

Appendix 1: Proposed bill to amend the RMA – further policy detail on proposals

Reducing the powers of the Minister for the Environment to prohibit or overturn local plan rules (section 360D)

1. Section 360D will be repealed from the RMA with the effect that the Minister for the Environment is no longer able to make regulations that either prohibit or remove rules in council plans that duplicate or overlap with subject matter that is included in other legislation.
2. While examples of duplication in the system are known, it is not clear that the development of regulations would be a proportionate response to these issues. Where there are any duplication issues, future iterations of the National Planning Standards and other national direction could also be used to rectify them. Moreover, decision-makers must ensure that any RMA policy statements or plans only include matters that are relevant to the purpose of the RMA.¹
3. No regulations have been made under this section of the RMA (or under sections 360E, 360G and 360H dealt with below). The removal of these regulation-making powers is considered to be appropriate as it will send a signal about the appropriate role of the Minister, and provide greater certainty for resource management decisions made by local government.
4. Section 360E deals with procedures relevant to making rules under section 360D and so would be consequently repealed.

Removing preclusions on public notification and appeals for subdivision and residential activity resource consents (aspects of sections 95A, 358, 120 and 360H), and restrictions on the scope of appeals (section 120(1B))

5. The RLAA 2017 curtailed opportunities for those affected by resource management decisions to meaningfully participate in decision-making processes. While some of these amendments were designed to accelerate urban development, an outcome which the Government supports, it should not come at the expense of peoples' access to justice.
6. The 2017 amendments removed or limited councils' ability to publicly notify resource consent applications for residential activities or subdivisions (unless they were non-complying² activities).³ The lack of a submission process could lead to a lower quality of decision, as key information would not be made available to decision-makers.
7. The ability to appeal a councils' resource consent decisions (and objections to these decisions), including for the resource consent applicant themselves⁴ were also removed by the 2017 amendments. This not only further reduced access to justice, but also led to perverse outcomes. The change may have resulted in

1 Section 18A of the RMA.

2 Activities that have adverse environmental effects beyond those anticipated by a resource management plan. Non-complying status is often reserved for those activities where the potential adverse effects are great but do not necessarily warrant prohibition.

3 Section 95A(5)(b)(i).

4 Section 120(1A)(b)(c).

some developers submitting applications that they have ensured were a non-complying activity in order to maintain their own appeal rights.

8. The public notification preclusions on residential activities and subdivision of land could assist in the delivery of housing projects that require resource consent. However, prior to the preclusions coming into effect, there were very few consents that were publicly notified (1.5 per cent) or subsequently appealed (0.3 per cent)⁵. Consents that were publically notified were considered to have an environmental effect that was more than minor, and therefore it is important to allow for public participation.
9. The benefits of reinstating public participation and access to justice outweigh any potential costs of development delay caused by reinstating notification and appeal rights.
10. For the above reasons, it is proposed that the public notification preclusions relating to residential activities and subdivision of land, and the associated preclusions on the right to appeal decisions or conditions of consent relating to these applications, be repealed.
11. For consistency, section 360H would also be repealed, with the effect that the Minister for the Environment would no longer be able to recommend the making of regulations that would preclude public or limited notification for certain activities, or prescribe who may be considered an affected person in relation to limited notification.
12. Although section 360H regulation-making powers could assist in achieving the Government's urban development objectives, any proposals affected by such regulations would likely be small in scale. The removal of these regulation-making powers would therefore have a limited impact on the Government's housing objectives.
13. The 2017 amendments to the RMA also amended the scope of matters raised in an appeal on a resource consent to be limited to those matters that had been raised in original submissions.⁶ It is proposed to repeal the provision which imposes this limitation, thereby reinstating submitters' broad rights to appeal against any part of a notified decision on a resource consent, change of consent conditions, or review of consent conditions.
14. The repeal of this provision could potentially result in an increase in the cost and time involved in the resource consent process, due to an increased ability to appeal. However, the risk of this is low because, as discussed earlier in paragraph 8 above, only a low percentage of resource consents are appealed to the Environment Court.
15. Most importantly, the repeal would restore access to justice for those affected by proposed developments, particularly when decisions are made based on new information/evidence that was not apparent when submissions were first lodged. This would also help improve the quality of decision-making.

