CONSISTENCY OF FAST-TRACK APPROVALS BILL WITH OBLIGATIONS UNDER NEW ZEALAND'S FREE TRADE AGREEMENTS

1 Introduction

1.1 The purpose of this memorandum is to consider the implications of the Fast-track Approvals Bill (**Bill**) under New Zealand's free trade agreements (**FTAs**).

1.2 Specifically, it considers whether any of the Bill's provisions, and the analysis and procedure that has underpinned its formulation and introduction, may be inconsistent with those FTAs, procedurally and/or substantively.

1.3 Evidencing the considerable time constraints within which the Bill has been prepared, the Ministry for the Environment's departmental disclosure statement concedes:[1]

> *"There has not been any assessment of the policy contained in the FT Bill against New Zealand's international obligations, other than for the United Nations Convention on the Law of the Sea (UNCLOS) for which no conflicts were identified."*

1.4 The Bill has the potential to significantly impact New Zealand's environmental wellbeing, international reputation, and the many export industries that rely so critically on both. An absence of analysis against New Zealand's FTAs prior to the Bill's first reading is therefore concerning. The recent ratification of New Zealand's FTA with the European Union (**EU**) makes this absence of analysis even more extraordinary.

1.5 Trade agreements are a highly technical area of law. Although our analysis of the Bill against New Zealand's FTAs is preliminary and not exhaustive, it has been peer-reviewed by an experienced trade lawyer. We have confined its scope for the time being to the following FTAs and some headline provisions in their "Environment" (or, in the case of the EU, "Sustainable Development") chapters (annexed as **Appendix A**):

(a) NZ-UK FTA (in force);
(b) NZ-EU FTA (ratified and due to come into force on 1 May 2024); and
(c) Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**) (in force).

1.6 EDS recently made a joint submission[2] to the Ministry of Foreign Affairs and Trade's FTA Implementation Unit that a number of changes to New Zealand's environmental law and policies that the Government has already undertaken, or that are in-train or signalled, are inconsistent with New Zealand's obligations under the NZ-UK FTA. The Bill is one of those changes, and some of the analysis canvassed in that submission (annexed as **Appendix B**) is relevant to this memorandum.

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[1] https://disclosure.legislation.govt.nz/assets/disclosures/bill_government_2024_31.pdf at 3.1.
[2] With WWF-NZ, Forest & Bird, Greenpeace and Pure Advantage.

2 Summary of findings

2.1 Our preliminary analysis indicates the Bill is likely to be inconsistent with, or in breach of, general and specific commitments under the NZ-UK, NZ-EU, and CPTPP FTAs as listed below.

2.2 Some of these commitments are legally binding and subject to dispute settlement provisions, with the possibility for New Zealand's trading partners to bring a legal dispute. If New Zealand is found to be in breach of the trade agreement, and fails to bring measures into compliance, 'sanctions' can be imposed. Other commitments, whilst less strictly enforceable, may nevertheless undermine the integrity of the trade relationship where a Party acts inconsistently with them (e.g., commitments to cooperate).

2.3 Without significant amendment, we submit that the Bill could be inconsistent with, or in breach of, the:

(a) Best endeavours ***commitment to provide for a high level of environmental protection and continue to improve environmental protections***: NZ-UK FTA, Articles 22.4(2), 22.4(3); NZ-EU FTA, Articles 19.2(3), 19.2(4), 19.2(5); and CPTPP, Articles 20.3(3), 20.3(6);

(b) ***Obligation not to weaken, reduce, waive, or otherwise derogate from environmental laws to encourage trade or investment***: NZ-UK FTA, Article 22.4(3); NZ-EU FTA, Article 19.2(4); and CPTPP, Article 20.3(6);

(c) ***Requirement for evidence-based decision-making***: NZ-EU FTA, Article 19.13(1);

(d) ***Transparency obligations*** that require a reasonable opportunity for interested persons, stakeholders and the other Party to review and comment on any proposed measures that might affect the FTA's environmental provisions, or FTA generally: NZ-UK FTA, Articles 29.2(2)(b), 29.5(1); NZ-EU FTA, Article 19.14; CPTPP, Chapter 26;

(e) ***Requirement to ensure that all interested persons, including non-governmental organisations, have an early and effective opportunity, and an appropriate time period, to participate in the environmental impact assessment as well as an appropriate time period to provide comments on the environmental impact assessment report, for activities related to the production of energy goods or raw materials***: NZ-EU FTA, Article 13.8.2(a);

(f) ***Requirement to effectively implement the multilateral environmental agreements to which New Zealand is a party***: NZ-EU FTA, Article 19.5(2);

(g) ***Requirement to effectively implement the United Nations Framework Convention on Climate Change and the Paris Agreement***, including commitments with regard to nationally determined contributions, which includes the ***obligation to refrain from any action or omission that materially defeats the object and purpose of the Paris Agreement***: NZ-EU FTA, Article 19.6(2)-(3);

(h) ***Commitments to fossil fuel subsidy reform***: NZ-UK FTA, Article 22.8(2)(a); NZ-EU FTA, Article 19.7;

(i) ***Best endeavours commitment to protect and conserve endangered species and promote the conservation and sustainable use of biological diversity***: NZ-UK FTA, Article 21.12(6); NZ-EU FTA, Articles 19.8, 19.9; CPTPP, Article 20.17(4)(a), 20.17(4)(b), 20.13(3) and (5);

(j) ***Best endeavours commitment to promote sustainable agriculture and reduce agricultural emissions***: NZ-UK FTA, Article 22.10(3); and cooperative commitments in support of developing sustainable and resilient food systems: NZ-EU FTA, Article 7.1;

(k) ***Best endeavours commitment to promote the conservation and sustainable management of forests***: NZ-UK FTA, Article 22.11(2)-(3); NZ-EU FTA, Article 19.9(2)-(3); and

(l) ***Requirement to implement a precautionary, science and ecosystem-based fisheries management system, consistent with international best practice***: NZ-UK FTA, Article 22.9(4); NZ-EU FTA, Article 19.10(3); CPTPP, Article 20.16(3).

3 Analysis

FTAs: A spectrum of obligations

3.1 Free trade agreements contain a spectrum of legally binding obligations, signalled by the word "shall". (Reaffirmations, where parties merely "affirm" existing commitments made elsewhere,[3] are not legally binding.)

3.2 These legally binding obligations can be broadly categorised as follows:

(a) Best endeavour clauses (to "promote", "support", or "make efforts towards" some desirable activity);

(b) Commitments to cooperate;

(c) Commitments to take unspecified actions or measures (e.g., the parties "commit to maintain or adopt actions to combat illegal, unreported and unregulated fishing"); and

(d) Commitments that mandate specific actions or policies.

3.3 The specificity of these obligations is likely to inform the likelihood, and therefore risk, of challenge and enforceability in the event of non-compliance. That said, the risk of enforcement action being taken by a counterparty will ultimately depend on the facts of the case (and the pressure brought to bear on the complaining party to do so). A clear and egregious failure to take *any* steps may fall foul of a "best endeavours" commitment, or a commitment to take actions or measures in relation to a particular matter, albeit unspecified.

3.4 Below is our preliminary analysis of the Bill against the NZ-UK, NZ-EU, and CPTPP FTA commitments in light of this spectrum of obligations.

[3] For example, under Article 22.5 of the NZ-UK FTA where the parties affirm their commitment to effectively implement multilateral environmental agreements to which they are a party. This can be contrasted with the more directive language adopted in the NZ-EU FTA, Article 19.5.2, where the parties "shall effectively implement" the multilateral environmental agreements to which they are a party.

General commitment: Non-derogation of environmental protections

3.5 Notwithstanding recognition of the Parties' sovereign right to establish and modify levels of domestic environmental protection that they deem appropriate, the Bill is likely to be inconsistent with the general commitments common to all three FTAs:[4]

(a) To "strive" or "endeavour" to:

(i) Ensure that a Party's environmental and other relevant law and policies ***provide for, and encourage, a high level of environmental protection***; and

(ii) ***Continue to improve its level of environmental protection***;[5] and

(b) **Not to weaken, reduce, waive or otherwise derogate from its environmental laws *in order to encourage trade or investment between the Parties***.[6]

3.6 The commitment to high levels of environmental protection can be categorised as a 'best endeavours' clause. "Strive" means to "try very hard" to achieve something,[7] whilst "endeavour" means to try or attempt to do something.[8] It is a forward looking, proactive obligation. A case could be made that the Bill neither provides for nor encourages a high (let alone any) level of environmental protection.

3.7 There is also a real risk that enacting the Bill in its current form could put New Zealand in breach of the non-derogation obligation. That is because the design and structure of the Bill, particularly its legislative purpose and subordination of environmental safeguards in pursuit of it, materially constrains the ability of Ministers to give effect to environmental safeguards that would normally apply to approvals covered by the Bill.

3.8 By establishing a 'one-stop shop' for development and infrastructure projects requiring approvals across multiple 'environmental' statutes, the Bill's legislative purpose is exclusively:[9]

> *"… to provide a fast-track decision-making process **that facilitates the delivery of infrastructure and development projects with significant regional or national benefits**."*

3.9 There is no reference to, or requirement for, those projects to be 'sustainable' or subject to mandatory environmental safeguards. Indeed, the Bill sets out a hierarchy of assessment criteria for fast-track approvals which expressly requires greater weight be given to its project-delivery purpose over "considerations under other relevant legislation", including environmentally protective ones.[10]

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[4] NZ-UK FTA, Articles 22.4(2), 22.4(3); NZ-EU FTA, Articles 19.2(3), 19.2(4), 19.2(5); and CPTPP, Article 20.3(3), 20.3(6).
[5] NZ-UK FTA, Article 22.4(2); NZ-EU FTA, Article 19.2(3); and CPTPP, Article 20.3(3).
[6] NZ-UK FTA, Article 22.4(3); NZ-EU FTA, Article 19.2(4); and CPTPP, Article 20.3(6).
[7] https://dictionary.cambridge.org/dictionary/english/strive.
[8] https://dictionary.cambridge.org/dictionary/english/endeavour.
[9] Bill, clause 3. This is not surprising given the policy objectives focus on simplifying, speeding up, and making consenting less costly with an increase in favourable decisions for major projects that are deemed to have regionally or nationally significant benefits: see Ministry for the Environment, Supplementary Analysis Report, at 12, para 36. The criteria to compare policy options thus focus on a) expediency b) cost reductions c) simplicity d) certainty e) effectiveness f) upholding the Crown's Treaty obligations and g) managing risks.
[10] Bill, Schedule 3, clause 1(2), Schedule 4, clause 32(1).

3.10 That weighting is contrary to New Zealand's recognition under the NZ-UK and NZ-EU FTAs "that sustainable development encompasses economic development, social development *and* environmental protection, *all three being interdependent and mutually reinforcing*".[11]

3.11 And, in responding to the desire "to cut red tape and make it easier for New Zealand to build the infrastructure and major projects needed to get the country moving again",[12] it effectively authorises decision-makers under the Bill – principally the Ministers for Infrastructure, Transport, and Regional Development – to weaken and derogate from the higher levels of environmental protection normally applicable under the various statutes to which the Bill applies. The Ministry for the Environment's options assessment foreshadows this, observing that the Bill:[13]

> ***"… presents a risk to the environment and to sustainable management of resources if the legislation is enabled to sidestep existing environmental protections agreed through RMA Plans. There will also be greater impacts on wildlife and protected species. More development will occur on public conservation land, with associated reductions in conservation values."***

3.12 Other features of the Bill exacerbate these concerns. These are well documented in EDS's submission on the Bill (annexed as **Appendix C**) and, in summary, include:

(a) The fact that Schedule 2, Part A listed projects will automatically go to expert panels for assessment and thereby circumvent the fast-track referral process, including (seemingly) any ineligibility criteria;[14]

(b) The method by which Schedule 2, Part B listed projects will be deemed "to have significant benefits"[15] and thus eligible for referral by the Minister for fast-track approval;

(c) The focus of the mandatory eligibility criteria the joint Ministers must consider when determining a referral application, which are concerned with consistency with the legislative (pro-development) purpose, speed and cost-efficiency, and the likelihood of the project having "significant regional or national benefits";[16]

(d) The nature of the discretionary considerations to which the joint Ministers may refer when determining whether a project would have "significant regional or national benefits",[17] the measure of which is otherwise undefined and thus open to Ministerial interpretation, but which could include "support[ing] primary industries, including aquaculture" and "support[ing] development of natural resources, including minerals and petroleum";[18]

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[11] NZ-UK FTA, Article 22.3(3)(a); NZ-EU FTA, Article 19.1(2).
[12] https://www.beehive.govt.nz/release/one-stop-shop-major-projects-fast-track
[13] Ministry for the Environment, Supplementary Analysis Report, at 19 – and is thus "*worse than* doing nothing/the status quo/counterfactual".
[14] EDS submission on the Bill, paras 14 - 31.
[15] Bill, clause 12(3), EDS submission on the Bill, paras 32 – 37.
[16] Bill, clause 17(2), EDS submission on the Bill, paras 38 – 42.
[17] Bill, clause 17(3) – as opposed to addressing an evidence-based development or infrastructure need / problem.
[18] Bill, clause 17(3)(e) and (f); EDS submission on the Bill, paras 38 – 42.

