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RM Reform gets rolling

Bills introduced to Parliament and submission closing date already looming

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Resource management reform is one step closer. The much anticipated Natural and Built Environment Bill and Spatial Planning Bill have been introduced to Parliament and submissions close on 5 February 2023.

RMA reform – what you need to know

The Natural and Built Environment Act (NBA) will be the primary replacement for the Resource Management Act 1991 (RMA). The NBA intends to provide a planning panacea for enabling development while protecting the environment, solving the housing crisis, addressing the infrastructure deficit and giving effect to the principles of Te Tiriti o Waitangi. The often-forgotten Spatial Planning Act (SPA) will provide for Regional Spatial Strategies (RSS) which will provide regional direction for where we live, work and play.

The NBA and SPA respond to the Government's concern that "the current system takes too long, costs too much and has neither adequately protected the natural environment, nor enabled development where needed" (Minister David Parker 6 September 2022).

Cabinet's RM reform objectives are:

To improve system efficiency and effectiveness, and reduce complexity, while retaining appropriate local democratic input.

To better enable development within environmental biophysical limits including a significant improvement in housing supply, affordability and choice, and timely provision of appropriate infrastructure including social infrastructure.

To protect and, where necessary, restore the environment and its capacity to provide for the wellbeing of present and future generations.

To give effect to the principles of Te Tiriti o Waitangi and provide greater recognition of te ao Māori, including mātauranga Māori.

To better prepare for adapting to climate change and risks from natural hazards and better mitigate the emissions contributing to climate change.

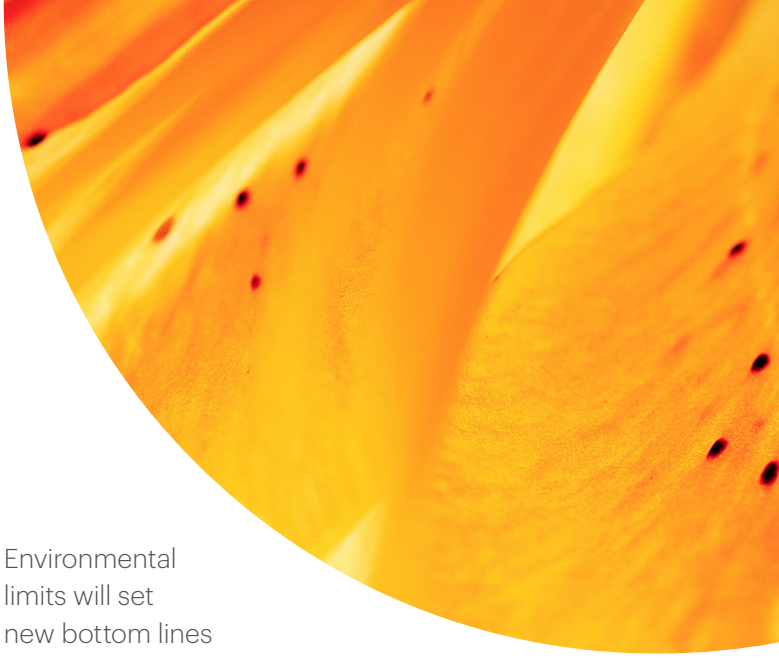
The Bills will not be passed until mid-2023, and will not immediately replace the RMA. Instead, the RMA will be slowly phased out during a transition period of 7-10 years. During this time different sets of rules will apply to different regions and the resource management landscape will be extensive and complex.

In his speech to Parliament, Minister Parker asserted that "on a conservative estimate costs to users will fall by 19 per cent a year, or $149m, equal to more than $10 billion in cost savings over 30 years". He also stated that "benefits will flow to the public through cost savings for housing and fewer consents. The environmental benefits – which cannot be valued in dollar terms – will be substantial". So how do the Bills really measure up against these objectives?

The new engine room – purpose, outcomes and limits

Part 2, and its focus on managing effects, was often referred to as the "engine room" of the RMA. Clause 14 of the NBA still contains a duty to avoid, remedy, minimise, offset or provide redress for adverse effects and an effects management framework,[1] but there is a significant shift in focus to systems outcomes,[2] environmental limits,[3] and targets.[4] A requirement to "protect", or "if degraded restore" the natural environment sits front and centre in clause 5(a). This directive language arguably gives a degree of primacy to the natural environment over other requirements such as providing for "well-functioning urban and rural areas" (clause 5(c)) and "the ongoing and timely provision of infrastructure services to support the well-being of people and communities (clause 5(i))."

