Impact Summary: Additional proposals for proposed bill to amend the Resource Management Act 1991

Section 1: General information

Purpose

1. This Regulatory Impact Statement (RIS) is additional to the original RIS for the resource management amendment bill. The original RIS provides the majority of the analysis for the proposals in the bill, which can be found on the Ministry for the Environment (the Ministry) website.[1]

2. This RIS covers three proposals:

    - 3.1.12 Enabling the Environment Protection Authority (EPA) to take enforcement action under the Resource Management Act 1991 (RMA)

    - 3.3.2 Clarification for alternate Environment Judge appointments (note this supersedes the analysis contained in the original RIS as this policy has been further clarified through further consultation undertaken with the Ministry of Justice and the judiciary)

    - 3.3.3 Provide legal protection for special advisors to the Environment Court

3. The Ministry is solely responsible for the analysis and advice set out in this RIS, except as otherwise indicated. The analysis and advice has been produced for the purpose of informing additional policy decisions to be taken by Cabinet for inclusion in the proposed package of amendments.

Key Limitations or Constraints on Analysis

4. There is an implicit role of making value judgements in a resource management system. The current Government considers that some key principles must be adhered to in any reform of the resource management system. These include upholding Part 2 of the RMA, providing for local decision-making and meaningful participation, and achieving good environmental outcomes.

5. For background on the overall scope of the bill and how the proposals were identified, see the original RIS for the proposed bill, which accompanied the paper considered by Cabinet (CAB-18-MIN-0485.01): 'Impact Summary: Proposed bill to amend the Resource Management Act 1991' (original RIS).

6. Additional proposals for the bill, covered in this RIS, were agreed by a group of Ministers with delegated authority (CAB-18-MIN-0485.01).

[1] http://www.mfe.govt.nz/more/briefings-cabinet-papers-and-related-material-search/regulatory-impact-statements/impact

7. This RIS covers a proposal relating to enforcement of the RMA, which came about after work undertaken by the Ministry on options to improve compliance with the RMA and improve environmental outcomes. This was the result of a series of reports identifying problems with councils' enforcement of the RMA.

8. Another proposal in this RIS provides more detailed analysis on a proposal from the original RIS, relating to alternate Judges in the Environment Court.

9. The changes included in this RIS broadly fit the following criteria, which are also included in the original RIS:

    - problem well-defined – the scope and scale of the problem is reasonably well-known and requires minimal further policy development and consultation

    - statutory fix required – the problem is created by the legislation and is not better addressed through national direction, regulation or guidance

    - simple solution – the problem is anticipated to require relatively straightforward amendments and minimal consequential changes

    - cost effective – the solution is generally easy for councils to implement and does not require major changes to existing systems and processes.

10. The criteria ensure that the proposed changes have minimal implementation costs for users of the system, particularly councils. This is important given that recent changes in the system from the Resource Legislation Amendment Act 2017 (RLAA) are still being implemented.

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Section 2: Problem definition and objectives

2.1 Background

11. The RMA is New Zealand's primary environmental statute, covering environmental protection, resource management and our urban planning regime. Since its inception, the RMA has been subject to numerous reviews and reforms. Recent changes include the RLAA, the Resource Management Amendment Act 2013, and the Resource Management (Simplifying and Streamlining) Amendment Act 2009. RISs for these previous reforms are available on the Ministry website.[2] The RLAA was the most comprehensive package of reforms to the RMA since its inception in 1991, and required a significant implementation programme.

12. The primary purpose of the RMA is to promote the sustainable management of New Zealand's natural and physical resources. To achieve this purpose, the RMA assigns different roles and responsibilities to central and local government, requiring authorities and the Minister for the Environment. Central government has responsibility for administering the RMA, providing national direction and responding to national priorities relating to the management of the environment and environmental issues. Most of the everyday decision-making under the RMA is devolved to city, district, regional and unitary councils.

2.2 What is the policy problem or opportunity?

13. This RIS is additional to the original RIS for the resource management amendment bill. The original RIS provides the majority of the analysis for the proposals in the bill.

14. The original RIS details the primary problems and specific problems the proposed bill seeks to address. The primary problems are that some RMA tools and processes create complexity and uncertainty, and opportunities for public participation are limited.

15. This RIS covers three proposals, which link to these overarching problems:

    - 3.1.12 Enabling the Environment Protection Authority (EPA) to take enforcement action under the Resource Management Act 1991 (RMA)
    - 3.3.2 Clarification for alternate Environment Court Judge appointments
    - 3.3.3 Provide legal protection for special advisors to the Environment Court

16. These proposals address discrete problems with the existing legislation and its enforcement. These have been identified through work on compliance, monitoring and enforcement; and the Environment Court. A wider review of the resource management system has not been undertaken at this stage.

17. The specific problem this bill seeks to address in relation to this proposal is that there is inconsistency and uncertainty in relation to the enforcement of the RMA. The problem and evidence is explained in more detail below in section 3.1.12.

[2] http://www.mfe.govt.nz/rma/reforms-and-amendments

2.3 Objectives of the proposed bill

18. Further details on the objectives for the proposed bill can be found in the original RIS.

19. The primary objective of the proposed resource management bill that is relevant to enabling the EPA to take enforcement action under the RMA, is reducing complexity and increasing certainty.