(e) The express eligibility of prohibited activities (which often have significant environmental or human health effects)[19] for fast-track approval and failure to exclude from eligibility other projects that would be clearly in breach of environmental bottom lines;[20]

(f) The concentration of fast-track referral and final approval powers[21] in the "joint Ministers", who for most approvals are those responsible for infrastructure, regional development and transport. This can be contrasted with the Covid-19 fast track process for which the referring Minister was the Minister for the Environment, with assessment and final decisions made by expert consenting panels;

(g) The appointment process of expert panels which is to be undertaken "in consultation with the Minister [for Infrastructure]",[22] and for which environmental expertise is not a mandatory requirement;[23]

(h) The diluted function of expert panels to advisory bodies only, confined to making recommendations (and proposing conditions) on projects which the joint Ministers can deviate from anyway (provided "they have undertaken analysis of the recommendations and any conditions included in accordance with the relevant assessment criteria"),[24] or refer back to the panel for reconsideration;[25]

(i) The compressed timeframes within which the Bill requires panels to undertake often highly complex assessments are likely to materially constrain the integrity of the panels' recommendations and conditions; and

(j) Consultation requirements and opportunities for adequate scrutiny are disproportionately limited, irregular and unjustified (particularly in light of the extent of Executive decision-making powers and diminution of evidence-based environmental safeguards that have been developed with extensive public input), including:

i No requirement to invite comment from the Minister, Secretary, or Parliamentary Commissioner for the Environment, nor any environmental group,[26] noting that standing to appeal derives from exercising the right to comment;[27]

ii No public or limited notification requirements for Resource Management Act 1991 (**RMA**) consents nor requirement for expert panels to hold a hearing;[28] and

[19] Bill, clause 17(5). The Ministry for the Environment rated this policy option as "much worse than doing nothing/status quo/counterfactual" in its Supplementary Analysis Report, at 29.
[20] EDS submission on the Bill, paras 45 – 47.
[21] Bill, clause 25; Schedule 4, clause 40; EDS submission on the Bill, paras 71, 108.
[22] Bill, Schedule 3, clause 2(5).
[23] Bill, Schedule 3, clause 7.
[24] Bill, clause 25(4). The Ministry for the Environment has identified that this could give risk to natural justice issues if the Ministers make a decision that deviates from the expert panel recommendation without seeking views of affected parties: SAR, at 21, para 71 refers.
[25] Bill, clause 25(5).
[26] As provided for under the Covid-19 fast track process. Refer EDS submission on the Bill paras 89 – 97.
[27] Bill, clause 19(1)(b); Schedule 4, clause 20(3); EDS submission on the Bill, para 95.
[28] Bill, Schedule 4, clause 20(1), 23, though panels are required to seek comment from owners and occupiers of affected land.

iii Limited rights of appeal to determining questions of law in the High Court (rather than to the Environment Court 'on the merits') with no right of direct appeal to the Court of Appeal.

3.13 The collective effect of these features of the Bill (among others) will likely lead decision-makers to weaken or derogate from the higher levels of environmental protection that normally characterise approvals for development and infrastructure projects under the core legislation that the Bill seeks to streamline by relegating or removing them.

3.14 In doing so, the Bill could have the effect of unfairly advantaging the market-competitiveness of New Zealand export producers, thereby frustrating the underlying objective of these general environmental protection commitments in the FTAs. A primary producer who receives an approval under the Bill that does not require compliance with standard environmental safeguards may be able to produce and sell more products at a lower cost. Although New Zealand's FTAs do not explicitly incorporate subsidy disciplines from the WTO,[29] the Bill could have the effect of indirectly subsidising New Zealand exports.[30]

3.15 Articulating this point, Kerr and De Sombre note that Article XVI of the General Agreement on Tariffs and Trade is designed to preclude states:[31]

> *"… from granting any form of income or price support "which operates directly or indirectly to increase exports of any product from . . . its territory." The agreement recognizes that granting such subsidies can harm other contracting parties and "may hinder the achievement of the objectives of this Agreement" (GATT 1947, Article XVI, section a). In particular, parties are required to cease granting such subsidies, directly or indirectly, on products other than primary products, and to apply subsidies to primary products only where doing so does not result in giving that party a "more than equitable share of world export trade in that product" (GATT 1947, Article XVI, section b, part 3). Subsidies are indirectly considered as things that result "in the sale of such a product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market" (GATT 1947, Article XVI, section b, part 4). While this article was clearly not written with environmental protection measures in mind,* ***a case can be made that environmental standards lower than those in other countries provides such a subsidy by making the production process less expensive****.*

3.16 The non-derogation obligation must be supported by an intent to encourage trade or investment. Evidence of this intent is easily found in the public domain, including ministerial commentary of a desire to advance New Zealand's trade interests and export viability at the expense of "onerous, unworkable" environmental regulations.[32]

3.17 There is a credible risk that private sector interests in counter-party jurisdictions, that are subject to more stringent environmental safeguards, would take issue with this. EDS and

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[29] As per the Agreement on Subsidies and Countervailing Measures.
[30] Relatedly we note that New Zealand exporters face the possibility of risks from subsidies in the United States (under the Inflation Reduction Act) and the EU (under its Green Deal). To the extent that the Bill might have a similar effect could undermine New Zealand's credibility if we want to take issue with those or similar initiatives in the future.
[31] Dr. Suzi Kerr and Dr. Elizabeth R. De Sombre, *Motu Economic and Public Policy Research* (Wellesley College 17 June 2001) "Trade and the environment: The risks and opportunities for New Zealand associated with the relationship between the WTO and multilateral environmental agreements" – Motu Report for the Ministry for the Environment, at 2-3.
[32] See for example, Hon. Shane Jones, 12 December 2023, https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansD_20231212_20231212.

others have already raised this matter with NGO counterparts in the UK and EU to make sure they are aware of the New Zealand Government's actions.[33]

3.18 Irrespective of counter-parties' appetite to engage in consultation or other dispute settlement processes, New Zealand should expect reputational consequences - particularly if well-publicised - that inform consumer preferences for New Zealand export products and services, including for tourism. The effect of reputational risks for "NZ Inc." and the wider economy should not be underestimated.

General commitments: Evidence-based measures and procedural transparency

3.19 The Bill is likely to be inconsistent with requirements for evidence-based decision-making under Article 19.13(1) of the NZ-EU FTA, which requires that:

> *"When establishing or implementing measures aimed at protecting the environment… that may affect trade or investment,* ***each Party shall take into account available scientific and technical information, relevant standards, guidelines or recommendations.****"*

3.20 The speed with which the Bill has been developed has significantly curtailed opportunities for consultation and compromised the evidentiary justification for many of the features detailed above. This is evidenced throughout the Ministry for the Environment's Supplementary Analysis Report (**SAR**) and Disclosure Statement on the Bill.

3.21 The time constraints within which officials were evidently operating means:

(a) "[S]ome of the policy design choices present a risk to system coherence";[34]

(b) The problem definition was developed by reference to infrastructure projects and only focused on RMA matters, not to approvals under other legislation. As a result, the SAR acknowledges that: [35]

> *"… the challenges/barriers posed specifically by conservation and heritage approvals are not well understood. There may be negative impacts on conservation land and wildlife outcomes which have not been quantified";*

(c) The late addition of changes to the Fisheries Act to the Bill "have not been considered";[36]

(d) Limited data and evidence was available to assess policy proposals: "Ideally, we would have undertaken an analysis looking at the wider scope of options, impacts and spill-over effects of the policy";[37]

[33] https://newsroom.co.nz/2024/03/27/lack-of-trade-advice-on-fast-track-bill-shows-reckless-disregard/
[34] SAR, at 2.
[35] Ministry for the Environment, SAR: Fast-track Approvals Bill, 29 February 2024, at 4.
[36] SAR, at 4.
[37] SAR, at 4.

(e) Consultation and analysis "have been done in a compressed timeframe"[38] and concurrently, with no consultation having occurred on policy proposals for including non-RMA legislation.[39] The SAR notes that:[40]

> *"The relatively tight timeframe together with the complexity of the policy proposals for the fast-track regime means that some interested parties have not had sufficient time to make comprehensive submissions";*

and that:[41]

> *"Feedback from our engagement has emphasised that the tight timeframes and lack of opportunity to garner views on specific policy proposals (as they were being concurrently developed) has impacted the ability to provide comment.* ***The analysis therefore is unable to be as detailed or thorough in relation to the consulted criterion for SAR as would usually be expected for a Bill of this significance****."*

3.22 It is important within this context that several key aspects of the Bill's architecture do not reflect the Ministry for the Environment's preferred options. Instead, key aspects of the Bill have been developed under Ministerial direction despite official advice to the contrary. For example, the Ministry advised that:

(a) Expert panels should be the substantive and final decision-maker for approvals because they have expert knowledge and are independent (and therefore pose less legal risk than Ministerial decision-making);[42]

(b) The legislative purpose should still take into account the sustainable management of natural and physical resources for current and future generations, albeit "to a lesser extent";[43]

(c) Established environmental protections under other legislation should continue to have the same level of direction on decision-making that they currently have, better reflecting the local voice that has contributed to the development of national direction and local plans;[44]

(d) Prohibited activities should remain ineligible for fast-track referral;[45] and

(e) The Bill should not list projects in its schedule(s).[46]

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[38] SAR, at 5.
[39] SAR, at 5.
[40] SAR, at 5.
[41] SAR, at 5.
[42] SAR, at 20. We note that, in support of promoting integrity among public officials, Article 26.8 of the CPTPP requires each Party to "promote, among other things, integrity, honesty and responsibility among its public officials" and to this end, to try to maintain "measures to promote transparency in the behaviour of public officials in the exercise of public functions." Given the extent of Executive decision-making power under the Bill and limited opportunities for public oversight or accountability, we think there is considerable risk to the promotion of transparency in the behaviour of public officials in the exercise of public functions under the Bill, including pursuant to the currently opaque process by which projects will be listed under Schedule 2.
[43] SAR, at 23, para 74.
[44] SAR, at 25, 27.
[45] SAR, at 28.
[46] SAR, at 32.

3.23 The Government should also be mindful of the transparency obligations under the three FTAs, which are a cornerstone of free trade relations and cooperation.

3.24 These obligations require, to the extent possible and appropriate, a reasonable opportunity for interested persons, stakeholders and (the) other Parties/y to comment on any proposed laws that apply to matters covered by their FTAs.[47] That includes (under the NZ-UK FTA) providing information regarding "any proposed or actual measures [that a Party considers] may materially affect the operation of [the] Agreement, or otherwise substantially affect the other Party's interests" thereunder.[48]

3.25 As noted in EDS's joint submission on the implementation of the Environment Chapter of the NZ-UK Free Trade Agreement (refer Appendix B), the Government's suspension or truncation of normal regulatory impact analysis processes for the Bill means that Ministers, interested persons and the wider public do not have visibility of the key consequences of proposed changes, including costs, benefits, other impacts, and a comparison against alternatives.[49]

Specific commitments

*Opportunity for "all interested persons" to comment on environmental impact assessments (**EIAs**) for activities related to the production of energy goods or raw materials*

3.26 Article 13.8(1) of the NZ-EU FTA provides that:

> *"Each Party shall ensure that its laws and regulations require an environmental impact assessment for activities related to [the] production of energy goods or raw materials, where such activities may have a significant impact on the environment."*

The Annex 13[50] list of "energy goods" and "raw materials" includes (the mining/extraction of) coal, oil, gas, and a range of chemicals, minerals, and precious and base metals.

3.27 Article 13.8(2) further provides that:

> ***"With respect to the environmental impact assessment referred to in paragraph 1, each Party shall, as required by its laws and regulations:***
>
> ***(a) ensure that all interested persons, including non-governmental organisations, have an early and effective opportunity, and an appropriate time period, to participate in the environmental impact assessment as well as an appropriate time period to provide comments on the environmental impact assessment report."***

3.28 "Ensure" means to "make something certain to happen".[51] The Bill does not *ensure* that all interested persons, *including non-government organisations* can participate in and comment on EIAs (that relate to the production of energy goods or raw materials). It is therefore likely that the Bill is inconsistent with this obligation.

[47] NZ-UK FTA, Article 29.2(2)(b); NZ-EU FTA, Article 19.14; CPTPP, Chapter 26.
[48] NZ-UK FTA, Article 29.5(1).
[49] Refer Appendix B, para 45.
[50] https://www.mfat.govt.nz/assets/Trade-agreements/EU-NZ-FTA/Annexes/Annex-13-List-of-Energy-Goods-Hydrocarbons-and-Raw-Materials.pdf
[51] https://dictionary.cambridge.org/dictionary/english/ensure.

3.29 The consultation requirements for EIAs under the Bill are open to interpretation by a project applicant. Clauses 13 and 14 of Schedule 4 of the Bill respectively set out the information required, and matters to be covered, in an EIA. The former includes "(e) identification of persons who may be affected by the activity and *any response to the views of any persons consulted, including the views of iwi or hapū that have been consulted in relation to the proposal*", and the latter "(a) any effect on the people in the neighbourhood and, if relevant, the wider community, including any social, economic, or cultural effects." The latter could arguably imply a requirement to consult, but there is no express requirement to do so. It certainly does not ensure that all interested persons, including non-governmental organisations have an opportunity to participate in the development of the EIA.

3.30 Clause 20 of Schedule 4 specifies who must or may be invited to comment on *consent applications* for listed or referred projects generally, not on EIAs specifically. That clause prohibits a panel from giving public or limited notification of applications (clause 20(1)). Although it lists who it "must" invite comments from, this does not include "all interested persons, including non-governmental organisations", though a panel "*may* invite written comments from any other person the panel considers appropriate".

3.31 Notification to all interested persons and non-governmental organisations is thus discretionary under the Bill. This is a materially different approach to that adopted in existing fast-track processes which specifically list non-government organisations as entities from which feedback on proposals should be sought.

3.32 For completeness, we interpret the qualifier in Article 13.8(2) - "*as required* by its laws and regulations" - to be more a question of 'how' the law requires such consultation rather than 'if', so that new laws and regulations relating to EIAs should provide for wide participation and feedback by interested parties (and non-government organisations).[52] That purposive interpretation ensures that EIAs are transparently derived and substantively robust.

