2018 RMA Amendment Bill: Outstanding scope decisions

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Security Level	In-Confidence	MfE Priority:	Urgent

	Action sought:	Response by:
To Hon David Parker, Minister for the Environment	Decision	19 June 2018

Actions for Minister's Office Staff	**Return** the signed report to MfE.
Number of Attachments 2	Titles of attachments: 1. Appendix 1 - Staged approach to the Resource Management Act 1991 (RMA) reform 2. Appendix 2 - Relevant provisions that were never implemented, and were repealed in 2017
Note any feedback on the quality of the report	

Ministry for the Environment contacts

Position	Name	Cell phone	1st contact
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2018 RMA Amendment Bill: Outstanding scope decisions

Key Messages

1. On 27 April, we provided you with our most recent advice on a suite of possible amendments that could be progressed as part of a narrowly scoped Resource Management Amendment Bill to be introduced later this year (2018-B-04498 refers). We also met with you to discuss this advice on 2 May and 24 May.
2. This briefing note seeks final decisions on the scope of the narrow Bill. At our 2 May meeting, you requested advice on possible options to enable the Environment Court to hear appeals on councils' notification decisions for resource consents.
3. At present, and for the life of the RMA, the only avenue to appeal notification decisions is by judicial review to the High Court. An enabling power was introduced in 2005 to replace the judicial review with an ability for the Environment Court to issue a declaration on notification decisions. As it was never brought into force, this enabling power was repealed in 2017.
4. Changing the current provisions has a high risk of unintended consequence. It is likely to give rise to additional uncertainty, cost and delay within the system through increased costs for councils, decreased certainty for consent applicants, and increased workload for the Environment Court. It could also have an impact on the government's wider programme of urban development as the Crown departments and agencies are applicants and/or consent holders.
5. Given these risks, we do not recommend including an amendment to enable the Environment Court to hear challenges to notification decisions for resource consents in this narrow Bill. Instead, we suggest this is taken forward within the workstream as part of the longer-term system reform.
6. If you wish to progress this further, we have developed two possible options to provide for a challenge to a council's notification decision as part of the narrow Bill. Both options affect the jurisdiction of both the Environment Court and the High Court and progressing either will require us to undertake more detailed consultation with the Ministry of Justice.
7. We also seek your confirmation of the content in Appendix 1, which summarises the Bill's purpose, content and the two staged approach to the resource management reform in line with our discussions to date. This will be reflected in the draft Cabinet paper we anticipate providing you with on 20 June in order to consult with your ministerial colleagues ahead of its consideration at ENV on 31 July.

Recommendations

8. We recommend that you:
    a. **Confirm** the purpose, objective and content of the proposed Bill and the two staged approach to the reform of the RMA (as outlined in Appendix 1).

Yes/No

EITHER:

b. **Agree** to consider the issue of appeals to notification decisions on resource consent applications alongside other issues relating to the role of the Environment Court including public participation and appeal rights, as part of the comprehensive review of the RMA to be undertaken next year.

Yes/No

OR:

c. **Direct** officials to progress an amendment through the proposed Bill that will allow the Environment Court to consider challenges to notification decisions on resource consent applications by way of a declaration (Option A).

Yes/No

OR:

d. **Direct** officials to progress an amendment through the proposed Bill that will enable a merit appeal to the Environment Court for notification decisions on resource consent applications (Option B).

Yes/No

e. **Note** that we will reflect your decisions above in the draft Cabinet paper for the Bill that we will provide to you on 20 June, for consultation with your ministerial colleagues ahead of consideration by ENV on 31 July.