20. The Environment Court proposals in this RIS are minor, technical matters which require clarification in the RMA.

2.4 Who is affected and how?

21. Overall, the proposals in the bill aim to change the behaviour of councils and users of the resource management system, primarily resource consent holders. The specific proposal in this additional RIS is expected to improve compliance by strengthening powers for taking prosecutions and other enforcement actions. It is also expected to act as a deterrent to non-compliance as there is another organisation with enforcement functions.

22. Some groups, such as some councils, may oppose this change, as it provides the EPA power to assume the council's responsibility for enforcing the RMA in certain situations.

23. We have undertaken consultation with selected regional compliance staff on how this proposal can work in practice, and their feedback has been taken into account. We have consulted the Ministry of Justice, Treasury, the EPA and Crown Law in developing detailed policy proposals, and these agencies are generally supportive of these proposals.

2.5 Are there any constraints on the scope for decision-making?

24. The changes aim to address a small set of problems that require legislative change. These changes reflect the decision of Cabinet to give the EPA enforcement functions under the RMA [CAB-18-MIN-0485.01, paragraph 34 refers].

25. To ensure the scope of the proposed bill is manageable, the criteria for inclusion is to include proposals that broadly meet the following criteria:

    - problem well-defined – the scope and scale of the problem is reasonably well-known and requires minimal further policy development and consultation

    - statutory fix required – the problem is created by the legislation and is not better addressed through national direction, regulation or guidance

    - simple solution – the problem is anticipated to require relatively straightforward amendments and minimal consequential changes

    - cost effective – the solution is generally easy for councils to implement and does not require major changes to existing systems and processes.

26. Given the evidence base behind the proposal, we consider it broadly meets the criteria of the problem being well defined. We were directed to consider a statutory fix to address the problem. Regarding the cost effectiveness, we consider the proposal in this additional RIS does have costs, however the benefits outweigh the costs (further explained in section 4).

27. A wider, comprehensive analysis of the system and the problems associated with it has not been undertaken. This is because the Government intends to begin a longer-term, more comprehensive review of the resource management system this year that builds on the current programme of work to address key priorities across urban development, climate change and freshwater.

28. The changes proposed in this bill are largely discrete and stand-alone, so they would not be impacted by, or impact on, longer-term changes.

Section 3: Options identification

30. The following section outlines the options considered for the additional proposals. The objectives and specific proposals are outlined below in table 1. The proposals discussed in this additional RIS are in bold text. The numbering in section three, reflects the numbering in table 1 and is aligned with the original RIS for this proposed bill.

31. Note that proposals no longer part of this proposed bill are shaded grey.

Table 1: Objectives for the reform and specific proposals

Note: Bold text = proposals discussed in this additional RIS, grey text = proposals no longer in the proposed bill

Primary Objectives	**Reduce complexity and uncertainty with RMA tools and processes**									**Increase opportunities for public participation**		**Minor/technical fixes**
Desired outcomes	Councils have more certainty that local decision-making will not be overridden in certain circumstances	Councils are able to place consent applications on hold at the request of the applicant, and in instances where they are waiting for a charge to be paid	Infringement fee amounts for persons and persons other than natural persons are adequate to deter non-compliance	Sufficient time is provided for councils to make the decision to take a prosecution	A fair timeframe is provided for applicants in emergency circumstances to apply for resource consent	Processes are clarified to ensure better and more timely implementation of the National Policy Statement for Freshwater Management 2014	The RMA promotes appropriate subdivision and the legislation is consistent in regard to decision-making	All councils are able to use a contribution regime	The RMA is effectively enforced	Adequate opportunity for public participation in the resource consent processes is ensured	Adequate access to justice in relation to resource consent decisions is ensured	
Reform proposals	3.1.1 Repeal section 360D regulations (remove duplicating rules) and consequential change to section 360E 3.1.2 Repeal section 360G regulations to prescribe fast track activities or information requirements 3.1.3 Repeal section 360H regulations to preclude notification for certain activities or who is an affected party for limited notification	3.1.4 Allow applicant led flexibility in processing of their non-notified resource consent applications 3.1.5 Allow councils to stop the resource consent application 'statutory clock' if a charge has not been paid	3.1.6 Increase infringement fees and introduce a split for natural and persons other than natural persons	3.1.7 Extend the statutory limitation period for filing charges	3.1.8 Extend the timeframe for applying for a resource consent for emergency works under section 330B (emergency works under the Civil Defence Emergency Management Act 2002)	3.1.9 Enable the effects of multiple resource consents to be considered when reviewing consents; and address the timing for when a review can be undertaken Enable review of consent conditions while other unrelated plan provisions are under appeal	3.1.10 Reverse the subdivision presumption	3.1.11 Reinstate the use of financial contributions	**3.1.12 Enabling the EPA to take enforcement action under the RMA**	3.2.1 Repeal the public notification preclusions relating to residential activities and subdivision of land and repeal the definition of 'residential activity'	3.2.1 Repeal the preclusions on the right to appeal decisions, conditions of consent, or objections relating to the subdivision of land and residential activities 3.2.2 Repeal the restriction on appeals which limit appeals on resource consents to those matters raised in a submission 3.2.3 Enable the Environment Court to hear challenges relating to resource consent notification decisions	3.3.1 Make explicit that deemed permitted activities do not contravene Part 3 of the RMA **3.3.2 Clarification for alternate Environment Court Judge appointments** **3.3.3 Provide legal protection for special advisors to the Environment Court**

