Parliamentary Commissioner for the Environment
Te Kaitiaki Taiao a Te Whare Pāremata

Submission on Resource Management (Consenting and Other System Changes) Amendment Bill

To Environment Select Committee

5 February 2025

Submitter details

This submission is from the Parliamentary Commissioner for the Environment, Simon Upton.

I wish to appear before the Environment Committee to present my submission.

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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.

Key points

- Overall, I am supportive of the Bill, particularly the changes regarding cost recovery and the compliance regime which provide an increasingly robust framework for enforcement activities. However, I have a number of reservations.
- Reviews of coastal permits for ports should be publicly notified, and consent authorities should have the discretion to invite submissions from any person considered appropriate.
- Renewable energy-consenting lapse periods should remain unchanged, and any necessary guidance to consenting authorities promulgated by way of national direction.
- Catchment, or sub-catchment, management is the most effective approach to achieving improved environmental outcomes and should be considered in the approach to proposed amendments to section 70 discharges and adverse effects.
- Farm plans could be a useful addition to the regulatory landscape, provided implementation meets a number of conditions for their success. For example, they should ideally be based on free, high-quality information, and need to be created within the context of local issues. In my view, farm plans are more likely to add value if developed by catchment groups at a catchment or sub-catchment level.
- Criteria for decisions should be added to the new regulation-making power for emergency response regulations, to ensure the scope of regulations is no more than reasonably necessary in the circumstances. Consideration should also be given to including a review mechanism, to ensure the regulations remain relevant and appropriate.
- The current drafting of section 100 should be retained, so that the consent authority has the discretion to hold a hearing if it considers it necessary, which may include (but is not

limited to) requiring further information.

- A justification for codifying the review of draft consent conditions has not been made out. If included, the new section should ensure consultation on draft conditions is an iterative process between consent authorities and applicants, and if notified, submitters should provide comment on the final draft from that process.

Introduction

Overall, I am largely supportive of Bill's intended outcomes, subject to the reservations noted below which are arranged by the subject matter the Bill addresses.

Infrastructure and energy

Ports. I support the addition of a review requirement for section 384A coastal permits held by port companies, to identify any adverse environmental effects, and impose or amend conditions accordingly.[1] However, it is unnecessary to prohibit public notification of the review. Port operations cannot be separated from the place in which they occur, and the communities that live alongside them. There is no sensible reason why public notification should not happen, or why consent authorities cannot invite submissions from any person they deem appropriate, particularly when the Bill removes the possibility of a hearing.

With hearings also prohibited by the Bill, giving public notice and leaving the scope of submissions to the consent authority's discretion will ensure that relevant information is made available to inform review decisions. It will also promote transparency, and enhance community confidence, in the process. The limitations on the scope and conduct of a review are sufficient to manage the nature of submissions and how they are considered by the consent authority, with a focus on efficient process.

Renewable energy consenting and designations. Currently, section 125(1)(a) applies to renewable energy consents, which allows a consent authority to specify the lapse date, which is normally granted as requested by applicants.[2] If no date is specified, then the default five-year lapse period applies. Rather than arbitrarily amending primary legislation, national direction is the appropriate instrument for policy to guide consent authorities on longer or shorter lapse periods, if such guidance is necessary to ensure consistency and certainty.

Extending the lapse period by doubling it to 10 years, or longer if specified, does not align with the overall policy rationale that we should be encouraging these developments to be undertaken more swiftly. Allowing for an extended time frame has the potential to invite land banking, effectively locking up resources, and potentially frustrating competitors.

Renewable energy (and wood processing) consenting. The requirement to reach a decision on consents within one year (or extended to two years) assumes that projects are amendable to a one-size-fits-all approach. While solar photovoltaic or onshore wind projects may involve relatively straightforward considerations for consent decisions (dependent on size and location), others such as hydro and geothermal projects are complex and impactful, requiring the time to craft carefully considered conditions.

[1] Cl 47, new ss 165ZZD-165ZZI.
[2] Regulatory Impact Statement: Increasing consent durations and lapse periods for certain activities in the Resource Management Amendment Bill 2, 20 September 2024, para 120.

The Bill is silent on the consequences of a decision not being made within the specified time period. I recommend that the committee seeks advice from officials on this point to satisfy itself that the categorisation of the activity does not result in consent being automatically granted without conditions.

