Submission

To: **Committee Secretariat**
Primary Production Committee
Parliament Buildings
Wellington

By: **Northland Regional Council**

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

1. Introduction

1.1. Northland Regional Council (NRC) appreciates the opportunity to submit on the Resource Management (Freshwater and Other Matters) Amendment Bill (the Bill). NRC's submission is made in the interest of promoting the sustainable management of Northland's natural and physical resources, the wellbeing of its people and communities, and an effective and efficient resource management system.

1.2. The NRC submission follows the structure of the Bill and mostly provides commentary on the more material proposed changes that affect NRC's functions and roles and / or the sustainable management of the environment.

1.3. NRC's key submission points are summarised below:

- Excluding the Te Mana o te Wai hierarchy of obligations from resource consent application and decision-making processes. NRC opposes this change and our position is that the current application of the Te Mana o te Wai hierarchy should be retained. Any changes should only be made following a holistic review of the National Policy Statement for Freshwater Management 2020 (NPS-FM), rather than piecemeal 'tweaks' that create uncertainty. There are significant potential negative impacts on tangata whenua that must also be considered, which have not been given adequate weight in the Bill.
- Aligning consent pathways for coal mining with those for other extractive activities in national direction. NRC is neutral on this change but acknowledge that the different activity status appeared to relate more to greenhouse gas emissions than potential adverse effects on freshwater, wetlands or biodiversity.
- Modifying obligations under the National Policy Statement for Indigenous Biodiversity (NPSIB 2023) to identify new SNAs. NRC is neutral on the extension to timeframes for mapping SNAs in district plans; however, we strongly encourage government to implement positive incentives (e.g. biodiversity credits) for biodiversity protection by landowners.

- Amending stock exclusion regulations in relation to low-slope land. NRC opposes the removal of regulations relating to low-slope land and deferring stock exclusion requirements to Freshwater Farm Plans. Removal of these regulations will weaken the regulations significantly, as these regulations currently provide a nationally consistent 'baseline'. There are risks of inconsistent approaches to stock exclusion if decisions are deferred to individual freshwater farm plans without a consistent national baseline to work from – however we see potential to allow exceptions to the regulations to be made through freshwater plans where appropriate mitigations are identified in action plans.
- Repealing intensive winter grazing regulations in the National Environmental Standards for Freshwater 2020 (NES-F). NRC is neutral on this change, given that winter grazing is not a common practice in Northland, but we recommend Government considers the risk that removing these standards poses in regions where intensive winter grazing is common but not managed in regional plan rules (i.e. where NES-F provisions have been relied upon).
- New process to prepare or amend national direction (and new section 32AB RMA). NRC could support a more streamlined process for amending / developing national direction, provided there are adequate requirements for public consultation and that decisions are based on expert recommendations. We do not agree with the proposal for a different standard for evaluation reports on national direction by central government (new section 32AB) compared with those applied to council plan-making (section 32).
- Freshwater Farm Plan Regulations (add the definition of critical source areas). NRC supports the inclusion of this definition in the Freshwater Farm Plan regulations if they are to be deleted from the NES-F, as critical source areas are a key part of on-farm risk assessment.

Submission

2. **Application of the Te Mana o Te Wai hierarchy to consenting**

2.1. NRC does not support this change to remove consideration of Te Mana o te Wai hierarchy from consent processes and decisions. While the Te Mana o te Wai hierarchy is more relevant for plan making than consenting, it gives consent authorities the ability to add weight to the ecosystem health and wellbeing of waterbodies in decision-making on consents, and underpins related 'anti-degradation / avoid over-allocation / freshwater improvement' direction in the NPS-FM. That said, our understanding is that the hierarchy has not been interpreted as the 'environment at all costs' and in our experience has not created major difficulties or hurdles for consenting. We note that under section 104(1) RMA, consent authorities must 'have regard to any relevant provisions of a national policy statement' which provides some discretion (it does not say 'give effect to').

2.2. The Te Mana o te Wai hierarchy is embedded in the only objective in the NPS-FM (objective 2.1); however, there are other NPS-FM provisions that are likely more pivotal and require explicit consideration in consent decisions, including:

- Policy 1: Freshwater is managed in a way that gives effect to Te Mana o te Wai.
- Policy 2: Tangata whenua are actively involved in freshwater management (including decision-making processes), and Māori freshwater values are identified and provided for.