3.33 It also best accords with the context of Article 13.8(2) and the effective operation of its other sub-clauses. For example, Article 13.8(2)(b) requires each Party to 'take into account the findings of the EIA relating to the effects on the environment prior to granting the authorisation". That provision would be deprived of any sensible, ordinary meaning (and effect) if the Parties anticipated that laws and regulations might not "require" this at all. But '*how*' exactly they might require or provide for it (like consultation) may differ as between the Parties.

3.34 Thus we do not consider that the qualifier absolves the Bill from needing to comply with Article 13.8(2).

*Effective implementation of multilateral environmental agreements (**MEAs**)*

3.35 All three FTAs record the Parties' mutual recognition of the importance of MEAs in protecting the environment. Under the NZ-UK FTA and CPTPP, New Zealand "affirms its commitment to implement the multilateral agreements to which it is a party".[53] The NZ-EU FTA is more

[52] Noting that Article 31 of the Vienna Convention on the International Law of Treaties requires that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of their object and purpose".
[53] NZ-UK FTA, Article 22.5(2), CPTPP, Article 20.4(1).

directive, requiring that the Parties "**shall effectively implement** the MEAs, their protocols and amendments that it has ratified and which have entered into force."[54]

3.36 New Zealand has ratified numerous MEAs, the effective implementation of which could be deleteriously impacted by the Bill. These include specific commitments in relation to:

(a) Conserving and protecting endangered species;[55]
(b) Protecting biodiversity and ecologically important terrestrial and marine areas;[56]
(c) The protection of wetlands;[57] and
(d) Climate change and emissions reductions.[58]

3.37 The "effective" implementation of a MEA requires that a Party's domestic legislative and policy settings are both consistent with, and give effect to, the commitments it has made as a Party to that agreement.[59] Yet the SAR concedes that no such analysis has been conducted of the Bill against New Zealand's MEAs, apart from with respect to the United Nations Convention on the Law of the Sea. This presents a concerning and glaring analytical gap that overlooks the potential for the Bill to undermine or operate contrary to MEA commitments, particularly in relation to climate change and conservation matters, which we outline below.

Climate change

3.38 New Zealand is a party to the United Nations Framework Convention on Climate Change (**UNFCCC**) and the Paris Agreement. It has set both international and domestic emissions reduction targets in support of the goal of keeping the global average temperature increase to well below 2°C above pre-industrial levels, while pursuing efforts to limit the temperature increase to 1.5°C.

3.39 Whilst, under the NZ-UK FTA, New Zealand only "affirms" its commitment to implementing the Paris Agreement "and taking action to reduce greenhouse gas emissions" with the aim of achieving its domestic net zero targets by 2050,[60] the NZ-EU FTA establishes a sanctionable commitment "to effectively implement the UNFCCC and the Paris Agreement, including commitments with regard to nationally determined contributions."[61] That commitment (in Article 19.6(2)) "includes ***the obligation to refrain from any action or omission that materially defeats the object and purpose of the Paris Agreement***" (under Article 19.6(3)).

3.40 As we note in our submission on the Bill, notwithstanding these commitments, the Bill "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

[54] NZ-EU FTA, Article 19.5(2).
[55] Including under the Convention on the International Trade in Endangered Species of wild flora and fauna (CITES), the Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention), and the Agreement on the Conservation of Albatrosses and Petrels.
[56] Under the Convention on Biological Diversity (CBD) and Kunming-Montreal Global Biodiversity Framework (GBF).
[57] Under the Convention on Wetlands (Ramsar Convention).
[58] Under the United Nations Framework Convention on Climate Change and the Paris Agreement.
[59] As per the interpretation of "as required" in Article 13.8(2) of the NZ-EU FTA discussed above, the interpretation of effective implementation proposed best aligns with Article 31(1) of the Vienna Convention on the Law of Treaties 1969, which provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given the terms of the treaty in their context and in the light of its object and purpose."
[60] NZ-UK FTA, Article 22.6(1) and (2).
[61] NZ-EU FTA, Article 19.6(2).

the Climate Change Response Act 2022 (or relevant obligations such as the Paris Agreement)."[62]

3.41 In the Ministry for the Environment's Supplementary Analysis Report, its Climate Implications of Policy Assessment (**CIPA**) Team "notes that expediting infrastructure and development through fast-track approvals could lead to significant indirect emissions impact through increased construction activity."[63] And although "[i]ndividual projects undergoing the fast-tracking approvals process may undergo an emissions impact assessment", the CIPA Team acknowledges that "this is at the Minister's discretion."[64]

3.42 A climate impact assessment, including on emissions, should be a mandatory requirement to avoid locking in avoidable emissions, whether direct or indirect. In light of the Bill's focus on development at speed, with environmental considerations being lower-order (effectively inconsequential) concerns, there seems a high likelihood such assessment, if not mandated, will simply be bypassed.

3.43 Omitting a mandatory requirement to ensure fast-tracked development and infrastructure projects will be consistent with New Zealand's domestic and international climate change obligations, including our emissions reduction targets, is likely to be inconsistent with Articles 19.6(2) and (3) of the NZ-EU FTA.

3.44 This omission is also entirely at odds with, and likely to undermine, New Zealand's global leadership role on increasing ambition on climate action through Fossil Fuel Subsidy Reform and championing the initiation of negotiations for an Agreement on Climate Change, Trade and Sustainability.

3.45 This is even more so in light of the specific reference in Clause 17(3)(f) of the Bill to supporting the development of natural resources, including "petroleum", the effect of which is that projects that "support" fossil fuel exploration and extraction "may" be considered to be regionally or nationally significant and thus eligible for fast-track referral.

3.46 Based on the best available and accepted international climate science, there is an argument to be made that enabling such a facilitative approach[65] to fossil fuel extraction, coupled with a legislative purpose and hierarchy that gives precedence to development and diminishes environmental safeguards, is likely to materially defeat the object and purpose of the Paris Agreement.[66]

3.47 If coupled with government financial guarantees to incentivise the revival of New Zealand's oil and gas sector,[67] it would also likely be in breach of its commitments to progressing the

[62] EDS submission on the Bill, at para 48 (although, of course, the joint Ministers "may", under clause 17(4)(g), consider projects that "will support climate change mitigation, including the reduction or removal of greenhouse gas emissions" to be regionally or nationally significant for the purpose of fast-track eligibility. This is impossible to reconcile with the ability for the joint Ministers to concurrently consider projects that "will support development of natural resources, including minerals and petroleum" (clause 17(4)(f)) to also be of regional or national significance.
[63] SAR, at 129.
[64] SAR, at 130.
[65] In terms of meeting the eligibility criteria for fast-track referral but also as the combined result of the Bill's facilitative purpose, absence of mandatory climate change considerations, diminution of environmental safeguards, limited opportunities for public participation, and Executive powers of override.
[66] Which requires substantial reductions in the production and consumption of fossil fuels, and an assumption of common but differentiated responsibilities.
[67] https://www.thepost.co.nz/business/350194089/shane-jones-seeks-advice-compo-oil-and-gas-firms-if-rights-extinguished

elimination of harmful fossil fuel subsidies in respect of which New Zealand has been globally advocating to reform, and slowing the transition to clean energy.[68]

Protection of wildlife and biodiversity conservation

3.48 The impact of the Bill on conservation could also be inconsistent with New Zealand's FTA obligations in relation to the protection of endangered species and conservation and sustainable use of biological diversity.

3.49 The NZ-UK FTA requires the Parties to:[69]

(a) "Take appropriate measures to protect and conserve native wild fauna and flora at risk from trade-related activities, including by taking measures to conserve the ecological integrity of specially protected areas";

(b) Promote and encourage the conservation and sustainable use of biological diversity in accordance with its law and policy; and

(c) Promote the conservation of marine ecosystems and species.

3.50 Similarly, the CPTPP commits the Parties to:

(a) "Take appropriate measures to protect and conserve wild fauna and flora that it has identified to be at risk within its territory, including measures to conserve the ecological integrity of specially protected natural areas";[70]

(b) "Maintain or strengthen government capacity and institutional frameworks to promote sustainable forest management and wild fauna and flora conservation, and endeavour to enhance public participation and transparency in these institutional frameworks";[71] and

(c) "Promote and encourage the conservation and sustainable use of biological diversity" and "recognise the importance of public participation and consultation, in accordance with [the Party's relevant] law or policy, in the development and implementation of measures concerning the conservation and sustainable use of biological diversity."[72]

3.51 Likewise, under the NZ-EU FTA, the parties shall, among other things:[73]

(a) Promote the long-term conservation and sustainable use of CITES-listed species and species that meet the criteria for listing; and

(b) Take appropriate action to conserve biodiversity when it is subject to pressures linked to trade and investment.

[68] NZ-UK FTA, Article 22.8(2)(a); NZ-EU FTA, Article 19.7.
[69] NZ-UK FTA, Article 22.12(6).
[70] CPTPP, Article 20.17(4)(a).
[71] CPTPP, Article 20.17(4)(b).
[72] CPTPP, Article 20.13(3) and (5).
[73] NZ-EU FTA, Articles 19.8 and 19.9.

3.52 Although these obligations comprise a mixture of aspirational 'best endeavours' and taking unspecified "appropriate" measures in support of a common objective,[74] it is concerning that the SAR notes that "there has been very limited analysis of including conservation approvals" (including any, seemingly, by the Department of Conservation), which "will have impacts on wildlife and conservation land" that have not been quantified.[75]

3.53 EDS's submission on the Bill identifies a number of concerns and anomalies under the Bill that are specific to conservation legislation, likely resulting from "no analysis" being "provided by the Department of Conservation for the SAR on the conservation approvals contained in the fast-track".[76] These include:

(a) That there is no longer a requirement that concessions be consistent with conservation management strategies and conservation management plans,[77] or for these instruments to be considered unless authored, co-authored or approved by Treaty settlement entities;[78]

(b) 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;[79]

(c) 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,[80] only "consideration" of this.[81] Nor is there to be public notification of applications for easements and licenses on conservation land, despite it being publicly owned;[82]

(d) The risk that enabling exchanges of conservation land for private land and money could allow short-term conservation enhancements to be considered even where the longer-term outcome is a net loss of conservation estate land;[83]

(e) Allowance for conservation covenants to be amended or revoked by the Minister of Conservation,[84] having regard to only the purpose of the Bill, the purpose of the covenant/value of the land, and whether it will compromise regionally, nationally or internationally significant values. There is no express hierarchy for these considerations, which means that the Minister could prioritise development over conservation even where values are internationally significant;

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[74] NZ-EU FTA, Article 19.8 sets out similar expectations for the mutual conservation and sustainable use of biodiversity and consistency with the Convention on the International Trade in Endangered Species of Wild Fauna and Flora and the Convention on Biological Diversity and its Protocols. As noted in para 1.3 above, it appears that time constraints have not allowed for officials to conduct any analysis of the Bill's provisions vis-à-vis New Zealand's obligations under the multilateral environmental agreements to which it is a party, other than UNCLOS.
[75] SAR, at 32.
[76] SAR, at 4.
[77] Bill, Schedule 5, clause 4(i), EDS submission on the Bill, para 100.
[78] Bill, Schedule 5, clause 6(1)(b).
[79] Bill, Schedule 5, clause 4(b), 4(g).
[80] Bill, Schedule 5, clause 4(h).
[81] Bill, Schedule 5, clause 5(a).
[82] Bill, Schedule 5, clause 4(c).
[83] Bill, Schedule 5, clause 18.
[84] Bill, Schedule 5, clause 23.

(f) The ability to provide for offsetting and even compensation for impacts on wildlife in relation to approvals under the Wildlife Act 1953,[85] which will be decided by the joint Ministers and Conservation Minister, rather than the Conservation Minister acting alone.[86] This is a major departure from that legislation, which does not allow authorisation for harm to wildlife. There are no parameters around the extent of harm that can be caused, even to Threatened, Data-Deficient and At-Risk species; and

(g) The inclusion of access arrangements under the Crown Minerals Act 1991 as an "approval" eligible for fast tracking under the Bill. Such approvals allow for access to Crown owned conservation land for mining and, as presently drafted, could potentially include areas listed in Schedule 4 of the Crown Minerals Act 1991 (including national parks, nature reserves, scientific reserves, wilderness areas, sanctuaries, marine reserves, Ramsar wetlands, and specific locations including large parts of the Coromandel Peninsula).[87]

3.54 Overall, EDS's submission concludes:[88]

> *"… 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."*

3.55 We therefore submit that the effect of the Bill's provisions on conservation and biodiversity protections are likely inconsistent with both:

(a) The general FTA 'best endeavours' commitment to maintaining high levels of environmental protection, and associated non-derogation obligations; and
(b) Specific commitments to take appropriate action to protect and conserve endangered species and biodiversity.

Sustainable agriculture, food systems and forests

3.56 As noted above in relation to specific climate change commitments, there is no requirement under the Bill to consider the effects of climate change vis-à-vis a fast-track project, nor for projects that "support primary industries" to be sustainable. Under the NZ-UK FTA, however, the parties are required to "take measures to, and promote efforts to, reduce greenhouse gas emissions from agricultural production" and to "promote sustainable agriculture and associated trade".[89] Whilst what constitutes "taking measures" is vague and therefore difficult to enforce, it is arguable that a complete *absence of* (any) such measures would not be.

