Ministry for the Environment
Manatū Mō Te Taiao

PROACTIVE RELEASE COVERSHEET

Minister	Hon Chris Bishop	**Portfolio**	Environment
Name of package	RIS material for Resource Management (Consenting and Other System Changes) Amendment Bill	**Date to be published**	10 December 2024

List of documents that have been proactively released		
Date	***Title***	***Author***
25-Jul-24	Regulatory Impact Statement: Policy analysis of compliance and enforcement proposals for inclusion in Resource Management Amendment Bill No.2	Ministry for the Environment

Information redacted **NO**

Any information redacted in this document is redacted in accordance with the Ministry for the Environment's policy on proactive release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Policy analysis of compliance and enforcement proposals for inclusion in Resource Management Amendment Bill no.2

Coversheet

Proposal System improvements to compliance and enforcement provisions	**Description** The proposals in Annex 2 relate to system improvements to compliance and enforcement provisions in the Resource Management Act 1991 (RMA). These are Phase 2 targeted amendments aimed to facilitate progress in the short and medium term, ahead of Phase 3, via an amendment Bill to streamline and simplify the RMA's operation (Bill 2).
Relevant legislation Resource Management Act 1991 (RMA)	Sections 339(1), 327(3), 352(1)(a), 332(1), 322(1)(b) of the RMA
Policy lead	Rueben Shim, RMA Amendment Policy and Legislation Rob Dragten, System Enablement
Source of proposal	Cabinet decision (CAB-24-MIN-0246, ECO-24-MIN-0113 and ECO-24-MIN-0022)
Linkages with other proposals	No direct linkages with other proposals in RM Bill no 2
Limitations and constraints on analysis	Reduced timeframes have limited our ability to assess the feasibility of a broader range of options, including (in some instances) non-regulatory options. Our consultation and analysis have been done in a compressed timeframe. Several limitations caused by these tight timeframes include: • limited data and evidence available to assess the policy proposals • limited engagement with iwi/Māori • targeted engagement with councils

	Where necessary, the relevant government agencies have worked collaboratively with MfE on the RM Bill 2 proposals. However the constrained timelines have resulted in reduced cross-agency consultation timeframes. In 2023, the problems outlined below were analysed and the proposals suggested below were consulted on, approved by Cabinet and introduced in the National and Built Environment Act 2023 (NBEA), now repealed. In March 2024, the Minister Responsible for RMA Reform initiated engagement with local government, targeted Māori groups (including Post Settlement Governance Entities) and sector stakeholders through letters. The letters included an offer of engagement for feedback to inform the RM Bill 2 amendments with a short turn around. Where possible, feedback from previous consultation processes have informed this analysis. An indicative non-monetary estimation of costs and benefits has been undertaken but the actual impact of the proposals will be better understood following public input through the Select Committee process.
Responsible Manager	Liz Moncrieff, General Manager, Urban and Infrastructure Policy, Ministry for the Environment, 22 July 2024
Quality Assurance: Impact Analysis	The panel considers the impact analysis undertaken for the seven compliance and enforcement proposals **partially meets** the Quality Assurance criteria. The limitations and constraints have been clearly outlined, but this has impacted on the scope of the analysis and supporting evidence. Due to time constraints, a narrow range of options has been analysed and a heavy weighting has been assigned to proposals that can be implemented rapidly. A qualitative description has been provided of the costs and benefits which have not been quantified due to data/time limitations. There has been limited consultation and some concerns have been raised by the Ministry of Justice that have not been addressed relating to: • proposal one - reducing the maximum penalty to no longer enable jury trials, which has implications for basic legal rights and,

	• proposal two - increasing maximum RMA fines, because there is one fine for multiple offences and the level is not necessarily proportionate to the harm caused. The panel considers that further consultation and a wider review of compliance and enforcement at some stage in the future could help to mitigate the implementation risks associated with these proposals.

Compliance and enforcement proposals for inclusion in Resource Management Amendment Bill no.2

Proposals

1. This document analyses seven proposals of system improvements to compliance and enforcement provisions in the RMA aimed to facilitate progress in the short and medium term, ahead of Phase 3, via an amendment Bill to streamline and simplify the RMA's operation (Bill 2).

Objectives

2. The proposals align with the RMA work programme objectives to safeguard the environment and human health, and to improve regulatory quality in the resource management system.
3. In addition to the RMA work programme objectives, each proposal has its specific objectives, which are outlined as part of the analysis of each proposal.

Assessment criteria

4. The assessment criteria used to evaluate all proposal are:

    - Effectiveness – Extent to which the proposal contributes to the attainment of the relevant high-level objectives, including upholding Treaty Settlements. The proposal should deliver net benefits. Any trade-offs between the objectives should be factored into the assessment of the proposal's overall effectiveness.
    - Efficiency – Extent to which the proposal achieves the intended outcomes/objectives for the lowest cost burden to regulated parties, the regulator and, where appropriate, the courts. The regulatory burden (cost) is proportionate to the anticipated benefits.
    - Certainty – Extent to which the proposal ensures regulated parties have certainty about their legal obligations and the regulatory system provides predictability over time. Legislative requirements are clear and able to be applied consistently and fairly by regulators. All participants in the regulatory system understand their roles, responsibilities and legal obligations.
    - Durability & Flexibility – Extent to which the proposal enables the regulatory system to evolve in response to changing circumstances or new information on the regulatory system's performance, resulting in a durable system. Regulated parties have the flexibility to adopt efficient and innovative approaches to meeting their

regulatory obligations. (NB: A regulatory system is flexible if the underlying regulatory approach is principles or performance based).

- Implementation Risk – Extent to which the proposal presents implementation risks that are low or within acceptable parameters (e.g. Is the proposal a new or novel solution or is it a tried and tested approach that has been successfully applied elsewhere?). Extent to which the proposal can be successfully implemented within reasonable timeframes.

Proposal 1: Reduce the maximum term of imprisonment

Problem

5. Prosecutions under the RMA often involve the interpretation and application of technical rules and scientific data.

6. RMA offenders are liable for either a fine or up to two years imprisonment on conviction. Offences that are liable for two or more years of imprisonment are classified as category three offences under the Criminal Procedure Act 2011. Defendants charged with category three offences are eligible to elect trial by jury.

7. The technical nature of rules and evidence involved in RMA offending makes it difficult for laypersons to capably engage with a case if they are called to be part of a jury. This prompted the Resource Management Review Panel to recommend an amendment so that all, except the worst RMA prosecutions, may be heard as judge-alone trials[1].

8. Additionally, when a jury trial is elected by the defendant, the case is transferred to a Crown prosecutor. This can result in delays in access to justice. Additionally, Crown prosecutors do not have the same level of experience as specialist RMA prosecutors.

9. The proposal is to reduce the maximum term of imprisonment that can be imposed upon conviction for an RMA offence from two years to 18 months so that prosecutions are heard as judge-alone trials rather than a jury.

10. This would reflect the experience gathered so far on prosecutions. Custodial sentences are not common in environmental matters (e.g. 3 of the 269 defendants sentenced between 2018 and 2021 received a custodial sentence) and, when they are imposed, these are typically only for relatively short periods of weeks or months.

11. Avoiding the need to establish a jury would also reduce the burden on the courts and improve the efficiency of prosecution process. A jury trial election can add significant time and costs to the prosecution process. Once a jury trial is elected, the responsibility for prosecuting the case transfers to the relevant Crown solicitor, funded by the Crown. Establishing a jury also means expensive costs and longer timeframes for the courts. Jury trials generally take multiple court sitting days even for simple cases and could take weeks for more complex cases.

12. Jury trials take longer to resolve as they are more resource-intensive than judge-alone trials, and generally require more court events. Between June 2022 and June 2023, the average jury trial case required 13.5 court events compared to 8.6 court events for a judge-alone trial.

13. Jury trials require significant time and resources. For example, they have specific physical requirements: particularly a jury box in the courtroom, safe access to and from the courtroom for jurors, a deliberation room outside the courtroom, and other facilities

[1] Resource Management Review Panel "New Directions for Resource Management in New Zealand", June 2020, page 413, rm-panel-review-report-web.pdf (environment.govt.nz)

available to jurors. Scheduling a trial in these courtrooms is difficult because there are fewer of them available, pushing out available trial dates.