Yes/No

Signature

Katherine Wilson
Director
Resource Management System

15/6/18
Date

Hon David Parker
Minister for the Environment

Date

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Supporting material

Context

9. We have provided you with a series of briefings outlining a process for making changes to the resource management system (2018-B-04343, 2018-B-04174 and 2018-B-04498 refer).
10. On 27 April, we provided you with the last of these briefings recommending a suite of possible amendments that could be progressed as part of a narrowly scoped Resource Management Amendment Bill to be introduced later this year (2018-B-04498 refers). We also met with you to discuss this advice on 2 May and 24 May.
11. At the meeting of 2 May, you requested further advice on a potential amendment to enable the Environment Court to hear challenges to resource consent notification decisions. This briefing provides that advice.
12. We have summarised the purpose and scope of the Bill as well as its connection to a more comprehensive review of the RMA in Appendix 1 in line with the direction you have provided to date. We are seeking your confirmation on these matters.
13. We will finalise the draft Cabinet paper for the narrow Bill following the decisions sought by this briefing. We anticipate providing you with the draft Cabinet paper on 20 June for Ministerial consultation ahead of consideration at ENV on 31 July.

Analysis and Advice

General background

14. Notification decisions determine who is able to participate in the process of deciding a resource consent application. Under the RMA, councils have the discretion to decide whether a person is affected or not, and there is a process they must follow to determine whether to notify an application or not.[1] As a general principle, parties who are directly affected by a decision should be able to challenge that decision.
15. The Legislative Design and Advisory Committee (LDAC) guidelines state that appeal rights should be provided where we are confident that it will improve regulatory outcomes and support the objectives of the narrowly scoped Bill. This includes taking into account the costs and uncertainty associated with creating appeal rights. It is important to ensure that the value of appeals is balanced against the consideration of delay, significance of the subject matter, competence and expertise of the decision maker at first instance, and the need for finality.[2]

[1] Section 95 to 95G in the RMA.

[2] Section 28.2 of the Legislation Design and Advisory Committee (LDAC) guidelines 2018 edition.

Relevant history

16. There were two previous attempts to amend the RMA to provide for the ability to review notification decisions by the Environment Court, once in 1999 and again in 2005. The problems were defined as:

    a. Judicial review was expensive and time consuming

    b. The High Court did not have the specialist knowledge of the RMA as the Environment Court

    c. The level of non-notification for resource consents was considered high.

17. The 2005 amendments to the RMA introduced an enabling provision that, if enacted through an Order in Council,[3] would allow the Environment Court to issue declarations on notification decisions and replace the existing judicial review proceedings through the High Court.

18. However, this enabling provision was never brought into force due to concerns about the Environment Court's caseload. The 2017 amendments to the RMA repealed these unused provisions.

Options Analysis

Status quo

19. The only avenue to challenge a notification decision is judicial review to the High Court, which relates to the procedural fairness and not the substantive decision on the application. This is the process that has existed for the life of the RMA.

20. Although the level of non-notification has remained consistently high and the percentage of notified consents decreased from 5% in 1997/1998 to 3.3% in 2015/2016,[4] this does not mean the councils' notification decisions are low quality. Plan rules have more directly identified where applications would be non-notified. This creates greater certainty in the notification decision making process. As case law and good practice has developed, councils have become more consistent and more systematic in their decisions not to notify applications.

Options for change

21. We have identified two options you could consider for the role of the Environment Court in reviewing notification decisions, made by councils. These are:

    a. *Declarations:* Enable the Environment Court review of notification decisions, with a focus on the procedure followed to make a decision. The matter would be referred back to the council with direction.[5] *(Option A); or*

    b. *Merits Appeal:* Enable the Environment Court review of the merits of a decision through an assessment of both the facts and law. The Court would have the option to issue a new decision, or refer the decision back to the councils to review. *(Option B).*

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[3] Appendix 2 – the relevant provisions that were introduced in 2005, but never implemented. These provisions were repealed in 2017.

[4] Source: Bi-annual RMA Survey of Local Authorities and National Monitoring System.

