Environmental Defence Society submission on the Fast-track Approvals Bill

SUBMITTER DETAILS

FULL NAME: Environmental Defence Society Incorporated
ADDRESS FOR SERVICE: PO Box 91736, Victoria Street West, Auckland 1142
CONTACT: Greg Severinsen, Gary Taylor
EMAIL: greg@eds.org.nz; gary@eds.org.nz

Introduction

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

2. EDS is an apolitical, not-for-profit organisation dedicated to achieving improved environmental outcomes for all New Zealanders. It is active in capacities as a litigator, a policy think tank, and a conference organiser. It has dedicated considerable resource over the past seven years looking at the future of the resource management system in Aotearoa New Zealand.[1] It has become a leading voice in this space.

3. EDS strongly opposes the Bill. From an environmental and constitutional perspective, it is the worst piece of law to have been introduced to Parliament since the 1979 National Development Act.

Why EDS opposes the Bill

4. The Bill purports to be a fast-track legal framework. It is not. Rather, it is an environmental destruction Bill. It rides roughshod over almost all of the country's environmental protections that have been established over the last four decades. Unlike existing fast-track legislation, it is about circumventing environmental considerations, not streamlining process.

5. People and the economy rely on a healthy environment and New Zealand's environment is highly stressed. This is not an exaggeration: metrics for freshwater quality, biodiversity and the climate all show deterioration. It is clear that we need to be taking much better care of the environment and impacting it less. The Bill allows for the exact opposite, it does away with nearly every safeguard that limits peoples' impact on nature.

6. The Bill bears no resemblance to existing fast track processes. It places excessive and unfettered powers to approve projects in the hands of development Ministers. Its decision-making processes and criteria are so inadequate that the legislative process can be regarded

[1] For a list of EDS's resource management publications see: https://eds.org.nz/our-work/policy/projects/resource-management-reform/

as a rubber-stamping exercise. It excludes public participation. And its problem definition is based on extremely thin, and in places no, evidence.

7. The Resource Management Act 1991 (**RMA**) was essentially cross-party legislation (introduced by Labour, improved and passed by National). It was largely evidence-based, and reflected New Zealand's international commitments, domestic environmental issues and cultural context. EDS acknowledges the need for resource management reform - after all, the RMA is now more than 30 years old. However, the Bill addresses none of the RMA's deficiencies and does not provide evidence-based solutions to environment and development issues (such as those recommended by EDS in its investigations and recommendations over the past seven years).

8. EDS supports a resource management framework that enables New Zealand industry to operate and expand in a sustainable way. Enabling development and protecting the environment can be compatible. A framework founded on sustainability is essential for businesses' social licence. Projects established under the Bill may be technically approved, but will not be sustainable and will not have social licence. That is not good for industry and business.

9. The Bill may also be a breach of New Zealand's fair-trade agreements, including with the UK and Europe. These agreements require that the Government uphold environmental protections, as weakening laws could amount to subsidising industry. New Zealand's export market may be potentially harmed by the Bill, including via restricted market access and reputational damage.

10. The Bill is contrary to the National Party' environmental policy, which aspires to safeguard New Zealand's unique natural environment, native biodiversity, waters and landscapes for future generations. Its *Blueprint for a Better Environment* talks about sustainable freshwater, protection of our oceans and marine life, enhancing biodiversity, and opportunities for outdoor recreation. National has said that with clear, cohesive rules that target better environmental outcomes, growth and prosperity can be achieved within environmental limits. EDS agrees. The Bill will not achieve those outcomes, and will seriously damage National's credibility with respect to its environment policy.

11. The Bill was proposed by New Zealand First and is part of the coalition agreement between National and New Zealand First. The agreement was limited to establishing a fast-track one-stop-shop consenting and permitting process for regional and national projects of significance, with the process to include a referral by Ministers for suitable projects, to be introduced within the first 100 days. The Bill goes far beyond that agreement. It is astonishing that it has the support of the National Party.

Structure of submission

12. The submission is structured under the following headings:

- Overview of the Bill
- Project eligibility – Schedule 2A listed projects
- Project eligibility – referred projects
- Decisions – process and decision-making criteria for RMA approvals[2]
- Public involvement and other checks and balances
- Concerns specific to conservation legislation
- The rationale for the Bill – a disproportionate and irrational response

Overview of the Bill

13. The key aspects of the fast-track process are as follows:

    - The purpose of the Bill is to facilitate "the delivery of infrastructure and development projects with significant regional or national benefits".
    - To that end, it provides for a three-step process by which authorisations can be obtained under multiple "environmental" statutes, including under the RMA, Conservation Act, Wildlife Act, Reserves Act, Crown Minerals Act, and Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act).
    - Step 1 is where Ministers determine, upon application, whether to refer proposals to a consenting panel. To do so, certain eligibility criteria must be met, but there are additional factors requiring ministerial discretion. Some projects are to be specifically listed and go straight to panels.
    - Step 2 involves consideration of the application by a consenting panel. The panel provides recommendations (whether to grant or decline, and conditions) to Ministers.
    - Step 3 involves a final decision by Ministers as to whether or not to grant approval, and any conditions.
    - A further step, appeal to the High Court, is possible only on points of law and only to a limited range of persons.

Project eligibility – Schedule 2A listed projects

14. The Bill provides a mechanism for listed projects to automatically proceed to consideration by an expert panel, without the need for a statutory assessment as to whether the project is appropriate for fast-tracking in the first place. These listed projects will proceed to panel consideration even if they would otherwise have been ineligible for fast-track.[3] Such projects could include, for example:

    (a) Projects on land returned under Treaty settlement that do not have landowner consent;
    (b) Activities that are prohibited under the EEZ Act; and
    (c) Activities on protected land listed in Schedule 4 of the Crown Minerals Act, including wildlife sanctuaries and wilderness areas, and national reserves held under the Reserves Act 1977.