⁵ Ministry for the Environment National Monitoring System Data 2015/2016:

<http://www.mfe.govt.nz/rma/monitoring-and-reporting/national-monitoring-system-reporting-201415-and-201516>.

⁶ Section 120(1B) of the RMA.

Repealing the regulation-making power for additional fast-track activities (section 360G)

16. The 2017 amendments introduced a regulation-making power to identify types of resource consents subject to a fast-track resource consent process, and information requirements for fast-track consent applications. No regulations have been made under this section of the RMA.
17. Regulations are unlikely to be made under this provision as they would add complexity and confusion to the resource consent process, for minimal benefit. Repealing this provision will reduce complexity within the RMA and provide certainty that local decision-making will not be overridden in these circumstances.

Reversing the change to the subdivision presumption (section 11)

18. Prior to the 2017 amendments, all subdivision proposals required resource consent unless specifically permitted by provisions in a district plan. The 2017 amendments reversed this presumption, making all subdivision permitted unless restricted by a rule. This amendment has raised concerns that it sends a signal that subdivision should be supported, irrespective of its location (for example, in areas of high natural hazard risk or on versatile soils).
19. The majority of city and district plans control subdivision, and Ministry for the Environment officials are unaware of any such plans that have been updated to reflect the 2017 presumption change, given this is a recent change.
20. The proposed amendment to change the presumption of subdivision from permitted to restricted will ensure that all subdivision activities require resource consent unless permitted by a provision in a plan. This will provide more certainty in practice, as existing plans will no longer need to be revised to reflect the 2017 amendment. This will avoid any potential time and cost implications to councils associated with making such plan changes.⁷

Reinstating the use of financial contributions (various sections, for example sections 108, 108AA, 110, 111, 409, 411)

21. The ability to impose a condition on a resource consent requiring a financial contribution will not be available from 18 April 2022, as this provision was repealed by the Resource Legislation Amendment Act 2017. The intent of the 2017 amendments was to remove any potential confusion and concern regarding councils charging under both the RMA financial contribution regime and the Local Government Act 2002 development contributions regime.
22. However, once the financial contributions provisions are made unavailable, regional authorities will be unable to use any regime, as the development contributions regime is only available for the use of city or district councils.
23. The proposed amendment will reinstate the use of financial contributions and ensure they are not removed from the RMA in 2022. This will allow councils to choose which regime works best for the circumstance, and preserve a funding mechanism for regional councils. It will also assist councils that are experiencing

⁷ An average plan change takes 2 to 8 years, from notification to decision. The cost of plan changes can range from \$92,000 to \$263,500 (ref: <https://treasury.govt.nz/publications/risa/regulatory-impact-assessment-impact-summary-national-planning-standards>).

difficulties in moving to a development contributions scheme with their current development works.

Enabling applicants to have the processing of non-notified resource consent applications suspended (sections 91A-C)

24. In practice, applicants often request councils to put a non-notified resource consent application on hold, so that they can review draft conditions of consents before a decision has been made. As there is no provision for applicants to put their non-notified applications on hold, councils often use section 37 time extension provisions to extend the timeframe to suspend non-notified resource consents. This unintended use of section 37 by some councils has resulted in inconsistent data and a misrepresentation that councils are responsible for these delays.
25. The amendment to enable applicants of non-notified resource consents to suspend the processing of their application, for up to 20 working days (cumulatively) will codify practice, and help improve the efficiency of the resource consenting process.
26. The application should come off 'hold' at the request of the applicant, or in a few other instances similar to those for notified resource consent applications. If the 20 working days has passed without an applicant's direction, the council should, at its discretion, return the application or continue to process it.
27. If the application is subsequently notified, and the applicant again requests that the processing of their application be suspended, then the number of working days that the application was suspended prior to the notification decision must be added to the total working day exclusion from the time limits set before a consent has to be returned or continued to be processed.
28. Such a request should not be made if the applicant has lodged a notice of motion for the application to be referred to the Environment Court for the decision to be made, or if the Minister for the Environment has made a direction that the application is or is part of a proposal of national significance.

