

7 November 2019

Committee Secretariat
Environment Committee
Parliament Buildings
Wellington

Via email to: en@parliament.govt.nz

Dear Committee Secretariat

SUBMISSION ON RESOURCE MANAGEMENT AMENDMENT BILL

1. Hawke's Bay Regional Council (HBRC) makes this submission on the Resource Management Amendment Bill (the Bill).
2. HBRC wishes to speak to this submission.

Background

3. The Hawke's Bay region spans over 1.42 million hectares of land and 350 kilometres of coastline on North Island's East Coast, and has a population of some 166,000 people.
4. HBRC has a Regional Resource Management Plan (combining the Regional Policy Statement and regional plan for air, land and water resources) and a Regional Coastal Environment Plan and the Freshwater Progressive Implementation Programme envisages the RRMP being changed to give full effect to national freshwater requirements by 2030.
5. Over the 2018-2019 year HBRC processed 455 resource consents, all within the required statutory timeframe. As a consequence of the Tukituki catchment plan provisions coming into effect, we anticipate that more than 300 new land use consents relating to farming and freshwater will be lodged by June 2020.
6. Some 3,100 resource consents were monitored for compliance (just over 90% of all current resource consents) during the past year. Over 1,100 pollution hotline requests were received, of which 151 related to surface water and 13 to groundwater. In total, 40 abatement notices and 101 infringement notices were issued, and four prosecutions were taken. As more freshwater plan changes are made operative, we expect that consent, compliance, monitoring, education and research activities will all increase.

Submission Summary

7. HBRC **broadly supports the outcomes sought** from this legislative reform and its focus on reducing complexity and improving freshwater management.
8. Our comments generally relate to the changes for regional council functions, in particular the new freshwater planning process and the proposed role of the Environment Protection Agency in enforcement activities.

9. Last month, we made a submission on the Government's '*Action for Healthy Waterways Discussion Document*' however for completeness, details on the new freshwater planning process are set out in this submission to the Select Committee.

General comments

HBRC supports the additional requirements for the Minister in making National Environmental Standards (Section 44, page 6).

10. **HBRC supports the new provisions for non-notified applications**, including with respect to suspension of processing an application and return of the application (various changes between Sections 88 and 95B, pages 9-12).
11. **HBRC supports the new provisions** setting out the circumstances under which a **resource consent provision can be reviewed** (Section 128, page 12). HBRC notes that this specifically includes the ability to review land use consent conditions, which will become increasingly important for controlling land use, given the pending fresh water reforms.
12. **HBRC supports the extension of time to file charges for prosecution** (from 6 months to 12 months, Section 338(4), page 8). The current six-month limit can be too short where a complex case is being investigated. This will bring the RMA in line with other acts, for example the Building Act which has a 12-month limit. If the Environment Protection Agency (EPA) is to assume responsibilities in enforcement, this time extension will be critical as there will inevitably be time delays with involvement of a third party.
13. **HBRC supports the increase to infringement notice penalties** (Section 360(1)(bb), page 23). The current infringement fees are too low to be meaningful, particularly for the deterrence of corporate offenders. HBRC suggests that an even larger infringement fee could be applied to larger corporate organisations. We note that the infringement regulations must also be changed to align with any new infringement fees.

Enforcement Functions of EPA

14. **HBRC supports in part the extension of functions** of the Environment Protection Agency (EPA) to intervene in enforcement action (Part 12A, pages 19-23).
15. However, HBRC considers that the EPA should only be able to intervene **in clearly specified circumstances**. These circumstances could be:
 - a. At the request of the relevant enforcement agency
 - b. With respect to matters of national importance
 - c. Where there is a clear failure of the enforcement agency to undertake necessary compliance checks and/or initiate enforcement action.
16. Further, the **EPA should assist local authorities**, rather than take over and effectively become the lead enforcement agency (**unless it is an exceptional issue of national importance**), as previously discussed with the regional sector.
17. HBRC submits that the **requirement to supply all relevant information to the EPA should be doubled to 20 working days** (Section 343J(3) page 22). For those local authorities with fewer resources, this time extension should enable them to comply

more easily. Equally, sufficient time is needed for hand back to occur in an orderly way.

18. HBRC considers that further work is necessary to **establish fair and reasonable provisions for cost recovery** at all stages, including prior to and following on from the EPA taking or relinquishing control. The Bill does not set budgetary constraints on the EPA. Nor does it require the EPA to consider legal fees already incurred, or the scope and nature of any evidence gathered or expert reports that have already been commissioned. The EPA should not duplicate such preparatory work.

