



NZPI Position Paper: Regional-level NBA Planning

Introduction

This position paper is one of four in a series on RM Reform, prepared by NZPI in preparation for the introduction to Parliament of the Natural and Built Environments Bill and the Spatial Planning Bill. The four papers address outcomes-based planning, spatial planning, NBA planning, and consenting under the new system and should be read together. They reflect NZPI's position as at 9 November 2022, before the Bills have been introduced and the detail reviewed. Other position papers, including one on digital transformation, will be added to the series in due course.

Overall position

NZPI supports the shift to planning at a regional level and the system's increased focus on plan development over case-by-case resource consent assessments. An emphasis on plan development provides more certainty in the system and results in overall efficiencies. The regional-level focus, together with a conscious shift to planning for outcomes and a formal role for spatial planning, allows for a more holistic approach to planning for community wellbeing and Te Oranga o te Taiao. However, additional changes to the system are required, along with capability and capacity enhancement, to ensure the new system works well, maximises the benefits of change, and achieves the aims, objectives and outcomes of the reform as set out in the Randerson Report.

What we know of what's proposed in the new system

The Natural and Built Environments Act (NBA) will require one NBA Plan for each region¹. These plans will be developed and maintained by Regional Planning Committees, supported by a secretariat. These committees will be made up of members representing iwi and councils within the region, with the exact composition will be determined by each Regional Planning Committee, subject to minimum requirements. The purpose of NBA Plans will be to further the purpose of the NBA² by providing a framework for the integrated management of the environment in the region that the plan relates to.

NBA Plans will give effect to the National Planning Framework (NPF), provide for the environmental outcomes in the NBA, and be consistent with Regional Spatial Strategies (RSSs). According to the Exposure Draft of the NBA, NBA Plans will contain environmental limits and targets, provide for matters of significance to the region and to each district, help resolve conflicts, and may set objectives, rules, processes, policies, methods, and priorities for use, development and protection of land.

Statements of Community Outcomes and Statements of Regional Environmental Outcomes, prepared by local authorities, will inform NBA Plan development. Independent Hearings Panels (IHP) will hear submissions on NBA Plans and appeals will be limited to points of law, except where the Regional Planning Committee rejects the recommendation of the IHP (removal of most *de novo* appeal rights).

¹ Each existing region, but with Tasman and Nelson treated as one region

² The purpose of the NBA focuses on Te Oranga o te Taiao and the wellbeing of present and future generations

How is this different to the current system?

The number of plans in New Zealand will reduce from over 100 to 15 NBA Plans and 15 RSSs³. We understand the National Planning Standards, which set the structure and content for RMA plans, are being updated to reflect the new NBA Plans and RSSs. We expect this will require more than just an amalgamation of existing plans into the new structure. For example, the current content of Regional Policy Statements is likely to be divided between RSSs and NBA Plans.

Planning for land use at a regional level is a distinct change from the RMA, which has seen land use planning primarily undertaken by district/city councils. However, it is not a change for managing the natural environment, which has been undertaken at a regional level by regional councils. What is different for both land use and environmental planning, is that a new Regional Planning Committee, supported by a secretariat, will be responsible for preparing and maintaining NBA Plans – neither a district/city council nor a regional council. This changes the political setting for plan-making in New Zealand, with representatives from councils and iwi within a region working together on one NBA Plan.

The regionalisation of plan-making also means that plan-making will be separated, at least institutionally and possibly physically⁴, from plan implementation, as resource consent processes and enforcement and monitoring responsibilities will remain with the individual councils of the region. We see this separation as a risk to the overall effectiveness of the planning cycle as it potentially interrupts feedback loops that are critical for quality policy development and efficient and effective plan implementation.

The ‘front-loading’ of the system into plan-making over case-by-case consent assessment is another key change the Government is proposing. Key aspects of this change are the shift to a focus on achieving outcomes over managing environmental effects, removal of most *de novo* appeal rights on NBA Plans, encouragement of early and meaningful engagement with the public and key stakeholders on policy development, stronger national direction via the NPF, and fewer activity categories and resource consent types.

What do we like?