Enabling councils to suspend the processing of resource consent applications until fixed administrative charges are paid (new section)

29. Consent authorities are required to process resource consent applications within certain timeframes specified in the RMA. They have the ability to stop this timeframe in a number of situations specified in the RMA, for example when the consent authority has requested further information from the applicant. If these statutory timeframes are not met, a discount must be provided to the applicant.
30. Consent authorities have the right to stop working on a resource consent application until an administration charge that is payable to them, is paid in full.⁸ However, the RMA does not currently allow consent authorities to stop the 'processing clock' while this takes place.
31. This legislative misalignment has led to circumstances where consent authorities have either been unable to meet the statutory resource consent processing timeframes prescribed in the RMA, or they have had difficulties in recovering these costs, as there is no incentive for a consent holder to retrospectively pay.

⁸ Section 36AAB(2) of the RMA.

32. To address this misalignment and its unintended consequences, it is proposed that the RMA is amended to give consent authorities a discretionary ability to suspend the processing of a resource consent application if a fixed charge is payable relating to a specified process step.
33. On the basis of a review of several consent authority procedures, the suspension of consent processing is considered most necessary at lodgement and at the time the application is notified. This is when most councils charge a deposit.
34. The period of suspension will be excluded from the statutorily prescribed working days for resource consent applications to be processed. If suspended, the consent authority will be required to start processing again once payment is received.

Enabling longer time periods to lodge retrospective resource consents for emergency works (section 330B)

35. While it is appropriate that the consent authority be made aware of any emergency works that have been undertaken early on, 20 working days to subsequently lodge resource consent applications for these works is too short. That critical time is better spent ensuring people are safe, and focusing on recovery and response actions.
36. The proposed amendment is to extend the RMA timeframe for applying for a resource consent for emergency works under section 330B of the RMA (Emergency works under the Civil Defence Emergency Management Act 2002) from 20 working days to 60 working days. The current seven day time period to advise the consent authority of emergency works will remain.
37. The Ministry of Civil Defence and Emergency Management is supportive of this proposal.

Enabling review of conditions of multiple resource consents (section 128)

38. Stopping the further degradation of our freshwater is a Government priority. The National Policy Statement for Freshwater Management 2014 (Freshwater NPS) requires regional councils to set limits on resource use (e.g. water takes and discharges) to avoid over-allocation of water quantity and quality, and to phase out existing over-allocation. This can be achieved by setting appropriate flow rates or water quality standards in rules in regional plans, and either waiting for existing resource consents to expire, or reviewing the conditions of existing resource consents – the latter is faster.
39. Section 128 of the RMA sets out the circumstances when a council may serve notice on a consent holder to review the conditions of an existing resource consent. In order to implement the Freshwater NPS however, regional councils have expressed a number of concerns relating to the current provisions.
40. It is unclear whether councils are able to review the conditions of multiple resource consents concurrently so that the effect of these resource consents can be considered as a group, for example on a catchment basis.
41. Councils are also constrained by the requirement that reviewing conditions of consents relating to new flow rates or water quality standards rules in regional plans can only be initiated when the regional plan is operative, rather than when

the relevant rule is operative. As plans can spend many years under appeal, this can delay implementation of the limits set in plans under the Freshwater NPS with the result that water quality can continue to decline.

42. The existing provisions are also unclear as to whether regional councils can review conditions of regional land use consents where the existing activity may breach new flow rates or water quality standard rules set in regional plans. Many discharge permits are bundled up with regional land use consents. This lack of clarity could result in some discharge permits not being considered for review following a new rule in a plan becoming operative.

