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Environmental Defence Society submission on the COVID-19 Recovery (Fast-track Consenting) Bill

SUBMITTER DETAILS

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1. The Environmental Defence Society (EDS) thanks the Environment Select Committee for the opportunity to make a submission on the COVID-19 Recovery (Fast-track Consenting) Bill (the Bill).

2. EDS is a not-for-profit organisation dedicated to achieving good environmental outcomes for all New Zealanders. It is active in capacities as a litigator, a policy think tank, and a conference organiser.

3. The Bill seeks to stimulate the economy and generate employment in the wake of COVID-19 by fast tracking some projects requiring resource consent or designation under the Resource Management Act 1991 (RMA). There are three categories of project envisaged, each having targeted provisions in the Bill: (1) listed projects, which are 11 specifically identified projects to be fast tracked; (2) referred projects, which are not specifically identified but for which there is a process by which applications can be assessed and sent through a fast track; and (3) specifically identified activities for key infrastructure works by public entities that are deemed not to require consent at all (permitted activities).

4. We recognise the need for the Bill in these unprecedented times. However, we submit that a number of changes are required to safeguard environmental outcomes and improve drafting.

5. In our submission we use the normal conventions to indicate recommended additions (underlining) and deletions (~~strikethrough~~). Our recommendations are in **bold**.

The effect of Part 2 of the RMA

6. Part 2 of the RMA contains that Act's purpose and principles, and the key normative guide for decision-making on resource consents under the Act. Decisions must promote the sustainable management of natural and physical resources, which includes recognising and providing for matters of national importance in section 6.

7. Clauses 27, 29 and 31 of Schedule 6 of the Bill are in our view crucial, in that they provide the substantive direction/guidance for decisions on fast-tracked consents and notices of requirement for listed and referred projects. Our expectation is that this legislation will fast track process, but should not allow projects to be consented that would not otherwise be consented under the RMA. In particular, Part 2 of the RMA should remain paramount. Below, we refer to the drafting of cl 27 (listed projects), but note that this is applicable also to cl 29 (referred projects) and cl 31 (designations).

8. Clause 27 provides (as relevant):

> Consideration of consent applications for listed projects
>
> (1) When considering a consent application in relation to a listed project, and any comments received in response to an invitation given under clause 17(2), a panel must have regard to
>
> (a) any actual and potential effects on the environment of allowing the activity; and
> (b) any measure proposed, or agreed to, by the consent applicant to ensure positive effects on the environment to offset or compensate for any adverse effects that will or may result from allowing the activity; and
> (c) any relevant provisions of any of the documents listed in subclause (2); and
> (d) any other matter the panel considers relevant and reasonably necessary to determine the application.
>
> …
>
> (3) In respect of the matters listed under subclause (1), a panel—
>
> (a) must consider whether granting consent, subject to any conditions, would promote Part 2 of the Resource Management Act 1991 and the purpose of this Act; but
> (b) must apply section 6 of this Act (Treaty of Waitangi) instead of section 8 of the Resource Management Act 1991 (Treaty of Waitangi).
>
> …

9. This drafting is positive in the sense that it does not repeat the mistakes of previous legislation like the Housing Accords and Special Housing Areas Act, which imposed a hierarchy that demoted Part 2 of the RMA below the development-oriented principles of that Act. However, the wording could be improved for three reasons.

10. First, "must consider" is a weak direction when compared to the existing drafting of the RMA, where consideration of a wide range of instruments and matters are expressly *subject to* Part 2. It is also weak when compared to cl 27(3)(b), where the direction is to *apply* cl 6 concerning Treaty obligations. So while there is no hierarchy as drafted between the purpose of the Bill and Part 2, reference to Part 2 still needs to be strengthened.

11. Secondly, a direction to "consider" Part 2 and the purpose of the Act leaves decision-makers in a kind of normative limbo and is a strange way of drafting a clause that requires not just the exercise of discretion but the pursuit of clear statutory objectives. If panels are only to consider various things, what is the driving force behind decisions? One may consider something and then give it little weight. It makes sense to have regard to various instruments, environmental effects, and other relevant matters, but those considerations still need to be made within the context of a direction to *achieve* something. In the absence of a strong direction to Part 2, it leaves open the risk that, if legally challenged, the purpose of the Act under which the decision is being made will be held to be the paramount consideration.

12. Thirdly, the drafting is confusing in that it requires panels to consider whether granting consent would "promote Part 2 of the RMA". While the purpose of the RMA in s 5 is to "promote the sustainable management of natural and physical resources", it is unclear what is meant by the "promotion" of Part 2 as a whole.