Freshwater planning process: General

19. HBRC **supports repealing the collaborative planning process** as set out in Part 4 of Schedule 1. We consider it was overly complex and we could not envisage a situation in the Hawke's Bay where we would recommend its use.
20. HBRC **supports legislative changes that improve plan-making agility** under the RMA.
21. HBRC **supports in principle the proposed Freshwater Planning Process** as that process is essential for realising the Government's objectives for freshwater. Furthermore, it is HBRC's view that, subject to the related matters identified in this submission being addressed, without this new process there is practically no little likelihood of regional policy statement and regional plans being completed within the Government's demanding timeframes for freshwater planning.
22. We note that the proposed freshwater planning process only alters the planning process **after** a public notification milestone. The proposals set out in the Government's '*Action for Healthy Waterways Discussion Document*' will demand more from councils, tāngata whenua and communities within compressed planning timeframes, yet only the post-notification phase is proposed to be amended in the Bill. This is a missed opportunity, particularly given the expectations around engagement and consultation with tāngata whenua and the community in plan development.
23. HBRC **supports in principle having a hearing process with accredited and experienced hearing commissioners**, and the right of appeal to the High Court on points of law only. This is a more efficient and effective way of plan making by ensuring that all relevant evidence is presented and able to be fully tested at a hearing, and that those hearing evidence and making recommendations have appropriate RMA expertise. Appeals to the Environment Court have, in the past, resulted in protracted plan making processes, extending for years. For example, Plan Change 5 to Hawke's Bay's Regional Resource Management Plan took nearly six years to progress through the appeals phase (from mid-2013 to mid-2019).
24. However, HBRC considers some matters need to be better resolved for the proposed Freshwater Planning Process to be successful in practice. These are set out in the following sections.

Freshwater planning process: Scope and integration

25. The Bill needs to **better recognise and provide for the connections within and between natural resources and take a more holistic, systems-based approach to resource management**. The proposed new Part 4 plan-making process (pages 24-36) is limited to 'freshwater planning instruments', those regional plans or regional policy

- statements giving effect to the NPS-FM 2020 or more generally relating to freshwater. The Bill assumes that any changes to such instruments will be standalone, therefore making it possible to run an exclusive freshwater plan-making process.
26. The Bill needs to **better recognise and provide for the connection between management of fresh water and of coastal water**, particularly at the interface zones of estuary and river mouth.
 27. The Bill needs to **better align with the requirements of the National Planning Standards and other emerging national directions**, including those such as for indigenous biodiversity, highly productive soils and three waters management.
 28. **Extending the plan-making provisions proposed in the replacement Part 4 Schedule 1 to any plan change or review process as a matter of choice** would better address the issues above. This could be done now (especially for those councils with a single integrated natural resource plan) or signalled as part of the second suite of RMA reforms, if wider consultation is considered necessary.
 29. If genuine provision is to be made for Te Mana o te Wai, **sufficient time is needed to engage with tāngata whenua** to embed the principles in planning documents. From HBRC's recent experiences in preparing the TANK plan change, allowing sufficient time is essential to enable key concepts to be discussed, understood and recognisably provided for within a regional plan and/or policy statement. There is an inherent tension between having time to understand the concepts, issues and preferred practices, and the desire to get out and fix water bodies that are already recognised as having unacceptable water quality. If we cannot easily demonstrate how our regional plans give effect to Te Mana o te Wai, we risk litigation at the High Court and further delays in making needed changes.
 30. HBRC considers that it is possible to **ease the timeframes for undertaking relevant changes** without losing the urgency and necessity of taking appropriate action.
 31. The Bill would benefit by providing **clearer direction on pre-notification processes** and timeframes, including with respect to consultation with tāngata whenua and what constitutes 'adequate time' to consult with iwi authorities under Clause 4A(2) of Schedule 1 RMA. For example, the Mana Whakahono a Rohe provisions at sections 58L to 58U RMA provide much more process detail.

Freshwater planning process: Changes giving effect to earlier versions of the NPS-FM

32. The Bill should **recognise those changes to regional policy statements and plans that give effect to earlier versions of the NPS-FM**. The Bill proposes one transition, there could be a second:
 - a. By enabling those proposals which have been publicly notified prior to the NPS-FM 2020 coming into effect to continue their plan development path with respect to existing legislation (as proposed in the Bill at Clause 19, page 37)
 - b. By providing for a deferred time to fully comply with the 2020 requirements (beyond 2023, possibly to the next full plan review or 10 years from when the relevant change was made operative, whichever comes first).