15. Criteria preventing the referral of projects which require RMA consent are not replicated when it comes to panel recommendations and ministerial decision-making later on,[4] meaning

[2] Fast-track Approvals Bill, Schedule 4.
[3] Under clauses 18 and 21 of the Bill.
[4] For RMA approvals.

that projects listed in Schedule 2A do not have to be declined even if they would have been ineligible at the referral stage. And given the decision-making process described below, approval for these projects is basically guaranteed.

16. No listed projects have been included in the Bill as introduced. Rather, the Government proposes to establish a non-statutory Fast Track Advisory Group to consider which projects are appropriate for the fast-track process and recommend the same to Cabinet.[5]

17. No information is currently available about who will be on the Advisory Group. It appears that the appointments process will be entirely at the discretion of development Ministers, unencumbered by statutory parameters as to the members' environmental credentials or independence.

18. Likewise, the criteria under which projects merit being listed are not yet available. There is no assurance of any environmental considerations and no clarity of what legislative purpose (if any) projects will be considered against.

19. The Advisory Group proposition as currently presented is entirely unregulated. That is an unacceptable position given the power of the Group to recommend projects for listing in the Bill.

20. Developers will be able to submit projects to the Advisory Group for evaluation but there is no indication that any person or group that represents the environment will be able to provide input. There is not even an indication that those directly affected by the projects will be consulted. The Advisory Group will be making its recommendations based on an entirely one-sided process.

21. Cabinet will decide on the final mix of projects to be listed in the Bill. The list will then be introduced through the select committee process,[6] or (as we have heard is a possibility) even later via supplementary order paper at the stage of the Committee of the Whole.

22. There is no commitment to allowing public input into this aspect of the legislation. The proposed process for listing projects means that some of the most concerning aspects of the legislation – specific projects (potentially over 100 of them, we understand) that go straight to panels – may remain completely unscrutinised by the public, and without even the weak statutory tests for referral outlined below.

23. This approach is completely unacceptable. It comes very close to the authorising legislation used to rubber stamp the Clyde Dam, with the added indignity of skipping most of the parliamentary process to do so. Constitutionally, it is the select committee's role to examine and decide upon the list of projects to be included in the law, *based on detailed submissions from experts, stakeholders and the public*.

24. As it stands, a bill that seeks to exclude public involvement is itself being progressed in a way that excludes the public. If the Bill is incomplete, Ministers should admit this fact and delay

[5] Beehive media release: https://www.beehive.govt.nz/release/one-stop-shop-major-projects-fast-track

[6] The Ministry for the Environment has even indicated that the submission process to the Select Committee might be used as another way for proponents to "nominate" their projects for inclusion in the schedule (Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 34). This 'drafting by select committee' approach to filling gaps would be a highly unorthodox and improper use of the legislative process, because the public would not be able to submit on those components (a key reason for having select committees).

introduction to the House so it can be scrutinised in the normal way by select committee, including allowing public submissions on its entirety.

25. It is interesting to note that members of the current government criticised the previous government's release of some provisions of the Natural and Built Environment Bill in an "exposure draft" (with the explicit purpose of involving the public at an early stage of drafting via an *additional* round of select committee scrutiny), on the grounds that it was an incomplete version of the Bill. The Fast-Track Approvals Bill will have substantial holes in it up until the late stages of the legislative process, potentially bypassing even a single stage of submissions to select committee.

26. It is not known which projects will be included in Schedule 2A. Ministers have intimated that listed projects may include proposals that have been previously declined by independent, evidence-based Court or fast-track processes, proposals that are likely to have been declined under existing RMA processes, or proposals that have significant environmental effects that would otherwise have merited public consultation. Examples of projects that have been declined because they fail to meet environmental safeguards under existing resource management law include coal mines, dams and marine farms.

27. It will be shocking to the New Zealand public, and an insult to those community groups, individuals, iwi and hapū who participated in good faith in previous consenting processes, if those decisions are overturned by legislation.

28. The Ministry for the Environment recommended that the Bill should *not* provide for listed projects to get automatic referral, for procedural reasons (eg lack of transparency and iwi engagement).[7] EDS agrees.

Project eligibility – referred projects

29. In addition to Schedule 2A listed projects that are directed straight to expert panels, the Bill enables development Ministers to pick and choose projects for the fast-track process. These are called referred projects.

30. Schedule 2B of the Bill will list individual projects for Ministers to consider for referral. These projects have a 'leg up' on other projects because:

    (a) Ministers must take their listing under Schedule 2B into account when deciding to refer to panels; and
    (b) The Bill states that they are considered to have significant regional or national benefits, thus they already pass through the main eligibility criteria for referral.

31. Any person can apply to have their project referred. "Person" includes the Crown, which means that the Government can apply to itself to have its projects fast tracked. Ministers (or entities closely overseen and directed by Ministers) can thus be the developer, the regulatory gatekeeper and, as set out below, the ultimate decision maker. That is inappropriate and goes against one of the pillars of the 1980s state sector reforms, where government is not allowed to have special treatment.

32. There is no meaningful constraint on what projects can be referred for fast-tracking. This is problematic in two senses: (1) there is a low threshold in terms of a project's "significant

[7] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 34.

regional or national benefits", and (2) there are no requirements for exclusion based on a project's negative environmental impacts. It is also inappropriate that neither the Minister for the Environment nor the Minister of Conservation are involved in the referral process. We address these matters in turn below.

Low threshold for eligibility – significant regional or national benefits

33. To be eligible for referral, projects must have "significant regional or national benefits", an undefined term open to Ministerial interpretation.

34. Although the Bill contains criteria to assess whether a project would have significant regional or national benefits, the criteria are:[8]

    (a) Not mandatory considerations, and their application is subject to Ministerial discretion.