13. **We suggest the following drafting to replace cl 27(3)(a) (as well as equivalent provisions in cl 29 and cl 31):**

> **(3) In respect of the matters listed under subclause (1), a panel -**
>
> **(a) must not grant consent if doing so would be**
> **(i) contrary to Part 2 of the RMA; or**
> **(ii) contrary to the purpose of this Act**

14. This does not create any hierarchy; it simply disqualifies the granting of consent if either, or both, of those conditions are not met.

15. **We also note that there should be a clear expectation that *King Salmon* jurisprudence, particularly as developed in the consenting context of the *RJ Davidson* case,[1] applies to the assessment of consent applications under the Bill.** In other words, the pre-eminence of Part 2 in cl 27(3)(a) should not be an open invitation for a consent authority to override more specific and directive environmental safeguards in subordinate instruments (like national direction and plans) that have themselves been assessed through the lens of Part 2 already.

16. To some extent the continued effect of this case law might be signalled by cl 12 of the Bill (relationship with the RMA), which provides that all other provisions of the RMA apply unless replaced, modified or excluded.

17. Related to cl 27 is cl 9(1)(g) of Schedule 6, which requires an applicant to provide an assessment of the activity "in light of" Part 2 of the RMA. It is unclear what "in light of" means and this is unusual drafting for a statute.

[1] *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283.

18. The intent of the provision is good, but could be redrafted as:

> **9 Information required in consent applications**
>
> **(1) Every consent application for a listed or a referred project made under clause 2 must include the following:**
>
> **…**
>
> **(g) an assessment of the activity that demonstrates —**
>
> **(i) how it complies with Part 2 of the Resource Management Act 1991; and**
>
> **(ii) how it complies with the purpose of this Act: and**
>
> **(iii) how it meets the matters set out in section 19 (whether project helps to achieve purpose of Act)**
>
> …

Climate change in decision-making criteria

19. It appears that a consenting panel is not intended to be prevented from considering the effects of referred projects on climate change.[2] The current position under s 104E of the RMA is that local authorities cannot consider such things unless national direction is created to allow it. In cl 30(1) of the Bill, it is explicitly stated that ss 104A-104D of the RMA apply (with modifications), but there is no mention of s 104E. The implication seems to be that s 104E does not apply, which aligns with the broader reforms proposed to remove the section from the RMA under cl 25A of the Resource Management Amendment Bill.

20. However, cl 12(4) of the COVID-19 Recovery (Fast-track Consenting) Bill states that "unless replaced, modified, or excluded by this Act, all other provisions of the Resource Management Act 1991 (including sections 16 and 17) apply to a listed or referred project…". Although it is a fair inference, it is not explicit that s 104E of the RMA has actually been replaced, modified or excluded by cl 30(1). It may therefore still apply. At the very least, the position is uncertain (until, or if, s 104E is removed from the RMA itself).

21. Furthermore, it is even less clear that the climate change impacts of *listed* projects will be able to be considered by consenting panels (or mitigation measures required). This is important, because some of those projects (eg roading) have the potential for significant climate effects. The uncertainty for listed projects is greater than for referred projects, because there is no explicit reference to ss 104A-104D of the RMA applying to them.[3] It may therefore be harder to draw the inference that s 104E does not apply, especially given cl 12(4) of the Bill described above.

22. **It should be made clear that s 104E of the RMA (while it still survives) does *not* apply to decision-making for listed and referred projects.** This would mean that the targets and carbon

[2] This is supported by the relevant Cabinet paper (at [99]), which states that emissions increases or reductions are to be determined on a project by project basis through the consenting process.

[3] For other reasons – namely that the activity status-specific tests under these RMA provisions are heavily modified under the Bill, so they are replaced by quite different provisions.

budgets under the Climate Change Response Act *could* be taken into account by consenting panels.

23. Furthermore, it should be made clear that the climate change impacts of all projects *must* be considered, including their implications for the achievement of targets and budgets under the Climate Change Response Act. Without that strong link, consenting panels may face the same dilemma that councils faced under the RMA prior to 2004 – a lack of clarity about the extent to which climate change arguments are valid in individual consent decisions. The Climate Change Response Act has removed that policy uncertainty by providing a clear national level goal – a 2050 target – based on New Zealand's international commitments. Fast tracked projects should not be allowed to undermine that.

24. **We recommend changes to cl 27 of Schedule 6, as follows. The same changes should be replicated for cl 29 (concerning consideration of applications for referred projects) and cl 31 (concerning consideration of notices of requirement for listed and referred projects).**

> **27 Consideration of consent applications for listed projects**
>
> **(1) When considering a consent application in relation to a listed project, and any comments received in response to an invitation given under clause 17(2), a panel must have regard to—**
>
> **(a) any actual and potential effects on the environment of allowing the activity, including on climate change; and**
> **(b) any measure proposed, or agreed to, by the consent applicant to ensure positive effects on the environment to offset or compensate for any adverse effects that will or may result from allowing the activity; and**
> **(c) targets and budgets established under the Climate Change Response Act 2002; and**
> **~~(c)~~(d) any relevant provisions of any of the documents listed in subclause (2); and**
> **~~(d)~~(e) any other matter the panel considers relevant and reasonably necessary to determine the application.**

Projects that achieve the purpose of the Bill

25. The Bill sets out a process by which projects can be "referred" to an expert consenting panel (ie they can use the fast track process). This involves the Minister assessing an application against various criteria, including whether it meets the purpose of the Act (cl 18(3) and cl 19). Clause 18(2) lists several matters that prohibit the referral of projects to a panel.