3.57 The NZ-EU FTA contains a novel chapter on "Sustainable food systems" pursuant to which the Parties recognise "the importance of strengthening policies … that contribute to the development of sustainable, inclusive, healthy, and resilient food systems"[90] and agree to cooperate on topics such as:

[85] Bill, Schedule 5, clause 1(2)(e).
[86] Bill, Schedule 5, clause 2.
[87] EDS submission on the Bill explores the drafting issues in paras 109 – 115.
[88] EDS submission on the Bill, at para 118.
[89] NZ-UK FTA, Article 22.10(3).
[90] NZ-EU FTA, Article 7.1(1).

(a) Food production methods and practices which aim to improve sustainability, including organic farming and regenerative agriculture;
(b) The efficient use of natural resources and agricultural inputs, including reducing the use and risk of chemical pesticides and fertilisers, where appropriate;
(c) The environmental and climate impacts of food production, including on agricultural greenhouse gas emissions, carbon sinks and biodiversity loss; and
(d) Reducing the adverse environmental effects of policies and measures linked to the food system.

3.58 Although only cooperative in nature (making it difficult to compel compliance), the absence of any reference or requirement in the Bill to supporting "sustainable" primary production that reduces adverse environmental effects, including agricultural greenhouse gas emissions, could undermine New Zealand's integrity in terms of its intentions to comply with those cooperation commitments.

3.59 Similar arguments apply in relation to forestry. The NZ-UK and NZ-EU FTAs each acknowledge the link between deforestation, global warming and biodiversity loss.[91] Both agreements require the Parties to "promote" the conservation and sustainable management of forests and trade in forest products harvested from sustainably managed forests.[92] Although such hortatory language is ambiguous, again it seems at least arguable[93] that an absence of mandatory sustainability qualifiers in relation to "support[ing] primary industries" (the development of which can simply be deemed of "regional or national significan[ce]" pursuant to clause 17(3)(e) of the Bill) is inconsistent with such endeavour.

Sustainable fisheries and aquaculture

3.60 Under Article 22.9(4) of the NZ-UK FTA and Article 20.16(3) of the CPTPP (which apply only to fisheries), and Article 19.10(3) of the NZ-EU FTA (which applies to both fisheries and aquaculture), the Parties "shall" respectively "operate a fisheries management system" and "implement long-term conservation and management measures to ensure sustainable use of marine living resources" to "prevent overfishing and overcapacity; minimise by-catch of non-target species and juveniles; and promote the recovery of overfished stocks."[94]

3.61 Such systems or measures are to be based on the best scientific evidence available, application of the precautionary approach, internationally recognised best practices, and an ecosystem-based approach.[95]

3.62 Article 19.10(6) of the NZ-EU FTA further requires that the Parties "shall promote the development of sustainable and responsible aquaculture, taking into account its economic, social, cultural and environmental aspects, including with regard to the implementation of objectives and principles contained in the FAO Code of Conduct for Responsible Fisheries."

3.63 The subsidiarity of environmental safeguards and disregard for evidence-based policy and regulatory settings under the Bill are unlikely to ensure compliance with our free trade

[91] NZ-UK FTA, Article 22.11(2); NZ-EU FTA, Article 19.9(3);
[92] NZ-UK FTA, Article 22.11(3); NZ-EU FTA, Article 19.9(2).
[93] Based on a Vienna Convention analysis, looking at the ordinary meaning of the word "promote" along with the object, purpose, and context of the relevant provisions.
[94] NZ-UK FTA, Article 22.9(4); NZ-EU FTA, Article 19.10(3); CPTPP, Article 20.16(3).
[95] NZ-UK FTA, Article 22.9(4); NZ-EU FTA, Article 19.10(3); CPTPP, Article 20.16(3).

sustainable fisheries and aquaculture management obligations. The focus is exclusively facilitative.

3.64 Clause 17(3)(e) of the Bill provides Ministerial discretion for specific projects to be considered regionally or nationally significant for the purpose of fast-track referral eligibility. These projects include any that "support primary industries, ***including aquaculture***".

3.65 The evident policy bias toward facilitating aquaculture projects is further borne out in Clause 17(4), which provides that:

> *"A project **is considered to have significant regional or national benefits** … if it involves a resource consent application for an aquaculture activity within –*
> *(a) an aquaculture settlement area declared under section 12 of the Maori Commercial Aquaculture Settlement Act 2004 where the applicant holds the relevant authorisation; or*
> *(b) an area identified within an individual iwi settlement as being reserved for aquaculture activities."*

That is to say, such aquaculture projects can be automatically referred to a panel for assessment.

3.66 The facilitative approach toward aquaculture in particular is inconsistent with New Zealand's free trade obligations outlined above, which will be further jeopardised by the:

(a) Potential for Schedule 2, Part A projects to circumvent any environmental checks and balances in the referral assessment process (weak and subordinate as they are), notwithstanding that they might previously have been declined consent under standard RMA consenting process;[96]

(b) Primacy of the Bill's pro-development purpose over any environmental or conservation protections;

(c) Inherent decision-making bias by virtue of the portfolios for which the joint decision-making Ministers are responsible;

(d) Express bias toward facilitating aquaculture development with no sustainability caveat; and

(e) Exclusion of broader consultation on, participation in, and oversight of decision-making, or requirement that it must be evidence-based.

4 Concluding remarks

4.1 We have found that the procedural and substantive implications of the Bill in its current form could be inconsistent with New Zealand's environmental obligations under its free trade agreements with the UK, EU and under the CPTPP.

[96] Appendix B, para 38(b) refers: "Government Ministers have repeatedly intimated that an open ocean salmon farm near Stewart Island/Rakiura should be approved, notwithstanding that consent for it was declined by an independent panel of experts who determined that the proposal raised significant adverse effects on protected marine species. It is our understanding that this proposal may … be listed as an approved project in the Government's incoming 'fast-track' consenting Bill."

4.2 Even if the enforceability of the commitments, or likelihood of enforcement action being taken, thereunder are deemed questionable or low risk, we think it unwise to underestimate the reputational and associated commercial risks these inconsistencies pose to “NZ Inc”, exporters, and New Zealanders as a whole.

4.3 With increasingly environmentally astute consumer markets abroad, and a domestic citizenry dismayed by and mobilising against the Government’s evident disregard for protecting (or salvaging what remains of) New Zealand’s “clean, green” credentials, the Bill presents a very short-sighted and dangerous approach. Fast-track consenting should not and does not need to - be this way. We implore officials to withdraw or extensively revise the Bill.

APPENDIX A - SELECTED FTA ENVIRONMENT CHAPTER PROVISIONS

NZ-UK FREE TRADE AGREEMENT

CHAPTER 22 – ENVIRONMENT

Article 22.3 Context and Objectives

1 The Parties recall the Agenda 21 and the Rio Declaration on Environment and Development adopted by the UN Conference on Environment and Development in 1992, the Johannesburg Plan of Implementation of the World Summit on Sustainable Development of 2002, the Outcome Document of the UN Conference on Sustainable Development of 2012 titled The Future We Want endorsed by the UN General Assembly Resolution 66/288 adopted on 27 July 2012, and the 2030 Agenda.

2 The objectives of this Chapter are to promote mutually supportive trade and environmental policies; ***promote high levels of environmental protection*** and effective enforcement of environmental laws; ***encourage the Parties to address the urgent threat of climate change***; and enhance the capacities of the Parties to address trade or investment-related environmental issues, including through cooperation.

3 The Parties recognise that:

(a) sustainable development encompasses economic development, social development, and environmental protection, all three being interdependent and mutually reinforcing, and affirm their commitment to promote the development of international trade and investment in a way that contributes to the objective of sustainable development;

(b) enhanced cooperation to protect and conserve the environment and sustainably manage their natural resources brings benefits that can contribute to sustainable development, strengthen their environmental governance, and complement the objectives of this Agreement;

(c) the urgent need to address climate change, as outlined in the Intergovernmental Panel on Climate Change Special Report on Global Warming of 1.5°C, is a contribution to the economic, social, and environmental objectives of sustainable development; and

(d) the environment plays an important role in the economic, social, and cultural well-being of Māori in the case of New Zealand, and acknowledge the importance of engaging with Māori in the long-term conservation of the environment.

Article 22.4 General Commitments

1 The Parties recognise the sovereign right of each Party to establish its own environmental priorities and levels of environmental protection relating to the environment, including mitigation of and adaptation to climate change, and those which a Party establishes pursuant to the multilateral environmental agreements to which it is a party, and to establish, maintain, or modify its relevant law and policies accordingly.

2 Each Party shall endeavour to ensure that its environmental and other relevant law and policies provide for, and encourage, high level of environmental protection, and to continue to improve its respective level of environmental protection.

3 Without prejudice to paragraph 1, ***the Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protection afforded in their respective***

environmental laws. Accordingly, a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental laws in a manner that weakens or reduces the protection afforded in that law in order to encourage trade or investment between the Parties.

Article 22.5 Multilateral Environmental Agreements

1 The Parties recognise the important role multilateral environmental agreements play in protecting the environment, including reducing biodiversity loss and addressing climate change, and the need to enhance the mutual supportiveness between trade and environmental laws and policies.

2 ***Each Party affirms its commitment to implement the multilateral environmental agreements to which it is a party.***

Article 22.6 Climate Change

1 The Parties recognise the importance of achieving the objectives of the UNFCCC and the Paris Agreement in order to address the urgent threat of climate change, and the role of trade and investment in pursuing this objective, and commit to working together to take actions to address climate change. …

2 Accordingly, the Parties ***affirm their commitment to implement the Paris Agreement and to take action to reduce greenhouse gas emissions with the aim of strengthening the global response to climate change*** by holding the increase in global average temperature to well below 2oC above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5oC above pre-industrial levels, and their ambition of achieving their respective domestic net zero targets by 2050, and shall:

(a) ***promote the mutual supportiveness of trade, investment, and climate policies and measures***; …

3 In accordance with Article 22.19 (Cooperation) the Parties ***shall cooperate bilaterally***… on ways to mitigate and adapt to climate change, that may include:

(a) implementation of the Paris Agreement;

(b) international trade-related aspects of the fight against climate change, such as carbon leakage …; and

(e) ***policies, laws, and measures that can contribute to a reduction in greenhouse gas emissions and increased climate resilience and ways to mitigate and adapt to climate change***.

Article 22.8 Fossil Fuel Subsidy Reform and Transition to Clean Energy

1 The Parties recognise the need to reduce the use of fossil fuels and to support the global transition to clean energy in order to further the implementation of the Sustainable Development Goals of the 2030 Agenda and the objectives of the UNFCCC and Paris Agreement. The Parties further recognise that fossil fuel subsidies can distort trade and investment, disadvantage renewable and clean energy, encourage wasteful consumption, and contribute significantly to global greenhouse gas emissions.

2 Accordingly, each Party shall:

(a) ***take steps to eliminate harmful fossil fuel subsidies*** where they exist, with limited exceptions in support of legitimate public policy objectives;

(c) encourage the transition to clean energy for electricity, heat, and transport;

Article 22.9 Marine Capture Fisheries (excludes aquaculture or inland fishing)

1 The Parties recognise the importance of kaitiakitanga in conserving and sustainably managing fisheries and the mauri of marine ecosystems, and the role of trade in pursuing these objectives.

2 The Parties acknowledge their roles in the marine fisheries sector and recognise the importance of the conservation and sustainable use of fisheries resources and marine ecosystems, and the role of trade in pursuing these objectives.

3 In this regard, the Parties acknowledge that inadequate fisheries management, fisheries subsidies that contribute to overfishing and overcapacity, and illegal, unreported and unregulated (IUU) fishing threaten fish stocks, the environment, trade, and livelihoods, and recognise the need for individual and collective action to end such practices.

4 Accordingly, ***each Party shall operate a fisheries management system designed to:***

(a) prevent overfishing and overcapacity;

(b) reduce bycatch of non-target species and juveniles;

(c) promote the recovery of overfished stocks; and

(d) minimise adverse impacts on associated marine ecosystems.

Such a management system shall be based on the best scientific evidence available, the precautionary approach, an ecosystem-based approach, and internationally recognised best practices as reflected in relevant international instruments.

5 Each Party shall promote the long-term conservation of sharks, marine turtles, seabirds, marine mammals, and other species recognised as threatened in relevant international agreements to which each Party is a party.

6 The Parties recognise that the implementation of a fisheries management system that is designed to prevent overfishing and overcapacity and to promote the recovery of overfished stocks must include the control, reduction, and eventual elimination of all subsidies that contribute to overfishing and overcapacity or IUU fishing.

Article 22.10 Sustainable Agriculture

1 The Parties recognise the increasing impact that global challenges to kaitiakitanga of mauri such as land degradation, drought, the emergence of new pests and diseases, climate change, and loss of biodiversity, have on the development of productive sectors such as agriculture.

2 Recalling Sustainable Development Goal 2 of the 2030 Agenda, the Parties also recognise the importance of strengthening and implementing policies that contribute to the development of more productive, sustainable, inclusive, and resilient agricultural systems.

3 ***Accordingly, each Party shall:***

(a) take measures to, and promote efforts to, reduce greenhouse gas emissions from agricultural production; and

(b) promote sustainable agriculture and associated trade.

4 Consistent with Article 22.19 (Cooperation), the Parties shall cooperate on the development and the implementation of integrated policies that promote sustainable agriculture consistent with Sustainable Development Goal 2 and the Parties' specific circumstances. Areas of cooperation may include:

(a) encouraging sustainable methods of improving agricultural productivity;

(b) integrating the protection and sustainable use of ecosystems and natural resources in agricultural systems;

(c) adaptation and resilience to climate change in relation to agriculture; and

(d) research and collaboration on methods to measure and reduce emissions from agriculture.