The new purpose in clause 3 is a streamlined version of the old section 5. The inherent tension between enabling development and protecting the environment remains. The second limb incorporates te Oranga o te Taiao resulting in some inevitable overlap between the first and second limbs but broadening the focus to include the intrinsic relationship between iwi and hapu and te Taiao.



Environmental limits will set new bottom lines across six mandatory aspects of the natural environment but can be set for other matters. Clause 44 confers a power on the Minister to direct an exemption from an environmental limit where the activity provides "public benefits that justify the loss of ecological integrity". No guidance is provided as to how public benefits and ecological degradation are to be weighed by the Minister. Exemptions must be subject to time limits (clause 46).

Clause 6 sets out five mandatory decision making principles aimed at achieving integrated management, promoting the outcomes, recognising positive effects and managing adverse and cumulative effects. While framed as 'principles' they are extremely directive and, if retained in their current form, will provide a clear avenue for challenging decisions.

Te Tiriti o Waitangi – obligations strengthened

Clause 4 of the NBA requires all persons exercising functions under the NBA to "give effect to" the principles of te Tiriti o Waitangi. This is significantly stronger than the current requirement in section 8 of the RMA to take the principles "into account". Iwi, hapu and Māori are also provided with various opportunities to participate in key decision making processes, including the requirement for a minimum of two Māori appointed members on regional planning committees out of a total of six members.

[1] Clauses 61 – 67
[2] Clause 5
[3] Clauses 37 – 46
[4] Clauses 47 – 53

Schedule 2 sets out the transitional provisions that ensure that the integrity of Tiriti settlements and rights under the takutai moana legislation are upheld. This process includes engagement on the 70 Tiriti settlement agreements and where necessary, in agreement with the post settlement entity, to introduce a bill to amend the relevant treaty settlement legislation. This process could be lengthy and could slow down the transition to the new system.

The National Planning Framework – the mother of all national policy statements

National direction will be set out in a new National Planning Framework (NPF). The existing NPS, NES and regulations will be carried through to the NPF. The NPF will provide direction on the environmental outcomes, in particular how to resolve conflicts between those outcomes. The inevitable tension between competing environmental protection and development outcomes will not be easy to resolve. If the primacy given to environmental outcomes in clause 5 remains unchanged, then there may not be much flexibility for resolving conflicts in a way that accords greater weight to other outcomes.

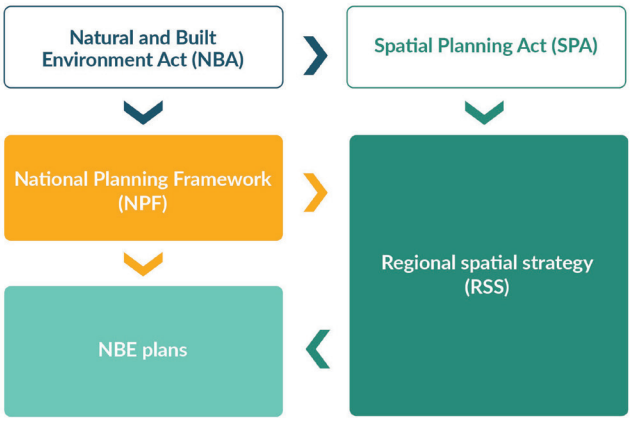


Figure 1: Key components of the future resource management system
Source: MfE Our Future Resource Management System Overview

Regional spatial plans – a roadmap for each region

Of all the different aspects of the proposed reforms, the prospect of a spatial plan for each region is one of the most promising in terms of its ability to deliver positive outcomes. When the SPA was announced, planners and developers all over the country began to imagine a world where there would be more stable and predictable conditions for investment and development, judicious use of land and the efficient and effective roll out of infrastructure to support development.

The provisions of the SPA, and the requirement for RSS, have the potential to deliver on that promise. However, the extent to which the RSS are effective will hinge on how they are reflected in the Natural and Built Environment Plans (NBE Plans). Clauses 97 and 104 of the NBA require NBE Plans to be "consistent with" the RSS unless new information has come to light or there has been a significant change in circumstances or the physical environment. Providing developers with "wriggle room" to argue a departure from the RSS has the potential to undermine its efficacy.