- Policy 5: Freshwater is managed (including through a National Objectives Framework) to ensure that the health and well-being of degraded water bodies and freshwater ecosystems is improved, and the health and well-being of all other water bodies and freshwater ecosystems is maintained and (if communities choose) improved.
- Policy 9: The habitats of indigenous freshwater species are protected.
- Policy 11: Freshwater is allocated and used efficiently, all existing over-allocation is phased out, and future over-allocation is avoided.
  [emphasis added]

2.3. The same can be said for regional plans, where limits have been set – for example, the Regional Plan for Northland prohibits the taking and use of water where it will exceed a limit (i.e. an allocation limit or minimum flow). Such provisions are more material and explicit in terms of discretion for consent decisions than the Te Mana o te Wai hierarchy.

2.4. We also note that the High Court[1] recently found that in relation to section 107 RMA and consenting (in summary):

> *For the purpose of section 107(1), the decision-maker must assess the effects of the grant of the permit from its commencement, rather than on the basis of what could be achieved in the future over the duration of the discharge consent (i.e., including as a result of staged conditions, such as future reductions or the introduction of good management practices).*
>
> *Once a decision-maker considers that the grant of a discharge permit is likely to give rise to one or more of the "prohibited" effects in section 107(1) (even if such effects only occur in the interim or short to medium term), the prohibition on granting the permit in section 107(1) applies.*
>
> *A Council cannot grant a consent that would breach section 107(1) on terms that were likely to contribute to the continuation of the prohibited effects, unless the explicit exceptions in section 107(2) apply.*
>
> *Any consent applications that are granted in reliance on this change would still be subject to the regional council's power of review under section 128 of the RMA in the event a plan review resulted in the imposition of stricter water quality or quantity standards. Consent applicants would therefore be wise to still take a long-term view to their activity before making significant investment decisions in reliance on this change.*

2.5. This effectively means that consents for discharges cannot be issued where the effects prohibited in s107(1) are likely to occur (such as any significant adverse effects on aquatic life) – even if such effects only occur in the interim, or the short- to medium-term. In our view, this is likely to have greater implications for consenting discharges than application of the Te Mana o te Wai hierarchy.

2.6. We also note that any consent applications granted in reliance on this change (removing Te Mana o te Wai from consenting decisions) could well be reviewed by regional councils under section 128 of the RMA in the event that a plan change would result in the imposition of stricter water quality or

[1] Environmental Law Initiative v Canterbury Regional Council [2024] NZHC 612

quantity standards. Consent applicants would therefore need to be aware of this risk before making significant investment decisions in reliance on this change.

2.7. For the above reasons, we see the proposal as unnecessary, and consider that it will only add uncertainty. We understand that Government intends to review the NPS-FM. We recommend that any change to the application of the Te Mana o te Wai hierarchy should be considered as part of a holistic review of the NPS-FM, rather than ad hoc tweaks being made in isolation.

2.8. The repeated amendments to NPS-FM regime (four versions since 2011, and another to come) is frustrating, time-consuming and costly for councils, tangata whenua, stakeholders / industry, and our communities. It has meant significant delays in implementing freshwater improvements as councils and interested parties grapple with shifting policy direction. We strongly urge the government to achieve cross-party support in any revisions to the NPS-FM, to provide a stable policy regime.

2.9. Excluding the Te Mana o Te Wai hierarchy of obligations from resource consent application and decision-making processes will be unacceptable for many hapū / iwi / Māori, for reasons that include:

- Te Mana o Te Wai is a holistic framework to protect the mauri of the wai. Any changes upset the balance of this framework, and will likely be of deep concern to Māori, given indications by Government of its intention to replace the NPS-FM and rebalance Te Mana o te Wai.
- Te Mana o te Wai is an integral element of the NPS-FM that progresses Māori freshwater rights and interests. These rights and interests were acknowledged by the Crown in the Hight Court in 2012,[2] and were recorded in the Supreme Court in 2013.[3] Watering down Te Mana o te Wai has the potential for creating negative and irreversible impacts on freshwater quality. Improving water quality and the health of ecosystems and waterways has consistently been articulated by Māori as being of utmost importance to them.[4]
- The proposed changes would likely result in commercial uses of freshwater being prioritised over the health and wellbeing of waterbodies and freshwater ecosystems, and the health needs of people. This is antithetical to Māori values.
- The proposed changes are likely to negatively impact on implementation of Policy 2 relating to the active involvement of tangata whenua in freshwater management (including decision-making processes), and to Māori freshwater values being identified and provided for. This would undermine implementation of the Tiriti principle of partnership.
- Freshwater is a taonga to Māori that is in a vulnerable state, and the Crown has a Tiriti obligation that extends to "active protection of Māori people in the use of their lands and waters to the fullest extent practicable".[5] The proposed changes could undermine the implementation of the Tiriti principle of active protection.
- The proposed changes could negatively impact on the upholding of existing and future Treaty settlements (e.g. the Waikato and Whanganui River settlements) and may reduce the scope of

