining within 10m of a natural wetland even though:

i. It results, or is likely to result, in the complete or partial drainage of all or part of the wetland;[24]
ii. The taking, use, damming, or diversion of water will change, or is likely to change, the water level range or hydrological function of the wetland;[25] or
iii. A discharge will change, or is likely to change, the water level range or hydrological function of the wetland.[26]

(f) The proposed changes would undermine current protections for SNAs by enabling coal mining despite:[27]

i. Loss of ecosystem representation and extent.
ii. Disruption to sequences, mosaics, or ecosystem function.
iii. Fragmentation of SNAs or the loss of buffers or connections within an SNA.
iv. A reduction in the function of the SNA as a buffer or connection to other important habitats or ecosystems.
v. A reduction in the population size or occupancy of threatened or at risk (declining) species that use an SNA for any part of their life cycle.

(g) Aotearoa New Zealand's wetlands and indigenous biodiversity need urgent protection. Natural wetlands and SNAs are hotspots for declining biodiversity and provide important biophysical controls to mitigate human hazards such as flooding, eutrophication and contamination of drinking water.

(h) Removing environmental protections to avoid a prospective court case and the risk of court fees is inappropriate and fails to respect core constitutional principles.

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[22] Ibid p 12
[23] See case-study in Deidre Koolen-Bourke and Raewyn Peart *Conserving Nature: Conservation Reform Issues Paper* (Environmental Defence Society, Auckland, July 2021), at p 115
[24] NES-F, reg 45(3)
[25] NES-F, reg 45(4)(c)
[26] NES-F, reg 45(5)(d)
[27] By amending cl 3.11(1)(a)(ii) of the NPSIB to include a carve out for new coal mining that impacts SNAs

Amendments to speed up process to prepare or amend national direction

33. EDS does not support the proposed changes to the process by which national direction (national environmental standards and national policy statements) is made in the Bill insofar as:

    (a) Public participation, and associated timeframes, will be weakened under proposed changes to s 46A of the RMA.
    (b) Section 32 evaluations will be weakened, including by removing references to the precautionary approach and the purpose of the RMA.
    (c) The Bill proposes to remove requirements for further evaluation reports under s 32AA, meaning that significant changes to national direction may escape proper scrutiny.
    (d) The Bill proposes to expand the situations in which the Minister can amend existing national direction without using a formal process.

34. Under the RMA, the Minister can recommend to the Governor-General that national direction be made or amended.

35. The Minister's recommendation is informed by a report generated via either a formal Board of Inquiry process (s 46A(3)(a) of the RMA) or by an alternative, more flexible, consultation process (s 46A(3)(a) of the RMA) (the **alternative process**).

36. The Bill proposes to remove the Board of Inquiry option.[28] EDS is agnostic as to the removal of this process. A Board of Inquiry has not been utilised to create or amend national direction since 2010.

37. However, we do not consider that the alternative process should be regarded as any less robust. We note with concern the Ministry's assessment that the "continued presence" of the Board of Inquiry process "has given rise to the perception that the alternative process needs to be of a similar scale and rigour" to a Board of Inquiry, and that it has been "over-engineered".[29] The implication is that the alternative process will be less robust in the future, which is concerning if it is to be the only mechanism available. Some contexts demand rigour, which is why a somewhat similar Independent Advisory Panel chaired by a retired Environment Court Judge was set up to assess the Essential Freshwater regulatory package in 2019-2020.

38. The Bill proposes several subtle but significant changes to the alternative process for the creation or amendment of national direction. These proposed changes water-down the process, making it less democratic and less evidence-based. They remove or weaken many of the checks and balances contained in the RMA around the creation or amendment of national direction.

Removing unnecessary prescription from the national direction process

39. There are two proposed changes within the scope of this issue:

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[28] Resource Management (Freshwater and Other Matters) Amendment Bill, cl 13
[29] Ministry for the Environment, 2024, *Supplementary analysis report* at p 2

(a) Amending the notification provision in s 46A(4)(b) of the RMA; and
(b) Removing reference to the list of requirements set out in s 51 of the RMA.

Public participation

40. Effective public participation is an important part of the creation or amendment of national direction.

41. Under the alternative process for national direction, the RMA requires that those notified be provided "adequate" time and opportunity to submit.[30] The Minister currently determines what is adequate.

42. The Bill seeks to amend that by more explicitly stating that the submission period is at the Minister's discretion. It adds the words "what the Minister considers to be" to s 46A(4)(d) of the RMA, in the context of what is adequate time and opportunity to submit.[31]

43. The SAR states that the change is to align the process of creating national direction with that for National Planning Standards.[32] This is considered advantageous as the planning standards process is "less prescriptive and the drafting is clearer".