Article 22.11 Sustainable Forest Management

1 The Parties recognise the importance of:

(a) kaitiakitanga in the conservation of the mauri, and the conservation and sustainable management of forests and the sustainable production of forest products in providing environmental and ecosystem services; economic and social benefits and opportunities for present and future generations including by addressing climate change and reducing biodiversity loss; and the role of trade in pursuing this objective; …

3 ***… each Party shall:***

(a) promote the conservation and sustainable management of forests;

(b) promote trade in forest products harvested in accordance with the law of the country of harvest and from sustainably managed forests;

(e) endeavour to reduce deforestation and forest degradation, including from land use and land use change.

4 In accordance with Article 22.19 (Cooperation) the Parties shall cooperate on ways to promote sustainable forest management and land use practices in support of the Sustainable Development Goals of the 2030 Agenda. …

Article 22.12 Conservation of Biological Diversity

1 The Parties recognise the role that terrestrial and marine biological diversity plays in achieving sustainable development, including through the provision of ecosystem services and genetic resources, and the importance of conservation and sustainable use of biological diversity. The Parties recognise that climate change can contribute to biodiversity loss, and that biologically diverse ecosystems including marine ecosystems can adapt better to the impacts of climate change and help to mitigate climate change through the natural sequestration and storage of carbon.

2 The Parties also recognise the importance of respecting, protecting, preserving, and in the case of New Zealand, embodying traditional lifestyles that contribute to the conservation and sustainable use of biological diversity.

3 The Parties acknowledge that threats to terrestrial and marine biological diversity include climate change, illegal take of and illegal trade in wild flora and fauna, the movement of terrestrial and aquatic invasive alien species across borders through trade-related pathways, habitat degradation and destruction, pollution, and unsustainable use.

6 Accordingly, ***each Party shall:***

(b) take appropriate measures to protect and conserve native wild fauna and flora that it has identified to be at risk including from trade-related activities within its territory, including by taking measures to conserve the ecological integrity of specially protected natural areas;

(d) promote and encourage the conservation and sustainable use of biodiversity including in trade-related activities, in accordance with its law or policy; and

(e) promote the conservation of marine ecosystems and species, including those in the areas beyond national jurisdiction.

7 In accordance with Article 22.19 (Cooperation) the Parties may cooperate on matters of mutual interest such as:

(a) protection of terrestrial and marine ecosystems and ecosystem services, including marine ecosystems and species in areas beyond national jurisdiction from trade-related impacts;

Article 22.13 Resource Efficient and Circular Economy

1 The Parties recognise that the transition towards a circular economy and greater resource efficiency can reduce adverse environmental and climate impacts of products and production processes, improve resource security, and contribute to their respective efforts to achieve their international commitments, including Sustainable Development Goal 12 of the 2030 Agenda.

4 In accordance with Article 22.19 (Cooperation) the Parties shall cooperate on ways to encourage a transition towards a resource efficient and circular economy, which may include:

(a) policies and practices to encourage the shift to a resource efficient and circular economy;

(b) promoting and facilitating trade that contributes to a resource efficient and circular economy, …

Article 22.15 Air Quality

1 The Parties recognise that air pollution is a serious threat to public health and ecosystem integrity, and note that reducing air pollution can help reduce emissions of greenhouse gases and contribute to addressing climate change and other environmental problems. Accordingly, the Parties recognise the value of an integrated approach in addressing air pollution and climate change.

2 Noting that some production, consumption, and transport activities can cause air pollution and that air pollution can travel long distances, the Parties recognise the importance of reducing domestic and transboundary air pollution, and that cooperation can be beneficial in achieving these objectives. To that end, each Party shall endeavour to reduce air pollution.

CHAPTER 29 - TRANSPARENCY

Article 29.2: Publication

1. ***Each Party shall ensure that its laws, regulations, procedures, and administrative rulings of general application with respect to any matter covered by this Agreement are promptly published, or otherwise made available, in a manner that enables interested persons and the other Party to become acquainted with them.***

2. ***To the extent possible and appropriate, each Party shall:***

> ***(a) publish at an appropriate early stage its consultation documentation***; and
>
> ***(b) provide interested persons and the other Party with a reasonable opportunity to comment or input on that consultation documentation.***

3. To the extent possible, when introducing or changing the laws, regulations, or procedures referred to in paragraph 1, each Party shall endeavour to provide a reasonable period between the date when those laws, regulations, or procedures, proposed or final in accordance with its legal system, are made publicly available and the date when they enter into force.

Article 29.5: Provision of Information

1. If a Party considers that any proposed or actual measure may materially affect the operation of this Agreement, or otherwise substantially affect the other Party's interests under this Agreement, it shall, to the extent possible, inform the other Party of the proposed or actual measure.

2. At the request of a Party, the requested Party shall endeavour to provide information and respond to questions pertaining to any proposed or actual measure that the requesting Party considers may affect the operation of this Agreement.

3. A Party shall convey any request or provide information referred to in paragraphs 1 and 2 to the other Party through its contact point.

CHAPTER 7 - SUSTAINABLE FOOD SYSTEMS

ARTICLE 7.1 Objectives

1 The Parties, recognising the importance of strengthening policies and defining programmes that contribute to the development of sustainable, inclusive, healthy, and resilient food systems, agree to establish close cooperation to jointly engage in the transition towards sustainable food systems (hereinafter referred to as "SFS").

ARTICLE 7.2 Scope

1 This Chapter applies to the cooperation between the Parties to improve the sustainability of their respective food systems.

2 This Chapter sets out provisions for cooperation in areas which can achieve more sustainable food systems.

ARTICLE 7.3 Definition of a sustainable food system

1 The Parties recognise that food systems are diverse and context-specific, encompassing a range of actors and their interlinked activities across all areas of the food system, including the production, harvesting, processing, manufacturing, transport, storage, distribution, sale, consumption and disposal of food products.

2 For the purposes of this Chapter, and acknowledging that the definition of SFS can evolve over time, the Parties consider SFS to be a food system which ensures access to safe, nutritious and sufficient food all year round in such a way that the economic, social, cultural and environmental bases to generate food security and nutrition for future generations are not compromised.

ARTICLE 7.4. Cooperation to improve the sustainability of food systems

4 The Parties shall cooperate on topics such as:

(a) food production methods and practices which aim to improve sustainability, including organic farming and regenerative agriculture, amongst others;
(b) the efficient use of natural resources and agricultural inputs, including reducing the use and risk of chemical pesticides and fertilisers, where appropriate;
(c) the environmental and climate impacts of food production, including on agricultural greenhouse gas emissions, carbon sinks and biodiversity loss;
(e) sustainable food processing, transport, wholesale, retail and food services;
(g) the carbon footprint of consumption;
(i) reduction of the adverse environmental effects of policies and measures linked to the food system; …

CHAPTER 13 – ENERGY AND RAW MATERIALS

ARTICLE 13.8. Assessment of environmental impact

1 ***Each Party shall ensure that its laws and regulations require an environmental impact assessment for activities related to production of energy goods or raw materials, where such activities may have a significant impact on the environment.***

2 With respect to the environmental impact assessment referred to in paragraph 1, each ***Party shall, as required by its laws and regulations:***

(a) ensure that all interested persons, including non-governmental organisations, have an early and effective opportunity, and an appropriate time period, to participate in the environmental impact assessment as well as an appropriate time period to provide comments on the environmental impact assessment report;

(b) take into account the findings of the environmental impact assessment relating to the effects on the environment prior to granting the authorisation;

(c) make publicly available the outcome findings of the environmental impact assessment; and

(d) identify and assess as appropriate the significant effects of a project on:
(i) population and human health;
(ii) biodiversity;
(iii) land, soil, water, air, and climate; and
(iv) cultural heritage and landscape, including the expected effects deriving from the vulnerability of the project to risks of major accidents or disasters that are relevant to the project concerned.

CHAPTER 19 - TRADE AND SUSTAINABLE DEVELOPMENT

ARTICLE 19.1 Context and objectives

2 The Parties recognise that sustainable development encompasses economic development, social development and environmental protection, all three being interdependent and mutually reinforcing.

4 The Parties recognise the urgent need to address climate change, as outlined in the Special Report on Global Warming of 1.5 °C of the Intergovernmental Panel on Climate Change, as a contribution to the economic, social and environmental objectives of sustainable development.

5 The objective of this Chapter is to enhance the integration of sustainable development, notably its environmental and social dimensions (in particular the labour aspects), in the trade and investment relationship between the Parties, including through strengthening dialogue and cooperation.

ARTICLE 19.2 Right to regulate and levels of protection

1 The Parties recognise the right of each Party to:

(a) determine its sustainable development policies and priorities;
(b) establish the levels of domestic environmental and labour protection, including social protection, that it deems appropriate; and
(c) adopt or modify its relevant law and policies.

Such levels, law and policies shall be consistent with each Party's commitment to the agreements and internationally recognised standards referred to in this Chapter.

3 Each Party shall strive to ensure that its relevant law and policies provide for, and encourage, high levels of environmental and labour protection, and shall strive to improve such levels, law and policies.

4 A Party shall not weaken or reduce the levels of protection afforded in its environmental or labour law in order to encourage trade or investment.

5 A Party shall not waive or otherwise derogate from, or offer to waive or otherwise

derogate from, its environmental or labour law in order to encourage trade or investment.

ARTICLE 19.5 Multilateral environmental agreements and international environmental governance

2 … ***each Party shall effectively implement the MEAs, their protocols and amendments that it has ratified and which have entered into force.***

ARTICLE 19.6 Trade and climate change

1 The Parties recognise the importance of taking urgent action to combat climate change and its impacts, and the role of trade in pursuing this objective, consistent with the United Nations Framework Convention on Climate Change done at New York on 9 May 1992 (hereinafter referred to as the "UNFCCC"), the purpose and goals of the Paris Agreement, and with other MEAs and multilateral instruments in the area of climate change.

2 In light of paragraph 1, each Party shall effectively implement the UNFCCC and the Paris Agreement, including commitments with regard to nationally determined contributions.

3 A Party's commitment to effectively implement the Paris Agreement under paragraph 2 includes the obligation to refrain from any action or omission that materially defeats the object and purpose of the Paris Agreement.

4 In light of paragraph 1, each Party shall:
(a) promote the mutual supportiveness of trade and climate policies and measures, thereby contributing to the transition to a low greenhouse gas emission, resource-efficient and circular economy and to climate-resilient development;

5 The Parties shall work together to strengthen their cooperation on trade-related aspects of climate change policies and measures bilaterally … Such cooperation may cover *inter alia*:
(a) policy dialogue and cooperation regarding implementation of the Paris Agreement, including with respect to means to promote climate resilience, renewable energy, low-carbon technologies, energy efficiency, sustainable transport, sustainable and climate-resilient infrastructure development, emissions monitoring, and emissions action in relation to third countries as appropriate;

ARTICLE 19.8 Trade and biological diversity

1 The Parties recognise the importance of conserving and sustainably using biological diversity and the role of trade in pursuing these objectives, consistent with relevant MEAs to which they are a party, including the Convention on Biological Diversity, done at Rio de Janeiro on 5 June 1992 (hereinafter referred to as the "Convention on Biological Diversity") and its Protocols, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, done at Washington on 3 March 1973 (hereinafter referred to as "CITES"), and the decisions adopted thereunder.

2 In light of paragraph 1, each Party shall:

(b) promote the long-term conservation and sustainable use of CITES-listed species and the inclusion of animal and plant species in the Appendices to the CITES where they meet the criteria for listing, and conduct periodic reviews …

(c) promote trade in products derived from the sustainable use of biological resources in order to contribute to the conservation of biodiversity; and

(d) take appropriate action to conserve biological diversity when it is subject to pressures linked to trade and investment …

3 The Parties recognise the importance of respecting, protecting, preserving and maintaining knowledge, innovations and practices of indigenous peoples and local communities embodying traditional lifestyles that contribute to the conservation and sustainable use of biological diversity, and the role of international trade in supporting this.

4 The Parties shall work together to strengthen their cooperation on trade-related aspects of biodiversity policies and measures bilaterally… Such cooperation may cover *inter alia*:

(b) trade and the conservation and sustainable use of biological diversity, …

ARTICLE 19.9. Trade and forests

1 The Parties recognise the importance of the conservation and sustainable management of forests for providing environmental functions and economic and social opportunities for present and future generations, and the role of trade in pursuing this objective.

2 In light of paragraph 1, ***each Party shall:***

(b) promote the conservation and sustainable management of forests and trade in forest products harvested in accordance with the law of the country of harvest and from sustainably managed forests; …

4 The Parties shall work together to strengthen their cooperation on trade-related aspects of sustainable forest management, minimising deforestation and forest degradation, forest conservation, illegal logging, and the role of forests and wood-based products in climate change mitigation and the circular and bioeconomies, bilaterally, regionally and in international fora as appropriate.

ARTICLE 19.10 - Trade and sustainable management of fisheries and aquaculture

1. The Parties recognise the importance of conserving and sustainably managing marine biological resources and marine ecosystems as well as promoting responsible and sustainable aquaculture, and the role of trade in pursuing these objectives.

2. The Parties acknowledge that inadequate fisheries management, forms of fisheries subsidies that contribute to overcapacity and overfishing, and IUU fishing threaten fish stocks, the livelihood of persons engaged in responsible fishing practices and the sustainability of trade in fishery products, and confirm the need for action to end such practices.