This would enable regional councils to prioritise plan development work for those catchments which have not been the subject of any NPS-FM change.

33. For HBRC, this would enable:
- a. The TANK plan change to proceed through the existing Schedule 1 plan-making process without the complication of either having to defer or vary the proposal to give full effect to whatever will be required in the NPS-FM 2020 (HBRC has adopted the plan change for notification, and is soon to make a decision on which plan-making path to take from Schedule 1).
 - b. The focus in the Tukituki catchment to remain on implementation of Plan Change 6, which was made operative in October 2015 and gives effect to the NPS-FM 2014.
 - c. A focus on freshwater plan development for those catchments in Hawke's Bay which have yet to have catchment-specific proposals developed (all catchments north of Ahuriri, including the Mohaka and Taharua catchments, and from Wairoa through to Mahia Peninsula, and all catchments to the south and east of the Tukituki), as provided for in HBRC's November 2018 Progressive Implementation Programme.

Freshwater planning process: Variation to a freshwater planning instrument

34. HBRC **opposes the power of the Chief Freshwater Commissioner to accept or reject a proposed variation** (Clause 52, page 31). This is an unprecedented and pre-emptive power, contrary to the long-standing role of councils in proposing changes and variations on behalf of their communities, and for communities participating through the Schedule 1 plan making processes. This proposal may also give rise to breaches of Treaty of Waitangi settlement expectations in light of the requirements of the Hawke's Bay Regional Planning Committee Act 2015.

Freshwater planning process: Freshwater hearing commissioners

35. The Chief Freshwater Commissioner should establish and manage a **pool of potential commissioners for each region** in advance of any freshwater planning instrument being notified. This could be done by:
- a. The regional council proposing nominations to create a pool of suitably qualified and experienced commissioners for the region
 - b. Iwi authorities proposing commissioners with an understanding of tikanga Māori and mātauranga Māori within their rohe.
36. As some commissioners may also be technical experts, it will be useful to have this sorted as early as possible so that the risk of a subsequent conflict of interest is minimised, and commissioner/experts can manage their responsibilities accordingly.
37. HBRC would prefer to be nominate commissioners from the pre-approved pool. This would enable the Panel to be formed from people collectively having the best balance of skillsets and knowledge relevant to the proposal. This would still leave the appointment responsibilities to the Chief Freshwater Commissioner (Clause 57, page 33)

Freshwater planning process: Process, timelines and budget

38. HBRC submits that the **timeline and process proposed in Section 80A(4)(d)** (page 7) **and Clauses 37(2) and 58** (pages 25 and 33-34) **should be modified**, to enable more effective and efficient management of the plan-making processes.

39. **At the time (or within 5 working days) of the freshwater planning instrument being notified**, the Chief Freshwater Commissioner should be informed of the freshwater planning instrument's public notification together with:
 - a. The notified freshwater planning instrument and supporting documentation (Clause 37(1)(a) –(c), page 24)
 - b. Nominations for the hearing panel from the pool of pre-approved commissioners (modified Clause 37(2)(b), page 25)
 - c. Any **relevant** Mana Whakahono a Rohe arrangement or other legislative obligations to RMA decision-making (Clause 37(1)(j), page 24).
40. The Chief Freshwater Commissioner should then **identify the Hearing Panel within 20 working days of receipt of the nominations**, and subsequently convene the panel as provided for under Clause 38 (page 25). This would enable the commissioners themselves to ensure they are available and prepared in sufficient time ahead of any hearing, and will give greater certainty to everyone that the tight timeframes (especially between 2023 and 2025) are more likely to be achieved. Should any issues be identified in securing a suitable panel, there is some time to find alternative commissioners. This will also enable more time for each regional council to work with their hearing panel to establish a sound hearing process and secure any technical advisors.
41. HBRC suggests that the **remaining documents** specified in Clause 37(1) should be **submitted** to the Chief Freshwater Commissioner (and the hearing panel) **within 20 working days of the closing date for further submissions** (i.e. Clause 37(1)(d) – (h), page 24). This should maximise the time available to the hearing panel to consider how they wish to manage the hearing process, whether pre-hearing meetings are desirable, what reports will best assist them in hearing and deliberating, whether further expert advice is needed on particular matters etc.
42. HBRC considers that the hearing panel should clearly be able to **propose mediation or prepare reports at any time before a hearing**, (as well as during the hearing (Clause 44(1) page 27, Clause 45(1) page 28).
43. HBRC submits that **any freshwater hearings panel must be able to work within a reasonable budget**, which could be agreed with the Chief Freshwater Commissioner. The additional time provided to work with the hearing panel should enable better discussion around panel expectations, and management of the hearing budget as no two plan changes are the same. This sort of liaison should also enable more effective use of staff and other resources to support the hearing process in a way that is commensurate with the issues and complexity of matters raised in the proposed freshwater planning instrument.