[5] Declarations are not 'appeals'. The Environment Court can be asked to make a declaration if matters under the RMA are unclear. A declaration made by the Environment Court could cover interim orders with the effect of preserving the position of a party to a declaration relating to the notification of a resource consent application; setting aside the decision of the consent authority, and sending the decision back to the relevant councils to reconsider, as well as providing direction in respect of how the notification decision should be re-considered; and making orders setting aside all or part of a resource consent related to the declaration proceedings.

22. To help assess whether either Option A or Option B should be included in the 2018 Bill, we have applied the criteria used in our earlier advice (2018-B-04498 refers), outlined below.

Options	Criteria				Analysis and advice
	Problem defined	Statutory Change	Simple	Cost Effective	
Option A – Declarations	x	✓	X	?	The Environment Court would be enabled to issue a declaration of a notification decision and refer it back to the council. This would be limited to reviewing procedural fairness, and is broadly the same as the provisions that were repealed in 2017, but would not be dependent on an Order in Council to come into force. This option is likely to increase the number of challenges to notification decisions. This will increase the caseload of the Environment Court and could reduce the Environment Court's capacity to provide its specialised advice in resource management matters.[6] However, Principal Environment Judge Newhook has signalled that the Environment Court has sufficient operational capacity to review notification decisions by way of declarations. If the existing option of judicial review to the High Court is also retained, the increased number of challenges would increase costs for councils. Conversely, costs for person challenging a decision in the Environment Court would likely to be lower.
Option B – Merits Appeal	x	✓	xx	?	In addition to the issues outlines above, a merits appeal is likely to require additional Environment Court resources to process, and may affect the capacity of the Environment Court to provide specialised advice on resource management matters. As there are multiple pathways for implementing merit appeals, and issues relating to jurisdiction of the High Court and Environment Court, further detailed policy design and consultation with Ministry of Justice would be necessary. This is unlikely to be completed within the timeframes proposed for introducing the narrow Bill.

Conclusion

23. We do not recommend including either option in the Bill. This is because these proposed changes to the role of the Environment Court have a high risk of unintended consequences if not considered holistically. To restore meaningful public participation and access to justice, it is important to look at the notification provisions, objections, appeals and judicial process across the planning system to ensure the quality of decision making is supported through longer term Resource Management system reform.

[6] It was roughly estimated in 2005 that there will be 60-100 additional sitting days, should there be any challenges to notification decisions to be heard by the Environment Court by a way of declarations (focused on procedural fairness, and not merits). This figure would be higher, should the Environment Court have the jurisdiction to review the notification decisions by a way of merits appeals.

24. The options could impact on wider government work programs to deliver affordable housing, and construct new schools and hospitals. For example, non-notified housing related consents could be challenged in the Environment Court, and the delivery of houses could be further delayed.

25. For councils, this may add to their costs and divert resources needed for other functions and issues. Councils may become more risk averse in determining notification decisions. This could lead to a higher level of notification and level of reporting, resulting in unnecessary costs and delays to resource consent processing. It may compromise the progress that councils have made in providing good customer service, and in good planning and consenting practice, and could reduce certainty for councils and the applicants/consent holders (including Crown departments and agencies).

26. If you wish to proceed with creating a role for the Environment Court to review notification decisions, we recommend Option A as more suitable for the narrow Bill.

27. For either option, further policy work with Ministry of Justice will be necessary to work through an appropriate time limit, consider the role, operation and resources of the Environment Court and the High Court, and whether to retain an option to retain judicial review with the High Court.

Consultation and Collaboration

28. We have undertaken very limited consultation on the narrow Bill proposals with local councils and agencies. Their feedback has been reflected in the body of this briefing note.

29. We have had a preliminary discussion with Ministry of Justice, who consider the avenue of judicial review should be retained if the Environment Court is also given the power to issue declarations or merits appeal.

Risks

30. Risks associated with the policy proposals are outlined above

Legal issues

31. No legal issues have been identified in respect of this paper.

Financial, regulatory and legislative implications

32. The Environment Court has indicated that it currently has the operational capacity to review notification decisions by way of declarations. There is, however, a risk that if a greater number of challenges are received than the Court anticipated in the future additional resources may need to be sought from the Crown.