    (b) Extensive and provide for projects entirely unrelated to any problem-based justification for fast-track, including where a project will "support primary industries" and "support development of natural resources, including … petroleum". This would capture large scale intensive dairying conversions irrespective of their sustainability and oil and gas exploration. It effectively exempts most of the economy from the RMA and other legislation.

    (c) Not exhaustive, so the extensive list set out could be expanded further to accommodate more reasons why a project has significant regional or national benefits.

    (d) Self-fulfilling (e.g. criterion (a), regarding whether a project has been identified as a priority project in a central government infrastructure priority list, can easily be met by the project being added to that list).

    (e) Inherently contradictory (e.g. criterion (c) is met where the project would increase the supply of housing or contribute to a well-functioning urban environment, even though increased supply does not always result in a well-functioning urban environment).

35. Existing fast-track processes have tighter and more specific eligibility gateways which target projects that would address an evidence-based issue (e.g. housing affordability), not just the amorphous concept of "benefits".

36. We see no evidence-based justification for all regionally beneficial projects having their environmental criteria diluted, other than a desire for the "normal" process under the RMA to be sidestepped wherever possible (or wherever it suits Ministers) on the grounds of a "can do" economy. There is also a risk of inequitable treatment based on which industry is seen as "good" or "bad" by Ministers.

37. Broad eligibility is doubly problematic given the weaknesses of the subsequent decision-making process described further below.

[8] Clause 17(3) of the Bill.

No real threshold for ineligibility on environmental grounds

38. The criteria under which Ministers must refuse to refer a project for fast-track processing include where there are certain existing rights (e.g. Māori interests in land or the coast and aquaculture occupation rights), projects that would require an approval under other legislation that cannot be given because of the land's status, and projects that require separate offshore renewable energy permitting legislation to be in place.[9]

39. The only criteria that bear any tangible relationship to environmental effects are the exclusion of prohibited activities under the EEZ Act or (regulations made under that Act), and non-mining activity on some classes of conservation land.[10] Mining on conservation land is also referred to but the effect of this is less clear, as discussed below.

40. There is no equivalent exclusion for prohibited RMA activities; indeed, these are expressly allowed to be referred for fast-tracking. Prohibited activities under the RMA are the most environmentally dangerous activities in sensitive locations. The provision in the Bill for these activities is an explicit invitation for developers to lobby Ministers to refer projects to fast-track where central government itself, or councils (following consultation with communities and scrutiny by the Courts), have explicitly banned that activity. There are relatively few prohibited RMA activities, and the rationale for overriding them is unclear. The Ministry for the Environment has pointed out that "prohibited activities often have significant environmental or human health effects…. Many prohibited activities are also there to protect existing significant infrastructure".[11]

41. There is also no requirement to preclude referral of projects that would:

    (a) Significantly increase greenhouse gas emissions;
    (b) Cause or contribute to the extinction of indigenous species;
    (c) Pollute freshwater;
    (d) Cause serious risk to human health and safety;
    (e) Degrade waterbodies covered by a Water Conservation Order (which is conferred because of the waterbody's *nationally outstanding* values);[12] or
    (f) Breach international law, such as projects in the coastal marine area that are prohibited under the London Dumping Protocol.[13]

42. These are just the most basic environmental bottom lines that we would expect to see in the mandatory exclusion criteria, not a complete list.

43. The Bill also does not require consideration of the impacts a project may have on climate change, or the importance of aligning decisions with emissions reduction plans or targets/budgets under the Climate Change Response Act 2002 (or relevant international obligations such as the Paris Agreement).

---

[9] Clause 18.

[10] National reserves under Reserves Act, as well as all land categories in Schedule 4 of the Crown Minerals Act except parts of the Coromandel Peninsula (see clauses 18(h) and (i) of the Bill.

[11] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024).

[12] For example, Te Waikoropupū Springs in Golden Bay.

[13] These activities are prohibited under marine dumping regulations made under the RMA. We presume that is why prohibited activities under EEZ Act regulations are specifically not eligible, so it is problematic that the requirement does not extend to RMA regulations (also subject to the London Dumping Protocol).

44. Ministers can refuse to refer a project, even if it meets eligibility criteria, if:[14]

(a) the project may have significant adverse effects on the environment; or
(b) the project includes a prohibited activity under the RMA.

45. However, refusal is at the Ministers' discretion and is made in the context of the purpose of the Bill, which is development focused.

Ministers responsible for referral decisions do not include Environment or Conservation Ministers

46. The "joint ministers" responsible for referral decisions do not include the Minister for the Environment.[15] Instead, the Ministers for Regional Economic Development, Infrastructure and Transport get to exercise their discretion as to whether a project has significant adverse effects on the environment and whether it should be referred.

47. The Minister of Conservation only has powers with respect to conservation legislation, and no role in relation to the coastal and marine environment (a critical role for the Minister of Conservation under the RMA).

48. Given the infrastructure and development bias of the referral criteria and lack of even the most basic environment safeguards, and the exclusion of Ministers with environment or conservation functions, it is clear that the Bill will allow projects with significant adverse environmental effects to be referred for fast-track approval.

Decisions – process and decision-making criteria for RMA approvals[16]

49. The Bill's process and decision-making criteria for RMA approvals demonstrates that, once referred, the fast-track process is little more than a rubber-stamping exercise.

50. All listed and referred projects proceed to expert panels for consideration. These panels are tasked with recommending to Ministers whether projects should be declined or approved (and what conditions should be applied).[17] Expert panels do not make final decisions. That is done by Ministers.[18]

The expert panel assessment

51. Although panels have the power to recommend that consent for a listed or referred project be declined, assessment criteria in clause 32 of Schedule 4 are drafted in a way that all but guarantees a panel will recommend granting consent.

