Submission on Package 1: NPS-Infrastructure, NPS-Renewable Electricity Generation and NPS-Electricity Networks

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Submitter details

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Parliamentary Commissioner for the Environment

The Parliamentary Commissioner for the Environment was established under the Environment Act 1986. As an independent Officer of Parliament, the Commissioner has broad powers to investigate environmental concerns and is wholly independent of the government of the day. The current Parliamentary Commissioner for the Environment is Simon Upton.

Introduction

Package 1 of the Government's consultation on changes to national direction centres on infrastructure – everything from roads and pipes to airports and power stations. The stated main objective of the proposals is to make it easier for these things to be granted resource consents. According to the consultation document, this is currently too difficult, in part because "resource management plans and other documents that guide decision-making often underplay the benefits of infrastructure, relative to its local adverse environmental effects".

I have no problem with requiring decision makers to recognise the benefits of infrastructure development. They are many – and many of them are environmental. For example, making it easier to build new wind and solar electricity generation should, over time, help to squeeze fossil fuels out of New Zealand's generation mix.

But infrastructure development can also come with environmental costs, and it is important that these are not ignored in the ongoing push to enable development. If that sounds overly dramatic, consider the recently enacted Fast-track Approvals regime where the main decision-making framework prioritises national and regional benefits over environmental (or any other) costs.[1]

The changes proposed in package 1 of this consultation do not go so far. By requiring decision

[1] For example, see s17 of Schedule 5.

makers to recognise and provide for the national benefits of infrastructure development, their main effect will be to place infrastructure on a more equal footing with the matters identified in other pieces of national direction and in Section 6 of the RMA.

With several exceptions that I discuss in more detail below, these changes strike a reasonable balance between enabling development and protecting the natural environment. They will not guarantee that infrastructure will be built wherever proposed. Nor will they require environmental impacts to be zero for development to go ahead. Ultimately, councils (and the consenting panels they appoint) will continue to have to assess the overall merits of individual projects within this (admittedly more enabling) framework.

These proposals will not make that task any easier, however. As far as I can tell, requiring decision makers to recognise and provide for the benefits of development alongside its costs essentially calls for cost-benefit analysis to be undertaken on a project-by-project basis. While I support that sort of approach, it is important not to be naïve about the information requirements involved. I have more to say on this below.

It is also important to acknowledge a key question underpinning cost-benefit analysis more generally and that is whether built capital can substitute for natural capital without any adverse consequences for overall wellbeing. The answer is that it cannot always do so.

An important line of thinking underpinning the RMA is that economic development is wholly dependent on the maintenance of a healthy environment, with care therefore required to ensure that environmental thresholds or bottom lines are not breached. The changes proposed in this consultation represent a shift away from this logic. By elevating the benefits of infrastructure development to the same status as the matters identified in other national direction or Section 6 of the RMA, the proposals implicitly assume that environmental damage can always be compensated for by investment in new built capital. In many cases, it can't.

Package 1: cross-cutting comments

Weighing infrastructure benefits against environmental costs is not easy

If implemented, policy 1 of the new NPS-Infrastructure would require decision makers to "ensure that the widespread, dispersed, and ongoing national, regional, or local benefits of infrastructure are recognised and provided for relative to any localised adverse effects on the environment". Similarly, the proposed changes to the NPS-Renewable Electricity Generation and NPS- Electricity Transmission would require decision makers to "recognise and provide for the national significance and benefits" of these activities.

These changes are hard to disagree with. Infrastructure development comes with significant benefits for society, and it makes sense to explicitly recognise that in the resource management system.

My main concern is how these changes will interact with the protections given to matters of national importance by Section 6 of the Resource Management Act. These require decision makers to recognise and provide for, among other things, areas of significant indigenous

vegetation and habitats, and the protection of outstanding natural features and landscapes. Which raises the question: what happens when a nationally significant infrastructure project is proposed in an area with nationally important environmental values?

The consultation document has the following to say on this matter: "…previous policy work had developed a draft 'effects management hierarchy' to address adverse effects on values in section 6 or the RMA and other national direction. The Government has now decided to focus on resolving these major tensions between infrastructure and natural environmental values in the replacement of the RMA …".