We support the emphasis on plan-making over consenting, and the regional-level focus for planning. We are optimistic that with the right implementation support, the new system will deliver better outcomes for community wellbeing and Te Oranga o te Taiao than have been achieved to-date.

Regional-level, combined land use and environmental planning will provide for a more holistic and Aotearoa-based approach to planning. Our natural and built environments are not separate and distinct from each other; water and land are interconnected, and Te Oranga o te Taiao helps us understand this. The idea of setting environmental limits, and then achieving positive outcomes for community wellbeing and Te Oranga o te Taiao within those limits, assists with a holistic approach.

We support changes that will reduce the adversarial nature of the plan-making process, including use of alternative dispute resolution early in the process and removal of most *de novo* appeal rights. Emphasis on early and meaningful involvement in plan-making, early resolution of conflicts including in accordance with tikanga Māori, and an inquisitorial focus, should produce well supported, good quality plans.

³ One NBA Plan and one RSS per existing region, but with Tasman and Nelson treated as one region.

⁴ It is not clear where the secretariats will be physically located. We expect flexibility for the Regional Planning Committees to determine arrangements for the secretariat and therefore variation between the regional arrangements.

What improvements can we make?

Better integration of te ao Māori

Regional-level NBA planning provides an opportunity to build on and strengthen the relationships, tools, processes and implementation methods that iwi and hapū have developed under the RMA, including the role of iwi and hapū management plans, statutory acknowledgement areas, mana whakahono a rohe, transfer of powers, and joint management agreements. This mahi, knowledge and experience must not be lost in the transition to the new system. In addition, learnings from Treaty Settlement legislation and processes must be applied to NBA plan-making.

Owners of Māori land who may not be represented by iwi or hapū entities also need recognition in the system. This could be achieved by a broad definition of 'tangata whenua' that includes iwi, hapū, Marae and Māori land owners as defined under Te Ture Whenua Māori Act.

We support the incorporation of Te Oranga o te Taiao into the NBA and this being a focus for NBA planning. Guidance from MfE, developed with tangata whenua, on what this means in practice would assist implementation. The new legislation must enable iwi and hapū to develop outcomes in NBA Plans based on Te Oranga o te Taiao in partnership with Regional Planning Committees, as a way to exercise tino rangatiratanga and kaitiakitanga and give effect to Te Tiriti o Waitangi⁵. This must be able to occur in the manner that best suits iwi and hapū within each region – a one-size-fits-all approach will not be appropriate.

Tikanga Māori methods of partnership and decision-making need to be provided for in the new system, such as through approval by tangata whenua representatives of appropriate representation and appointment methods for Regional Planning Committees and IHPs. A more equitable opportunity for the consideration of Māori outcomes will be provided through equal numbers of decision-makers appointed by tangata whenua as by local councils.

The Government must ensure the capacity and capability of iwi and hapū to participate fully in NBA planning, including as members of the Regional Planning Committees and IHPs, and as experts in te ao Māori including tikanga and mātauranga Māori.

Relationship of NBA Plans to NPF and RSSs

Clarity over the scope of NBA Plans in relation to the NPF and RSSs is of critical importance. In relation to the NPF, we support strong national direction for nationally important issues and issues requiring national consistency. With NBA Plans required to 'give effect to' the NPF, the NPF needs to be clear and explicit on what is required of NBA Plans, with no conflicting directions. Based on experience under the RMA, any ambiguity on this is likely to lead to drawn-out, adversarial processes.

The NPF has a key role in assisting NBA Plans to resolve conflicts. Resolution of conflicts at a policy level rather than at a consent level is one of the key approaches of the new system. We support this approach. We acknowledge it is difficult for the legislation itself to resolve conflicts between outcomes, although setting priorities among the outcomes listed in the NBA is likely to help. A strong NPF will be one that includes positive outcomes focused on Te Oranga o te Taiao and community wellbeing, and that applies a holistic approach to break down the siloed approach that current national direction is based on. This approach in the NPF will greatly assist the ability of NBA Plans to resolve regional and local level conflicts.