52. When making recommendations, panels must give weight "to the following matters, if relevant, in the order listed (greater to lesser)":[19]

[14] Clause 21(2) of the Bill.
[15] Despite that Minister being responsible for core legislation being overridden by the Bill.
[16] Fast-track Approvals Bill, Schedule 4.
[17] See Schedule 3, cl 1(4)(b). This provision is found in a very unusual place, leaving it unclear to those reading the Schedule 4 RMA process whether panels are empowered to recommend consent be declined.
[18] Clause 25; Schedule 4, cl 40.
[19] Schedule 4, cl 32.

Schedule 4, Clause 32

(a) the purpose of this Act; and
(b) the purpose of the Resource Management Act 1991 set out in section 5 of that Act; and
(c) the matters for consideration in section 6 of the Resource Management Act 1991; and
(d) the matters for consideration in section 7 of the Resource Management Act 1991; and
(e) the provisions of any of the following, if relevant, made under the Resource Management Act 1991:
    (i) any national direction:
    (ii) operative and proposed policy statements and plans:
    (iii) iwi management plans:
    (iv) Mana Whakahono ā Rohe:
    (v) joint management agreements; and
(f) the relevant provisions of the Resource Management Act 1991 or any other legislation that direct decision making under the Resource Management Act 1991 (*see*, for example, sections 104 to 107 of that Act and the provisions referred to in clauses 31 to 35).

53. At the top of the hierarchy is the purpose of the Bill, which seeks to facilitate the delivery of infrastructure and development projects with significant regional or national benefits. That objective is not qualified by any consideration of the natural environment.

54. The Ministry for the Environment specifically recommended that the purpose of the Bill include reference to sustainable management, not just development, and for matters under the RMA (national direction) to have equal weighting. This recommendation has not been followed.

55. Instead, clause 32 creates a clear hierarchy that favours infrastructure and development objectives, over the sustainable management purpose and principles of the RMA.[20]

56. As a case in point, even though RMA national direction is listed in the hierarchy, Ministers have already indicated that there is no requirement to comply with that direction. National policy statements for freshwater, the coastal environment and biodiversity have involved extensive evidence, stakeholder engagement and compromise prior to their enactment. This Bill provides an easy pathway for all that to be undone or ignored.

57. In addition to the obvious hierarchy created between the Bill's purpose and the RMA's purpose and principles (and its other criteria and instruments), there is also a more subtle second order hierarchy created between Part 2 of the RMA and RMA national direction. The *King Salmon*[21] and *Davidson*[22] decisions established (in the context of plans and consents respectively) that one cannot necessarily refer back to the purpose and principles of the RMA in order to undermine clear directions in national policy statements.[23] The new, clear hierarchy in clause 32, between Part 2 and national direction, risks a return to an overall broad judgment approach (which allows consenting decisions to undermine clear directions in national policy statements), reestablishing the deep uncertainty that characterised the system before the *King Salmon* jurisprudence.

[20] This is a similar approach to legislative drafting that was taken to the Housing Accords and Special Housing Areas Act 2013, but because of its much broader scope and powers, is far more significant.
[21] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.
[22] *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283.
[23] Even though section 104 RMA consenting considerations are "subject to" Part 2, the actual requirement is somewhat more nuanced in terms of when Part 2 can "override" more directive objectives and policies in national policy statements.

58. Reference to section 8 of the RMA is noticeably absent from the clause 32 hierarchy, thus panels are not required to take into account the principles of the Treaty of Waitangi / Te Tiriti o Waitangi when making their recommendations.

59. There is also no reference to the importance of reducing greenhouse gas emissions, or the need to align consenting decisions with emissions reduction plans or targets/budgets under the Climate Change Response Act 2002. This risks panels recommending approval of (or failing to recommend conditions on) projects that have a significant impact on the climate and New Zealand's international commitments.

60. Finally, section 104D of the RMA is expressly disapplied to a panel's consideration of a resource consent for a referred project.[24] Section 104D currently prevents non-complying activities from being granted consent where the activity would have more than minor adverse effects on the environment, or be contrary to plan objectives and policies. This is another environmental safeguard that the Bill removes.

61. We submit that the Bill takes a less environmentally responsible approach than even the National Development Act 1979. There, the Planning Tribunal (fulfilling the same function as expert panels under the Bill) was not allowed to have regard to the reasons for which the application was referred (e.g., energy security, economic benefit etc). The matters to be taken into account in making its recommendations had to be the same ones as under the normal statutory frameworks, not the development-focused ones in the National Development Act.[25]

Independence and expertise of panels

62. Panels are to be convened by a panel convenor, who must be a current or former judge of the Environment Court or High Court. They are not appointed directly by Ministers. This provides panels with a degree of independence.

63. However, panel members are not required to have skills and experience relevant to environmental management, only those "relevant to the purpose of the Act" (development focused), "matters specific to the project", Te Tiriti o Waitangi, tikanga and "if appropriate" conservation expertise.

64. There is also a requirement that panel convenors consult with Ministers when appointing panel members. This is unlike previous fast-track processes, where convenors had no such consultation requirement and were therefore more robustly independent.

Ministerial decision-making

65. Ministers, who do not themselves have the requisite technical expertise, can choose to accept or reject panel recommendations and proceed down a different route. This is deeply problematic. Placing Ministers at the front end (referral stage) and back end (decision-making stage) of the fast-track process reduces panels to advisory bodies. That is how the Planning Tribunal functioned under the National Development Act 1979.

66. The only constraint on final Ministerial decisions is that:[26]

[24] Schedule 4, cl 35(5).
[25] See section 9. Although the *Minister* could take into account those broader matters when making a final decision, following recommendations by the Planning Tribunal – see section 11.
[26] Under section 25 (read in conjunction with cl 40 of Schedule 4)

> "*Joint Ministers must not decide to deviate from a panel's recommendations unless they have undertaken analysis of the recommendations and any conditions included in accordance with the relevant assessment criteria.*"

67. It is unclear what exactly the "relevant assessment criteria" are in the context of RMA approvals since there is no direct cross-reference to clauses 32-35 of Schedule 4 or other provisions. One might assume that the "relevant assessment criteria" that Ministers must refer to in making a final decision are the same matters to which the panel must have regard. These are themselves entirely inadequate, as discussed above.

