

RMA system reform has critical implications for three waters

By environment, planning and resource management lawyers Simon Pilkinton, partner, and Kristen Gunnell, senior associate, at Russell McVeagh.

The three waters reform programme involves structural and regulatory reform rarely seen on this scale, with latest estimates indicating investment of \$120 – \$185 billion over the next 30–40 years is required to maintain, replace and upgrade three waters infrastructure. Four publicly-owned water services entities (WSE), spanning the length of the country, are proposed to manage our country's water service delivery.

From day one, the new WSEs will need to embark on an ambitious capital works programme. As part of this, existing infrastructure upgrades and new infrastructure alike will require the full suite of designations, resource consents and other approvals under our environmental legislation. Three waters infrastructure will also require protection and enablement in our district and regional plans and national policy documents.

The challenges facing WSEs in environmental planning and consenting will be significant.

Complicating the picture further, parallel to three waters reform, the Government is repealing and replacing the Resource Management Act 1991 (RMA), with a new environmental and planning statute called the Natural and Built Environments Act (NBA). The NBA will also be accompanied by two adjacent pieces of legislation, the Strategic Planning Act (SPA) and the Climate Adaptation Act. The overall intent of these changes is to stop further environmental degradation, while more efficiently enabling urban development.

The NBA regime will be critical to the success of three waters reform, as the new WSEs will immediately be among the largest 'users' of the NBA nationwide. There is a real danger the



Simon Pilkinton



Kristen Gunnell

Government's aims for three waters will be hindered, potentially to a significant extent, if the WSEs cannot efficiently obtain consents under the NBA.

The risk of absolute 'environmental limits'

An 'Exposure Draft' of the NBA's purpose and principles (the key provisions establishing the scope and direction of the NBA) has been released and submissions to the Environment Committee closed on 4 August.

The NBA Exposure Draft requires that mandatory 'environmental limits' are set out in either the National Planning Framework (NPF) or new NBA plans. Activities *must comply* with these environmental limits.

Sixteen outcomes must also be promoted, including an infrastructure outcome, to recognise the "ongoing provision of infrastructure services to support the well-being of people and communities". This outcome does not use directive wording, which is important in resolving conflicts between outcomes, relative to some of the biophysical outcomes that are proposed.

We see a real risk that absolute environmental limits and associated promotion of directive biophysical outcomes will ultimately prevail over the needs of three waters infrastructure, in the way the NBA is currently framed. The reality is that, in almost every instance, three waters infrastructure has the potential to infringe an environmental limit relating to freshwater, air, soil or the coastal environment. Absolute environmental limits will make it much harder (and in some cases impossible) for WSEs to obtain the consents they'll need.

The intention is that the NPF will be used to resolve conflicts

between competing environmental outcomes. Environmental limits can also be set “at different levels for different circumstances and locations”.

All of this is potentially helpful for WSEs, however at this stage, there is very little detail as to how the inherent conflicts between the environmental limits and biophysical outcomes on the one hand, and the needs of essential three waters infrastructure on the other, will be resolved. This tension needs to be resolved before the new legislation is enacted.

A potential solution – ‘consenting pathway’ for three waters infrastructure

To deliver on the objectives of three waters reform, the WSEs will require a clear and effective ‘pathway’ to consent through the NBA’s environmental limits, with the options including:

- **Infrastructure outcome strengthened** – within the NBA itself, the infrastructure outcome must be strengthened. Directive language expressly requiring decision-makers to provide for the needs of essential infrastructure is required.
- **Specific exceptions** – Clause 12(2), which makes environmental limits mandatory, should also be amended to specify that environmental limits can be set with specific exceptions or different standards for certain kinds of activities allowing a regime similar to what is provided in the current National Environmental Standards for Freshwater. This provides exceptions for specified infrastructure, including three waters infrastructure, in relation to certain rules (those rules are more onerous for other activities).
- **Directive infrastructure policies** – these need to be included in the NPF as the next layer down in the NBA’s hierarchy. The Schedule 1 process for setting the NPF (under which environmental limits sit) must explicitly require WSEs to be meaningfully involved to ensure WSEs can assist Planning Committees in setting environmental limits that are clear and workable for three waters infrastructure, and which do not result in unintended or perverse outcomes.
- **Mechanisms for timely review and amendment** – timely review of and, if required, swift amendment to environmental limits are also needed. Unintended consequences are often identified at the consenting stage following a lengthy planning process so there needs to be provision for these to be swiftly rectified, without putting WSEs and everyone else through the full statutory planning process all over again.
- **Offsetting and compensation of adverse effects** – this will be critical to resolve tensions between environmental limits and the needs of essential three waters infrastructure. The NBA Exposure Draft provides for offsetting or compensation to potentially be made available, through the NPF and NBA plans (or as a consent condition proposed by the applicant). These effects management tools will be key for three waters infrastructure, in circumstances where environmental limits cannot be met through activities undertaken completely on a particular project’s site. The NBA itself must explicitly provide for offsetting and compensation for essential three waters and other infrastructure – it cannot be left to the NPF or NBA plans to potentially enable these critical effects management tools.

To deliver on the objectives of three waters reform, the Water Service Entities will require a clear and effective ‘pathway’ to consent through the NBA’s environmental limits

Further complicating the picture – the crucial role of WSEs in spatial planning

Looking more broadly at the new regime, it will also be crucial that WSEs play a key role in spatial planning processes under the SPA (Strategic Planning Act). Spatial strategies will identify areas that are suitable for growth and development and therefore also where three waters infrastructure is required.

No one is better placed than WSEs to assist planning committees in identifying where three waters infrastructure should go, and when it can and should be provided.

The demands on WSEs in this regard will be substantial, with 14 regional spatial strategies under the SPA, compared to four WSEs spanning multiple regions. WSEs will be required to be involved in multiple spatial planning processes, at the same time. Many spatial planning processes will involve two WSEs.

As currently proposed, ‘stakeholder’ consultation will occur through workshops, with public consultation via a consultative process similar to that provided under the Local Government legislation. This does not adequately recognise the vital role of WSEs or the infrastructure they will operate, and substantially limits the input they can have in the spatial planning processes.

A more substantive and defined role for WSEs in spatial planning is essential which needs to be provided for in the SPA.

Further certainty (hopefully) lies ahead

We will have more certainty around whether three waters reform and the new WSEs will be proceeding by later this year, which will be helpful in the context of ensuring the NBA is ultimately fit for purpose when it comes to three waters infrastructure.

The full NBA is intended to be introduced to Parliament in early 2022, meaning that by that time, we should have clarity as to whether it will be WSEs that will have responsibility for consenting three waters infrastructure under the new regime. Amendments to the proposed NBA can be pursued with that clarity as to the future structure of the three waters sector in mind.

That said, the timing of NBA process still presents some difficulties. As currently proposed, the WSEs will not come into legal existence until mid-2022, and will not take ownership of three waters assets until mid-2024. It will therefore fall to existing asset owners and sector participants to actively ensure the new NBA sets up WSEs for success, in terms of their substantial future environmental planning and consenting obligations.