Section 70 discharge and adverse effects. The effect of the proposed amendment is to admit that we have a polluted baseline, which is affecting aquatic life, and allows a permitted activity standard that accepts this and requires improvement over time. I support this general approach, but this amendment will only function well if the council is satisfied that the overall framework of rules, including particular activities, will achieve catchment-scale reductions in adverse effects in the receiving environment.

In my recent report *Going with the Grain: Changing land uses to fit a changing landscape*, I made two points that are relevant here:

- To know if reductions in adverse effects over time are being achieved, there needs to be good information. This includes a monitoring network, which is spatially and temporally granular enough to pick up changes over time and can be associated with modelling that can enable the trajectory of progress (or lack of it) to be reassessed when new monitoring data comes to hand.
- Catchment or sub-catchment-based groups (or similar) might be best placed to use this environmental information and drive improvements to water quality forward. Such a collective approach relies on groups with local knowledge of activities and a sense of belonging to the land, who can assist councils to create robust and relevant rules and deliver effective environmental outcomes.

Farming and the primary sector

Certification and audit services for farm plans. Eligibility criteria for industry organisations (to become an approved industry organisation) will be prescribed by regulations, as will the requirements for the appointment of certifiers and auditors by those organisations. Without further detail (which may be specified by regulations), there is no clarity as to what industry organisation may apply to become approved to provide these services. Will it include processors or just levy bodies? It is also not clear if 'industry organisations' will include farming consultancies, which have been producing farm plans for farmers. Many processors already prepare a type of farm environment plan, so if the purpose is to avoid duplication, it would make sense to ensure they are included. For example, Fonterra has its Farm Environment Plan (Tiaki) which covers many aspects of the Freshwater farm plans introduced by the previous government.

Farm plans are a risk-based tool that may be useful in cases where attributing environmental outcomes is difficult. In *Going with the Grain,* I emphasised that farm plans may be a promising way forward, provided that (1) there is sufficient capacity for implementation, (2) the plans focus on the material issues for that catchment (rather than resorting to box ticking), and (3) there is a basis of good information for that catchment to underpin the exercise.

In any case, farm plans must account for the catchment context within which each farm sits. Farm plans should not be used in a way that reinforces the view that farm environmental management can be conducted solely through the lens of property boundaries. These rarely, if ever, map the

boundaries of the environmental gradients that actually determine outcomes at the level of catchments or sub-catchments. Action in one place may deliver more or less, than action in another place.

Ideally, catchment groups would be encouraged to develop joint farm plans that aggregate into catchment or sub-catchment plans. This would lessen the regulatory and financial burden on individual farmers, both for doing the plan and the audit process. Farm plans should show continuous improvement of the farm in terms of environmental impacts and management, but this needs to be contextualised within the local catchment and take account of the local issues. Plans will be pointless unless regional councils have the necessary information to identify the local issues that need to be managed, and a reliable monitoring network is in place to reference progress. All of these goals will be easier to achieve if the farm plan is developed jointly at a catchment or sub-catchment scale.

Access to robust centralised information would also make farm plans a lot easier to compile. A good deal of environmental information is available in the public domain but is not accessible by individual farmers without paying for expensive consultants. This information, if improved and made accessible, could help farmers identify 'hotspots' for environmental risks on their farms. In my view, the process of identifying hotspots would be most effective if done at the catchment or sub-catchment level. The environmental return on investment in many catchments is likely to be higher when action is focused on critical hotspots across the catchment rather than necessarily taking the same actions on each and every farm. This again supports the concept of developing joint farm plans at a catchment or sub-catchment scale.

RMA and fisheries. Currently, section 30(2) of the RMA prohibits regional councils from performing some of their functions if it controls the taking, allocation or enhancement of fisheries resources for the purpose of managing fishing or fisheries resources controlled under the Fisheries Act. A regional council may establish or implement policies and methods for maintaining indigenous biological diversity, a function which is not expressly subject to the section 30(2) prohibition. Control of activities in the coastal marine area have highlighted the relationship between the RMA and the Fisheries Act, which has been the subject of litigation, and has been helpfully clarified by the courts.

In *Mōtiti*, it was confirmed that both Acts provide the power to impose controls to protect biodiversity in the coastal marine area.[3] The Court of Appeal held that while not expressly subject to section 30(2), controls needed to maintain indigenous biodiversity are in practice likely to require the exercise of functions that are restricted by section 30(2). However, while the Court upheld that a regional council may control fisheries resources under its section 30 functions, it cannot do so to manage those resources for Fisheries Act purposes.