68. The Ministry for the Environment considers that approval is likely to be given under this framing:[27]

> "*This option [of placing the Bill's purpose at the top of the hierarchy] provides a clear focus of the legislation through promoting the fast-track bill purpose above other existing direction for decision-making. This is likely to provide certainty for projects that are consistent with this purpose for project delivery that they are likely to go ahead*."

69. In this context, a recommendation to approve a project is not just likely, but practically inevitable. Any discretion to recommend refusal is a mirage.

70. Direct political decision-making leaves Ministers open to considerable legal and political risk, including allegations of pre-determination, bias and corruption. Granting regulatory approvals should not be used to raise political capital or engage in pork-barrel politics, and to do so is constitutionally wrong. It is unclear how conflicts of interest are to be defined or managed. Lobbyists close to Ministers' ears will gain an unfair advantage (in addition to the considerable advantage that the Bill already gives to development interests).

71. The Ministry for the Environment has emphasised this risk, where it recommended putting "the legal risk of decision-making onto the expert panel (rather than the relevant Ministers)." It also points out natural justice issues if Ministers make different decisions from a panel without consulting affected persons who submitted to the panel.[28] And it will increase costs to the Crown, as officials would need to support the Minister in another stage of decision-making.

72. In practice, clause 25(5) of the Bill is also risky for Ministers as it provides that:

> "*In determining a substantive application, the joint Ministers may refer a part or the whole of the panel's recommendations back to the panel to reconsider, and give the panel any directions the Ministers think appropriate as to the reconsideration of a part or the whole of the recommendations*."

73. There are no parameters in the reconsideration process around what directions a Minister can give to a panel. These may even encompass firm instructions for a panel to change its recommendations, so that a Minister can then be seen as relying on independent advice.

[27] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 26-27.
[28] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 21.

74. Ministers should also not be able to adjust conditions recommended by expert panels. As the Ministry for the Environment states, "[s]etting conditions requires expert knowledge which does not reside with Ministers or officials, which expert panels are best placed to provide."[29]

75. As with the referral decision, the Ministers responsible for RMA approvals are development-focused ones, with the RMA roles of the Minister for the Environment and Minister of Conservation sidelined.

76. It is not clear what roles various government departments are to play in providing the advice upon which Ministers will rely when making final decisions. Overall, we submit that there are considerable risks in development-focused Ministers, exercising their discretion under development-focused legislation, on advice from development-focused departments.

Public involvement and other checks and balances

77. The Bill dispenses with almost all opportunities for the public to be involved in decisions affecting New Zealand's environment and natural resources.

78. When making referral decisions, Ministers must invite written comment from local government, other relevant Ministers and various Māori entities.[30] There does not appear to be any requirement to notify anyone else of the existence of a referral application or a referral decision, let alone invite submissions. That includes owners or occupiers of land affected by the project. Ministers can invite written comment from any person, but that is at their discretion.

79. Public and limited notification of a consent application or notice of requirement is not allowed by panels.[31] At their discretion, panels can invite comments from any person that they consider appropriate. But there does not seem to be any requirement that the public be involved in the process (although at least panels are specifically required to seek comment from owners and occupiers of affected land).

80. For listed projects, a panel must invite comments on an application from:

- Local authorities
- Iwi authorities
- Treaty settlement entities
- Customary marine title groups
- Protected customary rights groups
- Land owners/occupiers (including those adjacent)
- Various government Ministers
- The Director-General of Conservation (i.e. DOC)
- Requiring authorities having designations on the land or adjacent land

81. For referred projects, the list is broadly similar, with the addition of Heritage New Zealand Pouhere Taonga and the Infrastructure Commission/Te Waihanga. It is unclear why these two entities are excluded from providing comment on listed projects.

[29] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 21.
[30] Clause 19.
[31] Schedule 4, cl 20.

82. We find it incredible that the Minister for the Environment is not a relevant Minister from which the panels must seek feedback (for listed and referred projects). If intentional, which seems likely given the administrative role that the Ministry for the Environment has been relegated to in the Bill, this is an unprecedented attempt not only to usurp the portfolio's responsibilities, but to exclude it altogether from having a voice. (Curiously, there is a specific requirement to consult with the Minister for the Environment under clause 5 of Schedule 9 of the Bill where an approval is needed under the EEZ Act, but this does not include where approvals are needed under other legislation like the RMA.)

83. It is also problematic that the Secretary for the Environment does not need to be extended an invitation to comment. The Secretary has a statutory mandate under the Environment Act 1986 that operates independently from Ministers. Similarly, it is surprising that the Parliamentary Commissioner for the Environment does not have to be invited to comment by Ministers (referring) or panels (recommending).

84. There is no requirement to consult any person or entity representing the environment outside government, aside from Māori groups, and no person or entity within government other than the Minister and Director-General of Conservation.

85. While it is important that the Department of Conservation has an opportunity to provide feedback on projects, its involvement does not guarantee consideration of all environmental impacts. There are many examples of the Department of Conservation, which has a limited budget that will be reduced further this term, taking a backseat in cases and leaving environmental groups to bring evidence and contest projects with significant environmental impacts. Further, the Department is vulnerable to political direction on the issues that it raises.[32] EDS has explored these issues in its report on reforming the environmental advocacy system.[33]

86. It is telling that even the much-maligned National Development Act 1979 conferred standing (a "right to be heard") on "any person representing a relevant aspect of the public interest" before a Planning Tribunal inquiry.[34] The Bill appears to be intentionally designed to exclude people or groups representing the environment from contributing to fast-track approval processes.