14. The rate of elections for a jury trial has increased from 26 percent to 32 percent in the past five years.

15. The expenditure and revenue of the Court and registry during the 2021/22 fiscal year can be found in the annual report online.[2]

Fiscal year	*Expenditure*	*Revenue*
2021/22	$8,304,598	$1,193,930
2020/21	$8,946,332	$354,471
2019/20	$8,932,073	$455,695
2018/19	$8,794,577	$1,342,072

16. Prosecutions before a specialist environment judge alone (without a jury), are less time consuming, more efficient, and therefore expected to cost less for both defendants and prosecutors.

17. Prosecutions before a judge alone are led by council appointed prosecutors, allowing councils to be more closely involved in the prosecution process. The feedback from councils is that they would prefer this option.

18. The efficiency gains of judge-alone trials should be weighed against the function that the jury trial process provides in a democratic society. The right to elect a jury trial provides a safeguard against arbitrary or oppressive enforcement of the law by the Government. However this is less relevant in the context of the RMA where most sentences only involve fines and where nearly all RMA prosecutions proceed before a judge alone already.

19. In 2023, the problems we have outlined were analysed and the solution we are now proposing was consulted on, approved by Cabinet and introduced in the NBEA (now repealed).

20. The proposal is expected to achieve immediate benefits in terms of efficiency of process and aligns with what currently happens in the normal course of events for RMA prosecutions.

Objectives

21. In addition to the RMA work programme objectives, the proposal seeks to:

- ensure penalties for RMA offences are aligned with experience gathered so far on prosecutions (custodial sentences are not common and, when they have been imposed, these are typically only for relatively short periods of weeks or months). Also, nearly all RMA prosecutions already proceed before a judge alone.
- ensure that the court process for RMA offences appropriately reflects the technical nature RMA prosecution
- reduce the burden on the courts (including costs) and improve the efficiency of prosecution process

[2] Environment Court of New Zealand "Annual Reports", Various dates, Annual reports | Environment Court of New Zealand

Proposal – Option 2

22. Reduce the maximum term of imprisonment that can be imposed upon conviction for an RMA offence from two years to 18 months to reflect the experience gathered so far on prosecutions.

23. Reducing the term of imprisonment should not be interpreted as reflecting a lessening of the seriousness of environmental offending. The proposal reflects a rebalancing of the appropriateness of current sanctions for environmental offending in recognition that imprisonment is rare and, when custodial sentences have been imposed, these are typically only for relatively short periods of weeks or months.

24. The proposal would remove the eligibility of RMA prosecutions for a jury trial election. Also, a maximum of 18 months allows flexibility, high enough to represent a significant sanction for the most serious offending of the RMA, but below the threshold that triggers a time-consuming and costly jury trial election for cases which are more appropriately heard before a judge alone. This is because the environment judge is the person with the right expertise in the interpretation and application of technical rules and scientific data.

Other Options

Status quo – Option 1

25. Retaining the status quo is not a preferred option because it would not solve the disconnect between a maximum of two years and experience that tells us that most sentences involve fines and that, when there is an imprisonment conviction, it usually is for a short period of time.

26. The status quo does not solve problems of costs, delays and the lack of technical skills in the jury. Incidentally, it also does not align with feedback from councils who (as regulators) would like to be more involved in the prosecution rather than the Crown.

Wider review of the RMA penalty regime – Option 3

27. Option 3 could be a wider review of the RMA penalty regime, however, the problem is discrete enough to be dealt with separately; as when the solution was introduced in the NBEA (now repealed).

28. Option 3 is also not recommended as it would delay the immediate efficiency benefits that the proposal could bring to the RMA prosecution process.

How do the options compare to the status quo/counterfactual?

Key for qualitative judgements:	
++	much better than doing nothing/the status quo/counterfactual
+	better than doing nothing/the status quo/counterfactual
0	about the same as doing nothing/the status quo/counterfactual
-	worse than doing nothing/the status quo/counterfactual
- -	much worse than doing nothing/the status quo/counterfactual

	Option One – Status Quo	Option Two – Reduce maximum term of imprisonment	Option Three - Wider review of the penalty regime
Effectiveness	0	++ more effective at meeting all objectives than options 1 and 3	+ it could also introduce amendments that are effective at contributing to the attainment of the objectives but scores lower as there is uncertainty on when the wide review would take place, a wide (rather than targeted) review would take longer and these delays would not provide the immediate benefits that the RMA prosecution process needs and that option 2 would provide
Efficiency	0	++ more cost efficient than option 1 which is costly and option 2 (this proposal spreads the cost of new legislation across the whole of RM Bill 2 which makes it cheaper than a bespoke bill to amend the penalty regime)	+ it could introduce cost efficient solutions to the problem but scores lower as there is uncertainty on when the wide review would take place, a wide (rather than targeted) review would take longer and these delays would not provide the immediate benefits that the RMA prosecution process needs and that option 2 would provide
Certainty	0	++ has a stronger potential to achieve certainty as the solution is targeted to align provisions with the experience gained in prosecutions	+ it would achieve certainty because it would be a comprehensive review of the regime but it would not help in the short term with the present uncertainty due to the disconnect between the provisions and experience
Durability & Flexibility		++ enables the regulatory system to adapt to the changes in circumstances (the	++ has the potential to be a durable and flexible solution as the wide regime will be reviewed

		experience gathered in prosecutions)	
Implementation Risk	0	++ no implementation risks have been identified (aligns provisions with the experience gained in prosecutions)	++ a wide review is expected to be thorough in identifying and mitigating any potential implementation risks (including if novel solutions are introduced)
Overall assessment	0	++	+

Overall Assessment

29. Option 3 scores as well as option two in relation to some criteria. However the delay it would cause on immediate benefits to the RMA prosecution process results in a lower score in terms of effectiveness, efficiency and certainty.

30. Option 2 aligns with the focus of RMA Bill 2 (targeted amendments to facilitate progress in the short and medium term). It is expected to show immediate efficiency benefits to the environment prosecution process as it would mean cost savings and less time-consuming processes. The proposed amendment is proportionate to the offences and aligned to experience. It would match technical regulatory provisions with judges who have the required expertise to interpret them.

Cost/Benefit Analysis

Affected groups	**Comment**	**Impact**	**Evidence Certainty**
Additional costs of the preferred option compared to taking no action			
Regulated groups (defendants)	Ongoing Some defendants may believe that a jury trial affords them a more equitable process	Medium	Medium (arising from consultation with the Ministry of Justice)
Regulators (councils)	Ongoing (more involvement of councils in the prosecution)	Medium	Medium (arising from consultation with councils)
Treaty Partners	No impact was identified to apply specifically to Treaty Partners	N/A	Medium (arising from consultation under the NBEA)
Courts	Ongoing (judge alone process is less costly)	Low	Medium

Non-monetised costs	Ongoing	Medium	Medium
Additional benefits of the preferred option compared to taking no action			
Regulated groups defendants)	Ongoing (reduced maximum term and judge is expert in complex technical rules and scientific data)	Medium	Medium
Regulators (councils)	Ongoing (more involvement of councils in the prosecution)	Medium	Medium (arising from consultation with councils)
Treaty Partners	No benefit was identified to apply specifically to Treaty Partners	N/A	Medium (arising from consultation under the NBEA)
Courts	Ongoing (judge alone process is less costly)	Medium	Medium
Non-monetised benefits	Ongoing	Medium	Medium

Treaty implications

31. The Treaty of Waitangi sets out the Crown's obligations, specifically applicable is the duty of active protection. An improved efficiency and effectiveness of the environmental regulatory system benefits both Māori and the community at large.

32. Defendants who are Māori sometimes argue that their actions under the RMA, which the council considered offending, was them exercising their rangatiratanga. It is unclear whether removing jury trials from these offences would have implications on Māori defendants. However previous engagement was undertaken with Māori when this same change was introduced as part of the, now repealed, NBEA. At that time, feedback on the suite of compliance and enforcement system changes proposed ranged from general support to no objection. No impacts on Treaty settlements have been identified for this proposal.