Following the decision in *Mōtiti*, there is a high threshold for such rules to be imposed, with certainty for councils about when they can control activities in the coastal marine area and how to determine when matters are to be dealt with by fisheries:

> Necessity – Whether the objective of the control is already being met through measures implemented under the Fisheries Act.

[3] *Attorney-General v Trustees of the Motiti Rohe Moana Trust* [2019] NZCA 532.

Type – Controls that set catch limits or allocate fisheries resources among fishing sectors or establish sustainability measures for fish stocks would likely amount to fisheries management.

Scope – A control aimed at indigenous biodiversity is likely not to discriminate among forms or species.

Scale – The larger the scale of the control the more likely it is to amount to fisheries management.

Location – The more specific the location and the more significant its biodiversity values, the less likely it is that a control will contravene section 30(2).

The Bill's amendments muddy the clarity that the Court of Appeal has provided. Amending the process for proposed rules to require councils to undertake an assessment of the impact on fishing cuts across the established clarity of the statutory functions. Section 30(2) expressly prohibits councils from undertaking functions regarding fisheries management, so it seems strange to expect them to have the expertise required to undertake an assessment of the impact of their proposals on fisheries. Seeking the concurrence of the Director-General MPI with the council's assessment requires them to assess the assessment, duplicating effort unnecessarily.

In exercising the power to concur with an assessment, it appears that a key element of the purpose of the Fisheries Act is to be disregarded. The purpose of the Fisheries Act is to provide for the use of fisheries resources, *while ensuring sustainability.*[4] Ensuring sustainability, according to the Act, means:

- Maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations; and
- Avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment.

The matters that an assessment must, or may, examine seemingly only address the first of these considerations when ensuring sustainability.[5] This overlooks the fact that an assessment may lead to rules being proposed to manage impacts on the aquatic environment, including indigenous biodiversity. The Bill places extraordinary power in the hands of the Director-General, for whom the impact on the use of fisheries resources will be the sole matter taken into consideration, to the detriment of other effects of an environmental nature.

I do not support the amended requirements for rules that control fishing, which will confuse the performance of functions under the two Acts. If an amendment is to proceed, I recommend that rather than a pre-notification ability to veto a proposed rule, consultation with the Director-General regarding fishing impacts should be a mandatory aspect of notification. This would place the requirement to assess impacts within the expert functions of the Director-General, for which the council should be required to have regard, to be satisfied that the proposed controls do not amount to fisheries management and contravene section 30(2).

[4] Fisheries Act 1996, s 8.
[5] Cl 8, new s 32(2A).

Natural hazards and emergencies

Decline of land use consents and conditions for natural hazard risk. I support the authority of councils to decline land use consents or impose conditions where the activity will create a significant risk, or increase an existing risk, from natural hazards. However, the risks must be identified on the basis of good information. Councils currently have uneven access to good information from which to make such decisions. This is largely caused by variations in capability and capacity of councils, along with the costs associated with collecting and maintaining natural hazard risk information. Relying on the current system also risks duplication of effort with councils creating multiple bespoke systems for collecting, analysing, and using natural hazard information.[6] Consideration should be given to providing greater centralised support in the provisioning of natural hazard information to assist councils (and others) in their decision making.[7]

Emergency response regulations. While I support this approach in principle, clause 64 (new section 331AA) is an incredibly broad regulation-making power. I recommend the committee consider what decision-making criteria might be added to restrict this scope, in a similar way to other emergency legislation.

By way of comparison, it is quite unlike the design of empowering provisions which authorise the making of secondary legislation with similar effects. These include decision-making criteria and a limitation on their duration. I recommend that the committee consider the comparison of instruments that are empowered by emergency legislation, which accompanies this submission, and amends the regulation-making power in the Bill to include decision criteria and a fixed term duration.

The regulations will be limited by only applying to areas where a state of emergency or transition period has been declared. However, they may continue beyond the declarations ceasing to have effect, with an ultimate expiry of three years. It may be necessary in the context of recovery (rather than the immediate response) for this time period to apply, but the committee should also consider including a review mechanism, given that this broad power will be for regulations and their duration. This would ensure relevance and reasonableness in the continuation of the regulations and permit further scrutiny of the legislative instrument.