3. In light of paragraphs 1 and 2, each Party shall:

(a) implement long-term conservation and management measures to ensure sustainable use of marine living resources based on the best scientific evidence available, the application of the precautionary approach and internationally recognised best practices consistent with relevant United Nations and FAO agreements, in order to:

(i) prevent overfishing and overcapacity;

(ii) minimise by-catch of non-target species and juveniles; and

(iii) promote the recovery of overfished stocks;

(b) participate constructively in the work of the regional fisheries management organisations (hereinafter referred to as "RFMOs") of which they are members, observers or cooperating non-contracting parties, with the aim of achieving good fisheries governance and sustainable fisheries, such as through the promotion of scientific research and the adoption of conservation measures based on best available science, the strengthening of compliance mechanisms, the undertaking of periodic

performance reviews and the adoption of effective control, monitoring and enforcement of the RFMOs' management; and

(c) implement an ecosystem-based approach to fisheries management so as to ensure that negative impacts of fishing activities on the marine ecosystem are minimised, and promote the long-term conservation of marine turtles, seabirds, marine mammals and other species recognised as threatened in relevant international agreements to which it is a party.

6. ***The Parties shall promote the development of sustainable and responsible aquaculture, taking into account its economic, social, cultural and environmental aspects, including with regard to the implementation of the objectives and principles contained in the FAO Code of Conduct for Responsible Fisheries.***

7. The Parties shall work together to strengthen their cooperation on trade-related aspects of fishery and aquaculture policies and measures, bilaterally, regionally and in international fora, as appropriate, including in the WTO, FAO, OECD, United Nations General Assembly, RFMOs and other multilateral instruments in this field, with the aim of promoting sustainable fishing practices and trade in fish products from sustainably managed fisheries.

ARTICLE 19.13 Scientific and technical information

1. When establishing or implementing measures aimed at protecting the environment or labour conditions that may affect trade or investment, ***each Party shall take into account available scientific and technical information, relevant international standards, guidelines or recommendations.***

ARTICLE 19.14 Transparency

In order to inform the development and implementation of [environmental protection] measures, each Party shall, to the extent possible and appropriate, provide interested persons and stakeholders with a reasonable opportunity to comment on:

(a) measures aimed at protecting the environment or labour conditions that may affect trade or investment; and

(b) trade or investment measures that may affect the protection of the environment or labour conditions.

CHAPTER 20 - ENVIRONMENT

Article 20.2: Objectives

1. The objectives of this Chapter are to promote mutually supportive trade and environmental policies; promote high levels of environmental protection and effective enforcement of environmental laws; and enhance the capacities of the Parties to address trade-related environmental issues, including through cooperation.

2. Taking account of their respective national priorities and circumstances, the Parties recognise that enhanced cooperation to protect and conserve the environment and sustainably manage their natural resources brings benefits that can contribute to sustainable development, strengthen their environmental governance and complement the objectives of this Agreement.

3. The Parties further recognise that it is inappropriate to establish or use their environmental laws or other measures in a manner which would constitute a disguised restriction on trade or investment between the Parties.

Article 20.3: General Commitments

1. The Parties recognise the importance of mutually supportive trade and environmental policies and practices to improve environmental protection in the furtherance of sustainable development.

2. The Parties recognise the sovereign right of each Party to establish its own levels of domestic environmental protection and its own environmental priorities, and to establish, adopt or modify its environmental laws and policies accordingly.

3. Each Party shall strive to ensure that its environmental laws and policies provide for, and encourage, high levels of environmental protection and to continue to improve its respective levels of environmental protection.

6. Without prejudice to paragraph 2, the Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protection afforded in their respective environmental laws. Accordingly, a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental laws in a manner that weakens or reduces the protection afforded in those laws in order to encourage trade or investment between the Parties.

Article 20.4: Multilateral Environmental Agreements

1. The Parties recognise that multilateral environmental agreements to which they are party play an important role, globally and domestically, in protecting the environment and that their respective implementation of these agreements is critical to achieving the environmental objectives of these agreements. Accordingly, ***each Party affirms its commitment to implement the multilateral environmental agreements to which it is a party.***

2. The Parties emphasise the need to enhance the mutual supportiveness between trade and environmental law and policies, through dialogue between the Parties on trade and environmental issues of mutual interest, particularly with respect to the negotiation and implementation of relevant multilateral environmental agreements and trade agreements.

Article 20.7: Procedural Matters

1. Each Party shall promote public awareness of its environmental laws and policies, including enforcement and compliance procedures, by ensuring that relevant information is available to the public.

2. Each Party shall ensure that an interested person residing or established in its territory may request that the Party's competent authorities investigate alleged violations of its environmental laws, and that the competent authorities give those requests due consideration, in accordance with the Party's law.

3. Each Party shall ensure that judicial, quasi-judicial or administrative proceedings for the enforcement of its environmental laws are available under its law and that those proceedings are fair, equitable, transparent and comply with due process of law. Any hearings in these proceedings shall be open to the public, except when the administration of justice otherwise requires, and in accordance with its applicable laws.

4. Each Party shall ensure that persons with a recognised interest under its law in a particular matter have appropriate access to proceedings referred to in paragraph 3.

Article 20.13: Trade and Biodiversity

1. The Parties recognise the importance of conservation and sustainable use of biological diversity and their key role in achieving sustainable development.

2. Accordingly, **each Party shall promote and encourage the conservation and sustainable use of biological diversity, in accordance with its law or policy.**

3. The Parties recognise the importance of respecting, preserving and maintaining knowledge and practices of indigenous and local communities embodying traditional lifestyles that contribute to the conservation and sustainable use of biological diversity.

5. The Parties also recognise the importance of public participation and consultation, in accordance with their respective law or policy, in the development and implementation of measures concerning the conservation and sustainable use of biological diversity. Each Party shall make publicly available information about its programmes and activities, including cooperative programmes, related to the conservation and sustainable use of biological diversity.

6. Consistent with Article 20.12 (Cooperation Frameworks), the Parties shall cooperate to address matters of mutual interest. Cooperation may include, but is not limited to, exchanging information and experiences in areas related to:

(a) the conservation and sustainable use of biological diversity;

(b) the protection and maintenance of ecosystems and ecosystem services; and

(c) access to genetic resources and the sharing of benefits arising from their utilisation.

Article 20.15: Transition to a Low Emissions and Resilient Economy

1. The Parties acknowledge that transition to a low emissions economy requires collective action.

2. The Parties recognise that each Party's actions to transition to a low emissions economy should reflect domestic circumstances and capabilities and, consistent with Article 20.12 (Cooperation Frameworks), Parties shall cooperate to address matters of joint or common interest. Areas of cooperation may include, but are not limited to: energy efficiency; development of cost-effective, low emissions technologies and alternative, clean and renewable energy sources; sustainable transport and sustainable urban infrastructure development; addressing deforestation and forest degradation; emissions monitoring; market and non-

market mechanisms; low emissions, resilient development and sharing of information and experiences in addressing this issue. Further, the Parties shall, as appropriate, engage in cooperative and capacity-building activities related to transitioning to a low emissions economy.

Article 20.16: Marine Capture Fisheries (excluding aquaculture)

1. The Parties acknowledge their role as major consumers, producers and traders of fisheries products and the importance of the marine fisheries sector to their development and to the livelihoods of their fishing communities, including artisanal or small-scale fisheries. The Parties also acknowledge that the fate of marine capture fisheries is an urgent resource problem facing the international community. Accordingly, the Parties recognise the importance of taking measures aimed at the conservation and the sustainable management of fisheries.

2. In this regard, the Parties acknowledge that inadequate fisheries management, fisheries subsidies that contribute to overfishing and overcapacity, and illegal, unreported and unregulated (IUU) fishing can have significant negative impacts on trade, development and the environment and recognise the need for individual and collective action to address the problems of overfishing and unsustainable utilisation of fisheries resources.

3. Accordingly, ***each Party shall seek to operate a fisheries management system that regulates marine wild capture fishing and that is designed to:***

> ***(a) prevent overfishing and overcapacity;***
>
> ***(b) reduce bycatch of non-target species and juveniles, including through the regulation of fishing gear that results in bycatch and the regulation of fishing in areas where bycatch is likely to occur; and***
>
> ***(c) promote the recovery of overfished stocks for all marine fisheries in which that Party's persons conduct fishing activities.***

Such a management system shall be based on the best scientific evidence available and on internationally recognised best practices for fisheries management and conservation as reflected in the relevant provisions of international instruments aimed at ensuring the sustainable use and conservation of marine species.

4. Each Party shall promote the long-term conservation of sharks, marine turtles, seabirds, and marine mammals, through the implementation and effective enforcement of conservation and management measures. …

5. The Parties recognise that the implementation of a fisheries management system that is designed to prevent overfishing and overcapacity and to promote the recovery of overfished stocks must include the control, reduction and eventual elimination of all subsidies that contribute to overfishing and overcapacity.

Article 20.17 Conservation and Trade

1. The Parties affirm the importance of combating the illegal take of, and illegal trade in, wild fauna and flora, and acknowledge that this trade undermines efforts to conserve and sustainably manage those natural resources, has social consequences, distorts legal trade in wild fauna and flora, and reduces the economic and environmental value of these natural resources.

2. Accordingly, ***each Party shall adopt, maintain and implement laws, regulations and any other measures to fulfil its obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).***

3. The Parties affirm the importance of combating the illegal take of, and illegal trade in, wild fauna and flora, and acknowledge that this trade undermines efforts to conserve and sustainably manage those natural resources, has social consequences, distorts legal trade in wild fauna and flora, and reduces the economic and environmental value of these natural resources.

5. ***Each Party further commits to:***

(a) take appropriate measures to protect and conserve wild fauna and flora that it has identified to be at risk within its territory, including measures to conserve the ecological integrity of specially protected natural areas, for example wetlands;

(b) maintain or strengthen government capacity and institutional frameworks to promote sustainable forest management and wild fauna and flora conservation, and endeavour to enhance public participation and transparency in these institutional frameworks; and

(c) endeavour to develop and strengthen cooperation and consultation with interested non-governmental entities in order to enhance implementation of measures to combat the illegal take of, and illegal trade in, wild fauna and flora.

CHAPTER 26 - TRANSPARENCY AND ANTI-CORRUPTION

Article 26.2: Publication

1. Each Party shall ensure that its laws, regulations, procedures and administrative rulings of general application with respect to any matter covered by this Agreement are promptly published or otherwise made available in a manner that enables interested persons and Parties to become acquainted with them.

2. To the extent possible, each Party shall:

(a) publish in advance any measure referred to in paragraph 1 that it proposes to adopt; and

(b) provide interested persons and other Parties with a reasonable opportunity to comment on those proposed measures.

3. To the extent possible, ***when introducing or changing the laws, regulations or procedures referred to in paragraph 1, each Party shall endeavour to provide a reasonable period between the date when those laws, regulations or procedures, proposed or final in accordance with its legal system, are made publicly available and the date when they enter into force.***

4. With respect to a proposed regulation of general application of a Party's central level of government respecting any matter covered by this Agreement that is likely to affect trade or investment between the Parties and that is published in accordance with paragraph 2(a), each Party shall:

(a) publish the proposed regulation in an official journal, or on an official website, preferably online and consolidated into a single portal;

(b) endeavour to publish the proposed regulation:

(i) no less than 60 days in advance of the date on which comments are due; or

(ii) within another period in advance of the date on which comments are due that provides sufficient time for an interested person to evaluate the proposed regulation, and formulate and submit comments;

(c) to the extent possible, include in the publication under subparagraph (a) an explanation of the purpose of, and rationale for, the proposed regulation; and

(d) consider comments received during the comment period, and is encouraged to explain any significant modifications made to the proposed regulation, preferably on an official website or in an online journal.

Article 26.8: Promoting Integrity among Public Officials

1. To fight corruption in matters that affect trade and investment, each Party should promote, among other things, integrity, honesty and responsibility among its public officials. To this end, each Party shall endeavour, in accordance with the fundamental principles of its legal system, to adopt or maintain:

(b) measures to promote transparency in the behaviour of public officials in the exercise of public functions;

(c) appropriate policies and procedures to identify and manage actual or potential conflicts of interest of public officials;

(d) measures that require senior and other appropriate public officials to make declarations to appropriate authorities regarding, among other things, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials;

APPENDIX B – JOINT ENGO SUBMISSION ON THE IMPLEMENTATION OF THE ENVIRONMENT CHAPTER OF THE NZ-UK FREE TRADE AGREEMENT

SUBMISSION ON THE IMPLEMENTATION OF THE ENVIRONMENT CHAPTER OF THE NZ-UK FREE TRADE AGREEMENT

on behalf of

THE ENVIRONMENTAL DEFENCE SOCIETY, ROYAL FOREST & BIRD PROTECTION SOCIETY, WWF-NEW ZEALAND, GREENPEACE AOTEAROA & PURE ADVANTAGE

Dated 12 February 2024

To:

FTA Implementation Unit
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Introduction

1. This is a joint submission to the Environment and Climate Sub-Committee (**Sub-Committee**) on the Implementation of the Environment Chapter of the NZ-UK Free Trade Agreement (**FTA**) on behalf of the Environmental Defence Society (**EDS**), Royal Forest & Bird Protection Society (**F&B**), WWF-New Zealand (**WWF-New Zealand**), Greenpeace Aotearoa (**GP**) and Pure Advantage (together, 'we').

2. EDS is a not-for-profit, environmental non-governmental organisation. It was established in 1971 and seeks to improve environmental outcomes in Aotearoa New Zealand through law and policy change. EDS has extensive experience advocating for the protection of New Zealand's indigenous biodiversity and freshwater health.

3. WWF-New Zealand is a not-for-profit, environmental non-government organisation, and part of the international environmental organisation WWF (World Wide Fund for Nature). WWF is the world's leading conservation organisation, and is active in over one hundred countries and has more than five million supporters globally. Its mission is to stop the degradation of the planet's natural environment and to build a future in which humans live in harmony with nature. It brings together individuals, communities, businesses, and government to develop and implement innovative, evidence-based solutions.

