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

## Coversheet

| Purpose of Document | |
|---|---|
| Decision sought: | *Decisions to amend s107 of the Resource Management Act to minimise regulatory burden while retaining the core purpose of protecting freshwater.* |
| Advising agencies: | *Ministry for the Environment* |
| Proposing Ministers: | *Minister Responsible for RMA Reform* |
| Date finalised: | *[ie, date the RIS was signed out]* |

**Problem Definition**

The Resource Management Act 1991 (RMA) requires a regional council to be satisfied that the discharge of a contaminant will not result in any significant adverse effects on aquatic life, among other matters, before it can permit[1] (s70), or issue a consent[2] (s107) for that discharge.

Recent court decisions on s70 and s107 mean that discharges with those effects cannot be permitted or consented in degraded catchments – even where effects would be mitigated over time.

As a consequence, existing discharges (eg, from wastewater, meat processing, farming) in significantly degraded catchments[3] are unlikely to obtain replacement consents unless they can avoid significant adverse effects on aquatic life from day one of a new consent. Where activities cannot get a discharge consent, those activities will need to stop or ultimately become unlawful.

Environment Canterbury (ECan), which is probably the most heavily affected council, estimates that at least 525 discharge consents could be impacted by mid-2025. Many of those renewal applications are likely to either be declined, or otherwise be delayed in anticipation of a law change, which could prove costly because of the time penalties for consent delays which reduce councils' ability to fully recover their processing costs.

[1] As a permitted activity rule in a plan.

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

[3] We cannot put a number on how many catchments are significantly degraded, as it varies depending on the indicator (eg, nutrients, sediment, macroinvertebrate index, faecal bacteria), but, as a proportion of New Zealand's total land area, catchments where contaminant reductions are needed cover: 11% for total phosphorus (TP), 20% for total nitrogen (TN), 49% for sediment, and 79% for faecal bacteria (*E. coli*). These percentages would be higher if the area of undeveloped land (eg, conservation land) were excluded from the denominator. Catchments considered 'significantly' degraded are a subset of these percentages.

The resulting restriction on consenting discharges may not align with settings in the National Policy Statement for Freshwater Management 2020 (NPS-FM), which enable improved freshwater outcomes over time (with timeframes and methods for achieving those outcomes to be determined by councils and communities).

## Executive Summary

### Context

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

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

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

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

### Recent court decisions have changed how these provisions apply

In cases where a discharge would render a waterbody fully or over allocated, councils have allowed them, provided that adverse effects are mitigated over time. However, recent High Court decisions[4] have found that this staged mitigation approach is unlawful as both s70 and s107 require the listed effects to be unlikely before permission is given.

This interpretation means that discharges with those listed effects cannot be permitted or consented in degraded catchments – even where effects would be mitigated over time.

Many activities in degraded catchments now face the possibility of not getting or renewing discharge consents and not being able to function without them. Affected sectors include not only agriculture, but also industrial activities, infrastructure, stormwater and wastewater.

Such restrictions on consenting, in degraded catchments, may not align with settings in the National Policy Statement for Freshwater Management 2020 (NPS-FM), which enable:

- improved outcomes for freshwater to be worked towards over time; and
- councils and communities to determine the timeframes and methods for achieving those outcomes.

[4] *Federated Farmers Southland Incorporated v Southland Regional Council* [2024] NZHC 726 [9 April 2024], and *Environmental Law Initiative v Canterbury Regional Council* [2024] NZHC 612 [20 March 2024].

Councils also have concerns that a potential increase in consent processing loads (due to discharges no longer being permitted activities) could elevate the risk of delays and associated penalty costs.

**Urgency in addressing this problem**

The case for urgently addressing this problem is compelling. The High Court's interpretation of s107 is already in effect and will soon be impacting on discharge consent decisions. ECan estimates that it will receive at least 525 applications for discharge consent renewals by mid-2025. Many of those renewal applications are likely to either be declined, or otherwise be delayed in anticipation of a law change, which could prove costly because of the time penalties for consent delays which reduce councils' ability to fully recover their processing costs.

In response to these issues, regional councils, dischargers, and primary sector groups have requested changes to s70 and s107. Their aim is to avoid the risk to business, and economic and social impacts, of immediate discharge cessation (through consents being declined).

**Amendments to s70 not considered here (future work instead)**

Amendments have also been proposed to s70 (by regional councils, dischargers, and primary sector groups), similar to those proposed for s107, that would enable councils to set permitted activity rules for discharges with listed effects. However, the argument for urgency is less compelling with s70. This is because:

a. the court's decision on s70 has no immediate impact on resource users since it applies to council plans and will only have an impact when councils make the necessary plan changes, which could be several years
b. by then, amendments to s107 may be providing sufficient certainty around discharge consents for changes to s70 to no longer be warranted
c. the recently requested changes to s70 raise fundamental questions about the intent of the RMA and permitted activity status, and the balancing of environmental and economic risk, and therefore merit wider consultation and public input.

Since the regulatory effects of s70 are not imminent, the benefits of amending it are uncertain, and there are significant limitations on engagement with Māori and stakeholders, OIA s9(2)(f)(iv) [redacted]

A RIS will accompany those proposals and therefore the options and impacts for s70 changes are not evaluated further here.

**Options**

The options considered are referred to here as staged mitigation (Option 1) and exclusion for diffuse discharges (Option 2). These have been developed from proposals put forward in the various requests for change.

Both options would enable councils to grant discharge consents even where listed effects are likely. However, the options differ in these respects:

- Option 1 (proposed by regional councils) would (i) enable both diffuse and point source discharges to get consent where (ii) significant adverse effects on aquatic life are likely, but not where other listed effects are likely, provided that (iii)

conditions would contribute to an overall reduction in those adverse effects over the duration of the consent.
- Option 2 (proposed by pastoral farming interests) would (i) enable diffuse discharges to get consent, but not point source discharges, where (ii) any or all of the listed effects are likely, and (iii) with no requirement to mitigate the effects over the life of the consent. A similar option has been proposed by horticultural interests, with the diffuse discharge exclusion confined to commercial vegetable growing areas.

Both options would reduce costs and increase flexibility for dischargers when compared with the counterfactual scenario created by the court decision. Option 1 would do this more effectively, as it applies to all (diffuse and point source) discharges.

The main risk with both options is to the natural environment. Option 1 provides a safeguard, in that it requires consent-holders to reduce adverse effects over time, though this assumes and relies on compliance with all consent conditions.

Option 2 has no such requirement to reduce effects over time and therefore creates a significant gap in the environmental management of diffuse discharges. While it would not prevent councils from adding consent conditions as safeguards, it does not require this.