33. The feedback noted the need for the compliance and enforcement tools to be operationalised in a setting that incentivised good behaviour and prevention in the first instance. There was also interest in empowering iwi to take enforcement action and incorporating mātauranga Māori methods into the framework to identify and measure non-compliance. These suggestions exceed the focus of RMA Bill 2 (targeted amendments to facilitate progress in the short and medium term) and would better suit a wider review of the RMA penalty regime.

Consultation

34. The proposal has been prompted by feedback received from councils who have signalled they would support an amendment like this.

35. The Ministry of Justice has expressed concern with the proposal to reduce the maximum penalty to no longer enable jury trials to be selected. The right to a trial by our peers is an important right and feeds into the fundamental principles of open justice and the rule of law more broadly. Although resource management prosecutions can be complex, other areas of significant complexity are subject to jury trials (i.e.

complex financial crime). Also, judges can order a judge alone trial in cases likely to be long or complex.

36. Accordingly, the Ministry of Justice recommends that there should remain consistency with other areas of law and that the appropriate starting point should be determining the suitable penalty for each type of offending (which determines which category offence it is) with standard trial requirements flowing from that.

37. The proposal aligns with the focus of the RMA Bill 2 (targeted amendments to facilitate progress in the short and medium term) and, as such, it does not involve a review of offences. Determining the suitable penalty for each type of offending seems better suited to a wider review like the one we labelled option 3 above.

38. Consultation with Māori has been summarised under "Treaty implications".

Proposal 2: Increase RMA maximum fines

Problem

39. The Resource Management Review Panel's report explains that threat of legal punishment can act as an effective deterrent on non-compliance. For this threat to be effective, there needs to be awareness that the laws are enforced and that meaningful punishment will result from non-compliance. The RMA, along with several other regulatory regimes in New Zealand, have deterrence as their primary enforcement objective. In such regimes, penalties need to be set at a level high enough to deter non-compliance with the rules.

40. The most common penalties for RMA offences are fines. The Legislation Design and Advisory Committee notes that "maximum fines should not be disproportionately severe but should reflect the worst case of possible offending".

41. The maximum fine must be high enough to allow the imposition of a penalty that is meaningful to the offender, whether it be an individual or a multinational corporate entity. It is important that fines are high enough so that they are not perceived to be a minor licencing fee or perceived to be less expensive than complying with regulatory requirements.

42. The current maximum fines ($300,000 for individuals and $600,000 for corporate entities) are low and, therefore, inadequate to be an appropriate deterrent. This is because, in individual cases, judges establish a starting point within the fines range and decide on similar fine levels for similar offences.

43. An example of a council's report may illustrate the fine figures in a year. The 2018/2019 Bay of Plenty Regional Council's Regulatory Compliance Report shows that 12 prosecutions resulted in a total of $529,525 in fines.[3]

44. The majority of the $1.8 million in fines handed down in 2018/2019 was secured collectively by Waikato and Bay of Plenty Regional Councils.[4]

45. The Resource Management Review Panel's report points out that many offences against the RMA involve an element of commercial gain to the offender. Following the panel's investigation, it concluded that "It is common for this gain to far outweigh the penalties imposed through the courts". This means that the payment of a fine may simply be viewed as a 'reasonable licence fee'. For example, Horizon Flowers and its

[3] Bay of Plenty Regional Council "Regulatory Compliance Report", 2018/2019, page 1, content (boprc.govt.nz)
[4] Compliance and Enforcement Special Interest Group "Independent Analysis of the 2018/2019 Compliance Monitoring and Enforcement Metrics for the Regional Sector", 3 February 2020, page 42 CME-Metrics-Report-2018-19_ap14Lnw.pdf (d1pepq1a2249p5.cloudfront.net)

manager were fined a total of just under $60,000 for an unlawful water take in 20175. The agreed summary of facts noted the offending yielded the company commercial gain of between $320,000 and $985,000.

46. According to the report, an increase in penalties was generally supported by local government submitters. For example, Christchurch City council supports "…increasing the penalties for non-compliance so that they are an effective deterrent compared to the financial advantage of non-compliance".

47. Commercial gain also results from compliance costs avoided. For example, prosecutions for dairy effluent discharges, many of which occur as a result of inadequate infrastructure, typically result in fines in the tens of thousands of dollars, but effluent infrastructure upgrades' costs could start at the low hundreds of thousands of dollars.

48. The RMA's financial penalties in section 339 have not been amended since 2009 and, consequently, have become weak in their deterrence power. This is illustrated by a comparison with other statutes in New Zealand more recently amended, and other similar international jurisdictions.

49. The statutory maximum fines for environmental offences ($300,000 for individuals and $600,000 for corporate entities) are low. The maximum fines in the Health and Safety at Work Act 2015 and the Water Services Act 2021 are $600,000 and $3,000,000 for individuals and corporates respectively, while both the Biosecurity Act 1993 and the Commerce Act 1986 have respective maximum fines of $500,000 and $10,000,000[6].

50. Similar offences in Australia are liable for fines of slightly more than $1,000,000 for individuals and $10,000,000 for corporates, while in Canada, maximum fines are $1,000,000 and $6,000,000 respectively. In the United Kingdom, individual fines are set at up to 700% of an individual's weekly income, while the maximum corporate fines are set at £3,000,000.

51. In 2023, the problems we have outlined were analysed and the solution we are now proposing was consulted on, approved by Cabinet and introduced in the NBEA (now repealed).

52. The proposal is expected to achieve immediate benefits in terms of providing proportionate penalties for environmental offences and strengthening deterrence.

Objectives

53. In addition to the RMA work programme objectives (specifically improving regulatory quality in the resource management system), the proposal seeks to:

- meet National Manifesto commitments to increase penalties for non-compliance with forestry harvesting conditions
- update fines that have not been reviewed since 2009
- ensure offending is matched by proportionate fines
- improve the effectiveness of enforcement activity in resource management
- strengthen deterrence to avoid environmental offending

[5] Resource Management Review Panel "New Directions for Resource Management in New Zealand", June 2020, page 405 (case study 3) rm-panel-review-report-web.pdf (environment.govt.nz)
[6] The maximum fine under the Biosecurity Act and the Commerce Act is "the greater of $10,000,000, or three times the value of any commercial gain, or 10% of the turnover of the body corporate"

Proposal – Option 2

54. Increase maximum fines for RMA offending to $1,000,000 for individuals and $10,000,000 for corporate offenders.

55. This option is broadly consistent with the maximum fines with both other New Zealand legislation, and similar international jurisdictions and is the appropriate level to increase deterrence.

56. These fine levels were approved by Cabinet in 2023 and introduced in the NBEA (now repealed).

Other options

Status quo – Option 1

57. Retaining the status quo would not solve the problem that the statutory maximum fines for environmental offences in New Zealand are low so they are not acting as a deterrent, and they do not align with other New Zealand legislation and other similar international jurisdictions.

Wider review of the RMA penalty regime – Option 3

58. Option 3 is to wait for a future review of the RMA penalty regime or even the New Zealand criminal penalty regime to analyse wider options such as setting fines in terms of "penalty units" indexed to inflation or fines like in the Commerce Act which are linked to commercial gain or corporate turnover.

59. Option 3 is not recommended as it would delay the immediate deterrent benefits that the proposal could bring to environmental offending.

How do the options compare to the status quo/counterfactual?

	Option One – Status Quo	Option Two – Increase RMA fines	Option Three - Wider review of the penalty regime
Effectiveness	0	++ more effective at meeting all objectives than options 1 and 3 (especially, meeting National Manifesto commitments)	+ it could also introduce amendments that are effective at contributing to the attainment of the objectives (especially, updating outdated fines) but scores lower as there is uncertainty on when the wide review would take place, a wide (rather than targeted) review would take longer and these delays would not provide the immediate benefits that the RMA prosecution process needs and that option 2 would provide
Efficiency	0	++ more cost efficient than option 1 (due to	+ it could introduce cost efficient solutions to the problem but scores

		the outdated fines) and option 2 (as this proposal spreads the cost of new legislation across the whole of RM Bill 2 which makes it cheaper than a bespoke bill to amend the penalty regime)	lower as there is uncertainty on when the wide review would take place, a wide (rather than targeted) review would take longer and these delays would not provide the immediate benefits that the RMA prosecution process needs and that option 2 would provide
Certainty	0	++ has a stronger potential to achieve certainty (predictability, consistency and fairness) as the solution is targeted to update outdated fines	+ it would achieve certainty because it would be a comprehensive review of the regime but it would not help in the short term with the present lack of certainty (predictability, consistency and fairness) due to out-of-date fines
Durability & Flexibility		++ enables the regulatory system to adapt to the changes in circumstances (by updating outdated fines)	++ has the potential to be a durable and flexible solution as the wide regime will be reviewed
Implementation Risk	0	++ no implementation risks have been identified (updates outdated fines)	++ a wide review is expected to be thorough in identifying and mitigating any potential implementation risks (including if novel solutions are introduced)
Overall assessment	0	++	+

Overall Assessment

60. Option 3 scores as well as option two in relation to some criteria. However the delay it would cause on immediate benefits to the RMA prosecution process results in a lower score in terms of effectiveness, efficiency and certainty.