[2] Waitangi Tribunal The Stage 1 Report on the National Freshwater and Geothermal Resources Claims (Wai 2358, 2012)
[3] New Zealand Māori Council v Attorney General [2013] NZSC 6, [2013] 3 NZLR 31 at [145].
[4] Waitangi Tribunal The Stage 2 Report on the National Freshwater and Geothermal Resources Claims (Wai 2358, 2019)
[5] New Zealand Māori Council v Attorney-General [1987] 1 NZLR 641, and affirmed by the Privy Council New Zealand Maori Council v Attorney-General [1994] 1 NZLR 513.

matters in the NPS-FM that can be considered by iwi or hapū who have roles in consent decision-making under a Joint Management Agreement (s36B of the RMA), or under a Treaty settlement.

- The proposed changes are likely to negatively impact on the compulsory value of mahinga kai. The application of indicators based on the first obligation particularly will be removed. The value of Mahinga kai is founded upon mātauranga and its recognition through the monitoring methodologies used by many hapū.

Given NRC's commitments to partnership with hapū and iwi, the proposed changes in the Bill are likewise opposed by NRC.

3. **Aligning consent pathways for coal mining**

3.1. NRC is neutral on this proposed change. As we understand it, the different activity status appeared to relate more to greenhouse gas emissions than potential adverse effects on freshwater, wetlands or biodiversity that could well arise through other mineral extraction activities. In principle, under an effects-based planning regime such as the RMA, controls applied through national direction should relate to the objectives of the national instrument (in this case wetlands and biodiversity values), and activities with similar potential effects should be treated in a similar fashion.

4. **Modifying obligations under the National Policy Statement for Indigenous Biodiversity (NPSIB 2023)**

4.1. NRC is neutral on the extension to timeframes for mapping SNAs in district plans. We see a requirement to map and manage SNAs in district plans as only one side of the equation, and strongly encourage the government to implement a positive incentive regime (e.g. biodiversity credits or similar) for biodiversity protection by landowners. This is particularly important for a region such as Northland, which has comparatively large areas of indigenous vegetation cover on private land. Māori land in particular is also likely to be disproportionately affected by SNA mapping and management, as large tracts of Māori land are undeveloped and / or in a relatively natural state, and a significant percentage would likely qualify as SNAs.

4.2. Landowners need recognition and support for protecting and managing these areas to achieve material change – relying solely on regulatory approaches is not likely to be nearly as effective as combining incentives with regulation as needed. However, regional / district councils cannot afford the significant incentives required, while tools like rates relief and grant funding tend to have limited influence.

4.3. We note the previous government started investigating a biodiversity credit system. We encourage this government to continue doing this, but to also look into other options such as refining settings in the Emissions Trading Scheme to enable incorporation of wetlands and control of browsing pests to gain carbon credits, in addition to developing more accurate sequestration rates for native vegetation in the upper North Island (we consider current that look-up tables under-estimate carbon sequestration rates for Northland, given that they are based on a national average growth rate for mānuka/kānuka).

5. **Amending stock exclusion regulations relating to low-slope land**

5.1. NRC does not support this change, as removing all low-slope based stock exclusion requirements would significantly weaken the effect of the regulations in managing the risks from beef and deer related to water quality and the impact on wetlands >500m2. In Northland, low-slope land can be subject to relatively high-density stocking rates (but may not be intensively grazed as defined in the Stock Exclusion Regulations), and many of our swimming sites, drinking-water take locations and mahinga kai sites are also in lowland areas.

5.2. There is real value in having consistent national 'minimum standards' that can be applied through Freshwater Farm Plans and / or used as a basis for regional rules to drive appropriate on-farm risk assessments. We understand that there is an intention to defer decisions on stock exclusion for beef and deer (and dairy, pigs or intensive grazing in relation to natural inland wetlands >500m^2) to Freshwater Farm Plans. However, we note that beef grazing properties less than 20ha will not be required to develop freshwater farm plans and would therefore not be subject to stock exclusion requirements if low-slope maps and associated regulations were removed – this would leave regulatory gap for these properties. We are also concerned that without regulations driving the farm planning and risk assessment (and associated actions), there is a risk that farm plans will not require any stock exclusion, or alternative actions to manage effects from stock on water quality and wetlands. We note that the freshwater farm plan regulations have not been amended to refer to this as an explicit requirement, so it is unclear how it is planned to effectively implement this requirement.