As noted above, these options are primarily concerned with the immediate economic impacts on resource users and efficiency of policy settings in the counterfactual. They therefore focus on removing barriers to the continuity of affected economic activities, while allowing for freshwater improvement to be achieved over time.

Longer term, there may be other options available to address the problem. Examples include contaminant allocation caps with tradable discharge markets, sinking lid restrictions on land use, inputs, or activities, and staged reductions in contaminant discharges.

However, these are not assessed in this SAR as they would likely take too long to implement, and would not provide a solution to the problem in the immediate term.

**Treaty impact analysis**

- A Treaty impact analysis for Option 1 is outlined in Appendix B.
- In light of the lack of engagement with iwi, hapū and Māori, and the information and analysis detailed in Appendix B, it is difficult to assess:
  - whether or not the principles of partnership and active protection have been met
  - any potential impacts on the Crown's previous commitments on Māori freshwater rights and interests, and
  - whether or not some Treaty settlement commitments have been met.

## Limitations and Constraints on Analysis

This analysis is largely high-level because of the limitations on detail and certainty imposed by the following constraints:

**Time constraints**

- The RMA Reform timeline and the recency of the change proposals for s107 have prevented the preparation of a Regulatory Impact Statement (RIS). This document is a Supplementary Analysis Report (SAR).

- The timeline has also limited the scope of change options considered, level of analysis, collation and review of evidence, and engagement with iwi/Māori, stakeholders and the public.

**Assessment of counterfactual**

- The 'counterfactual' option presented here is a new scenario. The recent High Court interpretations of s70 and s107 supplant the pre-existing status quo based on how councils have typically applied s70 and s107. This new scenario has not yet had time to play out, so is presented here as a counterfactual whose potential impacts are inferred rather than evidence-based.

**Data and evidence**

- We have limited data and evidence on the likely impacts of s70 and s107 going forward. There has been insufficient time and resource to obtain more council data on how many consents, businesses, and catchments might be affected going forward. Without this data, we have been unable to provide an economic or cost/benefit analysis nor quantify potential costs to councils, regulated parties, and communities.

**Limitations on consultation, testing, and stakeholder engagement**

- Time has also limited our engagement with external parties. The amendment options presented here were proposed by affected stakeholders and interested parties in letters to Ministers and the Ministry for the Environment, and (as extraneous matters) in submissions on RMA Reform Bill 1.
- There has been limited additional engagement and no time or opportunity for feedback from stakeholders, Treaty partners, councils, ENGOs, or the public.
- Time constraints have not allowed for engagement with PSGEs on how best to uphold Treaty settlement arrangements and iwi/Māori.

| **Responsible Manager(s) (completed by relevant manager)** |
|---|
| *Nik Andic*<br>*Manager*<br>*Policy*<br>*Ministry for the Environment*<br><br>*[Signature]*<br>*[Date signed out]* |

| **Quality Assurance (completed by QA panel)** | |
|---|---|
| Reviewing Agency: | Ministry for the Environment |
| Panel Assessment & Comment: | A quality assurance panel with members from the Ministry for the Environment has reviewed the Supplementary Analysis Report (SAR) prepared by the Ministry. The panel consider that the information and analysis partially meets the Quality Assurance criteria. The panel consider that the analysis is clear and concise; however, the extent of the analysis is limited. There is limited data and evidence presented, and there has been limited engagement |

| | |
|---|---|
| | with external parties. Time constraints have applied to the development of the SAR which has prevented a more fulsome analysis of the issue, and these constraints on the analysis are well signalled. |

# Section 1: Diagnosing the policy problem

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

1. Since the RMA came into effect in 1991, freshwater quality has worsened in many parts of New Zealand, despite provisions intended to avoid, mitigate, or remedy adverse effects.[5]

2. For example, 95% of rivers flowing through pastoral land are contaminated to some degree by excess nutrients, bacteria, sediment, or algae. Not all of these rivers are degraded and some are improving (eg, turbidity), but, for many measures, the trend is downward or not improving.

3. Models of *Campylobacter* infection risk show 45% of total river length being unsuitable for swimming. An estimated 46% of lakes larger than 1 hectare have poor or very poor health, based on models of nutrient contamination and algal growth. Only 2% rated good or very good, and more lakes had worsened (45%) than had improved (36%).

4. Aquatic biodiversity is in a poor state, with 76% of indigenous freshwater fish species, and 68% of freshwater birds, threatened with extinction or at risk of becoming threatened, and macroinvertebrate index trends worsening at more sites (56%) than improving (25%).

5. The contaminants largely come from discharges from agricultural land, road surfaces, logging sites, and construction and maintenance sites. Most take the form of diffuse (or non-point source)[6] discharges, with point-source discharges (pipes) making up the balance.

6. Historically, point-source discharges from industrial and infrastructural pipes and drains (eg, factories, wool scours, dairy sheds, meat-works, sewage plants, stormwater drains) were also major contributors, but these have lessened in recent decades.

**Councils' approach to managing discharges prior to recent court decisions**

7. Since 1991, councils have used the RMA's freshwater provisions to control point-source discharges. However, they were slow to apply these tools to diffuse discharges. Instead, councils relied mainly on educational and other non-regulatory approaches whose overall success turned out to be quite limited.

8. In the early 2000s some councils began applying the RMA to diffuse discharges as well as point-source ones. Some have made discharges a permitted activity. Others require them to be authorised by a discharge consent with conditions requiring that they be mitigated over a set time period. Some councils use a mix of permitted activity rules for some discharges and consents for others.

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

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

**Current situation (following the court decisions)**

9. The previous section set out the council approach to managing discharges to date. Recent court decisions7 have found that councils must be satisfied significant adverse effects on aquatic life (one of the listed effects) will not occur, or will cease, *at the time the discharge is permitted or consented.*

10. The implications of these decisions for all councils, and for many dischargers, are that they prohibit any discharges that have listed effects on aquatic life but provide no legal pathway for reducing those effects where they already exist, acknowledging that some activities will need to continue (eg, stormwater discharges).

11. This places a requirement on dischargers to mitigate all listed effects immediately. Where that is not feasible (cost or practically), the impacts are potentially severe – the dischargers must cease their activities immediately and, if they do not, can be penalised for acting unlawfully.

**The s107 decision**

12. The decision on s107 relates to discharge consents and is already in effect. Councils may now only grant a discharge consent if the discharge's listed effects cease immediately.