44. Aligning the consultation processes for new and amended national direction with that for National Planning Standards is inappropriate. National environmental standards and national policy statements have far more substance than planning standards. They therefore warrant greater oversight and public participation.

45. In any event, the suggestion in the SAR that the proposed change does no more than ensure consistent language, without any substantive implications, is undermined by:

(a) The SAR's contradictory assertion that "the most significant costs of the proposal is the potential reduction in opportunities for public participation" and that there "may be instances where a national direction proposal is made with more limited opportunities for submissions that may have occurred counterfactually."[33] Further, with specific reference to the proposed change to s 46A(4)(d), the SAR identifies a "risk that there will not be adequate time and opportunity for submissions.[34]

(b) The SAR's assertion that the "risks of process challenge" would be reduced. In this manner, the proposed change appears to be an attempt to minimise the chances of successful judicial review of the Minister's decision on the adequacy of consultation. In particular, it appears to be a legislative attempt to push back on a recent decision of the Court of Appeal in *Muaupoko Tribal Authority Incorporated v Minister for the Environment.*[35]

In that case, the Court reviewed what was adequate consultation in the context of new national direction. The Court held that the Government had not adequately

[30] RMA, 46A(4)(b)
[31] Resource Management (Freshwater and Other Matters) Amendment Bill), cl 11(7)
[32] Ministry for the Environment, 2024, *Supplementary analysis report*, para 9(c)
[33] Ibid at p 3
[34] Ibid at para 25
[35] *Muaupoko Tribal Authority Incorporated v Minister for the Environment* [2023] NZCA 641 from [137]

consulted on the change to national direction and provided some guidelines for what constitutes adequate consultation:

i. If consultation is to be adequate, the opportunity for input must be meaningful.[36]
ii. Those being notified/consulted must have a reasonable opportunity to state their views.[37]
iii. They must be properly informed about what is proposed so that they can make appropriate decisions and respond fully.[38]
iv. In some cases, a single conversation may suffice; in other contexts, consultation may demand months or years of consultation.[39]
v. The obligation to consult and/or to notify, receive and consider submissions can trigger an obligation to start afresh and reconsult where a substantial change to the original proposal is contemplated.[40]

The Court held that what is adequate will also depend on the context and nature of the proposal. Some contexts will require "extra diligence".[41] Some national direction will require "considerable caution notwithstanding the possibility of delay" arising from consultation.[42]

46. In this context, it is unreasonable for the SAR to assert that the risk of inadequate time and opportunity for public consultation on new and amended national direction is minimal because there is no change from the status quo. Clearly, the risks outlined above signal there is intended to be a substantive change. The Government cannot have a bob each way and assert both that there is no real change but also that there are risks as a result of the change. That is contradictory.

47. If enacted, there is a risk that Ministers will use the proposed change to s 46A(4)(d) to impose inappropriately short submission deadlines on potentially significant changes to national direction. In light of the unreasonably short timeframes imposed for recent consultations (including on policy changes in this Bill) that risk is far from fanciful.[43]

48. EDS therefore opposes the amendment to s 46A(4)(b).

Removing list of requirements

49. Currently, any report to the Minister on new or amended national direction must consider, among other things, Part 2 of the RMA and evidence received.[44]

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[36] Ibid at [139]
[37] *Port Louis Corp v Attorney-General (Mauritius)* [1965] AC 1111 (PC), [1965] WLR 67 at 1124; and *Board of Trustees Phillipstown School v Minister of Education* [2013] NZHC 2641 at [60]
[38] *Muaupoko Tribal Authority Incorporated v Minister for the Environment* [2023] NZCA 641 at [139]
[39] Ibid at [139]; *Wellington International Airport Ltd v Air New Zealand Ltd* [1993] 1 NZLR 671 (CA) at 675
[40] *Muaupoko Tribal Authority Incorporated v Minister for the Environment* [2023] NZCA 641 at [139]
[41] Ibid at [141]
[42] Ibid at [141]
[43] For example, the public was given only a few days to provide comment on policy proposals to amend legislation to extend duration periods for existing aquaculture consents, and to provide comment on policy underpinning the Fast-track Approvals Bill, prior to the introduction of Bills to the House
[44] Resource Management Act 1991, ss 51(1) and 46A(4)(d)

50. The Bill proposes to delete this requirement[45] on the basis that it would "clarify the process for national direction, remove prescription and ensure consistency across the RMA".[46] There is no analysis of what impact this proposal will have.