61. Option 2 is expected to show immediate benefits to the environment prosecution process. Current maximum fines are too low to effectively deter environmental

offending. An increase in fine levels would ensure offending is matched by proportionate fines, increase deterrence and be more consistent with other similar legislation in New Zealand and overseas.

Cost/Benefit Analysis

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Regulated groups (defendants)	Ongoing (fines will be higher but judges rarely set fines at the top maximum)	Medium	Medium
Regulators (councils)	One off (implementation of the new fines through guidance and comms)	Low	Medium (arising from consultation with councils)
Treaty Partners	No impact was identified to apply specifically to Treaty Partners	N/A	Medium (arising from consultation under the NBEA)
Courts	One off (implementation of the new fines through guidance and comms)	Low	Medium (arising from consultation with councils)
Non-monetised costs	Ongoing	Low to Medium	Medium
Additional benefits of the preferred option compared to taking no action			
Regulated groups (defendants)	One off (clear information about the new fines levels allows them to make informed decisions)	Low	Low
Regulators (councils)	Ongoing (increased deterrence)	Medium	Medium (arising from consultation with councils)
Treaty Partners	No benefit was identified to apply specifically to Treaty Partners	N/A	Medium (arising from consultation under the NBEA)
Wider public	Ongoing (increased deterrence and, in turn, healthier environment)	Medium	Medium (arising from consultation with councils)

Non-monetised benefits	Ongoing	Medium	Medium

Treaty implications

62. The Treaty of Waitangi sets out the Crown's obligations, specifically applicable is the duty of active protection. An improved efficiency and effectiveness of the environmental regulatory system benefits both Māori and the community at large.

63. Defendants who are Māori sometimes argue that their actions under the RMA, which the council considered offending, was them exercising their rangatiratanga. It is unclear whether increasing individual fines for offenders would have Treaty implications (ie specific to Māori and different from implications for other defendants). However previous engagement was undertaken with Māori when this same change was introduced as part of the, now repealed, NBEA. At that time, feedback on the suite of compliance and enforcement system changes proposed ranged from general support to no objection. No impacts on Treaty settlements have been identified for this proposal.

64. The feedback noted the need for the compliance and enforcement tools to be operationalised in a setting that incentivised good behaviour and prevention in the first instance. There was also interest in empowering iwi to take enforcement action and incorporating mātauranga Māori methods into the framework to identify and measure non-compliance. These suggestions exceed the focus of RMA Bill 2 (targeted amendments to facilitate progress in the short and medium term) and would better suit a wider review of the RMA penalty regime.

Consultation

65. The proposal has been prompted by feedback received from councils who have signalled they would support an amendment like this.

66. We have consulted with the Ministry of Justice who is concerned that the proposed penalty levels are not proportionate to the harm caused by every offence captured. It suggests that a wider consideration of the culpability and harm caused by each offence and then setting the appropriate penalty for each offence on that basis, rather than applying one penalty to multiple offences, best ensures the penalties are proportionate to the harm caused by offending.

67. The proposal aligns with the focus of the RMA Bill 2 (targeted amendments to facilitate progress in the short and medium term) and, as such, it does not involve a review of offences. Determining the suitable penalty for each type of offending seems better suited to a wider review like the one we labelled option 3 above.

68. Consultation with Māori has been summarised under "Treaty implications".

Proposal 3: Extend local authorities' ability to recover costs

Problem

69. RMA regulators incur a variety of compliance and enforcement costs.

70. Fines revenue represents only a small proportion of the councils' total costs of delivering the compliance and enforcement service. Fines also have a different purpose than cost recovery. Their purpose is to punish non-compliance and to provide specific and general deterrence.

71. Cost recovery is recommended so that those causing the need for an activity by the council contribute most towards its cost. The inability to recover costs directly from those contributing the need for the activities drives perverse behaviours. For example, the reliance on rates to fund compliance monitoring of permitted activity rules provides an incentive for councils to require consents for resource use activities, where cost recovery is possible.

72. Administrative recovery mechanisms allow direct recovery of attributable costs related to administering the regulators' compliance and enforcement functions. Section 36 of the RMA provides the statutory basis for the recovery of administrative costs.

73. Currently, section 36 empowers a local authority to fix fees to recover some costs from the resource user. However section 36 does not enable fees to be fixed to recover costs associated with many common compliance and enforcement activities, such as monitoring the compliance with plan permitted activity rules, responding to notifications from the public about alleged breaches of environmental rules, and investigating non-compliance.

74. The proposal is to provide for the recovery of compliance and enforcement costs not currently covered by section 36.

75. The Resource Management Review Panel researched the problem and concluded that, as a result, monitoring of permitted activity rules and investigation activities that cannot be cost recovered directly are either not done, are under-resourced, or must be funded by the public through rates, which is contrary to the polluter pays principle developed through case law. The Resource Management Review Panel's report noted that the status quo can add up to serious environmental impacts as shown in case study 2 on page 401[7].

Objectives

76. In addition to the RMA work programme objectives, the proposal seeks to:

- strengthen resourcing for the compliance, and enforcement functions of councils
- improve efficiency and effectiveness of councils' functions
- ensure compliance and enforcement activities can be funded in a way that is consistent with user pays and polluter pays principles, avoiding a disproportionate cost burden on councils and the ratepayer

Proposal – Option 2

77. Provide for recovery of costs associated with compliance and enforcement activities, including permitted activity monitoring, complaint response, and investigation activities.

78. Cost recovery is not appropriate in all situations, for example, it would not be appropriate for RMA regulators to recover the cost of investigation where the investigation revealed that no offence had been committed, or the party subject to that investigation was not responsible for the offending.

79. The proposal is to provide that the regulator "may" require a person to pay any reasonable costs incurred by the regulator in, or incidental to, taking any action in connection with monitoring or enforcing the person's compliance with the RMA.

80. Reasonable costs would include the costs of investigation, supervision, and monitoring of the adverse effect on the environment, and the costs of any actions required to avoid, minimise, or remedy the adverse effect.

[7] Resource Management Review Panel "New Directions for Resource Management in New Zealand", June 2020, page 401 (case study 2) rm-panel-review-report-web.pdf (environment.govt.nz)

81. Introducing this discretion for councils would allow them to use cost recovery options and set the charges through the consultative process of their annual and long-term plans.

82. The recent review of the RMA analysed the problems we have outlined. In 2023, Cabinet and Parliament approved specific cost recovery mechanisms for councils in a few areas under the NBEA.

83. The proposal is to introduce a provision similar to section 722(1) of the NBEA that said: "An NBE regulator may require a person to pay any reasonable costs incurred by the regulator in, or incidental to, taking any action in connection with monitoring or enforcing the person's compliance with this Act". Any further decisions on the levels of recovery, etc will be made separately from the amendments under the RMA Bill 2.

Other options

Status quo – Option 1

84. Retaining the status quo does not solve the problem of local councils' inability to recover their costs and the burden on ratepayers.

Wider review of cost recovery under the RMA – Option 3

85. Option 3 would be a wider review of cost recovery under the RMA, however, the alternative is not preferred because it would take longer for the intervention to effectively meet the objectives.

How do the options compare to the status quo/counterfactual?