3.1 Reduce complexity and uncertainty with RMA tools and processes

3.1.12 Enabling the EPA to take enforcement action under the RMA

3.1.12.1 Giving the EPA enforcement powers under the RMA

Problem

32. Councils have responsibility for compliance, monitoring and enforcement (CME) functions under the RMA. However, recent reports, including those by the Environmental Defence Society[3], the Ministry[4] and the OECD[5] stated there are inconsistencies regarding councils' capability and resourcing of CME, and some councils are not carrying out their enforcement functions effectively. A lack of effective and consistent enforcement can lead to a reduction in compliance with the RMA, which in turn leads to negative impacts on the environment.

33. The key issues in relation to council CME are:

    - lack of resources/priority given to CME – National Monitoring System (NMS) data shows that 10 councils have no staff dedicated to CME, and 29 have less than one Full Time Equivalent staff (FTE)[6]. All but one of these 29 are at the city and district council level. In addition, the total number of RMA CME staff dropped by 7.8 per cent from 436.7 FTE in 2012/2013 to 374 FTE in 2016/17[7].
    - lack of capability/skills – in relation to incident investigation or taking a prosecution[8]
    - conflicts of interest – elected representative involvement in enforcement decisions[9]
    - lack of transparency and accountability – lack of central government oversight and response to issues with local authorities' performance.[10]

34. Insufficient council CME appears to be a significant issue, and not acting will lead to negative impacts on the environment. The Ministry's objective is to strengthen enforcement against those who may breach the RMA. This ties into the overall goal of increasing compliance with the RMA, which will lead to better environmental outcomes.

35. No single tool will address the range of causes of poor compliance in the system – a range of tools are required. There are approaches that have been developed to assist

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[3] Brown, 2017, *Last Line of Defence*, Environmental Defence Society, Auckland

[4] The Ministry for the Environment, 2016, *Compliance, monitoring and enforcement by local authorities under the Resource Management Act 1991*, Wellington

[5] OECD (2017), *OECD Environmental Performance Reviews: New Zealand* 2017, OECD Publishing, Paris

[6] National Monitoring System data 2016/17

[7] National Monitoring System data 2012/13 - 2016/17

[8] Brown, 2017, *Last Line of Defence*, Environmental Defence Society, Auckland, p 45.

[9] Ibid, p 48.

[10] Ibid, p 34.

councils in carrying out their CME functions. For instance, the Ministry released its Best Practice Guidelines for Compliance, Monitoring and Enforcement under the RMA in 2018, which provides councils with guidance as to what is expected of them in terms of CME. In addition, there are plans to improve the information about CME collected by the Ministry's NMS, which could inform future regulatory action.

Proposed Option – give the EPA the same enforcement powers as councils

36. We consider central government intervention is justified due to certain councils lacking capability in regard to their CME functions.

37. The proposed option is to create a RMA enforcement unit within the EPA, with the aim of increasing compliance with the RMA, and leading to better environmental outcomes. The aim is to ensure that appropriate enforcement action is taken against breaches of the RMA. The EPA's role would complement councils' functions. The EPA would assist councils, and intervene in the CME role of councils in certain cases.

38. The assistance function could help alleviate the issues councils face in terms of:
    - lack of resourcing and priority given to CME
    - lack of capability/skills.

39. The intervention function could assist:
    - in situations where there is a benefit in the EPA having political independence
    - in raising the profile of CME across the sector, resulting in a higher prioritisation of CME work.

40. A central government enforcement unit could also allow the targeting of specific environmental issues from a national perspective.The EPA currently has no enforcement functions under the RMA, so we propose that the EPA is given the same enforcement powers as councils. This would mean the EPA can respond in a manner that is appropriate to the nature and seriousness of the offending.

41. The EPA would be given RMA enforcement powers by enabling the EPA to appoint enforcement officers, with ancillary powers to allow the EPA to undertake actions related to enforcement.

Alternative Options

Targeted audits and recommendations

42. It would be possible for the Ministry or the EPA to audit councils in order to identify issues with council performance, and to provide recommendations on actions a council may need to carry out. These audits could target poor enforcement decision procedures and conflict of interest policies, and the implementation of those procedures and policies. Audits could be directed where there is insufficient resourcing of CME by councils.

43. This option would allow for the targeting of systemic issues within a council, rather than a case-by-case approach to enforcement action. There would need to be sufficient weight given to these recommendations to encourage council action after an audit has been undertaken, potentially including a means to enforce recommendations.

Place an enforcement unit within the Ministry for the Environment

44. We considered whether an enforcement role could be given to the Ministry instead of the EPA. However, the Ministry does not have any enforcement staff or associated resources in place that could be used to carry out enforcement functions. The EPA has enforcement functions under other environmental legislation, which may allow it to transition well into this enforcement role. On this basis, it was considered the CME role would fit best within the EPA.