13. Discharge consents allowing the staged mitigation of listed effects are now unlawful.

**The s70 decision**

14. The decision on s70 is of less immediate significance. It specifically applies to plan rules and will not have an impact until such time as councils make the necessary plan changes.

15. In that event, discharges likely to have listed effects cannot be permitted activities and will need a discharge consent to continue.

**Combined effect of the recent court decisions on s70 and s107**

16. These court decisions, when taken together, mean that some existing discharges cannot be permitted (under s70), and are unlikely to obtain a new consent (under s107), in effect making them prohibited.

17. Existing discharges (eg, wastewater, meat processing, farming) in degraded catchments are unlikely to obtain replacement consents unless they can avoid all significant adverse effects on aquatic life (and other listed effects) from day one of a new consent. Where activities cannot obtain a consent, they will need to stop or ultimately become unlawful.

18. The resulting restriction on consenting may not align with settings in the National Policy Statement for Freshwater Management 2020 (NPS-FM), which enable improved freshwater outcomes over time (with timeframes and methods for achieving those outcomes to be determined by councils and communities).

[7] *Federated Farmers Southland Incorporated v Southland Regional Council* [2024] NZHC 726 [9 April 2024]: High Court decision on RMA s70; and *Environmental Law Initiative v Canterbury Regional Council* [2024] NZHC 612 [20 March 2024]: High Court decision on RMA s107.

## What is the policy problem or opportunity?

19. Following these recent court decisions, there is now no pathway for certain discharges (ie, those likely to have the listed effects on freshwater or aquatic life) to lawfully take place.

20. This limits councils' ability to manage impacts via consents across not only agriculture, but also industrial activities, infrastructure provision, stormwater, and wastewater. It means that:

    a. more discharge consent applications will be declined (due to likely listed effects),

    b. consents that are granted may have tighter conditions (to prevent listed effects), and

    c. (potentially) more dischargers will need consents (because discharges with likely listed effects may no longer be a permitted activity).

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

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

22. Many dischargers are likely to face increased compliance costs, more restrictive consent conditions, and, where consents are declined, potentially significant financial impacts.

23. In degraded catchments, discharges that are likely to have listed effects may not get discharge consents if the dischargers cannot finance and implement all their mitigations up- front or get an exemption under s107(2).

24. This could stop many established activities and also some proposed new ones, potentially including infrastructure with significant public benefits (eg, new discharges from upgraded city wastewater treatment plants, or stormwater discharges from new developments).

25. Many current consent holders will have budgeted for a staged mitigation approach (eg, district council wastewater treatment upgrades), including councils in their Long-Term Plans. These costs will now need to be paid for upfront. In many cases this will be unaffordable.

### Existing national direction

26. The High Court judgment is consistent with the NPS-FM requirements (eg, Policy 5 degraded water bodies are improved, the health of other water bodies is maintained), however, the NPS also provides for:

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

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

**Impact on consenting (s107)**

27. The court's decision on s107 is already affecting significant discharge consents. For example, it is a key consideration in the current assessment of Timaru District Council's application to Environment Canterbury (ECan) for a stormwater consent for Geraldine township. This is still in progress. It has also resulted in the court's revocation of a discharge consent covering the 238 dairy farms serviced by the Ashburton Lyndhurst Irrigation Limited scheme.

28. ECan is probably the most heavily affected council, with an estimated 525 applications for discharge consent renewals expected in the current financial year. In light of the court's decision on s107, ECan's options are to either:

    a. decline a significant proportion of applications; or

    b. delay consent processing in anticipation of a law change, which could prove costly because of the time penalties for consent delays which reduce councils' ability to fully recover their processing costs.

**Impact on permitted activity rules (s70)**

29. When the s70 decision is eventually given effect via plan changes, ECan estimates that, in Canterbury alone (where many discharges are a permitted activity when associated with a permitted land use), thousands of new discharge consents could be required, depending on the council's assessment of their likely effects

30. If this were to happen without any changes to s107, many of these consent applications would be declined. However, if s107 is amended to enable staged mitigation, more consents could be granted and the impacts of s70 would be significantly lessened.

31. Although economic impacts would lessen, compliance costs would still increase for those discharges that had previously not needed a consent. ECan anticipates that the increase in consent applications could also add significant extra load to the resource management system, potentially compounding consent-processing backlogs (and potential penalty costs).

## What objectives are sought in relation to the policy problem?

32. The policy objective is to provide a consenting pathway for certain discharges to lawfully continue, even in degraded catchments, where they can do so while enabling freshwater improvement to occur over time.

33. This recognises that receiving waters can already be subject to significant adverse effects on aquatic life; that granting a discharge consent can be consistent with improvement; and allows for that improvement to occur over an appropriate timeframe.

34. Any solution should also consider how it applies to consents already impacted by the court decisions in the counterfactual.

35. The proposed vehicle for this is an amendment to s107 that aligns with the sustainable management purpose of the RMA[8] and the Government's objectives for RMA Reform[9].

[8] Section 5 of the RMA.

[9] The RMA reform objectives [refer ECO-24-MIN-0022] are: making it easier to get things done by:
a) unlocking development capacity for housing and business growth

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

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

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

## What scope will options be considered within?

36. The options assessed here are limited to those requested by stakeholders and interested parties in submissions on Bill 1 and in letters to the Minister and Ministry. Time has limited our ability to fully canvass other options for addressing the urgent issues raised here.

37. There has been no opportunity for formal consultation and submissions on the options.

38. Regional councils have singly (ECan) and collectively (Te Uru Kahika) proposed options that would enable staged mitigation for discharge consents under s107 and permitted activity status for discharges under s70, subject to plan rules.

39. Primary sector interests, variously representing irrigators, pastoral farmers, and vegetable growers, have generally sought changes to s107 that would enable discharge consents, and s70 options that would enable permitted activity status, with no environmental safeguards or mitigation requirements.

b) enabling delivery of high-quality infrastructure for the future, including doubling renewable energy
c) enabling primary sector growth and development (including aquaculture, forestry, pastoral, horticulture, and mining –

while also:

d) safeguarding the environment and human health
e) adapting to the effects of climate change and reducing the risks from natural hazards
f) improving regulatory quality in the resource management system
g) upholding Treaty of Waitangi settlements and other related arrangements.

40. Some environmental organisations, but not all, support amending s107 to improve certainty, but not at the risk of adverse environmental outcomes, while all oppose any changes to s70 that would enable permitted activity status for discharges with adverse effects. They also oppose changes being made without wider consultation and public submissions (ie, through the Bill 1 process rather than Bill 2).