33. Given the potential risks of duplication of roles with the High Court, there is a need to further consult with Ministry of Justice and the Courts to understand the impact on the roles and operations of the courts.

34. There may be some additional costs to the Crown as an applicant for a resource consent, if there are opportunities to challenge councils' decisions on notification in the Environment Court or if non-notification decisions are overturned. We have not been able to quantify these implications at this stage. Consultation on the Cabinet paper may provide some information on this.

Next Steps

35. Subject to your decisions, we will finalise a Cabinet paper seeking Cabinet's agreement to the proposed amendments and authorisation for Parliamentary Counsel Office (PCO) to draft an RMA Amendment Bill for introduction to the House later this year. We anticipate providing you with the draft Cabinet paper on 20 June to enable you to consult with your ministerial colleagues ahead of consideration at Cabinet Environment, Energy and Climate Committee (ENV) on 31 July.

36. We have attached an outline of the two staged approach to the RMA reform and the scope of the narrow Bill (Appendix 1), which could be used to support early consultation with your colleagues.

Appendix 1 - Staged approach to the Resource Management Act 1991 (RMA) reform

Staged approach to Resource Management Act 1991 (RMA) reform

The government has committed to considerably improving the effectiveness of the resource management system to enable sustainable economic growth and underpin future prosperity [ENV-18-MIN-0015 refers]. The RMA remains the principal statute for managing the use of natural and physical resources in New Zealand and this note outlines a staged approach to undertaking RMA reform.

Stage 1: RMA Amendment Bill 2018

Introduce a narrowly-scoped RMA Amendment Bill in 2018 to address a discrete set of issues with the existing legislation. This Bill is consistent with manifesto commitments and designed to complement the Government's current priority work programmes to improve urban, freshwater and climate outcomes.

The proposed objectives of the Bill are:

- reducing complexity
- increasing certainty
- restoring meaningful public participation.

The following content is proposed:

- reducing complexity and increasing certainty by clarifying particular resource consent processes and tools for compliance, monitoring and enforcement, removing certain Ministerial regulation making powers, reversing the subdivision presumption to restricted, and clarifying when and how resource consents can be reviewed to enable better and more timely implementation of the National Policy Statement for Freshwater Management 2014
- improving public participation through removing limitations on notification and appeals, particularly for subdivision consents and resource consents for residential activities.

To ensure a manageable scope for this Bill the following criteria have been applied:

Criteria for inclusion in RMA Amendment Bill 2018
Problem well-defined – the scope and scale of the issue is reasonably known with minimal further policy development and consultation required.
Statutory fix required – the problem is created by the legislation and is not better addressed through national direction, regulation or guidance.
Simple solution – correcting the issue is anticipated to require relatively straightforward amendments with minimal consequential changes.
Cost effective – it is generally easy for councils to implement and not requiring major changes to existing systems and processes.

A Cabinet paper seeking agreement for PCO to draft this Bill for introduction to the House later this year will be considered by ENV on 31 July.

Stage 2: Longer-Term Resource Management System Reform

The 2018 Bill will address some of the more urgent issues with the RMA, while also building towards a more comprehensive review of the resource management system next year.

The more comprehensive review will not be starting from a blank slate. It will build upon the changes progressed through the RMA Amendment Bill 2018, and current priority work to improve urban, climate and freshwater outcomes. It will need to align and take into account other system related work happening across government, including the Urban Growth Agenda, Three Waters Review and the Productivity Commission's inquiry into local government funding (due to report in mid-2019).

The purpose of the wider review is to address the deeper issues undermining system performance needed to realise further gains across our priority areas in the longer-term, and support a more productive, sustainable and inclusive economy.