Provide the EPA with different enforcement powers than councils

Provide the EPA with greater enforcement powers than those currently held by councils

45. It would be possible to amend the RMA so the EPA is given greater enforcement powers than councils. For example, the EPA could be given powers to undertake remediation action to mitigate or prevent environmental damage where there is a significant risk of environmental damage. Currently councils require an enforcement order from the Environment Court to perform these functions, which leads to delays in carrying out remedial action. Powers such as this may be useful to improve enforcement of the RMA.

46. This alternative would allow greater powers of enforcement than the proposed option, and so would help address the problem to a greater extent. However, this alternative is not recommended, as this option would lead to a misalignment between the powers of the EPA and those of councils. It would be difficult to justify giving the EPA greater enforcement powers than councils, where councils will continue to carry out the bulk of enforcement actions.

Provide the EPA with some of the enforcement powers currently held by councils

47. It would be possible to amend the RMA so the EPA is given only some of the enforcement powers currently held by councils. For example, the EPA could be given powers to enter property to collect evidence, but not be able to issue abatement notices and infringement notices. This would mean the only enforcement actions available to the EPA would be prosecutions and enforcement orders.

48. This alternative would ensure that the EPA only focuses on offending that is likely to justify a prosecution or enforcement order (ie, significant offending).

49. However, this means that if the EPA investigates a case and finds that neither a prosecution nor enforcement order is justified, it would have no other formal tools for responding and may not be able to take any action. The EPA might have to request the council take appropriate action. In addition, a wider range of tools, including the power to issue an infringement notice, will give the EPA more options when undertaking an investigation and will enable them to take appropriate action.

Conclusion

50. The proposed option will help to improve CME of the RMA across New Zealand. It will improve environmental outcomes by assisting and supporting councils, and intervening in their enforcement activities if deemed necessary. However, this proposal will not, by itself, address all problems with CME under the RMA.

51. The following sections are premised on the high-level conclusion to give the EPA enforcement powers.

3.1.12.2 When the EPA can act in relation to a matter

Problem

52. There may be instances where a council is not carrying out its enforcement functions effectively. In some cases, if effective action is not being taken by the council, the EPA may wish to 'take over' a particular case. The EPA currently has no specific powers to intervene in council CME activities.

53. There would need to be a framework to guide the EPA's actions. This is because there is an overlap with its functions and councils' functions.

Proposed Option

54. The EPA to assist (help the council) or intervene (take over the function of the council) where a council is already involved in an investigation or enforcement action, or commence its own action where a council is not involved in an investigation or enforcement action. The EPA will have the power to choose which cases to take on, and to refer the matter to a council, if appropriate.

55. The ability to assist councils with cases would be of use where the council requires additional resourcing or capability to take a case. The ability to intervene in a case will assist where a council is not taking effective enforcement action, for example due to a lack of political will.

56. There are various alternative options as to how to create a framework to guide the EPA's enforcement actions.

Alternative options

Factors for taking action set in legislation

57. The factors specifying when the EPA takes action could be set legislation, similar to those for calling in proposals of national significance (section 142 of the RMA). These may be in relation to issues of importance from a national level. For example, in determining whether to assist, intervene or commence in relation to a matter (investigation or enforcement action), the EPA could, among other things, have regard to:
    - whether there is significant public interest in relation to the matter
    - the actual or potential effects on the environment in relation to the matter
    - the risk of a similar matter recurring in the particular region or district, or nationally; or the cumulative effects of a similar matter occurring in the past
    - the capacity and capability of any relevant local authority to adequately respond to the matter
    - whether there is an actual or potential effect on more than one region or district in relation to the matter.

58. Having factors by which the EPA acts in legislation could help demarcate the EPA's function from councils' functions, and provide guidance to the EPA as to when it should use its enforcement function under the Act. This would be especially useful where the

EPA would be intervening in a council's enforcement action. However, these factors would need to be broad and contain a 'catch-all' provision in order to give the EPA flexibility to carry out any of its functions. Therefore, this option would not provide much more certainty to councils or the public as to how the EPA operate in practice, compared with having factors set outside of legislation.

Factors for acting specified in a policy document

59. An alternative option would be for the factors the EPA will use to decide whether to act on cases will be developed through a policy created by the EPA and/or the Ministry, which would set out the factors that the EPA will need to take into account before assisting or intervening. In parallel with these legislative changes, there is work planned for the time period before these powers are granted, where the EPA will assist councils without the use of any enforcement powers. This option will allow the best factors to be developed in practice, which can give councils and the public a better indication of the cases the EPA may be likely to take.

60. This option gives the EPA a high level of flexibility in where it chooses to investigate or take enforcement action, which is important so that it can respond to differing environmental offending over time. The factors the EPA could take into account in order to take action can change over time, and having them set in a policy document would allow the factors to be changed more easily compared with if they were in legislation. The ability to challenge decision-making will not be materially different if the factors are set at a policy level compared with if they are set in legislation. In both cases, judicial review will be available to a council. We envisage that the policy document would be available to the public, to inform how the EPA decides whether to take action.