51. This will mean that evidence can be ignored in the report to the Minister. That is completely at odds with the approach taken in other parts of the RMA. No where else is evidence provided for and then disregarded by decision makers. What would be the utility of it in the first place?

52. The proposed change means that the purpose and principles of the RMA, the very law the national direction is being promulgated under, can be ignored. That idea is so preposterous it beggars belief.

53. We can only hope that the proposed change is a drafting error, with the intention being not to remove reference to Part 2 but rather to remove cross-reference to a section of the RMA that will be repealed by the Bill.

54. EDS therefore opposes repeal of s 46A(4)(d). If the section is to be repealed, an equivalent of s 51(1)(a) and (d), which requires consideration of Part 2 and evidence received, should be inserted into s 46A.

Amending evaluation report requirements to make them less onerous and more proportionate

55. There are two proposed changes within the scope of this issue:

    (a) New evaluation report for national direction; and
    (b) Removing the requirement for further evaluation reports.

New evaluation report for national direction

56. The Bill proposes to introduce a new evaluation report for national direction. It seeks to replace ss 32 and 32AA RMA with a new s 32AB.

57. The SAR describes this change as follows:[47]

> "*Evaluation reports for national direction would require a narrower scope of assessment compared to the status quo. They would require a broad assessment of consistency with the Act's purpose, reasonably practical alternative options and broader environmental and economic impacts but would not require quantification of costs and benefits or an assessment of cultural effects anticipated from implementation of the proposal*."

58. There may well be a case for streamlining s 32, which is lengthy and complex. However, its proposed replacement has significant risks and would not be fit for purpose. It is not "comprehensive" as claimed by the SAR.[48]

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[45] Resource Management (Freshwater and Other Matters) Amendment Bill), cl 11(9)
[46] Ministry for the Environment, 2024, *Supplementary analysis report*, para 9(d)
[47] Ibid at 12
[48] Ibid

Section 32AB – reference to the purpose of the RMA

59. Despite what the SAR asserts, there is no requirement in proposed s 32AB for the Minister to consider consistency with the RMA's purpose. The purpose and principles of the RMA (Part 2) is not mentioned at all in the section. Nor is the current s 32 requirement to consider whether national direction is the most appropriate way to achieve the purpose of the RMA.

60. Instead, the requirement would be to consider the "effectiveness" of the proposal (which raises the question, effectiveness in achieving *what*, if not the purpose of the RMA), and the impact on environment and economy (again, with no reference to how the importance of such things are to be measured in light of the purpose of the RMA).

61. Thus, while s 32 might be usefully streamlined with respect to national direction, it should retain a clear requirement for evaluations to assess whether a proposal is consistent with the purpose of the RMA. This would appear to be consistent with the policy intent expressed in the SAR.

Section 32AB - precaution

62. Proposed s 32AB removes the s 32(2)(c) RMA requirement to assess the risk of acting or not acting if there is uncertainty in information. Essentially, this means that the precautionary principle will no longer apply to Ministers.

63. Internationally, precaution has been recognised as one of the key pillars of environmental law, and s 32 is the primary place in which it is recognised in the RMA. Based on the wording of s 32, and the scheme of the RMA more generally, precaution has been subject to careful interpretation in the courts. It should not risk being lost by excluding it from proposed s 32AB.[49]

64. The Bill risks national direction being made or changed in a way that underemphasises potential environmental impacts and instead focuses on its effectiveness in achieving the policy priorities of Ministers (including development-focused drivers).

65. EDS submits that if s 32 is to be replaced, reference to the precautionary approach and the risks of acting/not acting based on uncertainty should remain intact. This should be modelled on s 10(4) of the Natural and Built Environment Act 2023 (**NBE Act**).[50]

Comparison with the NBE Act

66. The SAR asserts that proposed s 32AB would be similar to that included in the NBE Act.[51] That is not the case. Section 32AB has material differences to equivalent provisions in the NBE Act (Schedule 5 cl 7).

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[49] We note also that the Natural and Built Environment Act 2023 had a precautionary principle of general application (applicable to all decisions made under the Act) under section 10, which explains the absence of a comparable precautionary principle in its requirements for evaluation reports on national direction

[50] If information required for decision making under this Act is uncertain or inadequate, a person exercising powers and performing functions and duties under this Act must favour—(a) caution; and (b) providing a level of protection for the natural environment and cultural heritage that is proportionate to the risks and effects involved

[51] Ministry for the Environment, 2024, *Supplementary analysis report,* para 28

67. This is significant, because their alleged similarity is one of the key justifications given for a lack of consultation on the Bill.[52] Essentially, the reasoning is that changes have already been subject to extensive public input and policy development so need not be rehashed.