In the meantime, consenting panels will need to consider the new (enabling) national direction alongside existing (environmentally focused) national direction (as well as any plan provisions relating to Section 6 matters) from the moment the new NPSs take effect in late 2025.[2]

As noted above, that task will not be easy, in large part because the information required to properly assess the benefits and costs of new infrastructure projects is not always – or even often – available.

Despite the decrees regarding national significance in package 1, the reality is that the benefits of new infrastructure, renewable electricity generation or electricity networks will vary widely according to local context. The benefits associated with a new transmission line will depend significantly on how congested the existing network is. Similarly, the benefits of a new airport will depend on how well served the city or town in question already is. In some cases, the benefits of a project may indeed be nationally significant. In others, they may not be.

The same is true for environmental costs. Disturbing an area of regenerating scrub is one thing. Disturbing a largely untouched area of lowland swamp forest is quite another. Valuing the (mainly) non-market benefits these ecosystems provide complicates matters even further. This is where the provision of accessible, high-quality environmental information would considerably reduce costs and speed up the decision-making process. Instead of having to undertake bespoke site assessments for every new piece of infrastructure, we should have the information to know what parts of the country are suitable for building, for example, wind farms – provided certain standards are met.

Much like the benefits of infrastructure, environmental costs and benefits can occur at different scales. In other words, they can be locally or nationally significant. They can even negate each other. A good example is renewable energy infrastructure, which may often have local environmental impacts but can improve the environment nationally by negating the need for fossil fuels.

The point is that these trade-offs are inevitably difficult to evaluate. Attempting to use national direction to do so from Wellington is even more so. I will be interested to see how the Government tackles this issue when new resource management legislation is introduced next year.

[2] Sometime in late 2025, according to the Government announcement accompanying the proposed new national direction. https://www.beehive.govt.nz/release/consultation-opens-sweeping-overhaul-primary-sector-regulations

For the time being, let me just observe that many of the changes currently being proposed seem to be premised on the idea that consenting difficulties are largely the result of how the RMA is drafted. I very much doubt if that is the case. Consenting panels are not constantly referring to the Act seeking divine guidance. In most cases, they are just scrambling to find enough information to make defensible decisions. The changes proposed here – and in the Government's resource management reform more generally – won't change that.

Watering down the requirement to avoid, remedy or mitigate environmental damage

In situations where Section 6 values are not involved, both the NPS-Infrastructure and NPS-Renewable Electricity Generation include proposals to weaken requirements to avoid, remedy or mitigate the adverse effects of development. For example, policy 8 of the NPS-I requires that: "planning decisions must enable new infrastructure or major upgrades of existing infrastructure, provided that adverse effects on environmental values (not in section 6 or covered by national direction) are avoided where practicable, remedied where practicable or mitigated where practicable".

The addition of "where practicable" represents a significant departure from the 'avoid – remedy – mitigate' framework set out in section 17 of the RMA. As noted in the draft NPS, the intention is "to introduce a more enabling approach than the status quo …".

Just how enabling this approach is will depend on the definition of "where practicable". Somehow, the consultation documents manage to remain silent on this. Given that what is being proposed involves a potentially major change to the settled understanding of the s17 language, I would have expected at least some discussion of how "where practicable" is to be interpreted and applied.

MfE staff acknowledged the lack of any definition during webinars undertaken as part of this consultation and pointed to existing case law, which (apparently) defines "where practicable" as something that is technically and economically feasible.

This definition effectively amounts to a significant watering down of the expectation that the adverse environmental impacts of development be avoided, remedied, or mitigated. In at least some cases, adopting any of these approaches will be precluded by the second limb of the definition – the need for economic feasibility. Consider any project that is marginal in terms of return on investment, for example. The requirement for adverse environmental impacts to be avoided, remedied, or mitigated would presumably render the project sub-economic immediately.

Furthermore, I would ask whose responsibility it will be to determine if a particular action is technically or economically feasible? Infrastructure developers will naturally be best placed to assess this. But at the same time, they inevitably have incentives to overstate the technical difficulty and economic cost of measures to avoid, remedy or mitigate environmental damage. How are consenting panels – necessarily in possession of less information than project applicants – supposed to navigate this?