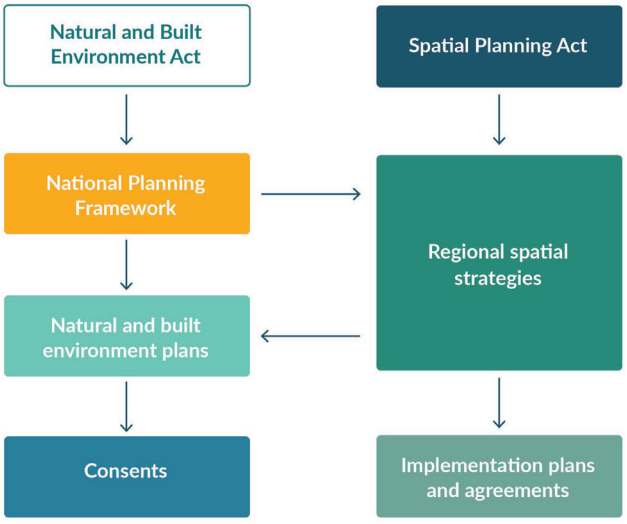


Figure 2: How the system works together
Source: MfE Our Future Resource Management System Overview

Natural and Built Environment Plans – the mega plan approach

The existing 100 plus regional policy statements, coastal policy statements and regional district plans will be rolled into 15 Natural and Built Environment Plans (NBE Plans). The NBE Plans will cover several existing district council areas. Regional Planning Committees (comprising members from the relevant councils and Māori) will be responsible for formulating the NBE Plans. NBE Plans are required to:

- Give effect to the NPF;
- Apply the environmental limits and targets; and
- Be consistent with the RSS.

The RPC formulates the NBE Plans and notifies it for submissions but an Independent Hearing Panel (IHP) will be appointed to hear the submissions and make recommendations. The recommendations are then handed back to the RPC to make decisions. Appeals are limited to points of law in the High Court except where an IHP recommendation is rejected by the RPC. In other words, the Auckland Unitary Plan approach is to be rolled out nationwide.