87. This is particularly concerning because the very projects that are likely to be referred to panels are also the ones that are likely to have significant adverse environmental effects and warrant the additional scrutiny provided through submissions and expert evidence from non-governmental organisations.[35]

88. An invitation to comment is significant not just for the ability to provide information, evidence and argument, but also because it establishes standing to appeal on points of law to the High Court.

---

[32] As was shown in its decision to delete concerns about the serious water quality risks associated with the Ruataniwha Dam from its submission on that project: www.rnz.co.nz/national/programmes/ninetonoon/audio/2569548/doc-excise-detailed-submission-of-the-ruataniwha-dam-project

[33] G Severinsen *Environmental advocacy in the future resource management system* (Environmental Defence Society, 2023).

[34] National Development Act 1979, s 8.

[35] Even prohibited activities – which by definition are environmentally harmful – are eligible for fast-tracking and therefore little public scrutiny.

89. EDS accepts the need for some constraints on public involvement to ensure some consenting decisions are made more quickly than under the RMA. For example, other fast track processes have stated that hearings are not mandatory, appeal rights are constrained, and the public at large may not have an opportunity to submit. However, this cannot come at the expense of transparency and oversight of executive power, especially since the Bill allows a much wider range of projects (almost anything) to utilise the process than other fast track legislation.

90. Such oversight is provided by environmental groups as recognised under the Covid-19 fast track process, which named individual environmental groups that must be invited to comment. Even under the National Development Act 1979, the *quid pro quo* for loss of public participation was explicit recognition of the Commissioner for the Environment (the precursor to the Parliamentary Commissioner), who had significant input into the deliberations of the Planning Tribunal in the form of an independent audit.[36] Under the Bill, there is no provision for independent testing of ministerial or panel decisions.

Concerns specific to conservation legislation

91. The Bill also applies to approvals under the Wildlife Act 1953, Conservation Act 1987, Reserves Act 1977, Freshwater Fisheries Regulations 1983, Fisheries Act 1996, Crown Minerals Act 1991 (access arrangements for Crown land), heritage legislation, and the EEZ Act. The process for referral is the same, with differences in process and decision-making criteria specified through various schedules.

92. Schedule 5 makes changes to how the concessions, covenants and land exchange provisions of the Conservation Act and Reserves Act are applied. These are less extensive than changes to RMA approvals, and do exclude fast tracking for most activities on some categories of conservation land (e.g., national parks, national reserves and marine reserves).[37] Final decisions are made by the Minister of Conservation, not the joint Ministers responsible for RMA approvals.[38] But there are still significant elements of concern.

93. There is no longer a requirement that concessions be consistent with conservation management strategies and conservation management plans.[39] There is no requirement for these instruments to even be considered unless they have been authored, co-authored or approved by Treaty settlement entities, creating a double standard in the conservation community.[40]

94. Moreover, concessions can be granted even when the application is "obviously inconsistent with", or does not "comply" with, the provisions of the Conservation Act, and where the concession is not consistent with the conservation purpose for which the land is held.[41]

[36] An environmental impact report was sent to the Commissioner who then called for submissions to be made within 6 weeks. The Commissioner gave his opinion in the form of an "audit" and send this to the Planning Tribunal. Moreover, under the National Development Act, those who would normally decide the consent (which nowadays would be councils) needed to give the Planning Tribunal their own recommendation as to whether it should be granted or declined.
[37] Clause 18(h).
[38] Schedule 5, cll 3(a). 18, 23.
[39] Schedule 5, cl 4(i).
[40] Schedule 5, cl 6(1)(b). This is curious, since under cl 9 of Schedule 5 there is a requirement for an applicant to provide an assessment of a proposal again conservation management strategies and plans, which seems redundant if they are not mandatory considerations.
[41] Schedule 5, cl 4(b), 4(g), which disapplies sections 17SB and 17U(3) of the Conservation Act 1987.

95. There is no longer a requirement that an application for a structure/facility be declined where it could reasonably be undertaken outside the conservation estate or in another part of the conservation estate having lower impact,[42] only "consideration" of this.[43] There is to be no public notification of application for easements and licenses on conservation land, despite it being publicly owned.[44]

96. The decision-making criteria for fast-track concessions are unclear and confusing. Schedule 5 outlines three constrained matters that the panel must consider when assessing and reporting on concession applications.[45] Yet the Minister, in making a decision on a concession, must consider a much wider range of matters, including the purpose of the Bill, the purposes for which the land is held, and some conservation management strategies and plans.[46] It is unclear whether the panel's recommendatory role is intended to be narrower than the role performed by the Minister.

97. Clause 6 is also confusing because it requires some matters to be "had regard to" and others to be "considered". It is not clear whether that is intended to be significant.

98. Clause 18 of Schedule 5 provides for exchanges of conservation land for private land and money. While the provision is subject to a requirement that the land exchange will enhance the conservation values of land managed by the Department, the ability to take into account money provided to the Crown as part of the exchange means that short-term conservation benefits (e.g., by funding predator control for a period of time) will be taken into account even where the longer term outcome is a net loss of land to the conservation estate. In addition to that risk, it is unclear whether, or how, the development-focused purpose of the Bill is intended to affect such decisions.

99. The Bill also allows for conservation covenants to be amended or revoked by the Minister of Conservation.[47] This can occur with only limited constraints on the Minister; he or she must simply "have regard" to three things: the purpose of the Bill, the purpose of the covenant/values of the land, and whether it will compromise regionally, nationally or internationally significant values. Although there is no express hierarchy here (as there is with RMA approvals), there is substantial latitude for the Minister to prioritise development over conservation even where values are internationally significant.