41. As noted above, this SAR is only analysing options to amend s107. Any changes to section 70 will be considered as part of the Government's longer-term reform of the resource management system, which will enable further analysis, including engagement with Māori, impact analysis, consultation, and public submissions.

## What options are being considered?

**Options for amending s107 – Restriction on grant of certain discharge consents**

*Counterfactual – s107 remains unchanged*

42. This option would maintain the current situation, as per the court decision, where councils can only grant a discharge consent if satisfied that listed effects are unlikely. No amendment is required for this.

*Option One – Staged mitigation*

43. This option would amend s107 to enable a discharge consent to be granted where significant adverse effects on aquatic life are likely, if the council is satisfied that:

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

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

44. This would be a return to the common practice of councils prior to the court decisions.

45. This would only apply to s107(1)(g) – "significant adverse effects on aquatic life", and not the other effects listed in s107(1).

46. It would apply equally to diffuse discharges and point source discharges and allow existing activities to continue while actions are taken to reduce and mitigate significant adverse effects over time. This approach is supported by Te Uru Kahika.

47. This approach recognises that receiving waters can already be subject to significant adverse effects on aquatic life; that granting a discharge consent can be consistent with improvement; and allows for improvement to occur over an appropriate timeframe.

48. This amendment would apply to all resource consent applications, including those already lodged with a consent authority.

*Option Two – Exclusion of diffuse discharges*

49. This option (as proposed by pastoral farming interests) would exclude diffuse discharges from the listed effects test in s107(1). Councils would not be prohibited from granting a consent for discharges with listed effects if they are diffuse discharges.

50. The assessment of the consent application, and any conditions to be imposed, would still be subject to relevant planning rules and regulations.

51. A variation of this option would be to exclude commercial vegetable growing discharges (as proposed by Horticulture NZ) from the listed effects test in s107(1). We have not considered this option here.

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

**Example key for qualitative judgements:**

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

| | *Counterfactual* | *Option One – Staged mitigation* | *Option Two - Exclusion of diffuse discharges* |
|---|---|---|---|
| **Effectiveness** | 0<br>The counterfactual has immediate benefits for freshwater and aquatic life in degraded catchments, but potentially significant costs for any farms and businesses in those catchments for discharges which have listed effects and do not qualify for exemption under s107(2).<br>While it would achieve the core RMA freshwater objective, the counterfactual risks doing so at a social and economic cost that may not align with the Government objectives for RM reform nor with the approach to freshwater improvement set out in the NPS-FM (which provides for improvement over time). | ++<br>This option would allow for improvements to happen over time, while enabling farms and businesses to discharge without undue cost and disruption.<br>Although staged mitigation carries the risk of perpetuating discharge effects through missed targets and repeat consent renewals, it also reduces the risk of significant social and economic costs.<br>This option appears to be more effective than the counterfactual at balancing environmental and economic risk to achieve both the RMA's freshwater objective and the Government's RMA reform objectives, in accordance with the NPS-FM's enabling approach to freshwater improvement. | 0<br>By providing a consent pathway for diffuse discharges with listed effects, but not for point source discharges, this option provides worse environmental outcomes for diffuse discharges than the counterfactual and fewer economic benefits than Option 1.<br>By not enabling the effects of point source discharges to be mitigated over time, this option fails to provide a pathway for the continuity of any necessary infrastructure, stormwater and wastewater whose listed effects must cease immediately.<br>Given the scale of diffuse discharges and their dominant contribution to freshwater degradation, this option carries the greatest risk of not achieving the government's environmental objectives.<br>While consents granted will be subject to council plan rules, there is no requirement in this option for them to be mitigated.<br>Because of the enhanced environmental risk and potential social and economic impacts where point source discharges are concerned, this option is no more effective than the |

| | | | |
|---|---|---|---|
| | | | counterfactual at balancing all of the relevant RMA and Government objectives. |
| **Efficiency** | 0<br>The cost of this option to the regulated parties includes consent application cost (which remains unchanged, but more dischargers in the past will lose their investment by not getting a consent), the cost of immediately mitigating listed effects (in all cases, higher than under staged mitigation, and in some cases unaffordable), and/or the costs of having to cease the discharging activity, which could involve investment write-offs, business closures, project abandonment, or other significant costs for individuals, companies, and infrastructure providers, (provided these do not qualify for an exemption). All of these costs are likely to increase in comparison to the pre-existing situation.<br>The consenting cost to the regulator is unlikely to be significantly affected (as consent processing, monitoring, and enforcement costs are recoverable from the applicant), but there could be increased litigation costs where council assessments of likely discharge effects are disputed by an applicant. This would also see an increase in costs for the courts. | ++<br>This option would be efficient, as it would essentially be a return to the previous practice, as understood and applied by councils and consent holders prior to the court decisions.<br>It would result in a continuation of the current consenting and mitigation costs for regulated parties as it is essentially a continuation of the situation that preceded the status quo. It is therefore lower cost than the status quo.<br>Councils and courts too would incur less cost, as there would likely be less litigation around consenting decisions.<br>Overall, this option has less regulatory burden than the counterfactual. | +<br>This option would be less costly than the status quo for diffuse discharges, but does not solve the problem for point source discharges, including for infrastructure waste and stormwater discharges.<br>Overall, this option has less regulatory burden than the counterfactual, but more than Option 1. |
| **Certainty** | 0<br>The court decision on s107 provides a high level of regulatory certainty. The requirements are clear and able to be applied consistently by councils.<br>The only area of significant uncertainty is in the extent to which council assessments of likely listed effects will be litigated. | +<br>This option would provide a high level of regulatory certainty, as a return to past practice prior to the recent court decisions. and less uncertainty around potential litigation.<br>This is because the council's assessment of likely effects would have less costly implications, requiring only that discharges are incremental lowered rather than being eliminated immediately. | 0<br>This option would not provide a complete or enduring solution.<br>This option would provide a high level of regulatory certainty but would carry a significant level of uncertainty around potential litigation.<br>This is because the council's assessment of likely effects would have costly implications for dischargers not covered by the exclusions in |