Introducing the new additional language of “where practicable” without sufficient guidance and opening the door to a subjective decision on whether something is technically or economically feasible may risk increased litigation. Shifting to this approach could make it more costly and time consuming to get consent if the matters go to court to decide what these new tests mean.

I do not support the addition of the “where practicable” caveat.

The introduction of functional and operational need tests

The NPS-Infrastructure, NPS-Renewable Electricity Generation, and NPS-Electricity Networks all include policies requiring decision makers to recognise and provide for development in particular environments where there is an operational or functional need for it to do so. Operational need is defined as “the need for a proposal or activity to traverse, locate or operate in a particular environment because of technical, logistical, or operational characteristics or constraints.” Functional need is defined as “the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment.”

My concern here is that arguments about operational or functional need will be used to justify development in areas with significant ecological or landscape values.

The consultation documents give the impression that operational or functional need is a binary thing. In other words, that infrastructure, renewable electricity generation and electricity networks can **only** locate in certain places. That is certainly true for some of the infrastructure classes concerned by this consultation – navigation installations being an obvious example. But for the vast majority of the infrastructure classes involved, there will almost always be an alternative location or route available.

Take airports or hospitals for example. Beyond the need to be reasonably near population centres, these can be located just about anywhere. Or consider solar and wind electricity generation, which is possible anywhere in New Zealand. The same is true for network infrastructure, such as roads and transmission networks – there will almost always be alternative routes available between two nodes.

I understand that suggestions along the lines of “there are plenty of alternative places where infrastructure activity ‘x’ could be located” are a constant source of frustration for many in the infrastructure sector. I am also well aware that the costs of infrastructure development can escalate rapidly if alternative location choices are required – in some cases, even threatening the viability of projects themselves. That said, it is equally important to recognise that alternative location choices can generate considerable value if areas with significant environmental or ecological values are avoided.

The real question in all of this is what the costs of alternative locations or routes are, and whether they are justified by the environmental benefits associated with not disturbing environmental values in the (infrastructure provider’s) preferred site or route. But that is not what this consultation is proposing should be considered. Rather, the focus on operational or functional needs means that decision makers will be required to consider the benefits of

certain location choices, but not necessarily the costs.

Some of the proposals in the NPS-Infrastructure are particularly concerning in this respect. Policy 4, for example, requires decision makers to: "recognise it is the role of the infrastructure provider to identify the preferred location for the infrastructure activity". The rationale given for this is to avoid the "relitigation of the infrastructure providers' assessments of alternative options".

Infrastructure providers will naturally have a view about their preferred location or route. In general, that view will be reached based on private considerations such as which locations maximise the return on investment associated with a particular project. If public costs are also considered, it is quite possible that alternative locations or routes would be preferred. Which, of course, is the rationale for the involvement of public decision makers in the first place.

The decision in the 1950s to locate transmission lines on the western side of the Desert Road provides a useful example. There may well have been good operational or functional reasons for this. But it was also a decision which guaranteed that travellers' views of one of New Zealand's iconic natural landscapes would be forever diminished. That public cost could have been largely avoided if the lines were located on the eastern side of the highway.

Package 1: comments on specific proposals

Enabling supporting activities in the NPS-Infrastructure

While the main focus of the NPS-I is on enabling infrastructure itself, there are also proposals to enable activities which are necessary for infrastructure development to proceed.

Policy 4 of the NPS-I would require decision makers to "recognise and provide for the role of infrastructure supporting activities, including by … recognising the operational or functional need of some infrastructure supporting activities, including supporting quarrying activities, to be in particular environments and locations …". Infrastructure supporting activities are defined as "activities needed to support infrastructure activities that are not undertaken by the infrastructure provider or ancillary activities and may include quarrying activities."

I have two concerns here.

The first relates to how broadly "infrastructure supporting services" are defined. Infrastructure development requires inputs from a wide variety of upstream sectors – aggregate from quarrying activities being just one. With that in mind, the current definition would potentially require decision makers to recognise and provide for everything from iron sand mining (for steel production) to fossil fuel extraction (for cement manufacturing).