100. The Bill also allows for changes to how approvals under the Wildlife Act 1953 are made. This requires a panel/Ministers to "take into account" the purpose of the Wildlife Act.[48] In itself this is confusing, given that the Act does not have a purpose clause. Presumably this refers to the Act's long title, but that long title is procedural rather than substantive, and not capable of being operationalised as a decision-making consideration.[49] The ability to provide for offsetting and even compensation[50] for impacts on wildlife is a major departure from the Wildlife Act, which does not allow authorisation of harm to wildlife. It is alarming that there are no parameters around the extent of harm that can be caused – even to Threatened, Data

[42] Schedule 5, cl 4(h), which disapplies section 17U(4) of the Conservation Act 1987.
[43] Schedule 5, cl 5(a).
[44] Schedule 5, cl 4(c).
[45] Schedule 5, cl 5.
[46] Schedule 5, cl 6.
[47] Schedule 5, cl 23.
[48] Schedule 6, cl 1(2)(a).
[49] "An Act to consolidate and amend the law relating to the protection and control of wild animals and birds, the regulation of game shooting seasons, and the constitution and powers of acclimatisation societies."
[50] Schedule 5, cl 1(2)(e).

Deficient and At-Risk species. The approach provided for in the Bill will increase the risk of species being pushed towards extinction.

101. It is inappropriate that the Ministers responsible for making decisions on approvals under the Wildlife Act are the "joint Ministers" (Transport, Regional Development and Infrastructure, acting jointly with Conservation), not the Conservation Minister alone.[51] It would be considered bizarre if the Conservation Minister were given a power of decision in relation to the other Minister's functions (e.g., under the Land Transport Management Act 2003). The approach of inserting the joint Ministers into Wildlife Act decision-making is no less strange. The clause is also inconsistent with other parts of the Bill, given that the Minister of Conservation is responsible for any approvals that would be necessary under the Conservation and Reserves Acts.[52]

102. The inclusion of access arrangements under the Crown Minerals Act 1991 as an "approval" eligible for fast tracking under the Bill is also of significant concern. Such approvals allow for access to Crown owned conservation land for mining.

103. Under current settings, open cast mining on areas listed in Schedule 4 of the Crown Minerals Act (including national parks, nature reserves, scientific reserves, wilderness areas, sanctuaries, marine reserves, Ramsar wetlands, and specific locations including large parts of the Coromandel Peninsula) cannot be granted access arrangements.[53]

104. Yet as presently drafted, the Bill would allow for such activities to be referred to panels. Clause 18(f) of the Bill provides that the following is not eligible for referral:

> "*an activity that would require an access arrangement under section 61 or 61B of the Crown Minerals Act 1991 for an area for which a permit cannot be granted under that Act.*"

105. Activities requiring an access arrangement are only ineligible for referral under the Bill where they are on land where a "permit" cannot be granted. Permits are defined under the Crown Minerals Act as "a prospecting permit, an exploration permit, or a mining permit".[54] There is nothing in the Crown Minerals Act that prevents such permits being granted for Schedule 4 land. Only *access arrangements* – a quite different type of approval – cannot be granted for such land.[55]

106. This means that the Bill would allow proposals to mine any Schedule 4 land – including on the Coromandel Peninsula, where bespoke protections around mining were hard fought decades ago – to be referred to a consenting panel. It may even allow referral of proposals to mine in national parks and marine reserves.[56] The only land category obviously protected is national

[51] Schedule 5, cl 2.
[52] Under Schedule 4.
[53] Crown Minerals Act 1991, s 61(1A). See also sections 53 and 54.
[54] Crown Minerals Act 1991, s 2.
[55] See Crown Minerals Act 1991, s 61(1A). Indeed, section 61(1) of the Crown Minerals Act states that access arrangements can be made "by agreement with the permit holder concerned" – meaning that such a person already holds a permit.
[56] It is not completely clear whether, by virtue of clause 10 of the Bill, this would extend to access arrangements for mining in national parks or marine reserves. Clause 10 states the Act applies "if 1 or more of the following (the *approvals*) are required for a proposed listed project or proposed referred project". The National Parks Act and Marine Reserves Act are not listed in this list. However, the actual authorisation (an access arrangement) is an approval under the Crown Minerals Act, which *is* provided for in clause 10.

reserves under the Reserves Act, which are not mentioned in Schedule 4 of the Crown Minerals Act and therefore have their own bespoke sub-clause preventing their referral.[57]

107. The environmental impacts *of* mining operations are generally assessed and controlled under the RMA, not the Crown Minerals Act, but this is no safeguard – RMA consents for mining are also potentially eligible for referral, and (as explored earlier) have significant issues.

108. A charitable interpretation would be that the effect of clause 18(f) is the unintentional result of poor drafting, as it would risk being able to refer proposals to mine even in national parks and marine reserves. Such an outcome would be outrageous. Perhaps the intention was for the term "permit" in clause 18(f) to be used in the more general sense of an "approval", encompassing where *access arrangements* cannot be granted. If it is a drafting error, it is one with significant consequences.

109. It is also anomalous that mining on Schedule 4 land is potentially eligible for referral, but *other* activities (e.g. primary production, housing development or activities having comparatively less impact than mining) are, by virtue of clause 18(h) of the Bill, *not* eligible.[58]

110. We also note that the Department of Conservation has had little or no input into these aspects of the Bill or provided advice to Ministers.[59] Perhaps this is why such drafting issues (if that is what they are) have arisen.

111. Overall, the Bill is a substantial watering down of our conservation laws. Given the low threshold for projects to be eligible, this could open some classes of conservation land up to all sorts of activities that are diametrically opposed to what conservation laws, strategies and plans stand for. This means that we may see coal mines, large hydro schemes, and even housing or primary production authorised on the conservation estate, with only the highest value parts of the conservation estate off limits (and even then, there is nothing to stop activities adjacent to those areas having impacts *on* them).

112. The Ministry for the Environment has stated that there will be:[60]

> "*negative impacts for other government objectives, including impacts and risks to conservation objectives and the purpose for which non-excluded conservation land is held*."