Based on initial scoping, the wider review is likely to focus on five broad themes:

- better legislative alignment across resource management legislation (including the RMA, Local Government Act 2002, Land Transport Management Act 2003, as well as other resource management legislation)
- restoring and enhancing public participation
- improving the quality of decision making
- issuing clear national direction
- enabling greater use of innovative tools and frameworks.

Further proposals for RMA reform that are consistent with these themes and that do not meet the criteria for inclusion in the RMA Amendment Bill 2018 can be provided by officials at the Ministry for the Environment.

The scope of the review will also be informed by the work of external stakeholder groups, such as that being led by the Environmental Defence Society who are taking a first principles look at how New Zealand's resource management system operates and how it could be improved.

Proposed Changes for a Narrow 2018 RMA Amendment Bill

	Proposal	Intent of Change
	Reducing complexity and uncertainty with RMA tools and processes	
1	Repeal section 360D regulations (remove rules that duplicate other legislation) and consequential change to section 360E.	Contribute to making the RMA less complex and provide more certainty to local authorities that local decision-making will not be overridden in these circumstances.
2	Repeal section 360G regulations that prescribe fast track activities or information requirements.	
3	Repeal section 360H regulations that preclude notification for certain activities or who is an affected party for limited notification.	
4	Increase infringement fines and introduce a split for natural/non-natural persons under section 360.	Provide a more meaningful deterrent to natural (individuals) and non-natural persons (for example companies) to reduce non-compliance under the RMA.
5	Extend the statutory limitation period for filing charges (for prosecutions) under section 338(4).	Ensure there is sufficient time for local authorities to gather evidence and consider whether a prosecution is an appropriate response to non-compliance under the RMA.
6	Extend the timeframe for applying for a resource consent for emergency works under section 330B.	Ensure there is an appropriate timeframe for applicants to apply for resource consent after a state of emergency.
7	Allow applicants to suspend the processing of their non-notified resource consents under sections 91A-91C.	Clarify current practice and improve the efficiency of the resource consenting process through allowing applicants the choice to put their resource consent on hold.
8	Change the presumption for subdivision back to being restricted unless expressly allowed in section 11.	Increase certainty in practice by providing continuity in how rules in plans are drafted in relation to subdivision, and send signal that subdivision in particular areas, eg. versatile soils or high natural hazard risk should be carefully considered during the resource consenting process.
9	Amend the resource consent review provisions in the RMA to better enable councils to effectively review consents under section 128(1)(b)(certain regional rules).	Enable better and timelier implementation of the National Policy Statement for Freshwater Management 2014.

10	Allow councils to suspend the processing of a resource consent if a fixed charge has not been paid by the applicant.	Provide clarification to improve consistency in practice.
	Restoring meaningful public participation	
11	Repeal the public notification preclusions for resource consents relating to residential activities and subdivision of land and repeal the definition of residential activity under sections 95A(5)(b)ii and 95(A)(6).	Restore public notification as an option for resource consents for residential activities and subdivision of land, and remove uncertainty with applying the 'residential activity' definition.
12	Repeal the preclusions on the right to appeal decisions or conditions of resource consent relating to the subdivision of land and residential activities under section 120(1A).	Restore access to justice in regard to residential activities and subdivision of land for resource consents.
13	Repeal the restriction on appeals which limit appeals on resource consents to those matters raised in a submission section 120(1B).	Restore access to justice by allowing the Environment Court to consider matters that were not submitted on, or matters that had changed since notification for resource consents.
	Technical amendments	
14	Add clarity by explicitly referring to deemed permitted boundary and marginal or temporary activities in Part 3.	Legal clarification to ensure that it is clear that these new types of permissions are not in contravention of Part 3 of the RMA.
15	Amend section 360(hn) stock exclusion regulations to include drains.	Ensure regulations could capture drains, which is the intent of the policy and was consulted on.