Given the repeated references to quarrying activities in the consultation documents, it seems reasonable to think that this is where the main policy focus lies. If this is the case, the definition of infrastructure supporting activities should be narrowed to make that clear. In doing so, it would be helpful to be more precise about what is meant by "quarrying activities". Based on the definition in the consultation document, it is unclear if this is meant to include only onshore

quarries, or if it also extends to offshore sand mining of the sort that has historically taken place off the coasts of Pakiri and Mangawhai.

My second concern echoes that expressed throughout this submission. Namely, how would a quarry with an operational or functional need to be in a particular environment or location (and which supports the development of a nationally significant piece of infrastructure) be assessed if it was proposed in an area with nationally important environmental values?

This sort of dilemma is far from hypothetical.

In 2020, Kokiri Lime Company Limited applied for access arrangements and resource consents to quarry rock on 15 hectares of conservation (stewardship) land near Fox Glacier.[3] The quarried rock is to be used for producing "armour grade protection rock" (for the construction of seawalls or stopbanks, for example) and roading aggregate.

Most of the land in question is within the Te Waipounamu World Heritage Area and covered in indigenous forest described as being "relatively intact with good ground cover, shrub, subcanopy and canopy layers, and emergent individuals, primarily rimu, but including kahikatea, totara, southern rata and miro".[4] A small portion of the site (around one hectare) operated as quarry in the 1980s and is significantly more modified.[5]

The proposed quarry expansion seems likely to meet a functional need test. The application for an access arrangement states that "the resource and quality of rock is not located elsewhere and is a one-of-a-kind resource in regard to density per m^3, weathering and abrasion resistance." At the same time, given the UNESCO World Heritage status, the vegetation present on the site is almost certainly nationally important for the purposes of Section 6 of the RMA. Which raises the question: which consideration would prevail under the proposed changes to national direction?

The precedence of electricity networks in the NPS-Electricity Networks

The NPS-Infrastructure and NPS-Renewable Electricity Generation both require decision makers to recognise, (i) the national significance and benefits provided by the assets involved, and (ii) the operational or functional need to locate those assets in particular environments. In doing so, these policies effectively elevate infrastructure and renewable energy development to a similar status as the matters of national importance listed in Section 6 of the RMA.

The revised NPS-Electricity Networks goes a step further. Policy 2 proposes that: "planning decisions must recognise and provide for EN activities that have an operational need or functional need to be in particular environments, including in areas with section 6 RMA values, with unavoidable adverse effects on those environments."

Why the Government considers electricity transmission and distribution to be more important than any other type of infrastructure is unclear. The consultation document simply notes "that the electricity network often needs to traverse a wide range of environments (e.g. urban, rural

[3] Mining Significance Report
[4] Ibid
[5] Ibid

and coastal), and that the system is interconnected across New Zealand" and "the need to maintain and upgrade an ageing network, and that renewable electricity generation needs to connect directly to the electricity network."

In my view, those arguments could apply equally to any form of network infrastructure – roads, pipes or fibre optic cables, for example.

It may be that this policy is motivated largely by considerations in Queenstown – one of two case studies presented in the Regulatory Impact Statement (RIS).[6] According to the RIS, Queenstown will need a second transmission line at some stage in the future, but the development of this has been hampered by the broad geographic coverage of areas mapped as Outstanding Natural Landscapes. If that is indeed the case, it is worth asking why the Government thinks it is necessary to override the landscape preferences of local communities – as expressed in the Queenstown Lakes District Plan – in favour of the benefits associated with new electricity infrastructure. After all, it is those same local communities who will feel the costs of transmission bottlenecks if new investment is not possible. Furthermore, as has been demonstrated by a recent Transpower-Aurora-PowerNet consultation, there appears to be plenty of scope to install new transmission capacity along the existing transmission corridor.[7]

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Te Kaitiaki Taiao a Te Whare Pāremata

[6] Interim-Regulatory-Impact-Statement-National-direction-for-electricity-networks-updating-NPS-ET-2008-and-NES-ETA-2009.pdf – p17.
[7] Energising Queenstown.