26. As drafted, under cl 19(e) of the Bill the Minister "may" consider whether "there is potential for the project to have significant adverse environmental effects" in making a determination whether a project achieves the purpose of the Act (and can therefore refer a project to an expert panel). We consider that this should be a gateway rather than a matter to be considered "at whatever level of detail the Minister considers appropriate". This is because if a project has the potential to cause significant adverse environmental effects it should not be consented through a fast track process. Instead, it should be subject to the normal RMA process.

27. We therefore recommend that cl 19(e) be deleted and a new cl 18(2)(e) be inserted to read:

> **(2) The project must not include any of the following activities:**
> **…**
> **(e) any activity that, in the Minister's opinion, has the potential for significant adverse environmental effects**

28. We also understand that the improvement of environmental wellbeing is consistent with the intent of the Bill. Environmental wellbeing should be reflected alongside social and economic wellbeing in cl 19 as reasons for which projects are considered to achieve the purpose of the Bill.

29. An amendment should be made as follows:

> **19 Whether project helps to achieve purpose of Act**
>
> **In considering, for the purpose of section 18(3), whether a project will help to achieve the purpose of this Act, the Minister may consider, at whatever level of detail the Minister considers appropriate, any or all of the following matters:**
> **…**
> **(b) the project's effect on the social, ~~and~~ cultural and environmental wellbeing of current and future generations:**
> **…**

Treatment of non-complying activities

30. Schedule 6 of the Bill outlines how applications and decisions are made for listed and referred projects.

31. It is positive that, in Schedule 6, cl 2(4)(a), applications cannot be lodged with the Environmental Protection Authority or considered by a consenting panel if they are for activities listed as prohibited in plans or regulations. We consider that this should be extended to non-complying activities as these are activities which the plan indicates are unlikely to be appropriate. The normal RMA process, including public participation, is appropriate for such applications. There also appears to be a drafting error in cl 2(4) of Schedule 6.

32. To address both of these issues, we recommend that cl 2(4) be redrafted as follows:

> **2 Lodging consent applications and notices of requirement**
> **…**

(4) Consent applications must not be lodged with the EPA nor determined by a panel if they relate to an activity that—
(a) is classified as a prohibited or non-complying activity—
(i) in a relevant plan or proposed plan; or
(ii) in regulations made under the Resource Management Act 1991 (including any national environmental standard): or
(b) ~~and~~ is within a customary marine title area, unless agreed in writing with the appropriate customary marine title group.

33. A complementary change, preventing the Minister referring applications for non-complying activities, should be made to cl 18(2)(a), as follows:

18 Criteria for projects that may be referred
…
(2) The project must not include any of the following activities:
(a) an activity that is described as a prohibited activity or non-complying activity in the Resource Management Act 1991, regulations made under that Act, (including a national environmental standard), or a plan or proposed plan:
…

34. We submit that it is inappropriate, even for listed projects, for a panel to be compelled to grant consent for non-complying activities. Under cl 32 as drafted, the only reasons a consent can be refused is because it is inconsistent with national direction or the terms of Treaty settlements.

35. We recommend deleting cl 28(7) of Schedule 6 in its entirety:

~~(7) When considering a consent application for a non-complying activity,—~~
~~(a) a panel must grant consent unless any of the grounds described in clause 32 for declining an application apply; and~~
~~(b) the activity need not comply with the requirements, conditions, or permissions (if any) specified for that activity in a resource management document; and~~
~~(c) the test under section 104D of the Resource Management Act 1991 must not be applied.~~

Deemed permitted activities for public infrastructure works

36. For some public works, the Bill deems some activities to be permitted activities. These are laid out in some detail in Schedule 4.

37. Clause 31 of the Bill specifies which kinds of activities cannot be deemed as permitted activities. Among other things, it provides that:

(2) An activity is excluded if it is a discretionary, non-complying, or prohibited activity under—

(a) the relevant plan or proposed plan
(b) the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011.

38. We do not see a compelling reason why this national environmental standard is singled out.

39. Clause 31(b) should instead refer to "any regulations made under the Resource Management Act 1991 (including any national environmental standard)" as follows.