113. The Ministry also stated, despite recommending a "one stop shop" for multiple permits overall, that there were significant risks for conservation and Treaty outcomes from doing so given the lack of analysis underpinning it.[61]

The rationale for the Bill – a disproportionate and irrational response

114. The problem definition underpinning the Bill is unconvincing, based on thin evidence, and is in most respects completely unrelated to the extent of "solutions" contained in the Bill. In other

[57] Clause 18(i).
[58] Except activities on specified parts of the Coromandel Peninsula, which are specifically excluded from ineligibility.
[59] "Due to time constraints, there has been very limited analysis on the problem definition associated with conservation, heritage and public works legislation. No analysis has been provided by the Department of Conservation for the SAR on the conservation approvals contained in the fast-track regime": Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 4.
[60] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 11.
[61] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 31-32.

words, the legislative provisions go well beyond what is needed to address the problems for which there is actual evidence.

115. For example, in the problem definition there is a significant focus on infrastructure and housing, and reliance on advice from the Infrastructure Commission, but it is hard to see how this has flowed through to highly permissive consenting for almost all forms of development, including "primary industries" and "priority projects". Indeed, the Ministry for the Environment states:

> *"Most of the problems identified in this SAR have been informed by the Sapere report commissioned by Infrastructure Commission/Te Waihanga on the cost of consenting infrastructure projects in New Zealand.. It did not cover the full range of projects (housing, mining, aquaculture etc) that this fast-track regime is anticipated to support."*[62]
>
> "*Due to time constraints, there has been very limited analysis on the problem definition associated with conservation, heritage and public works legislation. No analysis has been provided by the Department of Conservation for the SAR on the conservation approvals contained in the fast-track regime… . There may be negative impacts on conservation land and wildlife outcomes which have not been quantified*."[63]

116. More generally, the Ministry's report on the Bill is replete with different versions of 'we haven't had time' and 'there has been limited analysis'. The Ministry states that analysis was not as thorough as "*would usually be expected for a Bill of this significance*".[64] No consultation was conducted on non-RMA related provisions at all. This is not the Ministry's fault. It is the product of a deficient policy process directed by Ministers. For example:

> "*The changes proposed to the Fisheries Act were a late addition to the fast-track bill and have not been considered further in the SAR due to the time available for analysis*."[65]

117. Overall, the Ministry rates the Bill most favourably compared to alternatives: "*this option best aligns with the criteria, and the policy objectives*".[66] But this is unsurprising, given that five of the seven criteria used by the Ministry to assess options are focused on achieving the Government's development-oriented policy goals.[67]

118. This overall rating hides the fact that the Bill gets a negative rating ("worse than doing nothing") on the two criteria that are about environmental risks and te Tiriti.[68] The Ministry is to be commended for its clear messages here. In particular, it notes the following about the Bill:

---

[62] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 3.
[63] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 4.
[64] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 5.
[65] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 4.
[66] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 19.
[67] The criteria are expediency, reducing costs, simplicity, certainty ("the ability of the option to provide major projects with confidence that approvals will be granted and the development can proceed"), effectiveness ("the ability of the option to prevent major projects from being delayed by rules and broader policy objectives set by resource management national direction, regional/district planning provisions, conservation statutory documents"), uphold obligations under te Tiriti, and managing risks.
[68] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 19.

"*Some of the design choices present a risk to system coherence.*"[69]

"*The net impacts are likely to be negative for broader Māori rights and interests.*"[70]

"[It] *presents a risk to the environment and the sustainable management of resources if the legislation is enabled to sidestep existing environmental protections agreed through RMA plans.*"[71]

"*There will be greater impacts on wildlife and protected species*"[72]

"*More development will occur on public conservation land.*"[73]

119. The Ministry specifically advises against taking most of the key design measures in the Bill, despite using development-focused criteria to assess those measures. For example, the Ministry's preferred option was for:

- Expert panels to be the decision-maker, not Ministers.[74]
- The purpose of the legislation to integrate environmental considerations (noting that it was constrained from considering any options that did not place development ahead of environment).[75]
- RMA instruments to retain their current level of influence over decisions (including national direction).[76]
- No projects to be "listed" in the Bill (doing so was described as being "much worse than doing nothing" for environmental risk and Treaty obligations).[77]
- Prohibited activities not to be eligible for referral under the fast-track process (unsurprisingly, making them eligible was said to be "much worse than doing nothing" in terms of environmental risk).[78]

120. EDS supports the Ministry's preferred options.

Concluding comments

121. The Bill represents a monumental shift in environmental consenting in this country. It is a radical disruption of the system which will undoubtedly lock in environmental degradation for decades to come.

122. The Bill bears little resemblance to existing fast-track processes, which are currently operating adequately.

[69] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 2.
[70] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 19.
[71] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 19.
[72] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 24.
[73] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 24.
[74] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 20.
[75] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 23.
[76] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 25-26.
[77] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 32.
[78] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 28-29.

123. It goes well beyond the problem definition of addressing New Zealand's infrastructure deficit and will enable a wide range of activities, including in the conservation estate and coastal marine area.

124. It is the worst piece of law proposed since the National Development Act 1979 (although, as pointed out at various places above, the Bill is actually *less* environmentally and constitutionally sound than that Act in many places). The National Development Act created a split in the National caucus, was seldom used due its controversial nature, and was one of the catalysts for widespread protest against constitutionally inappropriate executive behaviour. We anticipate a similar movement if this Bill is enacted.

125. We submit that the Bill should not be passed. A robust and inclusive discussion about RMA reform is instead needed.

126. Despite its name, the Bill is *not* just about making decisions faster. We would support that aspiration. It is about circumventing environmental controls to make development easier, irrespective of the cost. We do not support it.

127. EDS thanks the Select Committee for the opportunity to submit on this Bill.

128. We wish to be heard in support of our submission.

Greg Severinsen / Gary Taylor