Factors for acting specified in legislation, with thresholds

61. As for the option one, except that there are criteria that the EPA must have regard to, and each criterion has a threshold. For instance, "a high risk of the offending recurring"; "the council has a low capacity to process the matter", etc. However, there is a risk involved in defining the cases in which the EPA may act in advance, as it will limit its future actions where it is not certain which types of cases it would be best suited to take. On that basis, this option is not recommended.

Factors for acting specified in regulations

62. As for the option one, except the factors would be developed in regulations. There would be an empowering provision in the Act to allow for criteria to be developed via a regulation. An advantage of this is that it would enable criteria to be developed after the interim period where the EPA will work with councils without any powers. However, during the period where regulations are not in effect, it may be difficult for the EPA to decide whether to take cases, as the EPA would be less justified in having its own policy in determining factors where regulations are intended to cover these criteria. This could delay the ability for the EPA to take action, and on that basis, this alternative is not recommended.

3.1.12.3 Process requirements for the EPA's involvement

Problem

63. It will need to be determined how the EPA and councils will interact where the EPA decides to be involved in enforcement actions or investigations, in order to prevent uncertainty, to ensure there is no overlap of functions and to ensure the effective use of these functions in practice.

Proposed Option

64. Intervention in an enforcement action/investigation would be effective, once the EPA gives written notice to the chief executive of the relevant councils.

65. Assistance and commencement can happen at any time and no written notice would be required.

Intervention

66. 'Intervention' would mean that, if there is a potential prosecution, the EPA would become the prosecutor when charges are filed. If there are other potential enforcement actions, the EPA will issue the enforcement action/apply to the Environment Court. If the council is carrying out an investigation, the investigation is controlled by the EPA. Ultimate decision-making would lie with EPA in respect of any enforcement matter, but the council may also be involved at the EPA's discretion.

Assistance

67. 'Assistance' would mean the default position would be that all decision-making would remain with the council, but the EPA would provide guidance/support in respect of any of the investigation or enforcement action. The EPA could also become the prosecutor or otherwise the lead on the enforcement action, if agreed between the council and the EPA.

Commencement

68. 'Commencement' means that the EPA may commence an investigation or enforcement action where no council is involved in the matter.

Alternative Options

Give notice to the council before the EPA's powers are effective

69. As per the preferred option, except to give five working days notice to the council before the EPA's powers are effective, to allow for consultation and response. This would allow for more collaboration between the EPA and councils. However, this provision would not be of use where the EPA is assisting the council, as communication between the EPA and the council will occur before the EPA chooses to provide assistance. We would expect the assistance function to be used in the majority of cases, and the intervention function to be used sparingly. However when the EPA uses the intervention function, this provision may limit the ability of the EPA to act quickly when required, which is critical to ensure the timely collection of evidence. On that basis, this alternative is not recommended.

Conclusions

70. The proposed option is preferred, as it will allow the EPA to act with minimal delay in relation to a matter, and will effectively delineate the ways in which the EPA can act.

3.1.12.4 Cost recovery

Problem

71. There are currently no cost recovery provisions in the RMA which would allow the EPA to recover the costs of enforcement action.

72. There are a number of ways councils can recover costs for taking enforcement action. Significantly, under section 342 of the RMA, councils are entitled to receive 90 per cent of fines awarded where a prosecution is successful. However, there is no legislative precedent for fines to be paid to a central government agency, and fines are generally paid into a Crown bank account.

Proposed Option

73. The proposed option is to give the EPA a power equivalent to that under section 152 of the Health and Safety at Work Act 2015. This would give the EPA a power to apply to the sentencing court for a convicted offender to pay to the EPA a sum that it thinks just and reasonable towards the costs of the prosecution (including the costs of investigating the offending and any associated costs).

74. This power is broader in scope than the ability under the Costs in Criminal Cases Act 1967 to apply for costs that apply to all prosecutions, as it specifically mentions investigation costs. This power will not be limited by a scale set out in Schedule 1 of the Costs in Criminal Cases Regulations 1987, in the way that costs under the Costs in Criminal Cases Act 1967 can be (unless the criteria to award costs in excess of this scale are met).

75. This option would go some way in giving the EPA the power to recover costs, given they will not be able to receive fines after a successful prosecution in the way that councils can. In addition, if the EPA assists a council, and takes a prosecution on a council's behalf, the local authority will be able to receive the fines from taking a prosecution. We anticipate that cost-sharing between the council and the EPA would be agreed on a case-by-case basis.

Alternative Options

Use equivalent of the 'charge back' provision

76. An equivalent of the section 25(4) of the RMA 'charge back' provision, which allows the recovery of costs from the council for the actions of a person appointed by the Minister to exercise the functions of a council. This could be used where the council has 'failed' in its enforcement functions, and the council will bear the costs of the EPA's prosecution/enforcement. An application for costs could be made to a court with criminal jurisdiction or the Environment Court. The definition of 'failed' would need to be in legislation. There could be a provision the equivalent of section 25(2) of the RMA as a safeguard – the council will have to be given notice in writing, and will have 20 working days to respond.