Appendix 2
RMA provisions that were never enacted, and were repealed in 2017

New Zealand Legislation

Resource Management Amendment Act 2005

115 Scope and effect of declaration

(1) Section 310 of the principal Act is amended by repealing paragraph (b), and substituting the following paragraphs:

(b) whether, contrary to section 62(3), a provision or proposed provision of a regional policy statement—

(i) does not, or is not likely to, give effect to a provision or proposed provision of a national policy statement or New Zealand coastal policy statement; or

(ii) is, or is likely to be, inconsistent with a water conservation order; or

(ba) whether a provision or proposed provision of a regional plan,—

(i) contrary to section 67(3), does not, or is not likely to, give effect to a provision or proposed provision of a national policy statement, New Zealand coastal policy statement, or regional policy statement for the region; or

(ii) contrary to section 67(4), is, or is likely to be, inconsistent with a water conservation order, any other regional plan for the region, or a determination or reservation of the chief executive of the Ministry of Fisheries made under section 186E of the Fisheries Act 1996; or

(bb) whether a provision or proposed provision of a district plan,—

(i) contrary to section 75(3), does not, or is not likely to, give effect to a provision or proposed provision of a national policy statement, New Zealand coastal policy statement, or regional policy statement; or

(ii) contrary to section 75(4), is, or is likely to be, inconsistent with a water conservation order or a regional plan for any matter specified in section 30(1); or

(2) Section 310(g) of the principal Act is amended by adding the word "; or".

(3) Section 310 of the principal Act is amended by inserting, after paragraph (g), the following paragraph:

(ga) whether a decision made by a consent authority under section 93 or section 94 to notify or not to notify an application for a resource consent was unauthorised or otherwise invalid; or

(4) Section 310(h) of the principal Act is amended by omitting the words ", except for an issue as to whether any of sections 93 to 94C have been, or will be contravened".

New Zealand Legislation

Resource Management Amendment Act 2005

117 Decision on application

Section 313 of the principal Act is amended by adding, as subsections (2) and (3), the following subsections:

(2) If the Environment Court makes a declaration under section 310(ga) (which relates to a decision made by a consent authority under section 93 or section 94 to notify or not to notify an application for a resource consent), the Court may—

(a) make any interim order it considers necessary for the purpose of preserving the position of any party to the application under section 311 for a declaration; and

(b) make an order setting aside a part or the whole of the decision of the consent authority and—

(i) referring a part or the whole of the decision back to the consent authority to reconsider:

(ii) giving the consent authority any directions it thinks just as to the reconsideration of a part or the whole of its decision:

(c) make an order setting aside a part or the whole of a resource consent granted on the basis of a decision made by the consent authority under section 93 or section 94:

(d) despite section 319(2), make an order to prevent the exercise of a resource consent until a decision has been made by the consent authority in accordance with an order of the Court made under paragraph (a).

(3) If the Environment Court gives directions under subsection (2)(b)(ii),—

(a) the Court must give reasons for those directions; and

(b) the consent authority must, in reconsidering its decision in accordance with the directions of the Court, have regard to the reasons of the Court.

PARLIAMENTARY COUNSEL OFFICE
TE TARI TOHUTOHU PĀREMATA

New Zealand Legislation

Resource Management Amendment Act 2005

- not the latest version

108 No review of decisions unless right of appeal or reference to inquiry exercised

(1) Section 296 of the principal Act is amended by omitting the heading, and substituting the heading "**No review of certain decisions**".

(2) Section 296 of the principal Act is amended by adding, as subsection (2), the following subsection:

(2) In relation to whether a decision made by a consent authority under section 93 or section 94 to notify or not to notify an application for a resource consent was unauthorised or otherwise invalid,—

(a) no application for review under the Judicial Review Procedure Act 2016 may be made; and

(b) no proceedings seeking a writ of, or in the nature of, mandamus, prohibition, or certiorari, or a declaration or injunction in relation to that decision, may be heard by the High Court.

Section 108(2): amended, on 1 March 2017, by section 24 of the Judicial Review Procedure Act 2016 (2016 No 50).