68. The differences between proposed s 32AB and Schedule 5, cl 7 of the NBE Act means that the costs and benefits of key aspects of s 32AB have not been assessed.

69. The table below compares the evaluation report requirements for national direction under the NBE Act (under what would have been a single National Planning Framework (**NPF**)) and the Bill.

Requirement in the NBE Act (Schedule 5, cl 7)	Comparison with proposed s 32AB
The extent to which a NPF proposal presents the most appropriate way to achieve the purpose of the Act	No equivalent (no mention of purpose, principles, Part 2 etc)
The effectiveness of the NPF proposal to achieve the system outcomes	Only reference to the effectiveness of the proposal (no mention of purpose, principles, Part 2 etc)
How the decision-making principles have been used to determine how to provide most appropriately for the system outcomes	No equivalent (which is significant, given that separate principles in the NBE Act were where the precautionary approach was contained)
The impact on the environment and on the economy (whether adverse or beneficial), whether to regulate or not to regulate [sic]	Similar, but with the notable difference that it does not specifically include consideration of impacts of *not* regulating
The reasonably practicable alternative options in the proposal for achieving the purpose of the Act	Similar, but no reference to purpose of the Act
The reasons for preferring the selected option	No equivalent (no direction to provide justification for preferred option)
Prepared in a way that is cost-effective	Replicated
Provides a level of detail that is proportionate to the scale and significance of the proposal	Replicated
Is succinct and plainly expressed	Replicated
Optimises the usefulness of the evaluation to decision makers and the public	Largely replicated
Responds to any matters raised in the advice of the limits review panel provided to the Minister.	No equivalent

70. Overall, it is clear that the evaluation reports prepared for national direction under both the RMA (s 32) and NBE Act (Sched 5, cl 7) were more rigorous than those proposed under s 32AB.

Section 32AB and regulatory impact assessment

71. Another justification given for replacing s 32 of the RMA with a diminished version (proposed s 32AB) is that the Government already has other mechanisms by which the costs and benefits of policies (and alternatives) are assessed. Specifically, the SAR states that there is overlap and duplication between evaluation reports required under s 32 and the more general regulatory

[52] Ibid at p 4

impact assessment required for development of government policy (including regulatory impact statements, Cabinet papers, briefings and submissions reports). This duplication is described as "onerous".[53]

72. EDS does not agree. Section 32 reports are currently statutory requirements, whereas regulatory impact assessments are not (although they are required by the Cabinet Manual) and can be waived (as was recently done for assessments implementing polices in the Government's 100 day plan).

73. The national direction elements of the Bill are a case in point – they have themselves not been subject to full regulatory impact assessment due to time constraints. Instead, the Ministry has produced a less detailed SAR. This has meant that "no engagement has been undertaken on the preferred option with Iwi/Māori, Post Settlement Governance Entities (PSGE), stakeholders or the general public due to time constraints" and there is "a very constrained analysis of options to address the problem, a lack of data and uncertainty with the analysis."[54]

74. Moreover, unlike s 32 analysis, regulatory impact assessments are linked to flexible criteria that are not focused on the purpose of the RMA. Ministers have considerable latitude to set those criteria themselves.

75. Ministers also have the ability to limit the options looked at through regulatory impact assessments. With respect to the current Bill, "the scope of the proposal was limited by policy decisions taken at Cabinet and by the Minister Responsible for RMA Reform."[55] It appears that only one option was assessed.[56] Section 32 reports are not constrained in the same way.

76. Overall, the existence or perceived overlap between s 32 evaluation reports and regulatory impact assessments is not a sound justification for weakening the s 32 analysis. It risks proposals being developed that are not consistent with Part 2 of the RMA.

Further evaluation reports

77. Currently, s 32AA of the RMA provides for further evaluation reports to be prepared where changes have been made since the initial s 32 evaluation report was prepared. The Bill proposes to dispense with further evaluation reports for national direction.[57]

78. Doing so carries risks. Without it, national direction could be altered significantly from the notified version with very little scrutiny or transparency. Under s 32AA(1)(c), further evaluation reports are only required to be of a level of detail that corresponds to the scale and significance of the changes. In other words, minor changes to draft national direction do not require onerous evaluation, undermining the rationale in the SAR for disapplying the section.