5.3. We understand the rationale for the change is that the 'one-size fits all' effect of the low-slope maps and associated regulations does not enable flexibility – we agree this can be an issue. To deliver on the government's intention to better utilise Freshwater Farm Plans while also driving appropriate risk assessments and identification of actions, we suggest that the maps (and regulations) be retained as is, but the following clause (or similar) could be added to regulations 14, 15, and 18, noting that the NES-F uses a similar mechanism to recognise mitigations set out in freshwater farm plans:

> *… unless undertaken in accordance with a resource consent or certified Freshwater Farm Plan that contains actions (if any) that result in adverse effects no greater than those achieved through regulation 14/15/18.*

5.4. The above amendment would also address an ongoing concern for NRC that the current regulations have made no allowance for exceptions through resource consents (i.e. the only option for councils is to issue abatements / infringements, or fines for non-compliance, even if exclusion is not practical or a landowner is just seeking a longer timeframe to meet requirements). These processes are currently unduly onerous.

6. **Intensive winter grazing**

6.1. NRC is neutral on this change, given it is not common practice in Northland, but recommend that government consider the risk that removing these standards poses in regions where intensive winter grazing is common and not managed through regional plan rules (noting that regions may be relying

on the standards, pending notification of freshwater plan changes). We support retention of the pugging and ground-cover standards (26A and 26B respectively).

7. **Changing the process and s32 requirements for creating or amending national direction**

7.1. NRC is neutral on a more streamlined process for creating and amending national direction, provided there are appropriate opportunities for public consultation (including hapū / iwi / Māori) and a robust and informed decision-making process. However, we are concerned that the Bill as it stands does not guarantee this, and leaves very wide discretion to the Minister in terms of consultation arrangements, the matters to be considered, and justifying the case for change (the new s32AB). Some national direction by its nature will have significant implications (for councils, Māori, industry, etc.) that should be subject to independent expert scrutiny such as a Board of Inquiry (or select committee). The Board of Inquiry process adds rigour to decision making that the government / Minister can rely on as independent expert advice; this will likely be of benefit to the Minister / government in relation to more contentious or significant changes in national direction. We therefore consider that the Board of Inquiry process should remain an option in the RMA, and oppose the repeal of sections 46A(d), and 47-51 of the RMA. However, we do support the current ability under s46A(3) for the Minister to choose whether to use a Board of Inquiry process, or the more streamlined option where appropriate.

7.2. We are very concerned about the omission of reference to assessment of social and cultural impacts from the evaluation report (new section 32AB on evaluation of national direction). We do not consider it sufficient to consider only the impact on the environment and the economy when proposing whether to regulate. This may reduce the level of impact analysis on matters considered important to hapū / iwi / Māori and communities.

7.3. The new section 32AB would apply far less prescription to the evaluation required for national direction than that required to be undertaken for a council plan change or proposal under section 32. This is despite national direction typically having more significant implications than a council plan change proposal. We do not understand the rationale for this change, or the need for a completely different, more lenient standard to be applied to central government proposals in contrast to that applied to local government proposals. It should be noted that national direction (especially national policy statements) often drives the need for council plan changes across New Zealand at significant cost. If anything, the process should be simpler for local government than central government, especially where the council proposals are to deliver or implement national direction. In our view, Regulatory Impact Statements (RIS) neither cover the same requirements as section 32 RMA, nor can they serve as an adequate replacement for section 32 evaluation reports. We also note RIS are more a requirement for legislative changes and not necessarily applied to national direction under the RMA (e.g. national standards). In the absence of a requirement for RIS some means to ensure a robust evaluation is needed to ensure the instrument is workable, efficient and effective and fit for purpose under the RMA (such as that in s32 RMA).

7.4. Our understanding is that this government was seeking to improve the standard of regulation, rather than weaken it (and has established a Ministry for this purpose). Weakening evaluation requirements

seems to be at odds with this intent. If changes are made to introduce a new section 32AB, the same standard should be applied to both central and local government processes, and the same changes should also be applied to local government proposals.

7.5. We appreciate having this opportunity to make a submission on this Bill, and we thank you for your careful consideration of it. We would be more than happy to answer any questions or provide further detail on any of the points we have made.

Signed on behalf of Northland Regional Council
Jonathan Gibbard (Chief Executive)

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Dated: 27/06/2024