I note that the benefit of passing primary legislation for an event is that it can be an omnibus measure straddling a number of statutory areas, whereas the proposed regulations would be confined to matters governed by the RMA.

System improvements

Cost recovery. I support the amended provisions for administrative charges set out in clause 10, which will go some way to alleviating the burden of providing the resources needed to support effective monitoring and enforcement.

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[6] Similar to the proliferation of biophysical freshwater water models currently used by councils (PCE, 2024 – *A review of freshwater models used to support the regulation and management of water in New Zealand*).

[7] An example of this is the recent publishing of downscaled national climate projections for Aotearoa New Zealand by MfE (https://climatedata.environment.govt.nz/).

Consenting process – hearings. Clause 34 replaces section 100, removing the ability for a submitter to be heard, so that the consent authority may only hold a hearing if it determines further information is needed.

In doing so, the Bill sides with those who believe that allowing submitters to be heard is a costly waste of time, and that those charged with making decisions know best. Section 100 currently states that consent authorities are not required to hold a hearing, unless they think one is necessary, or a submitter has asked to be heard. Clause 34 will constrain this, so that a hearing must not be held if the consent authority believes they have sufficient information.

The effect is to remove the right of citizens to challenge the information base on which the consenting authority plans to rely. It represents a loading of the dice in favour of some expert decision makers. There are two problems with that: where public resources are at stake, the public surely has some right to at least force the consenting authority to listen to those who might challenge the consent authority's view. It's one thing to read a submission and pronounce that you have understood it. It is entirely another to be challenged to address it in a hearing.

The amendment also presumes that consent authorities know everything, including that which they don't know. Submitters can assist consent authorities to gain valuable information. While time may be saved in the short run, decisions may be poorly informed and subject to legal challenge. Given that notified consents number less than 4% of all consents granted,[8] is this such a serious source of delay and cost?

The new drafting may also have the unintended consequence of increasing delays in consenting processes, which may be solved by resorting to current practice. Without an opportunity to participate in a hearing, submitters may instead challenge a consent authority's determination that it has sufficient information to decide an application. To avoid the risk of challenge and delay, it may be more efficient for consent authorities to continue the practice of holding a hearing when this is requested by a submitter, citing insufficient information as the reason for doing so.

I recommend that section 100 is retained in its current form. If the committee considers amendment is justified, the consent authority must retain discretion to hold a hearing if it considers it necessary, which may include requiring further information or responding to a submitter's request to be heard.

Consenting process – draft conditions. The current practice of reviewing draft consent conditions occurs outside of the statutory framework. New section 107G (clause 38) attempts to codify this practice, though with some key differences.

It appears to have been intended that the review of draft conditions would enable a collaborative approach between consent authorities and applicants, but the drafting does not provide sufficient procedural flexibility for this to occur.[9] For a notified application, draft conditions are provided to both the applicants and submitters at the same time. Comments must be provided within a reasonable timeframe, as specified by the consent authority. This contemplates a one-step approach. Not only does this preclude the necessary iteration of the draft conditions between the

[8] Patterns in RMA implementation: National Monitoring System data from 2014/15 to 2022/23, page 11 and Figure 7.
[9] Regulatory Impact Statement: RM Bill 2 consenting – improving consent processing efficiency, 10 December 2024, para 126.

consent authority and the applicant, but it potentially wastes the efforts of submitters who will be commenting on aspects which the applicant and the consent authority may mutually agree to change.

The brief policy justification for this new section does not describe any additional benefits of codifying the current process but notes a new potential risk of litigating conditions and the associated delay and cost. The Bill attempts to address this risk by limiting comments to minor or technical matters. This approach is unlikely to work in practice as conditions, by their very nature, are technical. Further, any attempt to limit the comments provided by the applicant will impede the intended collaboration between the consent authority and the applicant to achieve appropriate conditions.

The review of draft consent conditions is a process that does not require codification. If the committee is minded to proceed with inserting a provision, I recommend that consideration is given to drafting which facilitates collaboration between consent authorities and applicants, and that the opportunity for submitters to comment follows that process. The committee might also consider if a statutory timeframe for submitters' comments might be appropriate.

Compliance history. I support the proposal that an applicant's compliance history may be considered in consent decisions (clause 36).