	Option One – *Status Quo*	**Option Two – Extend cost recovery ability**	**Option Three - Wider review of RMA cost recovery**
Effectiveness	0	++ more effective at meeting all objectives than options 1 and 3 (especially, consistency with user pays and polluter pays principles, avoiding a disproportionate cost burden on councils and the ratepayer)	+ it could also introduce amendments that are effective at contributing to the attainment of the objectives but scores lower as there is uncertainty on when the wide review would take place, a wide (rather than targeted) review would take longer and these delays would not provide the immediate benefits that the RMA prosecution process needs and that option 2 would provide
Efficiency	0	++ more cost efficient than option 1 (which is costly) and option 2 (this proposal spreads the	+ it could introduce cost efficient solutions to the problem but scores lower as there is uncertainty on when the wide

		cost of new legislation across the whole of RM Bill 2 which makes it cheaper than a bespoke bill to amend the penalty regime)	review would take place, a wide (rather than targeted) review would take longer and these delays would not provide the immediate benefits that the RMA prosecution process needs and that option 2 would provide
Certainty	0	++ has a stronger potential to achieve certainty (predictability, consistency and fairness) as the solution is targeted to aligning legal requirements with user pays and polluter pays principles	+ it would achieve certainty because it would be a comprehensive review of the regime but it would not help in the short term with the present uncertainty due to the disproportionate cost burden on councils and the ratepayer
Durability & Flexibility		++ enables the regulatory system to adapt to new information on the regulatory system's performance (the disproportionate cost burden on councils and the ratepayer)	++ has the potential to be a durable and flexible solution as the wide regime will be reviewed
Implementation Risk	0	++ no implementation risks have been identified (aligns legal requirements with user pays and polluter pays principles)	++ a wide review is expected to be thorough in identifying and mitigating any potential implementation risks (including if novel solutions are introduced)
Overall assessment	0	++	+

Overall Assessment

86. Option 3 scores as well as option 2 in relation to some criteria. However the delay it would cause on immediate benefits to the RMA prosecution process results in a lower score in terms of effectiveness, efficiency and certainty.

87. Option 2 aligns with the focus of RMA Bill 2 (targeted amendments to facilitate progress in the short and medium term). It is expected to show immediate efficiency

benefits to the environment prosecution process as it would avoid the current cost burden on councils and the ratepayer.

88. Option 2 would ensure compliance and investigation activities can be funded in a way that is consistent with user pays and polluter pays principles. In turn, this is expected to strengthen the effectiveness and efficiency of compliance, enforcement and monitoring functions of councils.

Cost/Benefit Analysis

Affected groups	Comment	Impact.	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Regulated groups (defendants)	Ongoing (there will be a cost for offenders but this is justified as it will relate to the offence they committed)	Medium	Medium
Regulators (councils)	Ongoing (implementation)	Low	Medium (arising from consultation with councils)
Treaty Partners	No impact was identified to apply specifically to Treaty Partners	N/A	Medium (arising from consultation under the NBEA)
Non-monetised costs	Ongoing	Medium	Medium
Additional benefits of the preferred option compared to taking no action			
Regulated groups (defendants)	One off (clear information about the new cost recovery rules allows them to make informed decisions)	Low	Low
Regulators (councils)	Ongoing (councils will able to recover their compliance costs)	High	Medium (arising from consultation with councils)
Treaty Partners	No benefit was identified to apply specifically to Treaty Partners	N/A	Medium (arising from consultation under the NBEA)
Wider public	Ongoing (the investigation of public notifications about alleged breaches of environmental rules will be enabled)	Medium	Medium (arising from consultation with councils)
Non-monetised benefits	Ongoing	Medium	Medium

Treaty implications

89. The Treaty of Waitangi sets out the Crown's obligations, specifically applicable is the duty of active protection. An improved efficiency and effectiveness of the environmental regulatory system benefits both Māori and the community at large.

90. Previous engagement was undertaken with Māori when this same change was introduced as part of the, now repealed, NBEA. At that time, feedback on the suite of compliance and enforcement system changes proposed ranged from general support to no objection. No impacts on Treaty settlements have been identified for this proposal.

Consultation

91. The proposal has been prompted by feedback received from councils who have signalled they would support an amendment like this.

92. Consultation with Māori has been summarised under "Treaty implications".

Proposal 4: Accountability for non-compliance history

Problem

93. Currently, the RMA provides limited ability to consider non-compliance history, irrespective of the nature of prior offending. Councils cannot decline a resource consent application on the basis of previous non-compliance, non-compliance with a resource consent cannot be used as a reason to initiate a review of that resource consent's conditions and resource consents cannot be revoked or suspended on the basis of a poor compliance history.

94. The inability to account for prior non-compliance such as through revoking or suspending a resource consent leads to perverse outcomes. For example, there have been cases where a prolific RMA offender has been prosecuted multiple times for contravening a consent but has continued to offend under that consent.

95. In the face of ongoing offending and repeated non-compliance, the council has limited options other than to prosecute again and again, with all the associated costs and time commitment. If a council pursues a directive tool such as an enforcement order through the court, the escalation path in the event of non-compliance is to prosecute. The court, when faced with a repeat offender, is also restricted to punitive tools such as fines and ultimately imprisonment. The likelihood is low that repeated prosecutions will change an offender's behaviour if previous prosecutions have not brought about the desired behaviour change.

96. The primary accountability for non-compliance under the RMA is currently punitive (eg fines and infringement notices) but, as discussed above, fines are typically substantially less than the commercial gain that arises from offending, or than the costs deferred by not operating in a compliant manner.

97. The ultimate penalty to prevent further offences or harm is the removal (or restriction) of the license to operate[8]. Restricting the right to use a public resource may be appropriate when the offender is limiting the ability of future applicants to use the resource but it is a significant sanction and requires sufficient checks and balances to ensure the restriction is only applied where offending has been substantiated through a formal process. Restriction or revocation of the right to use natural resources should only be available following formal actions using statutory tools. In the context of the

[8] Sparrow MK "The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance", 2000, Washington DC: The Brookings Institution, pages 37-40

RMA, these statutory tools include infringement notices, prosecutions, abatement notices and enforcement orders.

98. The more serious the sanction, the greater the required oversight required to ensure resource users' rights are not unreasonably impinged. For this reason, suspension or revocation of a resource consent should only occur by application to the court, and only be available in response to the most serious situations, where offending is ongoing, significant or repeated. This situation would describe a very small percentage of RMA offences that have been the subject of formal actions using statutory tools (eg infringement notices, prosecutions, abatement notices and enforcement orders), which provide adequate appeal rights via application to the court.

99. Consent authorities would be able to impose less severe restrictions, such as an increase in the stringency of consent conditions, or an increase in the frequency of monitoring or reporting, in response to less serious or one-off offending.

100. In 2023, the problems we have outlined were analysed and the solution we are now proposing was consulted on, approved by Cabinet and introduced in the NBEA (now repealed).

Objectives

101. In addition to the RMA work programme objectives, the proposal seeks to:

- better equip regulators to anticipate and proactively respond to the higher risk of future harm that arises from parties with a demonstrated history of previous non-compliance

Proposal – Option 2

102. Enable regulators to take account of a person's previous non-compliance when processing applications for resource consents or transfers. Consent Authorities would be able to impose restrictions on the person's resource use proportionate to the level of non-compliance. Such responses could include adding additional consent conditions, increasing the stringency of consent conditions, or increasing the frequency of compliance monitoring, or the reporting requirements.

103. Enable regulators to initiate a review of a resource consent in response to non-compliance that has resulted in formal enforcement action (an abatement notice, an infringement notice, a conviction, or an enforcement order).

104. Enable regulators to apply to the court for an order to revoke or suspend a resource consent in response to ongoing, repeated or significant non-compliance. To enable the Environment Court to suspend or revoke a resource consent where offending is ongoing, significant or repeated. This situation would describe a very small percentage of RMA offences.

Other options

Status quo – Option 1

105. Retaining the status quo would not solve the problem of harm continuing to be caused to the environment by repeat offenders due to the councils' inability to decline a resource consent application on the basis of previous non-compliance.

Wider review of the RMA penalty regime – Option 3

106. Option 3 is to wait for a future review of the RMA penalty regime that includes learning and education non-regulatory options. The alternative is not preferred because it would delay a needed intervention to effectively meet the objectives.