43. The proposed amendments therefore:

- explicitly provide regional councils with the ability to review the effects of multiple consents on the maximum or minimum flows/rates or standards for quality stated in a regional rule, in order to give effect to new limits in a plan by existing users
- enable a regional council to review the conditions of consents once the relevant rule containing flow rates or water quality standards is operative so that the limit is applied in a more timely way
- broaden the type of regional resource consents that can be reviewed in relation to new rules set in regional plans for flow rates or water quality standards to also include regional land use consents so that where discharge permits and land use are bundled together these can both be reviewed.

44. This last change will also provide for any future initiatives of the water work programme to phase out over-allocation, and address intensification and at-risk catchments. Note that a change is not proposed to section 131 of the RMA which requires councils to have regard to whether the activity allowed by the consent will continue to be viable after the change. This protects consent holders from a situation where the implementation of a new rule could risk the viability of their existing activity.

Clarifying the legal status of deemed permitted activities (Part 3)

45. Deemed permitted activities (deemed marginal or temporary activities, and deemed permitted boundary activities) are new types of permissions added to the RMA through the 2017 amendments. Deemed permitted marginal or temporary activities can be provided for all activities excluding subdivisions. Deemed permitted boundary activities can be provided for district land use activities.

46. Deemed permitted activities are not resource consents. They provide an applicant permission to undertake their activity, even if the activity infringes a rule in a plan, by way of a 'written notice' given by the consent authority.

47. Part 3 of the RMA sets out duties and restrictions on, and the lawful establishment of, different types of activities. However it does not specifically refer to deemed permitted marginal or temporary activities, or deemed permitted boundary activities.

48. In order to provide more certainty around these new types of permissions, an amendment to explicitly refer to deemed permitted activities in Part 3 of the RMA

is required. This will make clear that these types of activities, including those that have already had permissions issued, are valid.

Strengthening enforcement tools for improving environmental compliance (sections 360 and 338)

49. The RMA stipulates a maximum infringement fee of \$2000 for stock exclusion offences and \$1000 for all other offences. Specific infringement fees are set under the Resource Management (Infringement Offences) Regulations 1999, which cover a range of offences for contravening restrictions on land use, the coastal marine area, certain uses of beds of lakes and rivers, water, and discharges. Infringement fees for noise related offences, and the failure to provide certain information to an enforcement officer are also specified under these regulations.
50. There is currently no distinction between offences committed by natural persons (individuals) or a person other than a natural person (companies/trusts). These maximum infringement fees are too low to be a real deterrent, especially for companies where non-compliance may be in the companies' pecuniary interest. The cost of applying for a resource consent is often in excess of the current maximum infringement fees.
51. An increase in the maximum infringement fee payable to \$2000 for a natural person, and \$4000 for a person other than a natural person, will provide a more meaningful deterrent, and improve consistency with maximum penalties available for prosecutions. These maximum infringement fees will apply to all infringement offences under the RMA (including stock exclusion offences).
52. While the Legislation Design and Advisory Committee recommends a maximum of \$1000 for infringement fees, it allows for "exceptions to the general principle". A more meaningful penalty is needed to deter offending and better reflect the value the public places on a healthy environment.
53. Another compliance and enforcement obstacle that councils face is insufficient time to collect and prepare evidence before filing charges for prosecutions. Under current provisions, charges for Category 3 offences⁹ must be filed within six months from when the alleged offence was known or should have been known. Significant evidence (samples, photos, witness statements, etc) is required to support a prosecution. Technical expertise can be required to analyse evidence and samples. This cannot always be achieved to a level suitable for court within six months.
54. An amendment to extend the statutory limitation period for filing charges for prosecutions of Category 3 offences from 6 months to 12 months, from when the alleged offence was known or should have been known, will better support effective enforcement regimes. This statutory limitation period is also consistent with the statutory limitation period in the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act).

Enabling the Environment Court to review councils' resource consent notification decisions (new sections)

⁹ As defined under the Criminal Procedures Act 2011.