77. However, this power is very similar to the Minister's section 25 powers under the RMA, which can be used in this situation if the council is not carrying out its entire CME functions to the extent necessary to achieve the purpose of the RMA (after the EPA has determined that it needs to step in). In addition, there is no legislative precedent for such a provision, there is difficulty in defining the extent of the 'failure' by the council before this power would apply, and the power would be very punitive towards councils.

Conclusions

78. The proposed option is preferred as it gives the EPA a straightforward ability to recover costs.

3.3.12.5 Information gathering powers for the EPA

Problem

79. The EPA currently does not have any specific information gathering powers under the RMA.

80. The Minister for the Environment can require councils to provide information under s 27 of the RMA, and can investigate and make recommendations for a "failure or omission" by a council to perform its statutory duties.

Proposed Option

81. Give the EPA the power to require information from councils and make it clear that they can require information in respect of enforcement/prosecutions. The time in which to receive information should be as soon as reasonably practicable, and in any case in not more than 10 working days, to prevent delays in response, which may impede enforcement action by the EPA.

82. This will make it clear that the EPA has the powers necessary to carry out its functions, rather than relying on the delegation of section 27 of the RMA, which may be too broad.

Alternative Options

Delegation of information-gathering powers to the EPA

83. Delegation of section 27 information-gathering powers to the EPA. This section contains broad powers to collect information from councils. However, this option would not grant a specific ability to collect information for the purposes for prosecution and enforcement, which may leave the power open to challenge.

Timeframe to provide information

84. As per the proposed option, but with a 20 working day timeframe to provide information. However, this will likely delay involvement by the EPA, which may frustrate effective enforcement action.

Conclusions

85. The proposed option is preferred as it gives unambiguous powers to the EPA to collect information from local authorities, in a timely manner.

3.1.12.6 Additional reporting requirements for the EPA

Problem

86. The EPA will require additional reporting obligations for its new RMA enforcement function.

Proposed Option

87. Adding a requirement that the annual report made by the EPA under section 150 of the Crown Entities Act 2004 be amended to include actions taken in respect of prosecutions and enforcement actions under the RMA, and the outcomes of these (where it would not prejudice the maintenance of the law). This is similar to the reporting requirement for the EPA set out in section 148 of the Hazardous Substances and New Organisms Act 1996.

Alternative Options

EPA make public reports

88. The EPA make public reports in respect of prosecutions and its enforcement actions (where it would not prejudice the maintenance of the law):

    (a) for the 12-month period starting on the date of this provision coming into force; and

    (b) for each following 12-month period.

89. This option is not preferred as it duplicates annual reporting requirements and may be onerous.

Conclusions

90. The proposed option is preferred as it is allows the EPA to report on its new function without requiring separate reports.

3.3 Minor/Technical Fixes

3.3.2 Clarification for Environment Judge appointments

91. The problem of a lack of clarity with the appointment of alternate Environment Judges was outlined in the original RIS. Following this, we have further consulted with the Ministry of Justice and the judiciary. This resulted in further defining the problem and proposed option. This section supersedes the section (3.3.2) in the original RIS.

Problem

92. Under the RMA, any judges (including alternate Environment Judges) appointed to the Environment Court, are dual warranted as judges or acting judges of the District Court or Māori Land Court. Their jurisdiction and powers are provided under District Court Act 2016 (DCA) and Te Ture Whenua Māori Act 1993 (TTWMA).

93. Under DCA and TTWMA, the Chief Judges of the relevant Courts are required to certify that acting Judges are necessary for the operation of their Courts, before they are eligible to be appointed as acting judges. This certification requirement was introduced in 2016, and intended to ensure the Courts' are not relying unnecessarily on acting Judges.[11]

94. Retired Environment Judges may only be needed for the operation of the Environment Court, rather than the District Court or Maori Land Court. In these cases, the relevant Chief Judges of the District Court and Māori Land Court would not be able to certify the retired Environment Judges, and these judges would not be able to be appointed as acting judges, which is a pre-requisite to be appointed as alternate Environment Judge.

95. These retired Environment Judges are valuable resources to the Environment Court as they have specialist knowledge in the resource management area.

Proposed Option

Amend the RMA to enable retired Environment Judges be appointed as alternate Environment Judges

96. The proposed option is to enable retired Environment Judges who are not needed in the District Court or Māori Land Court, but needed for the operation of the Environment Court, to be appointed as alternate Environment Judges under the RMA. This means a certification from the Chief District Court Judge or the Chief Māori Land Court Judge will no longer be required.

97. This proposed option will enable Environment Judges who have to retire at the age of 70 (due to the statutory requirement under DCA and TTWMA), but cannot be appointed as acting judges due to the certification requirements, to be appointed as an alternate Environment Judge. We are proposing that the term of appointments for these alternate Environment Judges align with the acting judges' term of appointment under

[11] Acting judges are not counted towards the maximum number of judges in the Courts.

DCA and TTWMA. This is to ensure consistency in the appointment of acting judges or equivalents in the Court system.

98. We are proposing to use the phrase ‘retired’ as this is consistent with the phrase used in another provisions of the RMA, and will reduce any confusion for users of the RMA.