How do the options compare to the status quo/counterfactual?

	Option One – *Status Quo*	Option Two – Accountability for non-compliance history	Option Three - Wider review of the penalty regime
Effectiveness	0	++ more effective at meeting all objectives than options 1 and 3	+ it could also introduce amendments that are effective at contributing to the attainment of the objectives but scores lower as there is uncertainty on when the wide review would take place, a wide (rather than targeted) review would take longer and these delays would not provide the immediate benefits that the RMA prosecution process needs and that option 2 would provide
Efficiency	0	++ more cost efficient than option 1 (which is costly) and option 2 (this proposal spreads the cost of new legislation across the whole of RM Bill 2 which makes it cheaper than a bespoke bill to amend the penalty regime)	+ it could introduce cost efficient solutions to the problem but scores lower as there is uncertainty on when the wide review would take place, a wide (rather than targeted) review would take longer and these delays would not provide the immediate benefits that the RMA prosecution process needs and that option 2 would provide
Certainty	0	++ has a stronger potential to achieve certainty (predictability, consistency and fairness) as the solution is targeted to cases of ongoing, repeated or significant non-compliance	+ it would achieve certainty because it would be a comprehensive review of the regime but it would not help in the short term with the present lack of certainty (predictability, consistency and fairness) as non-compliance history cannot be taken into account

Durability & Flexibility		++ enables the regulatory system to adapt to the changes in circumstances (relating to cases of ongoing, repeated or significant non-compliance)	++ has the potential to be a durable and flexible solution as the wide regime will be reviewed
Implementation Risk	0	++ no implementation risks have been identified (aligns provisions with the experience relating to cases of ongoing, repeated or significant non-compliance)	++ a wide review is expected to be thorough in identifying and mitigating any potential implementation risks (including if novel solutions are introduced)
Overall assessment	0	++	+

Overall Assessment

107. Option 3 scores as well as option two in relation to some criteria. However the delay it would cause on immediate benefits to the RMA prosecution process results in a lower score in terms of effectiveness, efficiency and certainty.

108. Option 2 aligns with the focus of RMA Bill 2 (targeted amendments to facilitate progress in the short and medium term). It is expected to show immediate efficiency benefits to the environment prosecution process as it would mean cost savings and less time-consuming processes.

109. Option 2 would better equip regulators to anticipate and proactively respond to the higher risk of future harm that arises from parties with a demonstrated history of previous non-compliance. In turn, this is expected to have a positive impact on the environment.

Cost/Benefit Analysis

Affected groups	Comment	Impact.	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Regulated groups (defendants)	Ongoing (non-compliance history may mean a resource consent application could be declined)	Medium	Medium

Regulators (councils)	Ongoing (implementation including guidance and comms)	Low	Medium (arising from consultation with councils)
Treaty Partners	No impact was identified to apply specifically to Treaty Partners	N/A	Medium (arising from consultation under the NBEA)
Non-monetised costs	Ongoing	Medium	Medium
Additional benefits of the preferred option compared to taking no action			
Regulated groups (defendants)	One off (clear information about the new rules allows them to make informed decisions)	Low	Low
Regulators (councils)	Ongoing (the proposal will reduce the burden on the council)	High	Medium (arising from consultation with councils)
Treaty Partners	No benefit was identified to apply specifically to Treaty Partners	N/A	Medium (arising from consultation under the NBEA)
Wider public	Ongoing (increased deterrence and, in turn, healthier environment)	Medium	Medium (arising from consultation with councils)
Non-monetised benefits	Ongoing	Medium	Medium

Treaty implications

110. The Treaty of Waitangi sets out the Crown's obligations, specifically applicable is the duty of active protection. An improved efficiency and effectiveness of the environmental regulatory system benefits both Māori and the community at large.

111. The Crown has a responsibility to ensure that environmental regulators act effectively and efficiently to intervene on unlawful pollution or resource exploitation. Enabling regulators to proportionately restrict a person's ongoing access to natural resources, following non-compliance, provides a mechanism to prevent future offending and harm.

112. Previous engagement was undertaken with Māori when a similar change was introduced as part of the, now repealed, NBEA. At that time, feedback on the suite of compliance and enforcement system changes proposed ranged from general support to no objection. No impacts on Treaty settlements have been identified for this proposal.

Consultation

113. The proposal has been prompted by feedback received from councils who have signalled they would support an amendment like this.

114. We have consulted with the Ministry of Justice who did not provide any comments on this proposal.

115. Consultation with Māori has been summarised under “Treaty implications”.

Proposal 5: Ban on insurance against fines

Problem

116. Currently, the RMA does not prohibit resource users from purchasing insurance to indemnify themselves against prosecution costs and financial penalties for RMA offences.

117. In principle, any means by which an offender or potential offender can circumvent their obligations to minimise their exposure to penalties undermines the deterrence aspects of a regulatory regime.

118. Efforts to improve deterrence, eg by increasing fines or fees, could be undermined if those committing offences are able to indemnify themselves against the fines that match their conduct.

119. Legal and defence costs are not part of the problem and the proposal does not extend to prohibiting insurance that relates to these costs.

Objectives

120. In addition to the RMA work programme objectives, the proposal seeks to:

- strengthen deterrence for environmental offending.
- improve the effectiveness of enforcement activity in resource management.

Proposal – Option 2

121. The proposal is to support increased fines by prohibiting insurance that indemnifies a person against financial penalties (but not prohibiting insurance for legal and defence costs) for RMA offences.

122. The two proposals working together are expected to strengthen deterrence and prevent offenders from circumventing their obligations under the RMA.

123. In 2023, the problems we have outlined were analysed and the solution we are now proposing was consulted on, approved by Cabinet and introduced in the NBEA (now repealed).

Other options

Status quo – Option 1

124. The status quo would not solve the problem of lack of deterrence due to the fact that offenders purchase insurance to indemnify themselves against prosecution costs and financial penalties for RMA offences.

Wider review of the RMA penalty regime – Option 3

125. Option 3 is to wait for a future review of the RMA penalty regime or even the New Zealand criminal penalty regime to analyse wider options such as setting fines in terms

of “penalty units” indexed to inflation or fines like in the Commerce Act which are linked to commercial gain or corporate turnover. This alternative is not recommended as it would delay the immediate deterrent benefits that the proposal could bring to environmental offending.

How do the options compare to the status quo/counterfactual?

	Option One – *Status Quo*	Option Two – Ban on insurance against fines	Option Three – Wider review
Effectiveness	0	++ more effective at meeting all objectives than options 1 and 3	+ it could also introduce amendments that are effective at contributing to the attainment of the objectives but scores lower as there is uncertainty on when the wide review would take place, a wide (rather than targeted) review would take longer and these delays would not provide the immediate benefits that the RMA prosecution process needs and that option 2 would provide
Efficiency	0	++ more cost efficient than option 2 as this proposal spreads the cost of new legislation across the whole of RM Bill 2 which makes it cheaper than a bespoke bill to amend the penalty regime	+ it could introduce cost efficient solutions to the problem but scores lower as there is uncertainty on when the wide review would take place, a wide (rather than targeted) review would take longer and these delays would not provide the immediate benefits that the RMA prosecution process needs and that option 2 would provide
Certainty	0	++ has a stronger potential to achieve certainty (predictability, consistency and fairness) as the solution is targeted to the conduct of circumventing	+ it would achieve certainty because it would be a comprehensive review of the regime but it would not help in the short term with the present lack of certainty (predictability, consistency and fairness) when people circumvent their

		obligations to minimise exposure to penalties	obligations to minimise their exposure to penalties
Durability & Flexibility		++ enables the regulatory system to adapt to the changes in circumstances (circumventing obligations to minimise exposure to penalties)	++ has the potential to be a durable and flexible solution as the wide regime will be reviewed
Implementation Risk	0	++ no implementation risks have been identified (aligns provisions with the experience relating to the conduct of circumventing obligations to minimise exposure to penalties)	++ a wide review is expected to be thorough in identifying and mitigating any potential implementation risks (including if novel solutions are introduced)
Overall assessment	0	++	+

Overall Assessment

126. Option 3 scores as well as option two in relation to some criteria. However the delay it would cause on immediate benefits to the RMA prosecution process results in a lower score in terms of effectiveness, efficiency and certainty.