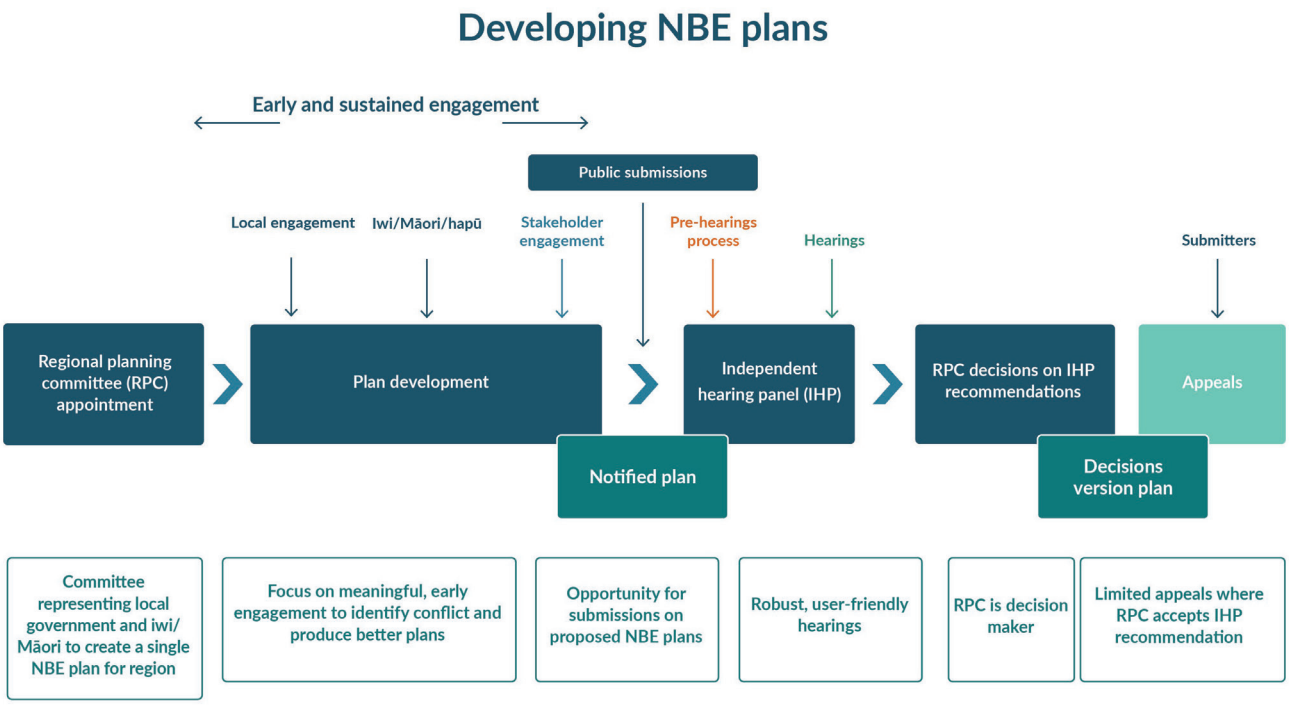


Figure 3: NBE plan development process
Source: MfE Our Future Resource Management System Overview

One of the key challenges of the new system will be the requirement for councils to collaborate in formulating the new NBAs. The RPC and IHP take the lead in the NBE Plan formation process with the aim of the streamlined approach. This approach worked well for the Auckland Unitary Plan, but there was only one council involved in that process. It would be disappointing if the new NBE Plan process resulted in bickering amongst councils via the lodgment of multiple submissions on the new plans.

Resourcing will also be a major issue. While the plan is to roll the NBE Plans out sequentially, experience from the Auckland process was that legal, planning and expert resources were severely stretched, both in terms of submitters and resourcing of the Council. The availability of resources has only worsened since that time.