99. To align with the DCA and the TTWMA, we are also proposing that the Principal Environment Judge, prior to recommending the appointment to the Attorney-General, will need to certify that the appointment of the retired Environment Judge as an alternate Environment Judge is necessary for the operation of the Environment Court. This also provides a safeguard against any over reliance of alternate Environment Judges in the Environment Court.

100. This option will allow for the specialist knowledge of retired Environment Judges to be retained by the Environment Court.

Alternative Options

Amend the District Court Act 2016 or Te Ture Whenua Maori Act 1993 to enable retired Environment Judges to be appointed as acting Judges

101. The District Court Act 2016 or the Te Ture Whenua Māori Act 1993 could be amended to enable the relevant Chief Judges to certify that acting Judges are necessary for the operation of the Environment Court, as well as their own courts.

102. This is not considered to be a preferred option as this legislative fix would not be as simple because it would require amendments to two other pieces of legislation. It may also have other implications on the operations of the Māori Land Court and District Court.

Conclusion

103. The proposed option is our preferred option as this will only require amendments to the RMA and not the other two pieces of legislation. Most importantly, it will enable retired Environment Judges who have the specialist knowledge and experience in resource management to be retained to assist with decisions in the Environment Court.

3.3.3 Provide legal protection for special advisors to the Environment Court

Problem

104. Special advisors are appointed from time to time to act as an Amicus Curiae.[12] When appointed, there is no contract that offers anything other than a fee and disbursements. The Environment Court appoints such advisors between two and four times per year.

105. Generally, special advisors are appointed where the Environment Court lacks some technical expertise.[13] A special advisor is not a member of the Environment Court, and therefore is not protected from legal proceedings (ie, does not have legal immunities) under section 261 of the RMA.

106. There is a risk that a special advisor who is needed to provide critical specialist assistance to the Environment Judge may decide not to be involved in Environment Court processes due to the lack of immunity and protection from legal proceedings that may result from advice they give in the Court. Given the wide range of topics that the Environment Court deals with, this may pose a risk if the Court cannot access technical specialists.

Proposed Option

Provide legal protection for special advisors to the Environment Court

107. The proposed option is to provide legal protection for special advisors to the Environment Court.

108. There is current precedent for protection from liability for special advisors in other jurisdictions. Section 164 of the Senior Courts Act 2016 provides legal protection for technical advisers. We consider this protection should also be available to special advisors in the Environment Court and recommend an amendment to the RMA to provide for this.

109. There are no known risks of providing legal protection for special advisors to the Environment Court under the RMA. Moreover, we consider the amendment to be minor and straightforward, and meets the relevant objectives of the bill.

Alternative Options

110. There are no alternative options. There is a clear problem and solution in the proposed option.

[12] Friend of the Court.

[13] Under s259 of the RMA, the Principal Environment Judge can appoint special advisors to assist with the matters of the Court (as the Principal Environment Judge sees fit).

Section 4: Impact Analysis (Proposed approach)

4.1 Summary table of costs and benefits

111. The costs and benefits below set out what is expected based on currently available information. The policies will be further tested, and the costs and benefits better understood, through public involvement during the Select Committee process.

Affected parties	**Comment**: nature of cost or benefit (eg, ongoing, one-off), evidence and assumption (eg, compliance rates), risks	**Impact** $m present value, for monetised impacts; high, medium or low for non-monetised impacts
Additional costs of proposed approach, compared to taking no action		
Councils	Potential additional work when collaborating with the EPA, when the EPA is undertaking its assistance enforcement function.	Low.
	Time in understanding EPA enforcement function.	Low.
The Ministry for the Environment	Central government staff time costs in policy development and subsequent implementation (eg, guidance).	Low.
	Central government budget in implementation costs.	
Resource management system users (including resource management professionals, developers and general public)	Increased likelihood of non-compliance being detected and acted upon.	Low/medium – the intended effect of the policy is the EPA enforcement function acts as a deterrent to non-compliance.
EPA	Increased cost with setting up and undertaking new enforcement functions (eg, additional staff, increased public communications, implementing new function, additional reporting requirements)	Medium – EPA has discretion on when to use its powers. $830,000 has been allocated to the EPA for this function for each of the years 2019/20 and 2020/21. The EPA will assist councils before the EPA receives its powers, and its staff for approximately the next 12 months will be two full FTE staff, a team leader and a senior investigator. These will report to a manager at

		the EPA, who is currently also responsible for Exclusive Economic Zone Act compliance.
	Increased staff time costs in understanding new functions.	Low – Ministry/EPA guidance can assist.
The Courts	Potential increased workload due to increased enforcement actions.	Low. 1-2 prosecutions per year estimated, based on current funding for unit.
Total Monetised Cost		Potential range of costs is likely to be low/medium. We have not yet looked at them in detail for this RIS.
Non-monetised costs		Low/medium.