Penalties. Reducing the maximum period of imprisonment to 18 months changes the category of the offence and removes the requirement for a jury trial (clause 65). Due to the often highly technical nature of environmental offending, there were good reasons to question whether jury trials were appropriate. I support the increase in financial penalties, which compensates for the reduced maximum sentence, aligns with the maximum fines under other environmental legislation, and will more meaningfully deter offenders' from weighing the commercial gain of non-compliance against the potential penalties. [10]

The committee might consider a corresponding uplift in the penalties specified for continuing and obstructive offences.[11] This would have occurred under the Natural and Built Environment Act 2024, which also split the continuing offence provisions into natural and non-natural persons, so that the liability for corporate offending was increased to $50,000/day, instead of $10,000 for a natural person.[12]

Insurance against penalties. I support removing insurance against penalties (clause 66) as an important improvement to avoid immunity being purchased.

Revoke or suspend consent. Revocation, or suspension, of consents by the courts is a powerful remedy. I support the addition of new section 314A, though clarity may be needed where multiple

[10] Biosecurity Act 1993, and the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 and is comparable to other jurisdictions – see the Regulatory Impact Statement: Policy analysis of compliance and enforcement proposals for inclusion in Resource Management Amendment Bill no.2, 25 July 2024, para 50.
[11] s 339(1A) and (2).
[12] Natural and Built Environment Act 2023, s 706.

resource consents apply to a site, or an activity is partly permitted and partly consented.[13] The committee should consider if this power should be extended to address the consequences of revocation or suspension for contemporaneous, or further resource consent applications, by the offender for the same site or activity.

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[13] This might be achieved by way of a Practice Note issued by the court (e.g. allowing the bundling of applications), though the committee should seek expert advice in this regard.

Comparison of instruments empowered by emergency legislation

Primary legislation	Instrument	Decision criteria	Duration	Review requirement
Epidemic Preparedness Act 2006	Immediate modification orders – to modify any requirement or restriction imposed by an enactment.	That the effects are, or are likely to be, such that the requirement or restriction is impossible or impracticable to comply (or comply fully) with; and the modifications go no further than is, or likely to be, reasonably necessary in the circumstances.	Unspecified – while an epidemic notice is in force.	Unspecified Note the High Court considered a requirement for periodic review of IMOs was implicit, where they continue in force for an extended period, and were not subject to a fixed date of termination.[14]
Canterbury Earthquake Recovery Act 2011	Orders in Council – to grant exemptions from, modify, or extend any provisions of any enactment.	Must take into account the purpose of the Act, and have regard to the recommendations of the Canterbury Earthquake Recovery Review Panel.	The Act, and any Orders in Council, expired 5 years after commencement.	Annual review of the Act, report presented to the House.
Hurunui/Kaikōura Earthquakes Recovery Act 2016	Orders in Council – to grant exemptions from, modify, or extend any provisions of any	Must be satisfied that the order is necessary or desirable for the purpose of	Orders expired after 2 years, unless revoked sooner.	Report on the operation of the Act presented to the House every 6 months.

[14] *Idea Services Ltd v Attorney-General & Ors*, [2022] HC 308, 141-145.

Primary legislation	Instrument	Decision criteria	Duration	Review requirement
	enactment.	the Act; and The extent of the order is not broader than is reasonably necessary to address the matters that gave rise to the order; and The order is consistent with specified restrictions.	Specified orders continued in force for 5½ years, unless revoked sooner.	
Severe Weather Emergency Recovery Legislation Act 2023	Orders in Council – to grant exemptions from, modify, or extend any legislation or provisions of specified legislation.	Must be satisfied that the order is necessary or desirable for one or more purposes of the Act; and The extent of the order is not broader (including geographically broader in application) than is reasonably necessary to address the matters that gave rise to the order: and the order is consistent with specified restrictions and does not limit, or is a justified limit, of the rights and freedoms in the New Zealand Bill of Rights Act	Orders revoked after 5 years, unless sooner. Empowering provision to make orders revoked after 3 years.	Orders must be kept under review by the relevant Minister, and decide if they continue to be satisfied in relation to the decision criteria.

Primary legislation	Instrument	Decision criteria	Duration	Review requirement
		1990. Must provide a draft to, and have regard, to the recommendations of the Severe Weather Events Recovery Review Panel and the comments of the Regulations Review Committee. Must consider the environmental effects of the order, and whether any adverse effects can be avoided, remedied, or mitigated.		