| | | | |
|---|---|---|---|
| | | | this option. This could include industrial activities and infrastructure projects. |
| **Durability & Flexibility** | 0<br>It is likely that the economic impacts of this option would limit its durability, resulting in legislative changes to limit those effects once their magnitude became apparent.<br>The counterfactual provides little room for flexibility in the decisions that councils can make around discharge consents. | ++<br>This option rates higher than the counterfactual option on both durability and flexibility criteria.<br>It enables bespoke mitigation solutions to be attached to each consent, giving councils and dischargers considerable flexibility in achieving both environmental and economic objectives.<br>The option's durability has been demonstrated over the past decade, where it has become a familiar and accepted approach to managing discharges. | +<br>This option rates little better than the counterfactual on durability and flexibility, and well below Option 1.<br>It would provide the discharges that have been excluded with more flexible mitigation solutions than those that are not excluded.<br>This limited flexibility is also likely to limit the durability of this option. |
| **Implementation** | 0<br>For discharges that are denied consent, there is a risk that, instead of ceasing, many will continue unlawfully.<br>This would impose an additional burden on council monitoring and enforcement, which has traditionally not been a strong performance area with many councils. | +<br>This option has the potential for less implementation risk than the counterfactual.<br>There are, however, examples of staged mitigation not achieving the reductions required by the consent conditions.<br>This risk is not inevitable, however, and is contingent on council monitoring and enforcement practice and the rate of change required. | -<br>This option embodies both of the implementation risks presented by the counterfactual and Option 1.<br>For diffuse discharges, there is a risk of mitigations not being achieved within consent timeframes.<br>For point source discharges, where a consent or exemption have been declined, there is a risk of increased unlawful discharges. |
| **Overall assessment** | 0<br>The counterfactual ranks high on certainty but lower than Option 1 on effectiveness, efficiency, durability, flexibility and implementation. | ++<br>Option 1 addresses the immediate issues with the counterfactual by providing a way for discharges to be consented while still managing environmental effects through conditions.<br>Option 1 ranks well on all criteria compared to the counterfactual.<br>Although it carries significant implementation risk, so does the counterfactual. | +<br>Option 2 falls between the counterfactual and Option 1 on most criteria. It would require two discharge consenting regimes – one for excluded discharges, and another for everyone else – and would incur the costs and risks of both regimes.<br>This is because Option 2 is targeted at just one aspect of the underlying issue, and does not provide a solution for consenting of point |

| | | | |
|---|---|---|---|
| | | Options to mitigate the risk are not addressed here but could be part of future work. | source discharges following the court decisions.<br>Given the scale of diffuse discharges, it would also magnify the risk of adverse freshwater outcomes and would mean that s107 has little to no effect as a safeguard, particularly in the context of agricultural discharges.<br>This option would weaken councils' ability to ensure that diffuse discharges are sustainably managed and that water bodies are sufficiently safeguarded from contaminants generated by human activity. |

## Treaty Impact Analysis

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

    - Relevant Treaty principles
    - Engagement to date on proposed change
    - Potential impact of changes on freshwater quality
    - Māori freshwater rights and interests
    - Treaty settlements overview
    - Overall assessment of Treaty impacts of Option 1

53. In light of the lack of engagement with iwi, hapū and Māori, and the information and analysis detailed in Appendix B, it is difficult to assess:

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

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

54. Option 1 is the preferred option.

55. In the immediate term, it provides an effective and enduring solution to the issues with the counterfactual, by providing a way for discharges to be consented, while still ensuring that environmental effects are managed through conditions and improved over time.

56. It would achieve the full range of objectives more effectively, at less cost, than the other options. It would be more durable and flexible,

57. However, based on past evidence, there is an implementation risk with Option 1. Where mitigation targets are missed, listed effects may be iteratively perpetuated by repeat consent renewals or unreasonably long consent durations.

## What are the marginal costs and benefits of the option?

58. Although the costs and benefits of amending s107, and of the counterfactual, cannot be monetised, due to lack of data, they can be conceptualised relatively clearly, and their relative merits assessed (see Table 1 below).

59. Overall, amending s107 will avert the economic costs to farms, businesses, and communities of having discharge consents declined while prolonging the environmental effects of the discharges for longer than they would do under the counterfactual. The extent of this environmental cost will depend on the timeframe, the rate of improvement required under the consent, and council monitoring and enforcement of consent conditions.

**Table 1: Costs and benefits assessment**

| **Affected groups** *(identify)* | **Comment** *nature of cost or benefit (eg, ongoing, one-off), evidence and assumption (eg, compliance rates), risks.* | **Impact** *$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.* | **Evidence Certainty** *High, medium, or low, and explain reasoning in comment column.* |
|---|---|---|---|
| **Additional costs of the preferred option compared to taking no action** | | | |
| **Regulated groups:**<br><br>All dischargers including:<br>-farmers<br>-horticulturalists<br>-forestry companies<br>- infrastructure providers (eg, stormwater, wastewater)<br>-industrial and processing activities | There will be no additional costs for regulated groups. Instead, a net cost reduction is likely, though its scale is impossible to calculate. | Low | High.<br>Even without hard data, it is reasonable to conclude that having a discharge consent declined (as per the counterfactual) will incur more cost to regulated parties than having it granted (under an amended s107). |
| **Regulators:**<br><br>Regional and unitary councils | As consent processing, monitoring, and enforcement is charged on a cost recovery basis, there is unlikely to be an increased consenting cost to councils from amending s107. | Low | Medium.<br>Irrespective of its scale, it seems highly likely that there will be some reduction in litigation costs if fewer consents are declined. |
| Others:<br>- NZ public<br>- rural communities<br>- Treaty partners<br>- ENGOs<br>- recreational groups | Amending s107 to enable discharges to adversely affect freshwater, albeit temporarily, will impose a range of externality costs on the wider community (eg, the costs of ecological restoration, species recovery, tourism impacts, health impacts, reduced amenity and cultural opportunities). | Unknown.<br>The scale of the externality cost will depend on how effective the staged mitigation regimen is in practice. | High.<br>While the externality costs to the environment cannot be calculated with any precision, it is reasonable to conclude that they will be greater under the s107 amendment than under the counterfactual scenario, as a direct consequence of more discharges with listed effects being consented and fewer activities are closed as a result. |