Freshwater planning process: Cross examination of witnesses

44. HBRC considers that **cross examination should occur at the discretion of the hearing panel**, (Clause 40(2), page 26), rather than their being an assumption that it will occur in every instance. If cross examination is allowed, clear protocols should be established, and the hearing panel chair will need to exercise suitable control to ensure that cross examination is fair and reasonable, and that questioning adds value to the process, rather than just adding time.

Freshwater planning process: Recommendations beyond scope

45. HBRC submits that the **freshwater hearings panel should only be able to provide recommendations on matters that are within scope** of the proposal and the changes requested by submitters, as is the practice now (Clause 48(2)(a), page 29). We strongly support the submission of Local Government New Zealand on this matter, where they submit: *'The notion that the hearings panel may make recommendations on matters that are beyond the scope of the proposed freshwater planning instrument and/or submissions is alarming and contradictory to the principles of natural justice'*. There is already well established case-law on the scope of submissions 'on' a plan change. A departure from this practice starts to blur the roles between those responsible for developing plan proposals on behalf of communities and the hearings panel role in considering submissions in response to this. This is also problematic with respect to the requirements of the Hawke's Bay Regional Planning Committee Act 2015.
46. **Any matter which is beyond scope**, but which the panel would like to draw to the attention of the regional council, **should be included in their report as an advisory note only**. This would enable the panel to provide advice on matters that they consider relevant or helpful, without generating issues around rights of appeal or creating potential for judicial review of decisions. The Bill provides unfettered opportunity for the panel to make beyond scope recommendations, without providing any mechanism for challenge by council or submitters. This proposal raises significant concerns regarding natural justice principles. Further, if there are budgetary implications, which is quite likely if recommendations demand significant additional resources for implementation (such as through consenting, monitoring and compliance or further research), it is important for the council to be able to manage this through its Local Government Act obligations, including through the Annual and Long Term Plans.

Freshwater Planning Process: From panel recommendations to decisions of council

47. HBRC submits that the **freshwater hearings panel should be required to present their report and recommendations as soon as practicable after completing the hearing**. This would reduce the risk of a bottleneck for decision-making in December 2025 (or whenever decisions must be made on the freshwater planning instruments).
48. HBRC considers that the **timeframe from receipt of the panel's report and recommendations to public release of council decisions on those recommendations should be at least doubled** (this could be made subject to the approval of the Chief Freshwater Commissioner). In Hawke's Bay, the purpose of the Hawke's Bay Regional Planning Committee is to 'oversee the development and review of the RMA documents prepared in accordance with the Resource Management Act 1991 for the Hawke's Bay region (Section 9 Hawke's Bay Regional Planning Committee Act 2015). Accordingly, sufficient time is needed for the RPC to make its recommendations to HBRC on the panels' report and recommendations. Forty working days is still a tight requirement, given the significance of and interest in freshwater management. Furthermore, the logistics and practicalities of issuing decisions is not to be underestimated, not the least of which involves ensuring all published documents are accurate and that all administrative tasks can be completed.

49. HBRC also considers that there should be an **opportunity to extend decision deadlines, subject to approval of the Chief Freshwater Commissioner**. This would enable flexibility to deal with unexpected problems or circumstances beyond the control of the council.

Freshwater planning process: Rights of appeal

50. HBRC submits that the **drafting with respect to appeal rights needs to be made consistent** throughout the Bill. In particular, Section 80A(5)(d)(ii) (pages 7-8) inaccurately summarises the more specific appeal rights set out in Clause 54 (page 32), and relies on the disclaimer at Section 80A(10) (page 8) to cover the discrepancy. HBRC queries the value of providing a summary in one part of legislation that is prescribed in more detail elsewhere. HBRC considers that a connecting reference is all that is required.

Final Note

51. In light of the timing of the Committee's consultation on the Bill and the recent local government elections, we wish to record the fact that this submission has been prepared by Council staff and has not been endorsed by either the newly elected councillors or the statutorily mandated tāngata whenua members of the Hawke's Bay Regional Planning Committee.

Yours sincerely



James Palmer
Chief Executive

Phone: (06) 835 9202

Email: james.palmer@hbrc.govt.nz