55. The RMA sets out steps that councils need to follow to make their decisions on whether a resource consent application is notified or not. Who is notified of a resource consent application is important, as notification determines who can make a submission, which in turn provides an appeal right. If an application is non-notified, there is no opportunity for any submissions.
56. The level of non-notification for resource consents is high (more than 95 per cent since 1999).¹⁰ The only avenue to challenge a council's notification decision on resource consents is via a judicial review to the High Court. This avenue is expensive and time consuming.
57. Therefore, it is proposed to introduce a new avenue to enable a person who is dissatisfied with a consent authority's notification decision on a resource consent to have the ability to challenge the decision in the Environment Court. This proposal is similar to the provisions that were enacted in 2005 but never commenced, and were subsequently repealed in 2017.
58. The proposed new provisions will empower the Environment Court to make a declaration on whether a council's notification decision for a resource consent application was unauthorised or otherwise invalid. The Environment Court would also be able to make interim orders when considering an application for a declaration that preserves the position of any party to the declaration.
59. In order to make the declaration meaningful, the Environment Court should be able to make an order setting aside the whole or part of a resource consent, as well as referring the notification decision back to the consent authority for reconsideration, with or without any further directions.
60. There is an existing restriction in section 319 of the RMA, which does not allow the Environment Court to make an enforcement order¹¹ against a person if they are acting in accordance with a resource consent. This could potentially conflict with the future implementation of the proposal. The consent holder could act in accordance with the resource consent, even though there are parties who are dissatisfied about a council's notification decision and challenge the notification decision by way of a declaration. Therefore, the proposed amendment will need to clarify that the Environment Court is able to make an enforcement order preventing a person from exercising a resource consent until the consent authority has followed the direction of the Court.
61. Detailed policy work will be undertaken by the Ministry for the Environment and Ministry of Justice (MoJ) to determine how the proposed policy should work in relation to the existing legal avenue to challenge notification decisions. This will inform advice to the Minister for the Environment and Minister of Justice to make a decision on this matter. It is also recommended that the trade competitor restrictions are applied to reduce the risks of any misuse of the declaration powers, and ensure consistency with the provisions of the RMA.
62. The proposal has the potential to increase consent authorities' risk aversion in notification decisions, triggering longer reports that outline in detail why a particular resource consent application was notified or not. This could result in higher costs and potential delays in resource consent processing. However,

¹⁰ Biennial RMA Survey of Local Authorities and National Monitoring System.

¹¹ An order made by the Environment Court compelling a person to comply with the provisions of the RMA, a rule in a regional or district plan, or the terms and conditions of a resource consent.

providing an avenue to challenge notification decisions is a necessary means to ensure an appropriate check and balance on consent authorities' decisions and encourage meaningful public participation.

63. MoJ has provided feedback on the operational implications of this proposal for the Environment Court. MoJ advises that it cannot make firm predictions about the level of additional work that will be generated from the new avenue to challenge notification decisions to the Environment Court. However, based on the number of similar matters filed in previous years, MoJ considers that the Environment Court is likely to have the operational capacity for the new responsibility. MoJ notes that the assumption will require ongoing monitoring in the event that the number of challenges rise as a consequence of the new process.

Clarifying who can be appointed as alternate Environment Judges (sections 249 and 250)

64. I am proposing to amend the RMA to clarify that acting District Court Judges and acting Māori Land Court Judges are eligible for appointment as alternate Environment Judges.¹²
65. The RMA is unclear whether an acting District Court Judge or an acting Māori Land Court Judge could be appointed as an alternate Environment Judge. Therefore, I do not consider any principled reason why acting Judges should not be appointed as an alternate Environment Judge, considering they have the same access of powers, jurisdiction and immunities of the Judges.
66. The intent of the appointment of alternate Environment Judge under the RMA is to provide additional resources for the Environment Court. Former Judges are valuable resources to the Court system, given their knowledge and experience in the justice system.

¹² Section 249(2) of the RMA states that a person is only eligible to hold office as an alternate Judge if he or she holds office as a District Court Judge or Māori Land Court Judge