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[53] Ibid at p 3
[54] Ibid at pages 3, 5
[55] Ibid at p 9
[56] The SAR mentions four options, but the report itself does not appear to outline what they are and instead undertakes a cursory assessment of the option that is reflected in the Bill
[57] Resource Management (Freshwater and Other Matters) Amendment Bill, cl 6

79. The SAR does not provide an assessment of the risks or benefits of removing the application of section 32AA.[58] Instead, it simply states that it is no longer considered fit for purpose, with no elaboration.[59]

80. EDS therefore opposes replacement of s 32 for national direction and its replacement with s 32AB, and the disapplying of s 32AA for national direction.

Making it easier to make simple updates to national direction where a full national direction process would be disproportionate

81. Under the RMA, the Minister can amend a National Environmental Standard without consultation if the change has a minor effect, corrects errors or makes technical alterations.[60]

82. The Bill proposes to replace this section so that the Minister can make changes without consultation to:[61]

    (a) Align with a New Zealand Standard within the meaning of section 4 of the Standards and Accreditation Act 2015.
    (b) Implement New Zealand's obligations under any international convention, protocol, or agreement to which New Zealand is a party.
    (c) Give effect to provisions in an emissions reduction plan or national adaptation plan.
    (d) Change the time frame for implementation of any part of a national environmental standard.
    (e) Remove provisions in a national environmental standard that are no longer required as a consequence of changes to legislation.
    (f) Make changes that are no more than minor in effect, to correct errors, or to make similar technical alterations.

83. The Bill also expands application of the section to national policy statements and national planning standards.[62]

84. The SAR justifies this change on the basis that "the processes available for making minor updates to national direction are interpreted so narrowly as to be rarely used. This has resulted in unnecessary use of the more costly and time-consuming alternative process which is not proportionate to the effects of minor updates".[63] No examples of the "minor updates" that have suffered this fate are provided, so it is unclear what has been regarded as "minor" and what has not.

85. The proposed change captures a much wider range of updates to national direction that can be made behind closed doors. The new list of potential changes made without public involvement are not all "simple"[64] or "minor"[65] updates.

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[58] Ministry for the Environment, 2024, *Supplementary analysis report*, page 28
[59] Ibid p 26
[60] Resource Management Act 1991, s 44(3)
[61] Resource Management (Freshwater and Other Matters) Amendment Bill, cl 10
[62] Resource Management (Freshwater and Other Matters) Amendment Bill, clauses 6(3), 20
[63] Ministry for the Environment, 2024, *Supplementary analysis report*, p 7
[64] Ibid p 2
[65] Ibid p 10

86. In particular, being able to change the timeframes for implementing national direction provides a mechanism for indefinitely neutering these instruments. Implementation timeframes may be vital for achieving environmental outcomes for which standards have been prepared in the first place. Timeframes may also be vital to enable forward planning for councils, and may have been carefully crafted as a result of consultation with experts and the public. Ministers should not have unilateral power to switch them on or off at will (or delay their application in some parts of the country, e.g., those that are most polluted)[66] without a formal process involving public consultation.

87. Although climate change mitigation and adaptation is crucial, it is important that this occurs synergistically with protection of high environmental values. For example, adaptation could be provided for via ecologically harmful hard protection structures, while mitigation could occur by providing for solar energy in sensitive ecosystems or landscapes. Emissions reduction plans and national adaptation plans are not regulatory instruments and therefore require robust processes by which they are translated to regulatory standards or policy under the RMA (a process by which independent analysis and public submissions occur, and where national direction is assessed against the objectives of the RMA).

88. Due process should also be followed when implementing international obligations in domestic law. Some international agreements may not align with the purpose of the RMA, and removing procedural requirements for translating them into national direction would be an inappropriate use of ministerial powers.

89. The SAR explains, with respect to matters in proposed s 44(3), that "all of these processes are developed using a consultative process involving public submissions."[67] However, other participatory processes are not as robust as under the regulatory framework of the RMA and are not guided by its purpose and principles. It is significantly less likely that the public and civil society will engage in the development of New Zealand Standards and international agreements than with RMA processes.

90. Finally, under the NBE Act a streamlined process was available for changing national direction. However, this was only available where an amendment did not represent a "significant departure" from existing direction and it was appropriate in light of the extent and timing of public consultation on the matter. EDS would support a similar approach in this Bill.

91. While EDS supports the intent to streamline the preparation of national direction, this should not come at the expense of due process.

Wish to be heard

92. EDS wishes to be heard in support of its submission.

[66] Compare *Muaupoko Tribal Authority Incorporated v Minister for the Environment* [2023] NZCA 641
[67] Ministry for the Environment, 2024, *Supplementary analysis report*