⁵ The SPA and NBA propose to give effect to *the principles* of Te Tiriti o Waitangi, whereas NZPI's position, in alignment with the position of Papa Pounamu (NZPI Special Interest Group) on the Exposure Draft, is that Te Tiriti itself should be given effect to.

We support the requirement for NBA Plans to be ‘consistent with’ RSSs. We agree with the Randerson Panel that this is a strong enough direction to ensure the NBA Plans help to implement the RSSs, while also allowing some flexibility for NBA Plans to choose the best way to achieve the regional strategic direction. It is important that there is a consistent hierarchy of outcomes between the RSSs and the NBA Plans, to ensure the system as a whole is working towards achieving a consistent future.

Certainty in plans

A key implication of an emphasis on plan-making over consenting is that plans need to become more certain. This has the potential to take more time, requiring more resources and evidence. There is also a risk the status quo will be maintained through high use of the discretionary activity category to address uncertainty if nothing is done to resource and facilitate the increased emphasis on plan-making.

The NPF has a key role to play in addressing data and evidence requirements. First, through the national coordination, management and generation of data and digital tools via a national digital strategy. This is to both develop NBA Plans and to monitor our progress towards achieving outcomes and complying with limits and targets over time. Conflict resolution and certainty are improved by quantifiable data that is displayed and explained simply. There are benefits of efficiency, equity and accessibility to this being addressed at the national level, subject to the need to appropriately address Māori data sovereignty issues.

Second, the more directive the NPF can be about activities that will comply with limits and achieve outcomes (permitted activities) and about activities that will breach limits and not meet outcomes (prohibited activities), the better. This will take some of the load off NBA Plans and put it more appropriately on the NPF.

We caution that permitted activities with long lists of performance criteria are not necessarily the best way to achieve outcomes. Certainty of outcomes should come with flexibility on how to achieve them, which may mean that consideration through a consent process is more effective than overly prescriptive permitted activities that can lead to perverse outcomes and stifle innovation.

As an alternative to providing more certainty in plans, we consider providing tools so plans can better deal with *uncertainty* is important. To-date, the precautionary approach has been the main way to address uncertainty, but this is an effects-based approach, focusing on avoiding effects that are uncertain but potentially significant. It is not well suited to an outcomes-based system. Adaptive planning, in contrast, is able to focus on achieving outcomes in a context of uncertainty. It addresses uncertainty by considering different actions based on different triggers, and in this way provides flexibility and allows things to happen rather than promoting an ‘avoid’ approach. The NBA needs to support the use of this approach.

Regulatory v non-regulatory measures

We have come to rely heavily on rules and regulation under the RMA, even though the RMA allows for integration of non-regulatory measures. While rules and regulation might work for managing adverse effects, in a system focused on achieving outcomes, NBA Plans will need to consider rules alongside non-regulatory measures such as incentives, education, conservation and restoration programmes, etc. There must be clear links put in place between outcomes in NBA Plans and non-regulatory measures that help achieve outcomes in other types of planning documents (climate action plans, adaptation plans, long term plans, etc).

Policy evaluation

In a system focused on achieving outcomes, a broad range of policy development and evaluation methods and processes will be needed. Any replacement for section 32 of the RMA needs to allow for flexibility of evaluation method and process, consideration of non-regulatory methods alongside regulation, and given the increased emphasis in the new system on te ao Māori, provide a clear role for mātauranga Māori in policy development and evaluation.

Local input to NBA plan-making

Public involvement in plan-making is essential. This is even more so in a front-loaded system with reduced appeal rights and a more permissive consent framework. The new legislation needs to allow time for genuine and meaningful public participation in the system and flexibility for how public engagement is undertaken, and adequate resourcing needs to be provided so the system can achieve this.

As a profession, we understand the difficulty of engaging communities in planning processes and recognise the need to use digital tools and a variety of engagement methods to seek public input. The funding for and use of machine learning and AI participatory technology such as Frankly AI has the potential to significantly improve participation in plan making. A national digital strategy and funding is essential to support NBA Plans and make these consistent across the nation.