| | | | |
|---|---|---|---|
| **Total monetised costs** | N/A | N/A | N/A |
| **Non-monetised costs** | Environmental externality costs from discharge effects. | High. | High.<br>The lack of hard data means that the scale of costs and benefits cannot be quantified. However, their existence can be inferred with a high degree of certainty. |
| **Additional benefits of the preferred option compared to taking no action** | | | |
| **Regulated groups:**<br><br>All dischargers including:<br>-farmers<br>-horticulturalists<br>-forestry companies<br>- infrastructure providers (eg, stormwater, wastewater)<br>-industrial and processing activities | System continuity. Certainty, stability, familiarity, cost savings.<br>Compared to the counterfactual, there will be a net cost reduction for those dischargers whose consent application would have been declined.<br>This arises from the avoided costs to business and the reduced likelihood of litigation over declined consents.<br>There is also the avoided cost of legal penalties where discharges occur without a consent. In the counterfactual scenario, there is an elevated risk of such discharges.<br>These avoided costs could range widely for individual consent holders. Fixing an average is not possible.<br>ECan considers that "many" of the 525 renewal applications expected in this financial year will benefit from avoided costs if s107 is amended. | High, though not able to be monetised.<br>ECan has indicated that "many" of the 525 expected applications for consent renewals will be denied under the counterfactual scenario.<br>Amending s107 would significantly reduce this number and the associated costs to businesses and communities. | High |
| **Regulators:**<br><br>Regional and unitary councils | System continuity. Certainty, stability, familiarity, cost savings.<br>Compared to the counterfactual, there could be a significant cost reduction in council legal expenses due to fewer litigants appealing consent decisions. | High<br>If "many" of the 525 expected consent applicants in Canterbury this financial year will be declined consent under the counterfactual scenario, there could be anywhere from 50 to 250 (or more) potential appeals. | High |

| | | | |
|---|---|---|---|
| | | An amended s107 would significantly reduce this risk and cost. | |
| **Others:**<br><br>- NZ public<br>- rural communities<br>- Treaty partners<br>- ENGOs<br>- recreational groups | System continuity. Certainty, stability, familiarity.<br>Some communities may benefit from the avoided costs of closed businesses or infrastructure projects whose consents would have been declined under the counterfactual scenario. | High, though the scale of the avoided costs to business and infrastructure cannot be estimated. | High<br>While the avoided costs to business and communities cannot be calculated with any precision, it is reasonable to conclude that they will occur under the s107 amendment if more discharges are consented and fewer activities are closed as a result. |
| **Total monetised benefits** | N/A | N/A | N/A |
| **Non-monetised benefits** | System continuity. Certainty, stability, familiarity.<br>Costs avoided by businesses and infrastructure projects remaining viable because they can get discharge consents.<br>Fewer opportunity costs because discharge options are more open. | High | High |

# Section 3: Delivering an option

## How will the new arrangements be implemented?

60. All councils have long experience in processing, monitoring and enforcing discharge consents, and many dischargers have experience with that system.

61. Implementing an amendment to s107 that enables staged mitigation will be relatively straightforward because the amendment will reinstate a system that has become a standard approach to discharge management over the past decade.

62. Where a consent is granted for a discharge that has listed effects, councils will have to attach conditions for staged mitigation. The specific mitigation requirements will be unique to each consent and will be subject to council monitoring and enforcement.

63. While the mechanics of implementation are familiar, it is clear that, to be more effective, some improvements are needed in the staged mitigation model. In the past decade, many consent holders have missed their mitigation targets.

64. In such cases, the tendency has been for councils to grant replacement consents with new targets and timeframes but with no certainty that these will be met. The risk in this repeated renewal cycle, is that environmental harm can be perpetuated indefinitely, even while the discharge is ostensibly being reduced.

65. This risk has been raised by Fish and Game, among others. There are several potential ways in which it could be addressed, either in regional plans, or in further amendments to s107. These include:

    a. setting conditions that would prevent the renewal of failed consents, or

    b. specifying a time window within which adverse effects must be fully mitigated, or

    c. setting a sunset date after which staged mitigation is no longer an available pathway.

66. The merits or otherwise of these options are not the focus of this report. It is anticipated that these and other methods for reducing the implementation risk of staged mitigation could be considered further.

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

67. Systems are already in place for councils to monitor, evaluate, and review consent compliance and the cumulative effects and environmental outcomes of consented discharges.

68. There is no comparable system for monitoring, evaluating, and reviewing national resource management policy and legislation, much less the effects of specific provisions, such as s107.

69. State of the environment reporting provides insights into environmental trends, but these insights are not directly linked to specific policies or legislation.

70. The Ministry's Systems Enablement and Oversight group will oversee RMA implementation and efficacy generally, and may undertake reviews, investigations, and case studies, of particular matters as they arise.

71. At this point, however, there are no specific procedures in place for monitoring and evaluating s107.

# Appendix A: Relevant sections of the Resource Management Act 1991

**70 Rules about discharges**

(1) Before a regional council includes in a regional plan a rule that allows as a permitted activity—

(a) a discharge of a contaminant or water into water; or

(b) a discharge of a 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,—

the regional council shall be satisfied that none of the following effects are likely to arise in the receiving waters, after reasonable mixing, as a result of the discharge of the contaminant (either by itself or in combination with the same, similar, or other contaminants):

(c) the production of conspicuous oil or grease films, scums or foams, or floatable or suspended materials:

(d) any conspicuous change in the colour or visual clarity:

(e) any emission of objectionable odour:

(f) the rendering of fresh water unsuitable for consumption by farm animals:

(g) any significant adverse effects on aquatic life.

(2) Before a regional council includes in a regional plan a rule requiring the adoption of the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of any discharge of a contaminant, the regional council shall be satisfied that, having regard to—

(a) the nature of the discharge and the receiving environment; and

(b) other alternatives, including a rule requiring the observance of minimum standards of quality of the environment,—

the inclusion of that rule in the plan is the most efficient and effective means of preventing or minimising those adverse effects on the environment.

**107 Restriction on grant of certain discharge permits**

(1) Except as provided in subsection (2), a consent authority shall not grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or section 15A allowing—

(a) the discharge of a contaminant or water into water; or

(b) a discharge of a 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

(ba) the dumping in the coastal marine area from any ship, aircraft, or offshore installation of any waste or other matter that is a contaminant,—

if, after reasonable mixing, the contaminant or water discharged (either by itself or in combination with the same, similar, or other contaminants or water), is likely to give rise to all or any of the following effects in the receiving waters:

(c) the production of any conspicuous oil or grease films, scums or foams, or floatable or suspended materials:

(d) any conspicuous change in the colour or visual clarity:

(e) any emission of objectionable odour:

(f) the rendering of fresh water unsuitable for consumption by farm animals:

(g) any significant adverse effects on aquatic life.

(2) A consent authority may grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or section 15A that may allow any of the effects described in subsection (1) if it is satisfied—

(a) that exceptional circumstances justify the granting of the permit; or

(b) that the discharge is of a temporary nature; or

(c) that the discharge is associated with necessary maintenance work—

and that it is consistent with the purpose of this Act to do so.

(3) In addition to any other conditions imposed under this Act, a discharge permit or coastal permit may include conditions requiring the holder of the permit to undertake such works in such stages throughout the term of the permit as will ensure that upon the expiry of the permit the holder can meet the requirements of subsection (1) and of any relevant regional rules.