127. Option 2 aligns with the focus of RMA Bill 2 (targeted amendments to facilitate progress in the short and medium term). It is expected to show immediate benefits to the environment prosecution process.

128. Supporting the proposal to increase fines by prohibiting insurance that indemnifies a person against financial penalties is expected to strengthen deterrence. In turn, it is expected to bolster efforts towards the goal of reducing environmental offending.

Cost/Benefit Analysis

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			

Regulated groups (defendants)	Ongoing (there would be a cost for offenders who will have to pay fines themselves (rather than insurance companies) but this is justified as it will relate to the offence they committed)	Medium	Medium
Regulators (councils)	One off (implementation, including guidance and comms)	Low	Medium (arising from consultation with councils)
Treaty Partners	No impact was identified to apply specifically to Treaty Partners	N/A	Medium (arising from consultation under the NBEA)
Non-monetised costs	Ongoing	Medium	Medium
Additional benefits of the preferred option compared to taking no action			
Regulated groups (defendants)	One off (clear information about the new rules allows them to make informed decisions)	Low	Low
Regulators (councils)	Ongoing (increased deterrence)	Medium	Medium (arising from consultation with councils)
Treaty Partners	No benefit was identified to apply specifically to Treaty Partners	N/A	Medium (arising from consultation under the NBEA)
Wider public	Ongoing (increased deterrence and, in turn, healthier environment)	Medium	Medium (arising from consultation with councils)
Non-monetised benefits	Ongoing	Medium	Medium

Treaty implications

129. The Treaty of Waitangi sets out the Crown's obligations, specifically applicable is the duty of active protection. An improved efficiency and effectiveness of the environmental regulatory system benefits both Māori and the community at large.
130. The Crown has a responsibility to ensure that environmental regulators act effectively and efficiently to intervene on unlawful pollution or resource exploitation.
131. Previous engagement was undertaken with Māori when the same change was introduced as part of the now repealed NBEA. At that time, feedback on the suite of compliance and enforcement system changes proposed ranged from general support

to no objection. No impacts on Treaty settlements have been identified for this proposal.

Consultation

132. The proposal has been prompted by feedback received from councils who have signalled they would support an amendment like this.

133. We have consulted with the Ministry of Justice who did not provide any comments on this proposal.

134. Consultation with Māori has been summarised under “Treaty implications”.

Proposal 6: Increase the term of excessive noise directions

Problem

135. Local council enforcement officers can issue excessive noise directions, which are formal notices requiring a person to immediately reduce noise to a reasonable level. Excessive noise directions are commonly used in response to noisy parties. A notice prohibits the recipient from emitting excessive noise for the duration of the notice (currently 72 hours). It is an infringement offence to contravene an excessive noise direction, liable for an infringement notice that carries a $500 fee.

136. In 2023, there were more than 100,000 noise complaints across New Zealand, which resulted in 15,350 excessive noise directions being issued, and 202 infringement notices for breaches of those excessive noise directions[9].

137. The problem relates to repeated noisy parties occurring on consecutive weekends from problematic properties. The current short duration of an excessive noise direction means that a notice issued for a noisy party one weekend expires before the following weekend. When another noisy party occurs the next weekend, the council must first issue a new excessive noise direction before they can issue an infringement notice. Councils are not able to simply issue an infringement notice for breaching the previous excessive noise direction, only seven days before.

138. The short duration for excessive noise directions limits the ability of councils to effectively manage repeated noise events. The council gets stuck in a cycle of having to repeatedly issue excessive noise directions weekend after weekend, and there is nothing to deter the offender from having another noisy party the following weekend.

Objectives

139. In addition to the RMA work programme objectives, the proposal seeks to increase deterrence against repeated excessive noise emissions by extending the duration of an excessive noise directions so that a notice issued one weekend can continue to apply to the following weekend.

Proposal – Option 2

140. We propose the current timeframe for excessive noise directions be extended to eight days which would be an appropriate term as it would cover two weekends.

141. In 2023, the problems we have outlined were analysed and the solution we are now proposing was consulted on, approved by Cabinet and introduced in the NBEA (now repealed).

[9] Refer section 2.10 of the Annual Summary Information, 2022/23 complete dataset of Council implementation of the RMA, National monitoring system | Ministry for the Environment

Other options

Status quo – Option 1

142. The status quo would not solve the problem of perverse behaviours being enabled by the short timeframe, therefore, the alternative is not recommended.

Wider review of the RMA penalty regime – Option 3

143. Option 3 is to wait for a future review of the RMA penalty regime. This alternative is not recommended as it would delay the immediate deterrent benefits that the proposal could bring to environmental offending.

How do the options compare to the status quo/counterfactual?

	Option One – *Status Quo*	**Option Two – Increase term of excessive noise directions**	**Option Three – Wider review of the RMA penalty regime**
Effectiveness	0	++ more effective at meeting all objectives than options 1 and 3	+ it could also introduce amendments that are effective at contributing to the attainment of the objectives but scores lower as there is uncertainty on when the wide review would take place, a wide (rather than targeted) review would take longer and these delays would not provide the immediate benefits that the RMA prosecution process needs and that option 2 would provide
Efficiency	0	++ more cost efficient than option 1 (which is costly) and option 2 (this proposal spreads the cost of new legislation across the whole of RM Bill 2 which makes it cheaper than a bespoke bill to amend the penalty regime)	+ it could introduce cost efficient solutions to the problem but scores lower as there is uncertainty on when the wide review would take place, a wide (rather than targeted) review would take longer and these delays would not provide the immediate benefits that the RMA prosecution process needs and that option 2 would provide
Certainty	0	++ has a stronger potential to achieve	+ it would achieve certainty because it would be a comprehensive review

		certainty (predictability, consistency and fairness) as the solution targets repeated noisy parties occurring on consecutive weekends	of the regime but it would not help in the short term with the present lack of certainty (predictability, consistency and fairness) in relation to repeated noisy parties occurring on consecutive weekends
Durability & Flexibility		++ enables the regulatory system to adapt to the changes in circumstances (repeated noisy parties occurring on consecutive weekends)	++ has the potential to be a durable and flexible solution as the wide regime will be reviewed
Implementation Risk	0	++ no implementation risks have been identified (aligns provisions with the changes in circumstances)	++ a wide review is expected to be thorough in identifying and mitigating any potential implementation risks (including if novel solutions are introduced)
Overall assessment	0	++	+

Overall Assessment

144. Option 3 scores as well as option two in relation to some criteria. However the delay it would cause on immediate benefits to the RMA prosecution process results in a lower score in terms of effectiveness, efficiency and certainty.

145. Option 2 aligns with the focus of RMA Bill 2 (targeted amendments to facilitate progress in the short and medium term). Extending the duration of an excessive noise direction to 8 days is expected to increase deterrence against repeated excessive noise emission, by enabling councils to issue infringement notices in these situations. In turn, it is expected to show immediate benefits to the environment prosecution process.

Cost/Benefit Analysis

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Regulated groups (defendants)	Ongoing (offenders' choice of hosting loud parties will be limited but this is justified because of the harm they cause on the wider public)	Medium	Medium
Regulators (councils)	One off (implementation, including guidance and comms)	Low	Medium (arising from consultation with councils)
Treaty Partners	No impact was identified to apply specifically to Treaty Partners	N/A	Medium (arising from consultation under the NBEA)
Non-monetised costs	Ongoing	Medium	Medium
Additional benefits of the preferred option compared to taking no action			
Regulated groups (defendants)	One off (clear information about the new rules allows them to make informed decisions)	Low	Low
Regulators (councils)	Ongoing (reduced burden on councils)	Medium	Medium (arising from consultation with councils)
Treaty Partners	No benefit was identified to apply specifically to Treaty Partners	N/A	Medium (arising from consultation under the NBEA)
Wider public	Ongoing (reduced noise and increased deterrence)	Medium	Medium (arising from consultation with councils)
Non-monetised benefits	Ongoing	Medium	Medium

Treaty implications

146. The Treaty of Waitangi sets out the Crown's obligations, specifically applicable is the duty of active protection. An improved efficiency and effectiveness of the environmental regulatory system benefits both Māori and the community at large.