(2) An activity is excluded if it is a discretionary, non-complying, or prohibited activity under—

(a) the relevant plan or proposed plan
(b) ~~the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011.~~ <u>any regulations made under the Resource Management Act 1991 (including any national environmental standard)</u>

Information requirements

40. Clause 27(1)(b) of Schedule 6 refers to the need for consent panels for listed projects to consider "…positive effects on the environment to offset or compensate for any adverse effects…" where proposed or agreed to by an applicant. A similar reference should be made in cl 10 of Schedule 6 (information required to assess environmental effects) so that the application includes information about any offsetting proposals.

41. **A new subclause could be included after cl (10)(1)(d) as follows:**

<u>(da) a description of any measure proposed to ensure positive effects on the environment to offset or compensate for any adverse effects that will or may result from allowing the activity</u>

42. The climate change implications of projects, both listed and referred, are also important and need to be understood by decision-makers.

43. An assessment of the greenhouse gas emissions from a project should therefore be specifically required under Schedule 6 by adding a new cl 10(1)(i) as follows:

10 Information required to assess environmental effects
(1) An assessment of an activity's effects on the environment under clause 9(4) must include the following information:
…
<u>(i) an assessment of the greenhouse gas emissions likely to be generated by the project.</u>

44. We note that this is in theory already encompassed by "an assessment of the actual or potential effects on the environment" in cl 10(1)(a) of Schedule 6, given the broad scope of "environment" and "effects", but the expectation should be made explicit given the challenging history of considering climate change effects under the RMA.

45. A complementary change should also be made to cl 20 of the Bill, under which higher level information is provided to the Minister to enable her or him to determine whether to refer a project to a consenting panel. A change here should ensure that the Minister is made aware, prior to referring a project, of any negative impacts it would or could have *on* climate change.

46. Clause 20(3)(d) should be amended to read:

> **(3) The information to be included in the application is as follows:**
>
> **…**
>
> **(d) a description of the anticipated and known adverse effects of the project on the environment, <u>including on climate change</u>:**
>
> **…**

Other recommendations

47. We note that being contrary to a water conservation order and other matters are reasons that a consenting panel *must* decline an application for a referred consent (Schedule 6, cl 29(5)(b)(i)). This should be replicated for listed consents. **A new clause in Schedule 6 (cl 27(2A)) should be inserted as follows:**

> **<u>(2A) A panel must not grant a resource consent that is contrary to—</u>**
>
> **<u>(a) section 107 of the Resource Management Act 1991 (restriction on grant of certain discharge permits); or</u>**
>
> **<u>(b) section 217 of that Act (effect of water conservation order); or</u>**
>
> **<u>(c) an Order in Council in force under section 152 of that Act (relating to authorisations for coastal tendering); or</u>**
>
> **<u>(d) any regulations made under that Act; or</u>**
>
> **<u>(e) wāhi tapu conditions included in a customary marine title order or agreement; or</u>**
>
> **<u>(f) section 55(2) of the Marine and Coastal Area (Takutai Moana) Act 2011 (effect of protected customary rights on resource consent applications).</u>**

48. Under cl 17(6) of Schedule 6, a consenting panel must specifically invite comments from various groups concerning an application for consent or notice of requirement for a referred project. **We recommend that this requirement be replicated in cl 17(4) of Schedule 6 where a panel is considering listed projects, as follows:**

> **(4) For a listed project, a panel must invite comments on a consent application or notice of requirement before it from the following:**
>
> …

(k) Business New Zealand Incorporated; and
(l) the Climate Change Commission; and
(m) Employers' and Manufacturers' Association (Northern) Incorporated; and
(n) Environmental Defence Society Incorporated; and
(o) Generation Zero Incorporated; and
(p) Greenpeace of New Zealand Incorporated; and
(q) Infrastructure New Zealand Incorporated; and
(r) the New Zealand Fish and Game Council; and
(s) the New Zealand Infrastructure Commission/Te Waihanga; and
(t) Property Council of New Zealand Incorporated; and
(u) Royal Forest & Bird Protection Society of New Zealand Incorporated.

49. **We also recommend that the public be able to comment on all listed and referred projects alongside comment by the above entities, although that would not lead to rights to be heard or appeal.** The ability for the public to comment would not unduly slow down the process, but it would be important to ensure a consenting panel is supplied with all relevant information to make its decision.

50. We consider that the concept of a panel convenor, as an Environment Court judge, is a sensible way of approaching the appointment of expert consenting panels under Schedule 5.

51. We note, without further comment, that it is somewhat unusual to draft a Bill where most substantive content is contained in a series of appendices.

52. There is a spelling error at cl 17(4)(g)(ix). "Ggovernment" needs to be corrected.

Concluding comments

53. We again thank the Environment Select Committee for the opportunity to submit on the Bill. We wish to be heard in relation to our submission.