# Appendix B: Treaty Impact Analysis

## Introduction

1. This analysis assesses the Treaty impacts of Option 1 outlined in the main Supplementary **Analysis** Report (SAR) and covers the following matters:
   - Relevant Treaty principles
   - Engagement to date on proposed change
   - Potential impact of proposed change on freshwater quality
   - Māori freshwater rights and interests
   - Treaty settlements overview
   - Overall assessment of Treaty impacts of Option 1

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

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

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

3. Section 107 of the Resource Management Act 1991 (RMA) would be amended to achieve this. Full background to this proposal is outlined in the main SAR.

## Relevant Treaty principles

4. 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.[10]

   - 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".[11] 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.[12]

5. In regard to the Crown's obligation to protect taonga under the Treaty principles, the Privy Council confirmed "the Crown in carrying out its obligations is not required…to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time".[13] If a taonga was in a vulnerable state – particularly if that state was due to past breaches – then the Crown may have to take 'especially vigorous action'.[14]

6. The Waitangi Tribunal assessed the application of Treaty principles to freshwater management in detail in its freshwater and geothermal inquiry and associated reports

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

[11] Ibid.

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

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

[14] Ibid.

in 2012 and 2019.[15] 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.[16]

## Engagement to date on proposed change

7. No engagement has occurred to date with iwi, hapū or Māori groups (including Post Settlement Governance Entities (PSGEs)) on the proposed change in Option 1. This makes it hard to fully assess the Treaty impacts, including the specific impacts on Treaty settlements and other relevant arrangements.

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

## Potential impact of the proposed change on freshwater quality

9. The counterfactual[17] (following court decisions) has immediate environmental benefits for freshwater and aquatic life. Option 1 does not have the same immediate benefits, but only enables a consent to be granted where consent conditions would reduce adverse effects on aquatic life over time. This is consistent with improving freshwater quality over time as provided for under the National Policy Statement for Freshwater Management 2020 (NPS-FM). The following further mitigations would also continue to apply:

    - the NPS-FM would be a relevant consideration in resource consenting, including directing freshwater to be managed in a way that gives effect to Te Mana o te Wai (Policy 1), that freshwater quality is maintained or improved (Policy 5), and that existing over-allocation is phased out, and future over-allocation is avoided (Policy 11)[18]
    - consent authorities must consider any actual and potential effects on the environment of allowing an activity when deciding consents under section 104(1)(a)
    - consent authorities make consent decisions on a case-by-case basis, meaning future consent decisions in the context of the proposed change cannot be anticipated, and
    - consent authorities would retain the ability to refuse consents depending on the circumstances.

[15] 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).

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

[17] The counterfactual prohibits the granting of any discharge consents that have significant adverse effects on aquatic life.

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

## Māori freshwater rights and interests

10. 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.[19]

11. While there are a range of ways that Māori aspirations with respect to freshwater are articulated, they have been summarised as having the following four dimensions: (1) improving water quality and the health of ecosystems and waterways, (2) governance/management/decision making, (3) recognition of iwi/hapū relationships with particular freshwater bodies, and (4) economic development.[20]

12. As regarding the first dimension listed above, it is difficult to assess whether Option 1 would satisfy Māori aspirations for improving water quality. This is due to the lack of engagement and that Option 1 would not have the same immediate environmental benefits relative to the counterfactual (paragraph 9 refers).

13. In relation to the economic dimension to rights and interests, iwi, hapū or Māori groups could be consent holders or future applicants that may derive economic benefit from the proposed change. It has not been possible to assess this due to time and engagement constraints.

## Treaty settlements overview

14. Treaty settlements and other arrangements provide for PSGEs and other Māori representative groups to have varying degrees of influence on decisions made under the RMA. Most Treaty settlements also include an apology and promise by the Crown to engage in a new relationship based on Treaty principles.

15. Some Treaty settlements contain specific engagement obligations in the development of freshwater legislation and policy. For example, the Waikato River settlement includes a Crown commitment to "a new era of co-management in respect of the Waikato River", with "the highest level of good faith engagement". Its implementation includes the development of policy and legislation that may potentially impact on the health and wellbeing of the Waikato River.[21]

16. As no engagement, including with PSGEs, was undertaken on the proposed change in Option 1, it is difficult to evaluate and confirm whether or not the general and specific commitments provided for in Treaty settlements and other relevant arrangements have been met.

17. Some PSGEs have roles in consent decision-making through a joint management agreement (JMA) under section 36B of the RMA or under Treaty settlement arrangements. Option 1 would enable consent authorities to issue discharge consents that have significant adverse effects on aquatic life, in the context of the obligations and considerations identified at paragraph 9 above, and would retain the ability to refuse consents depending on the circumstances. Examples of roles in consent decision-making include:

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

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

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

- the JMA between Te Runanganui o Ngāti Porou Trustee and Gisborne District Council signed in 2015[22]
- iwi representation on the Taranaki Regional Council's Consent and Regulatory committee under the Taranaki Iwi Claims Settlement Act 2016.[23]

18. The roles of these entities remain unaffected by the proposed change in Option 1. Further background and analysis on other Treaty settlement provisions are provided in **Annex One**.

### Overall assessment of Treaty impacts of Option 1

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

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

[22] Accessible at https://www.gdc.govt.nz/__data/assets/pdf_file/0018/6057/jma-waiapu-catchment.pdf.

[23] See sections 97-101.

# Annex One: Further Treaty settlement analysis

## Background to this annex

20. This annex to Appendix B provides further background and analysis on Treaty settlements. It considers:

    - obligations on the Crown to engage with a PSGE on policy development and legislation reform issues, such as the proposed change in Option 1, and
    - redress or similar legislative arrangements that may be impacted by the proposed change in the RMA consenting process.

21. Both considerations are relevant for Treaty settlements as an impact on a consenting process arrangement in a settlement may be deemed by relevant PSGEs as more or less significant than what is assessed in this Treaty impact analysis, and this can only be determined through engagement with the relevant parties.

22. This annex also considers the Waikato River and Waipā River arrangements, statutory acknowledgements, joint entities, and the marine and coastal area, to further demonstrate the type of implications arising from the proposed change in Option 1. However, please note not all Treaty settlements and arrangements are covered.