147. Previous engagement was undertaken with Māori when the same change was introduced as part of the, now repealed, NBEA. At that time, feedback on the suite of

compliance and enforcement system changes proposed ranged from general support to no objection. No impacts on Treaty settlements have been identified for this proposal.

Consultation

148. The proposal has been prompted by feedback received from councils who have signalled they would support an amendment like this.

149. We have consulted with the Ministry of Justice who did not provide any comments on this proposal.

150. Consultation with Māori has been summarised under “Treaty implications”.

Proposal 7: Enable electronic service of documents

Problem

151. Section 352 provides for a person to specify an electronic address as an address for service for the matter to which the document relates. The wording relating to “the matter” appears confusing.

152. Also, the problem with the current wording is that it provides defendants the choice to not specify an electronic address as an address for service, requiring councils to use more time consuming, expensive, or inefficient processes such as mail or a process server approach to serve documents.

153. Similar legislation, such as the Commerce Act 1986, simply requires notices to be emailed to the email address used by a person (s102(1)(d)).

Objectives

154. In addition to the RMA work programme objectives, the proposal seeks to:

- align the RMA with similar provisions about the electronic service of documents under in other statutes
- reduce the burden to councils having to deliver paper copy of documents in person to a defendant
- improve efficiency and effectiveness of councils’ functions

Proposal – Option 2

155. The proposal is to lighten the council’s burden by removing the requirement to specify an electronic address as an address for service for the matter to which the document relates. Notices would be emailed to the email address previously used by the person in other communications with the council.

156. A recent review of the RMA analysed the problem and, in 2023, Cabinet approved the same solution we are proposing which was introduced in the NBEA (now repealed).

Other options

Status quo – Option 1

157. The time delays and cost relating to the status quo has been found to be a burden for councils when they intend to summons a defendant as part of a prosecution. Therefore, we do not recommend this alternative.

Mandatory email address – Option 3(a)

158. Option 3(a) would be to make an email address mandatory in any communications with the council so that the council can later use this email address for service if an offence takes place. This option is not preferred because not everyone has an email address.

Optional email address – Option 3(b)

159. Option 3(b) is to give the option to people to provide an email address in their communications with the council. Guidance would also be issued explaining that, if the choice is made to provide an email address, all future communications would be sent to that address.

160. Option 3(b) is not preferred because it may be confusing for some companies that may use several email addresses for different purposes.

How do the options compare to the status quo/counterfactual?

	Option One – ***Status Quo***	Option Two – Remove requirement to specify email address	Option Three - Make email mandatory or optional
Effectiveness	0	++ more effective at meeting all objectives than options 1 and 3	+ it could also introduce amendments that are effective at contributing to the attainment of the objectives but scores lower as there is uncertainty on when the wide review would take place, a wide (rather than targeted) review would take longer and these delays would not provide the immediate benefits that the RMA prosecution process needs and that option 2 would provide
Efficiency	0	++ more cost efficient than option 1 (which is costly) and option 2 (this proposal spreads the cost of new legislation across the whole of RM Bill 2 which makes it cheaper than a bespoke bill to amend the penalty regime)	+ it could introduce cost efficient solutions to the problem but scores lower as there is uncertainty on when the wide review would take place, a wide (rather than targeted) review would take longer and these delays would not provide the immediate benefits that the RMA prosecution process needs and that option 2 would provide
Certainty	0	++	+

		has a stronger potential to achieve certainty as the current section is unclear (when it says "the matter") and would align with the requirement that participants in the regulatory system understand their roles, responsibilities and legal obligations	it would achieve certainty because it would be a comprehensive review of the regime but it would not help in the short term with the present uncertainty
Durability & Flexibility		++ enables regulated parties to adopt efficient and innovative approaches to meeting their regulatory obligations	++ has the potential to be a durable and flexible solution as the wide regime will be reviewed
Implementation Risk	0	++ no implementation risks have been identified (fixes uncertain wording in a cost-efficient way)	++ a wide review is expected to be thorough in identifying and mitigating any potential implementation risks (including if novel solutions are introduced)
Overall assessment	0	++	+

Overall Assessment

161. Options 3(a) and 3(b) score as well as option 2 in relation to some criteria. However the delay the options would cause on immediate benefits to the RMA prosecution process results in a lower score in terms of effectiveness, efficiency and certainty.

162. Option 2 aligns with the focus of RMA Bill 2 (targeted amendments to facilitate progress in the short and medium term). It is expected to show immediate benefits to the environment prosecution process.

163. Enabling service of documents via an email address that is already known to be used by the person is expected to improve the efficiency and effectiveness of compliance and enforcement activities.

Cost/Benefit Analysis

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Regulated groups (defendants)	One off (while people get used to the new rules, there is the risk that an email address in the council's records in previous correspondence may no longer be checked but clear guidance will mitigate this risk)	Low	Low
Regulators (councils)	One off (implementation, including guidance and comms)	Low	Medium (arising from consultation with councils)
Treaty Partners	No impact was identified to apply specifically to Treaty Partners	N/A	Medium (arising from consultation under the NBEA)
Non-monetised costs	One off	Low	Medium
Additional benefits of the preferred option compared to taking no action			
Regulated groups (defendants)	Ongoing (clear information about the new rules allows them to provide a current email address for service)	Medium	Low
Regulators (councils)	Ongoing (the proposal will reduce the burden on the council)	High	Medium (arising from consultation with councils)
Treaty Partners	N/A No benefit was identified to apply specifically to Treaty Partners		Medium (arising from consultation under the NBEA)
Non-monetised benefits	Ongoing	Medium to High	Medium

Treaty implications

164. The Treaty of Waitangi sets out the Crown's obligations, specifically applicable is the duty of active protection. An improved efficiency and effectiveness of the environmental regulatory system benefits both Māori and the community at large.
165. It is unknown whether Māori might have lower access to digital devices which might prompt an impact on Māori offenders, however, previous engagement was undertaken with Māori when the same change was introduced as part of the, now repealed, NBEA. At that time, feedback on the suite of compliance and enforcement system changes

proposed ranged from general support to no objection. No impacts on Treaty settlements have been identified for this proposal.

Consultation

166. The proposal has been prompted by feedback received from councils who have signalled they would support an amendment like this.
167. We have consulted with the Ministry of Justice who raised concerns that this proposal does not support a party's access to justice or align with court rules. The Ministry of Justice considers that that the risk associated with using an email address that appears in the council's records in previous correspondence as an address for service is that the email address may no longer be checked by the person to be served so they may be unaware of significant legal matters which affect them including that they may be unable to appeal final decisions in the statutory time limits.
168. The feedback from the Ministry of Justice seems to be better aligned with option 3(b). As mentioned above, this option is not preferred because it may be confusing for some companies that may use several email addresses for different purposes.
169. In terms of the Ministry of Justice's comment about old email addresses, the guidance that will be published to implement this proposal will alert people of this risk.
170. Consultation with Māori has been summarised under "Treaty implications".

Implementation of all proposals

171. The proposals will be given effect through the legislation that amends the RMA (Bill 2). However the cost recover proposal is to introduce a provision similar to section 722(1) of the NBEA that said: "An NBE regulator may require a person to pay any reasonable costs incurred by the regulator in, or incidental to, taking any action in connection with monitoring or enforcing the person's compliance with this Act." Any further decisions on the levels of recovery, etc will be made separately from the amendments under the RMA Bill 2.
172. Guidance material will be provided to support the implementation of the changes.
173. The Ministry for the Environment will work with councils during the policy implementation and provide support on the guidance where practicable. Each council has a relationship manager from the Ministry who can assist with implementation support either directly, or by putting them in contact with the appropriate person.
174. There is also an opportunity for councils and the Ministry to come together to discuss practice at LGIG meetings.
175. During discussions with practising planning professionals from councils, concerns were not expressed about their ability to implement the changes.

Monitoring of all proposals

176. Councils will be responsible for the ongoing operation and enforcement of the changes as part of their function under the RMA.
177. Following implementation, the Ministry for the Environment will monitor progress as part of regular engagement with councils and reporting workstreams.
178. No further policy reviews of offences and penalties in the RMA are planned at this stage.