4. Globally WWF has been a leading voice on the development of tools and approaches to support a nature-positive future, particularly through the negotiation of the Kunming-Montreal Global Biodiversity Framework, as a co-founder of the Taskforce on Nature-related Financial Disclosures, and as a member and convenor of the Nature Positive Initiative.[97] In New Zealand, WWF-New Zealand advocates for the establishment of the

[97] https://www.naturepositive.org/news

enabling conditions required to support our domestic transition to a nature-positive future, and supports the uptake of nature-positive practice by industry with tools like the WWF Biodiversity Risk Filter.[98]

5. Forest & Bird, also known by its formal name as the Royal Forest and Bird Protection Society of New Zealand, is an environmental organisation specialising in the protection and conservation of New Zealand's indigenous flora and fauna and unique wild places and natural ecosystems. It is New Zealand's largest conservation organisation and has just celebrated its 100 year anniversary.

6. Greenpeace Aotearoa is an independent campaigning organisation. We use peaceful, creative confrontation to expose global environmental problems, and develop solutions for a green and peaceful future. Our goal is to ensure the ability of the earth to nurture life in all its diversity. That means we want to protect biodiversity in all its forms, prevent pollution and abuse of the earth's ocean, land, air, and freshwater, end all nuclear threats, and promote peace, global disarmament and non-violence. Greenpeace recognises Te Titiri o Waitangi signed in Te Reo Māori on 6 February 1840 as the foundation for the relationship between the Crown (and so the New Zealand Government) and the indigenous hapū of Aotearoa. Greenpeace recognises that Te Tiriti o Waitangi affirmed the sovereignty of tangata whenua.

7. Pure Advantage is a registered charity led by business leaders and supported by a collective of researchers and writers who investigate, communicate and promote opportunities for Aotearoa New Zealand to fulfil its potential for green growth.

8. WWF and Greenpeace have a presence in both parties to the FTA via WWF-New Zealand and WWF-UK and Greenpeace Aotearoa and Greenpeace UK and are interested in the implementation of the FTA from the perspective of that presence in both parties. Forest & Bird is a member of the BirdLife International network of NGOs and its UK partner is the Royal Society for the Protection of Birds and so has an interest in implementation of the FTA from its own perspective and also from a BirdLife network perspective.

Summary of submission

9. Chapter 22 of the FTA outlines the commitments made by New Zealand and the United Kingdom (**Parties**) in areas such as climate change, sustainable fisheries, conservation of biodiversity, sustainable agriculture, deforestation and the transition to clean energy. It affirms their commitments to multilateral environmental agreements (Art 22.5(2) and Art 22.6(2)), including the Paris Climate Change Agreement and the Convention on Biological Diversity, acknowledging the Parties' pivotal roles in addressing climate change and safeguarding biodiversity.

10. We submit that the actions of New Zealand's recently elected coalition Government are inconsistent with its obligations under the FTA, or that it is otherwise failing to carry out

[98] https://riskfilter.org/biodiversity/home

its obligations under the agreement. These breaches are set to continue with the Government's signalled changes to environmental law and policy.

11. The New Zealand Government has repealed key environmental Acts under urgency and intends to replace and amend evidence-based national policies that were collaboratively designed to protect nature. It is proposing law that will enable Ministers to unilaterally approve development and infrastructure projects with uncertain environmental safeguards. It has stopped a review of New Zealand's key emissions reduction tool which would have incentivised gross emissions reductions. It has scrapped several emission reductions and clean energy schemes and redirected emissions reductions funding to tax cuts. It plans to exploit the oceans and has failed to implement commitments under international agreements to protect ecologically sensitive seamounts from damaging bottom contact fishing methods.

12. In combination, the New Zealand Government's climate change and environmental law and policy changes, and those set to come, constitute a 'war on nature'. We submit that the Government's agenda to 'cut red tape' for industry and the primary sector is to give New Zealand producers a market advantage and enhance New Zealand's export competitiveness at the expense of the climate and the environment. In short, it is creating an implicit subsidy for New Zealand exports.

13. This submission details the following obligations in Chapter 22 that we consider the New Zealand Government's actions are inconsistent with or are failing to meet:

    - Art 22.4 Commitment to environmental protection
    - Art 22.6 Commitment to addressing climate change with carbon pricing
    - Art 22.8 Commitment to reforming fossil fuel subsidies and transition to clean energy
    - Art 22.9 Commitment to sustainable fisheries
    - Art 22.10 Commitment to promote sustainable agriculture
    - Art 22.12 Commitment to conserve biological diversity

14. Consequently, we ask that the Sub-Committee report to the Joint Committee that the New Zealand Government is not acting consistently with the obligations of the FTA or is otherwise failing to carry out its obligations therein.

15. We also note that the consultation offered to date in relation to the adoption of new policies and legislation fails to meet the expectations laid out in Chapter 29, including the requirements for consultation in Art 29.2 and 29.5.

Background comment and context of the development of the FTA

16. The FTA presents a significant opportunity for New Zealand to secure free trade deals with the UK. The agreement allows for the export of a diverse range of products free from customs duties and, over time, facilitates the liberalisation of other products. We strongly support New Zealand's trade relationships, recognising that they are a fundamental aspect of New Zealand's culture and critical to the national economy.

17. The FTA sets high standards to safeguard the interests of both countries. It is grounded in the key principles of *Trade for All*, emphasising economic sustainable development while taking into account the impact on the environment.[99] Inclusion of protections for New Zealand's water, climate change mitigation and enhancement of biodiversity were key themes in the public submissions on the proposal to create a *Trade for All* policy. Notably, 69% of total respondents highlighted that commitments to environmental and labour standards are of utmost importance to New Zealand's trade agreements.[100]

18. The FTA contains one of the most far-reaching Trade and Environment chapter New Zealand has ever negotiated, including commitments to take steps to eliminate fossil fuel subsidies, promote sustainable agriculture and address climate change.[101] It includes clear obligations that the Parties must comply with. The commitments canvassed in this submission all use the directive term "shall", which indicates a mandatory requirement to be consistent with or carry out the obligation.

19. Consumer preferences and supplier climate change reporting obligations (including of Scope 2 and 3 emissions) are driving these environmental obligations.

20. It is essential that the New Zealand Government complies with its obligations set out in the FTA, by retaining and implementing New Zealand's environmental laws and policies that have been designed to protect nature, including those relating to freshwater, indigenous biodiversity and climate change.

Overview of New Zealand Government's agenda

21. Since its formation in November 2023, New Zealand's new coalition Government's agenda has been one of reducing environmental protection and climate action to instead encourage trade and increase New Zealand's exports markets, including to the United Kingdom.

22. The plethora of environmental and climate law and policy changes already undertaken or proposed by the New Zealand Government are detailed in this submission. In summary, they include:

    (a) Repealing the country's most recent environmental laws and returning to a former resource management law that is widely accepted to no longer be achieving sustainable environmental outcomes or adequately facilitating development.
    (b) Pausing implementation of national policy on the protection of indigenous biodiversity and limiting its future application.

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[99] New Zealand Foreign Affairs and Trade, *Trade and Sustainable Development*, https://www.mfat.govt.nz/assets/Trade-agreements/UK-NZ-FTA/Trade-and-sustainable-development-_0.pdf
[100] Public Voice, *Trade for All - Summary of feedback,* December 2018, at 24 and 33, https://www.mfat.govt.nz/assets/Trade-General/Trade-policy/Trade-for-All-Summary-of-Feedback.pdf
[101] New Zealand Foreign Affairs and Trade New Zealand-United Kingdom FTA Key Outcomes, at 10

(c) Repealing and replacing national policy on freshwater management, including by removing the priority provided to freshwater ecological health in favour of commercial uses.
(d) Signaling the introduction of a law which will enable Ministers to green-light individual infrastructure and development projects, including export industries such as mining and aquaculture, with minimal environmental safeguards.
(e) Ceasing a review of New Zealand's main emissions reduction tool, the Emissions Trading Scheme (**ETS**), which will enable continued reliance on offsetting and planting exotic carbon forests to meet climate change commitments.
(f) Reversing New Zealand's ban on offshore oil and gas exploration and potentially providing an undefined government guarantee to explorers.
(g) Repealing the Clean Car Discount for low emission vehicles and applying road user charges on electric vehicles and plug-in hybrids.
(h) Stopping work on several public transport initiatives.
(i) Redirecting funds for climate mitigation into tax relief.
(j) Removing aquaculture regulations.
(k) Failing to implement international commitments to limit the environmental impact of bottom trawling in the South Pacific.
(l) Delaying pricing agricultural emissions and reviewing methane targets based on dubious 'science'.

23. Many of these changes are an unapologetic attempt by the New Zealand Government to expand the value of domestic exports by reducing barriers to higher production. In essence, the ability to make and sell more low-cost products (lamb and dairy particularly to the UK market).

24. For example, the newly elected Prime Minister campaigned on 'turbocharging' the primary sector[102] and boosting growth through trade.[103] The National Party's 'Getting back to farming' pre-election policy (much of which has been retained post-election) explicitly seeks to deregulate agricultural activities to increase productivity and consequently exports.[104]

25. Since forming Government, Minister of Regional Development and Oceans and Fisheries, Hon Shane Jones, regularly comments on his desire to expand the New Zealand economy at the expense of the environment and climate change action:

> *"This time around as the Fisheries Minister I'm keen to ensure that number one, we're looking after our own people, looking after jobs and opportunities for economic development to benefit New Zealand".*[105]

[102] https://www.stuff.co.nz/marlborough-express/133087645/luxon-gifted-national-party-wine-as-trade-policy-announced-in-marlborough
[103] https://www.rnz.co.nz/news/political/499827/watch-christopher-luxon-holds-media-briefing-on-trade-policy
[104] New Zealand National Party, *Getting back to farming*, https://www.national.org.nz/getting_back_to_farming
[105] https://newsroom.co.nz/2024/02/05/govt-kills-proposed-south-pacific-trawling-restrictions/

"Now of course, the perfidy didn't just stop with ETS. We've got the significant natural areas; we've got the national policy statements pertaining to biodiversity—they're gone. They will no longer have any legal impact in our rural economy, on our farmers, on our landowners—squashing the bejesus out of people's property rights. ***Similarly, we will no longer have onerous, unworkable water regulations; not only unworkable, but completely destructive of the viability of the very industry that is our key contributor in terms of export earnings****. … I am the Minister for Resources. I look forward to leading the debate changing the law, enabling gas and oil exploration, wealth development, to take place yet again in New Zealand".*[106]

26. The New Zealand Government's environmental and climate law and policy changes amount to using the commons / public good to subsidise the primary sector. For example, for more than three decades the Government's failure to adequately manage the impact of agricultural intensification (dairying particularly) on New Zealand's freshwater bodies has subsidised farmers by allowing them to externalise their environmental effects. This is a price that the New Zealand public is now paying for through significant freshwater degradation. National policy direction on freshwater management is an opportunity to turn that around and require farmers to internalise their environmental effects. However, the current Government is proposing to repeal it before it can be implemented.

27. The Government has also signalled an unwillingness to regulate to reduce the ecological footprint of commercial fisheries in New Zealand (including by failing to require best practice bycatch mitigation and delaying transparency measures because of cost concerns raised by industry). This amounts to efforts to enable New Zealand commercial fisheries to expand their export of low-cost seafood to the UK market.

Art 22.4 Commitment to environmental protection

28. Under Art 22.4(2) each Party *"shall" endeavour to ensure that its environmental law and policies provide for and encourage a high level of environmental protection and to continue to improve its respective levels of environmental protection.* The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protection afforded in their respective environmental laws. Accordingly, *the parties "shall not" waive or otherwise derogate from their environmental laws in a manner that weakens or reduces the protection afforded in that law in order to encourage trade or investment* (Art 22.4(3)).

29. We submit that the New Zealand Government's actions are clearly inconsistent with its obligations in Art 22.4 for the following reasons:

    (a) The Government has repealed the Natural and Built Environment Act 2023 and the Spatial Planning Act 2023

[106] Jones, 12 December 2023, 'Parliamentary Debates (Hansard) for Address in Reply Debate, *New Zealand Parliamentary Debates,* 772 https://www.parliament.nz/mi/pb/hansard-debates/rhr/document/HansS_20231212_057225000/jones-shane

Within weeks of taking office, the Government repealed the Natural and Built Environment Act 2023 (**NBEA**) and the Strategic Planning Act 2023 (**SPA**) under urgency and without formal public consultation. The result has meant a return to the Resource Management Act 1991 (**RMA**) as the principal law governing environmental protection and development in New Zealand.

There is broad consensus across a wide range of stakeholders, industry sectors, environmental organisations and Māori that the RMA has, amongst other things, failed to protect the environment and promote a low-carbon economy. Its effects-based regime, coupled with the inability to manage cumulative effects, has resulted in the degradation of ecosystems, loss of biodiversity and ongoing deterioration in freshwater quality. This is evidenced in successive State of the Environment reports produced by the Ministry for the Environment and Stats NZ.[107]

While the NBEA and SPA were not perfect, they represented the culmination of many years' work, and signified a major stride forward in environmental protection.

The NBEA had key provisions that would have provided a higher level of environmental protection, including:

- A purpose that prioritised the health of the natural environment.
- A shift from managing effects to focusing on outcomes.
- The requirement to establish environmental limits, beyond which environmental harm cannot occur.
- Mandatory targets for environmental restoration and improvement.
- A stronger framework for water conservation orders.
- A clear allocation of responsibility for contaminated land.

Equally, it provided a more efficient system to enable renewable electricity projects, indispensable to speed the transition to net-zero by 2050.

The SPA was designed to work alongside the NBEA, requiring each region to develop a long-term regional spatial strategy for developing land and infrastructure, integrating growth with the protection of areas with significant environmental values.