The proposed Statements of Community Outcomes and Statements of Regional Environmental Outcomes should not be necessary. Setting outcomes should be part of the NBA plan development process, in a similar way to setting objectives under the RMA. A requirement for outcomes to be set in a separate document has the potential to cause confusion and process inefficiencies. However, flexibility in the process for public engagement means allowing for different methods for setting outcomes, so having these documents as an option in the legislation, rather than a compulsory requirement, may be appropriate.

A body to support independent commissioners

The capability and capacity of independent commissioners, including Māori commissioners, needs to be a key focus of the reform. The 'front-loading' of the system puts great emphasis on first instance decision-making on plans, particularly with the removal of *de novo* appeal rights. As proposed, Regional Planning Committees will make decisions on NBA Plans based on recommendations from Independent Hearings Panels (IHPs). The role of the IHPs will be critical in the new system and cannot be over-emphasised. We consider that a new, independent body is needed to support commissioners in making robust recommendations.

We envisage a national body that would oversee the training, accreditation and appointment of independent commissioners, as well as the use of digital technology in hearing processes, with the overall intention of ensuring high quality hearing processes and recommendations. This would include ensuring appropriate local commissioners and Māori commissioners are included on IHPs, with appointment processes for Māori commissioners determined by tangata whenua from the relevant region. The Making Good Decisions programme is unlikely to be fit-for-purpose under the new system, and we expect only appropriately qualified and experienced Councillors would be able to serve as independent commissioners on IHPs for NBA Plans. The removal of *de novo* appeal rights means the first instance hearing needs to be inquisitorial in nature, and as fair and robust as possible, with appropriately qualified and experienced commissioners hearing submissions and making recommendations. The IHP process should not replicate an Environment Court process, but should provide for a thorough exploration of the issues.

Appeals

The removal of most *de novo* appeal rights is intended to reduce the time for plans to become operative and reduce the adversarial nature of the plan-making process, by incentivising early and meaningful involvement in plan development. We support these intentions, however, this change has risks associated with it. These risks include poor quality decisions not being able to be remedied, and the loss of benefits of Environment Court processes such as rigorous testing of evidence, critical analysis by the judiciary, and collective work on policy development and drafting through Court directed mediation and conferencing.

We consider the risk of poor quality decision-making can be managed by ensuring the capability and capacity of commissioners appointed to IHPs, in line with our position above on an independent body to support commissioners. We consider the risks from the loss of the benefits of Environment Court processes can be managed by increasing capability and capacity for engagement and alternative dispute resolution practices among practitioners, and by ensuring Regional Planning Committees and IHPs have flexibility to apply processes such as mediation, conferencing, and examination of evidence as early in the plan-making process as possible. This would effectively transfer the key benefits of appeal processes to earlier in the plan-making process. With these measures in place, we support the proposal to restrict appeals on NBA Plans to points of law, except in the case of a Regional Planning Committee rejecting a recommendation of the IHP.

The circumstances in which a Regional Planning Committee can reject a recommendation of an IHP should be identified in the legislation. These situations should include recommendations on matters not raised in submissions and beyond the scope of the plan or plan change, recommendations that impose unbudgeted costs on councils and may require additional processes such as under the Local Government Act to secure funding, and recommendations that conflict with local community outcomes.

IHP process efficiencies

There are also other ways to ensure the quality of IHP decision-making and reduce the need for appeals that should be considered. For example, an IHP could be required to issue draft decisions so that changes to plan drafting and potential unintended consequences can be considered before the decision is finalised. In addition, there would be efficiency benefits in an IHP remaining in place for one to two years after a decision on an NBA Plan is issued, and the IHP having the power to make changes to the NBA Plan as a result of interpretation or implementation issues. These would be changes that are beyond the limited scope of clauses 16 and 20A of the RMA and would avoid the need for a full plan change or variation process.

Changes to NBA Plans

We support the retention of private plan changes as a means to address unintended consequences of prohibited activities, especially if this category is used more. This is provided private plan changes comply with limits, achieve outcomes, and give effect to the NPF.

We also support more agile and responsive plan change processes for changes initiated by councils or Regional Planning Committees outside of the regular review period, including evaluation requirements (current s32 RMA). The ability for a Regional Planning Committee to set a bespoke process and delegate decision-making to match the nature, scale and significance of a change would provide agility and responsiveness in the system.