Expected benefits of proposed approach, compared to taking no action		
Councils	Access to additional investigative resource if their resources are overwhelmed.	Low/medium – noting that the EPA has discretion on whether it uses its functions for a particular case.
Resource management system users (including resource management professionals, developers and general public)	Increased enforcement of the RMA, leading to increased confidence and certainty in the resource management system.	Low/medium – noting that the EPA has discretion on whether it uses its functions for a particular case.
EPA	Enhanced investigative skill set with new enforcement functions under the RMA.	Low.
The Courts	The ability to provide legal protection for special advisors to the Environment Court would provide greater assurance that the Environment Court can obtain specialist technical support when required.	Low.
	Benefits through allowing for the specialist knowledge of retired Environment Judges to be retained by the Environment Court.	Low
Total Monetised Benefit		Potential range of costs is low/medium, we have not yet looked at them in detail for this RIS.

Non-monetised benefits		Low/medium.

4.2 What other impacts is this approach likely to have?

112. The RMA has been amended numerous times since enactment and further amendment may perpetuate issues with effective implementation.

Section 5: Stakeholder views

5.1 What do stakeholders think about the problem and the proposed solution?

113. In order for a comprehensive review of the resource management system to take place this year, as signaled by the Minister, there are time limitations for this proposed bill. This has led to constraints in time for the initial development of the proposals. Time pressure has also constrained stakeholder engagement.

114. The Minister has written to councils and has stated that the EPA would primarily play a complementary role to councils, but that the EPA will be able to take direct action in certain circumstances. We have undertaken consultation with selected regional compliance staff about the EPA proposal, and how the assistance function of the EPA can work in practice and provide benefit to both councils and the EPA. This feedback has helped ensure the workability of the proposal.

115. Local Government New Zealand have some concerns with the proposal relating to EPA enforcement functions, in particular the EPA's power to direct action without the support of the council concerned. This is likely in most cases to be limited to where councils have a lack of resourcing or a lack of political will to carry out a particular enforcement action. There will be an opportunity for submissions through the Select Committee process, which will provide good insight into further stakeholder views.

116. We have also consulted the Ministry of Justice, Treasury, the EPA and Crown Law in developing detailed policy proposals. Comments received by agencies were generally supportive of the proposed amendments.

Section 6: Implementation and operation

6.1 How will the new arrangements be given effect?

117. The proposals will be given effect through legislation to amend the RMA.

118. The Ministry and the EPA will communicate the changes through various pieces of guidance, including policy documents on the EPA's enforcement function.

119. For the majority of proposals, as outlined in the original RIS, councils will be responsible for the ongoing operation and enforcement of the changes. See the original RIS for more information on this.

120. For the EPA enforcement proposal, the EPA will be responsible for the ongoing operation of their enforcement function.

Transitional arrangements

121. Transitioning from the current RMA to the amended RMA will create some costs and uncertainty, particularly for the EPA and councils.

122. We are proposing that the EPA enforcement proposal changes commence the day after the date of Royal Assent. We are also proposing that the EPA is able to apply its new powers in respect of matters that occurred prior to commencement. This will mean that the EPA could use their enforcement powers as soon as possible.

123. We are proposing that the alternate Environment Judge proposal commence the day after the date of Royal Assent.

124. We are also proposing that the special advisors to the Environment Court proposal commence the day after the date of Royal Assent and that it apply to special advisors that have been appointed to assist with the Environment Court in a proceeding from the day after the date of Royal Assent. Immediate commencement will help ensure there are no barriers to special advisors being able to assist in the Court.

Section 7: Monitoring, evaluation and review

7.1 How will the impact of the new arrangements be monitored?

125. The Ministry has a regulatory stewardship role in regard to the environment. This means ensuring New Zealand's continued prosperity does not compromise the needs of future generations. As a regulatory steward, the Ministry ensures that environmental regulation is achieving this aim as effectively as possible.

126. The Ministry collects data through the NMS. The NMS requires councils to provide detailed data each year on the functions, tools, and processes that they are responsible for under the RMA. It is intended to provide a comprehensive and coordinated national framework to monitor the RMA. In addition, the EPA will be required to report on its RMA enforcement functions.

127. The monitoring and evaluation programme for RLAA can be used as a model and adapted following the new proposals (both in the original RIS and this RIS) to monitor the effectiveness of the changes against the objectives for the proposed bill. This is yet to be finalised but as an example it could include continuing to assist with implementation through the use of LG connect, a forum that councils can join to ask each other and the Ministry questions on the amendments.

7.2 When and how will the new arrangements be reviewed?

128. The new proposals will be reviewed alongside the previous 2017 amendments. This will primarily be done through use of the NMS which is collected annually and data can then be extracted. Broader environmental reporting on outcomes through attribution is difficult. We can gather stakeholder feedback on the effectiveness of the changes from organisations such as the New Zealand Planning Institute or the Resource Management Law Association. This will be used to inform policy work on long-term changes to the RMA, which has been signaled to commence this year.

129. Stakeholders will have opportunities to comment on the changes through LG connect. Councils will also be able to raise their own concerns, and pass concerns of the public and other professions to the Ministry through their resource management relationship manager. The Ministry and the EPA will collaborate with a group of compliance professionals from regional and unitary councils, in implementing the proposal to give the EPA enforcement powers.

130. Members of the public and planning professionals can call the Ministry to discuss the changes or write directly to the Minister for the Environment.

131. As the new arrangements are reviewed, progress on a more comprehensive reform to the resource management and planning system will be made to address wider issues, beginning this year, as noted by the Minister.