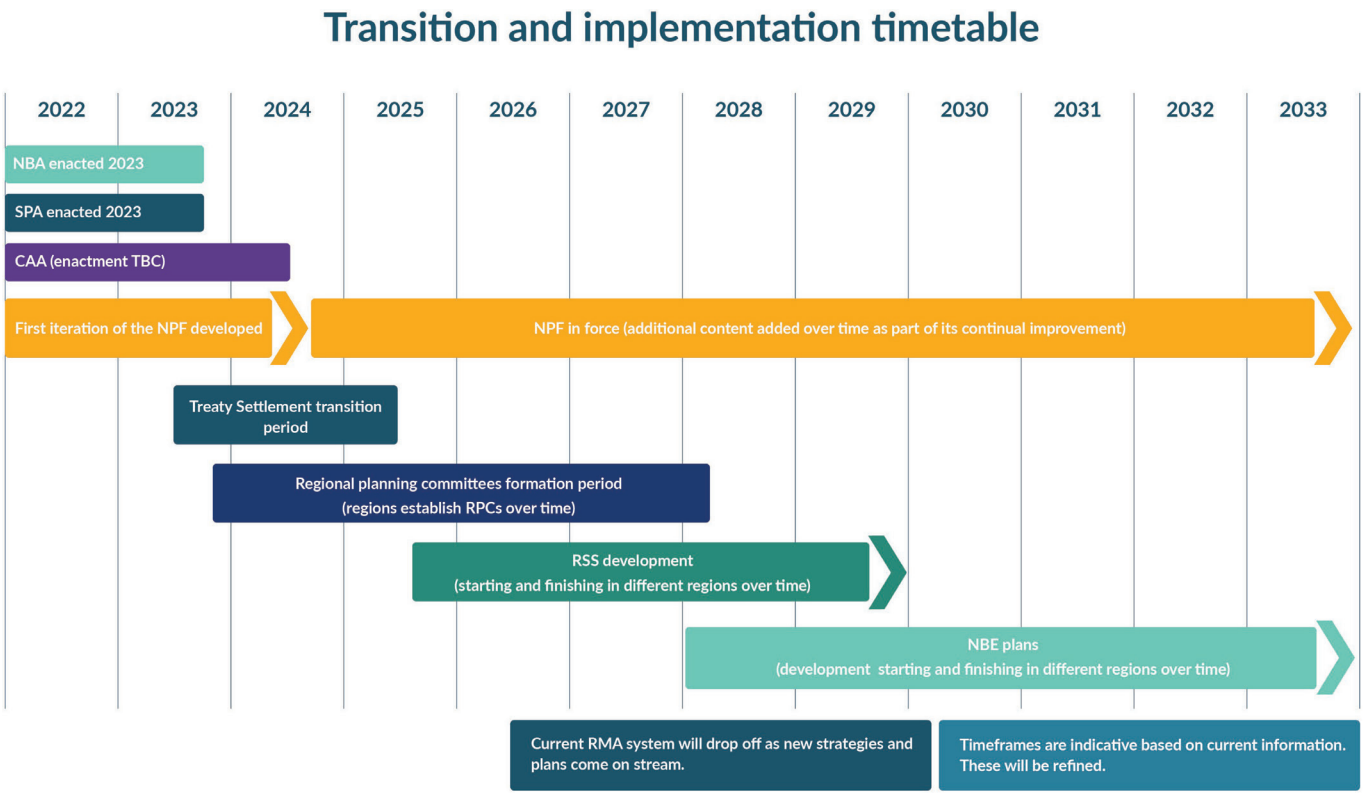


Figure 4: Indicative implementation timetable (subject to refinement)
Source: MfE Our Future Resource Management System Overview

Resource consenting – back to the future

Putting aside the changes outlined above, the resource consent process is broadly similar to the current system. The key changes include:

- A focus on enabling more activities without a resource consent, within limits–although this is not explicit in the Bills;
- The restricted discretionary and non-complying activity categories have been removed – albeit that the new "controlled" activity category is very similar to the existing restricted discretionary activity;
- A new mechanism for allowing activities that infringe permitted activity standards to proceed without consent;
- The COVID fast track consenting process has been retained but in a modified form;
- The notification provisions are quite different. There is a move away from the 'step' process under the RMA that applies on a consent by consent basis, and no focus on the level of effects. Instead, the NPF or NBE Plans will specify what level of notification is required for some specific activities, but public notification must occur if there are "relevant concerns from the community";
- Notification decisions will be able to be challenged in the Environment Court by way of declaration;
- Consent duration for activities involving water takes, use or discharges will generally be limited to 10 years;
- The ability to consider some 'amenity' effects has been removed;
- No consents can be granted for activities with *any* effect (being something more than a trivial effect) within places of national importance;
- Councils may decide not to hold a hearing for a notified application if they consider they have enough information, regardless of whether the applicant or submitter wish to be heard.

Existing use rights – with some new provisos...

The NBE Plans may make rules that affect existing use rights where poor environmental outcomes are occurring. The NPF may direct rules to be included in the NBE Plans that in fact erode existing use rights.

Existing use rights cannot be used for activities that are discontinued for a period of more than six months (under the RMA the period is 12 months). Consent authorities also have similar powers to cancel land use consents that cannot comply with the NBE Plan rules and review conditions of consent.

Consenting pathways – multiple options

The existing standard track, direct referral and Board of Inquiry processes have been retained and two new processes added:

- **Affected application pathway**: allows councils to publicly notify timeframes for receiving applications for a particular resource and then consider all of the applications together. Applications cannot be switched to a direct referral or board of inquiry process unless all applicants agree. Standard appeal rights apply.
- **Fast track pathway for specified housing and infrastructure projects**: based on the COVID fast track legislation, involves an application to the Minister followed by a consent application to be determined by an expert consenting panel. No notification is required (unless specified in the NPF or NBE Plan) and a hearing need not be held. A two year lapse period applies so this process is only useful for construction ready projects. Appeals are limited to the High Court on points of law.

Designations

There is a fair amount of familiarity in the new designation provisions. Designation powers will be available to a broader range of infrastructure providers, include those approved by the Minister on the basis that they provide a "public good". The designation process has been more clearly divided into two parts:

- Footprint designations: which allow the decision to be put in place without detailed information on environmental management. This process will be useful for route protection.
- Construction and implementation plans: which identify the works required to give effect to the designation and how the effects of those works will be managed.

Allocation of resources

The NBA embraces a wider range of allocation methods including comparative (merits based) consenting and more market-based allocation methods. Freshwater takes and discharges will be subject to shorter consent durations under both the RMA (during the transitional period) and the NBA.

Enforcement

The enforcement provisions have been significantly strengthened including:

- New enforcement tools including adverse publicity orders (offenders are named and shamed publicly) and monetary benefit orders (payment of any monetary benefit that accrued as a result of the breach);
- A prohibition on obtaining insurance to cover potential fines;
- Consent authorities may consider compliance history when processing applications;
- An increase of the maximum financial penalties to $1m for individuals and $10m for companies (however a reduction in prison sentences from 2 years to 18 months).