## Engagement obligations and specific obligations in settlements

23. Some Treaty settlements contain specific engagement obligations, but almost all settlements create an expectation of engagement, as most Deeds of Settlement contain certain statements in the apologies which include a promise by the Crown to enter into a new relationship based on Treaty principles and good-faith engagement. There are a number of Treaty settlements that require engagement on matters concerning water (often specific water bodies) and aquatic life in the policy/legislation making process.[24]

24. There are also a few settlements that have specific obligations, outside of engagement, that relate to water/aquatic life and matters relevant in consent decision-making. For example, settlements that require persons exercising functions and powers under the RMA to have particular regard to the habitat of tuna.[25] While the proposed change will give councils the ability to grant a consent where they currently cannot, it does not mean that councils *must* grant such consents. Councils must still consider other relevant matters through the consenting process as they do now, such as the requirement to have particular regard to the habitat of tuna. Therefore analysis suggests that redress which involves iwi/Māori in the consenting process, or matters relevant to decision-making, remain unaffected.

## Te Ture Whaimana – Waikato River and Waipā River Arrangements

25. The Waikato and Waipā River arrangements have a significant influence over statutory processes including complex interactions with the RMA. The Waikato and Waipā River Vision and Strategy/Te Ture Whaimana is prepared by the Waikato River Authority.[26] It

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

25 Ngāti Manawa Claims Settlement Act 2012 S125, Ngāti Whare Claims Settlement Act 2012 s129.

26 Key settlement Acts which establish, or create relevant responsibilities in relation to, the Waikato River Authority are Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, Ngāti Tūwharetoa, Raukawa and Te Arawa River Iwi Waikato River Act 2010 and Ngā Wai o Maniapoto (Waipa River) Act 2012. The Waikato

is the primary direction-setting document for the Waikato and Waipā Rivers, is deemed to be part of the Waikato Regional Policy Statement and prevails over an inconsistent provision in national direction. There is also a duty on decision-makers to have particular regard to Te Ture Whaimana.

26. The vision in Te Ture Whaimana is "for a future where a healthy Waikato River sustains abundant life and prosperous communities who, in turn, are all responsible for restoring and protecting the health and wellbeing of the Waikato River, and all it embraces, for generations to come."[27] There are many objectives set to achieve the vision but an objective of particular relevance to the proposed change is "the recognition that the Waikato River is degraded and should not be required to absorb further degradation as a result of human activities."[28]

27. Under Option 1, consent authorities must still consider other relevant matters through the consenting process (including to have particular regard to Te Ture Whaimana). While Option 1 gives consent authorities the ability to grant a consent where they currently cannot, it also does not mean councils *must* grant such consents. However in light of the lack of engagement, it is difficult to fully assess whether there are implications on the Waikato and Waipā River Arrangements that link to RMA consenting processes.

### Statutory acknowledgements

28. Most Treaty settlements contain statutory acknowledgements which apply to specified sites of significance, including waterways and catchments. If a discharge consent is applied for in an area that is within, adjacent to, or directly affects a statutory acknowledgement area, a council must have regard to the statutory acknowledgement when deciding whether the iwi is an 'affected person' for the purposes of notification decisions under the RMA. We do not consider the proposed change will have implications on the specific rights or provisions in Treaty settlements related to statutory acknowledgements that link to RMA consenting processes.

### Joint entities

29. Joint entities can be established by Treaty settlement legislation, including joint committees of councils consisting of equal numbers of iwi and council appointed members.[29] Treaty settlement joint entities generally have jurisdiction over a particular area or natural resource (eg, a river or lake catchment). They can either be specific to an individual iwi or be a part of collective redress where there are multiple interested parties.

30. The functions of a joint entity are specific to the settlement, but will generally include provisions for the entity to:

    - prepare a statutory planning document which has statutory effect (eg, on resource consent decisions)

River Authority is made up of members appointed by the five river iwi: Maniapoto, Ngāti Tūwharetoa, Raukawa, Te Arawa River Iwi, and Waikato-Tainui via their settlements.

[27] Waikato River - Vision and Strategy 2019.

[28] Ibid.

[29] There are 16 joint entities in total, either set up in Treaty settlement legislation or in legislation yet to be enacted. Examples of relevant joint entities include Rangitaiki River Forum, Te Maru o Kaituna and Te Kōpuka nā Te Awa Tupua.

- recommend the appointment of hearing commissioners for resource consent hearings, and
- participate in resource consent processes, including by making submissions (and potentially appealing).

31. One key purpose of this redress is to provide opportunities for the iwi to influence whether and how resource consents may be granted. This is primarily through the impact of the statutory plan (prepared and approved by the joint entity) on the RMA planning documents (eg, the regional policy statement, regional plan or district plan), which set the criteria by which resource consents are assessed (and what conditions may need to be imposed).

32. We do not consider that the proposed change will have an effect on the specific rights or provisions in Treaty settlement joint entity redress that links to RMA consenting processes. The proposed change will give councils the ability to grant a consent where they currently cannot (it does not mean that councils *must* grant such consent).

33. It is noted that not all Treaty settlement joint entities are the same and their specific functions can vary, and not all the provisions described above will be relevant to every entity.

### Other relevant instruments under the RMA

34. Other instruments that have been considered as part of this analysis are iwi planning documents provided for under the RMA.[30] 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. For example, Te Rūnanga o Ngāti Awa (TRONA) Environmental Plan notes TRONA consider themselves an affected party under Section 95E of the RMA for all resource consent applications not just within, adjacent to, or impacting statutory acknowledgement areas, but also for all consent applications that discharge contaminants to water or to land, in circumstance where it may enter water.[31] Any such instruments (current or future) will continue to apply as at present.

### Marine and Coastal Area (Takutai Moana) Act 2011 and the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019

35. The proposed change may affect the marine and coastal area. The Marine and Coastal Area (Takutai Moana) Act 2011 (Takutai Moana Act) provides for the recognition of the customary interests of iwi, hapū and whānau in the common marine and coastal area.

36. The Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 (Ngā Hapū o Ngāti Porou Act) contributes to the legal expression, protection and recognition of the continued exercise of mana of ngā hapū o Ngāti Porou within ngā rohe moana o ngā hapū o Ngāti Porou (marine and coastal area specified under the Act). The Ngā Hapū o Ngāti Porou Act has the same provisions as what is provided under the Takutai Moana Act, with some additional rights in recognition of their engagement under the Foreshore and Seabed Act 2004.

37. Option 1 will not impact the specific rights or provisions under either the Takutai Moana Act or the Ngā Hapū o Ngāti Porou Act that link to RMA consenting processes.

[30] See sections 61(2A)(a), 66(2A)(a), 74(2A)(a).

[31] Te Rūnanga o Ngāti Awa, Ngāti Awa Environment Plan 2020.