Repealing both Acts is a clear failure by the Government to improve the level of environmental protection in New Zealand. Rather, it is a step backwards to a regime that is not currently fit-for-purpose.

(b) The Government plans to repeal and replace environmental policies on freshwater management and the protection of indigenous biodiversity

[107] https://environment.govt.nz/facts-and-science/environmental-reporting/

The Government has confirmed that it intends to repeal and replace the National Policy Statement for Freshwater Management 2020 (**NPS FM**) and the National Policy Statement for Indigenous Biodiversity 2023 (**NPS IB**). Deregulating freshwater management and the protection of indigenous biodiversity will make it easier for the primary sector to produce more and cheaper exports whilst externalising their environmental effects.

National Policy Standard for Freshwater Management 2020

The NPS FM sets a national framework for how freshwater is to be managed across the country. It is founded on the principle of Te Mana o te Wai, which establishes a hierarchy whereby the health and well-being of water bodies and freshwater ecosystems is prioritised above the needs of people and commercial enterprises.

Recent reports have found that the state of New Zealand's freshwater system is under significant pressure.[108] [109] Land-based human activities (agriculture, forestry and urban expansion) are contributing to excess nutrients and sediment in waterways. This has severely impacted indigenous freshwater fish and birds with many threatened with extinction or at risk of becoming threatened. Moreover, public health has been affected by contaminants and water borne diseases in water used for recreation and drinking.

Regional councils are now in the process of implementing Te Mana o te Wai via freshwater plans. This has the potential to turn around the current state of our freshwater and the decline of freshwater species.

The Government has signalled its intention to amend the NPS FM by:

- Rebalancing Te Mana o te Wai to give greater priority to commercial freshwater uses.
- Replacing the National Environmental Standards for Freshwater.
- Allowing councils more flexibility in how they meet environmental limits.

These changes will set freshwater management back decades and ultimately result in more pollution for longer.

National Policy Statement for Indigenous Biodiversity 2023

The NPS IB was promulgated after a long process of stakeholder engagement and compromise, including with farming interests. Key to its implementation is identification of Significant Natural Areas (**SNAs**) which are areas of significant indigenous vegetation and significant habitats of indigenous fauna.

Aotearoa New Zealand has the highest proportion of threatened species in the world, with around 4,000 species considered threatened with extinction or at risk of becoming threatened. The vast majority of these species are endemic to New Zealand, meaning that if they are lost here, they will be lost forever.

The main drivers for biodiversity losses are decline and fragmentation of natural habitats due to land use change and intensification through urbanisation or agricultural development and impact of introduced species.

Much of our remaining native biodiversity is found on private land. Identifying SNAs is critical for safeguarding species in these areas as adverse effects on SNAs must be avoided.

The Government has signalled its intention to:

- Pause implementation of the NPS IB and its requirement to map SNAs.
- Undertake a broad review of the NPS IB.

These changes will weaken protection of indigenous biodiversity, particularly on private land.

[108] Ministry for the Environment and Stats NZ, *Our freshwater 2023*, April 2023

[109] LAWA, *Freshwater health monitoring results from all regions of New Zealand*, LAWA River Health – National Picture 2023, 24 October 2023 www.lawa.org.nz/explore-data/river-quality/ and LAWA Lake Health – National Picture 2023 www.org.nz/explore-data/lakes/

We have expressed our opposition to these intentions.[110] Regulation is essential to protect the environment from degradation. Both the NPS FM and the NPS IB were developed to provide a higher level of protection to two environmental domains that are currently in critical condition: freshwater and indigenous biodiversity.

(c) The Government has signalled that it will shortly introduce new a fast-track consenting law which will enable Ministers to unilaterally approve development and infrastructure, with as yet unknown environmental safeguards and limited public engagement. That includes mining and aquaculture projects which are being progressed to grow New Zealand's economy.

(d) The Government does not have any plans to improve levels of environmental protection; quite the opposite as detailed in this submission.

Art 22.6 Commitment to addressing climate change with carbon pricing

30. Under Art 22.6(2c), in pursuit of limiting average global temperature increase to 1.5^{O}C and achieving net zero by 2050, the Parties *"shall" promote carbon pricing as an effective policy tool for reducing greenhouse gas emissions efficiently*.

31. The ETS is New Zealand's primary tool for mitigating greenhouse gas emissions. New Zealander's Prime Minister has repeatedly stated that he wants the ETS to do more of the 'heavy lifting' in terms of achieving emissions reductions. However, current ETS settings are not modelled to achieve significant gross emission reductions, largely because there is no cap on removals. Its current settings prioritise net emissions reductions over gross emissions reductions and enable unlimited offsetting to achieve emissions reductions targets.

32. To address this issue, New Zealand's independent Climate Change Commission recommended a review of the ETS which the previous Government initiated and we submitted on.[111] That review proposed changes to the ETS to cap removals, which would drive greater gross emissions reductions. The current Government has stopped that review.[112]

33. Without amendment, the ETS is predicted to flood the market with removals credits by the mid 2030s, thereby tanking the carbon price and removing any incentive to reduce

[110] See, Environmental Defence Society, *Briefing for Incoming Minister for the Environment and Minister for Resource Management Reform*, December 2023, https://eds.org.nz/wp-content/uploads/2023/12/EDS-Briefing-Doc_Environment.pdf, Environmental Defence Society, *Briefing for the Incoming Minister of Conservation*, December 2023, https://eds.org.nz/wp-content/uploads/2023/12/EDS-Briefing-Doc_Conservation.pdf , media releases see, https://newsroom.co.nz/2023/12/01/new-government-crashes-environment/ and https://newsroom.co.nz/2023/12/20/more-pollution-for-longer-govt-rebalances-towards-commerce/

[111] Climate Change Commission, *2023 Advice on the direction of policy for the Government's second emissions reduction plan*, 22 November 2023, at 171

[112] https://consult.environment.govt.nz/climate/nzets-review/#:~:text=From%2019%20June%20to%2011,ETS%20review%20has%20now%20ceased.

gross emissions. No alternative process has been initiated by the current Government to address this issue.

34. We submit that the New Zealand Government's actions are therefore inconsistent with its obligations in Art 22.6.

Art 22.8 Commitment to reforming fossil fuel subsidies and transition to clean energy

35. Under Art 22.8(2) each Party *"shall" take steps to eliminate harmful fossil fuel subsidies and encourage the transition to clean energy*, including by ending direct financial support.

36. We submit that the New Zealand Government's actions are inconsistent with its obligations in Art 22.8 because:

    (a) The Government has repealed the country's current ban on offshore oil and gas exploration.

    Increasing oil and gas production is at odds with action to reduce greenhouse gas emissions and limit warming to 1.5^{O}C. The scientific evidence is unequivocal - reducing the use of fossil fuels is imperative if we are to limit global temperature to 1.5^{o}C above pre-industrial levels.

    Furthermore, reversing the ban on oil and gas exploration will slow New Zealand's transition away from fossils fuels and make it increasingly difficult to achieve net zero by 2050. The New Zealand Climate Change Commission has emphasised that achieving the country's net zero 2050 target will require a steady transformation of the energy system, where fossil fuel use is phased down and the supply and efficient use of renewable energy is maximised.[113]

    Some contend that more gas is required as a 'transition fuel'. We refute that assertion for the reasons set out in EDS's recent submission on the previous Government's Gas Transitions Plan.[114]

    (b) The Government is considering providing government guarantees to the oil and gas sector to achieve its goal of reviving the sector.[115]

    (c) The Government has repealed the 'Clean Car Discount'[116] which subsidised the purchase of electric vehicles. Electric and hybrid car sales have since

[113] Climate Change Commission, *2023 Advice on the direction of policy for the Government's second emissions reduction plan*, 22 November 2023, at 293
[114] Environmental Defence Society, *Submission on the Gas Transitions Plan Issues Paper,* 2023, https://eds.org.nz/wp-content/uploads/2023/11/EDS-Submission-.pdf
[115] https://businessdesk.co.nz/article/policy/shane-jones-explores-guarantees-for-gas-sector
[116] B, Simeon, *Bill to repeal 'Ute Tax' passed,* 14 December 2023, https://www.beehive.govt.nz/release/bill-repeal-%E2%80%98ute-tax%E2%80%99-passed

decreased.[117] The discount scheme was predicted to save between 1.1 and 2.2 million tonnes of carbon dioxide emissions from now until 2050,[118] which will need to be made up somehow by other emission reduction policies if New Zealand is to meet its net zero by 2050 goals.

(d) The Government has introduced Road User Charges for light electric vehicles and plug-in hybrids,[119] further challenging the transition of New Zealand's vehicle fleet away from fossil fuels.

(e) The Government has cancelled public transport projects promulgated under the previous Government that were well into development phases, including Auckland's Light Rail project and the Let's Get Wellington Moving project, to "reduce expenditure on cycleways".[120]

(f) The Government has determined to defund the Climate Emergency Response Fund (**CERF**) to underwrite tax relief.[121] CERF funds the implementation of New Zealand's Emissions Reduction Plan by supporting a programme of work across government and in cooperation in industry. The defunding of at least $2.5b of emissions reduction work strongly suggests this Government is resiling from New Zealand's Nationally Determined Contributions under the Paris Agreement and wider climate commitments.

(g) The Government has moved to actively encourage mining activities in New Zealand, including environmentally damaging activities on public conservation land. It has committed to changing the Crown Minerals Act so that the Government will actively 'promote' prospecting, exploration, and mining of minerals like fossil fuels. This means that New Zealand will have a net zero goal in one law and a requirement in another to promote mining fossil fuels that takes us away from that goal.

Art 22.9 Commitment to sustainable fisheries

37. Under Art 22.9(4) each Party *"shall" operate its fisheries management system to prevent overfishing, reduce by-catch, promote recovery of overfished stocks and minimise adverse impacts on marine ecosystems*. The management system "shall" be based on best scientific evidence, the precautionary approach, an ecosystem-based system and internationally recognised best practice.

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[117] https://newsroom.co.nz/2024/02/07/ev-sales-plummet-after-clean-car-discount-scrapped/; https://www.1news.co.nz/2024/02/09/electric-hybrid-vehicle-numbers-drop-after-clean-car-discount-scrapped/

[118] https://www.1news.co.nz/2024/01/19/scrapping-clean-car-discount-will-cost-twice-what-it-saves-transport-officials/; https://newsroom.co.nz/2024/01/18/ending-ev-subsidies-equal-to-extra-year-of-huntly-coal-burning/

[119] https://www.rnz.co.nz/news/political/506844/evs-plug-in-hybrids-to-pay-road-user-charges-from-1-april

[120] Coalition Agreement between the National Party and the New Zealand First Party https://www.nzfirst.nz/coalition-agreement

[121] https://www.rnz.co.nz/news/political/496899/greens-act-cry-foul-over-national-s-climate-dividend

38. We submit that the New Zealand Government's actions are inconsistent with its obligations in Art 22.9 because:

(a) Over 90% of New Zealand's seafood is exported. With a view to enabling further growth in seafood exports to key markets, including the United Kingdom, the New Zealand Government has committed to removing barriers to unlimited potential of commercial fisheries.

(b) The National and New Zealand First Coalition Agreement (2023) signals the Government's clear intent to remove regulations that "impede the productivity and enormous potential of the seafood section."[122] In some cases, this is expected to come at the expense of marine mammals and seabirds. In New Zealand, 90% of seabirds and 30% of marine mammals are threatened or at risk of extinction.

For example, Government Ministers have repeatedly intimated that an open ocean salmon farm near Stewart Island/Rakiura should be approved, notwithstanding that consent for it was declined by an independent panel of experts who determined that the proposal raised significant adverse effects on protected marine species.[123] It is our understanding that this proposal may even be listed as an approved project in the Government's incoming 'fast-track' consenting Bill discussed above.[124]

(c) The Government recently blocked the implementation of a conservation measure to restrict bottom trawling in the South Pacific, despite the South Pacific Regional Fisheries Management Organisation having taken the decision on the measure by consensus in 2023. [125]

(d) The Government still does not require the application of all three best practice seabird bycatch mitigation steps prescribed under the Agreement on the Conservation of Albatrosses and Petrels in its domestic fisheries, even though 90% of New Zealand's seabirds – many of which are endemic – are at risk of extinction.

Art 22.10 Commitment to promote sustainable agriculture

[122] Coalition Agreement between the National Party and the New Zealand First Party https://www.nzfirst.nz/coalition-agreement

[123] https://www.epa.govt.nz/news-and-alerts/latest-news/hananui-aquaculture-project-fast-track-consent-declined/

[124] Jones, 12 December 2023, 'Parliamentary Debates (Hansard) for Address in Reply Debate, *New Zealand Parliamentary Debates,* 772, https://www.parliament.nz/mi/pb/hansard-debates/rhr/document/HansS_20231212_057225000/jones-shane

[125] https://newsroom.co.nz/2023/12/21/nz-to-propose-catching-three-years-worth-of-fish-in-one-year/; https://newsroom.co.nz/2024/02/01/jones-to-make-nz-jobs-no-1-to-dismay-of-ocean-conservation-allies/; https://newsroom.co.nz/2024/02/05/govt-kills-proposed-south-pacific-trawling-restrictions/

39. Under Art 22.10(3), the Parties *"shall" take measures to promote efforts to reduce greenhouse gas emissions from agricultural production and promote sustainable agriculture and associated trade.*

40. We submit that the New Zealand Government's actions are inconsistent with its obligations in Art 22.10 because:

    (a) The Government has decided not to price agricultural emissions until 2030, despite agricultural emissions accounting for 49% of New Zealand's emissions. It is the only sector in New Zealand that does not account for its emissions.

    (b) The Government has undertaken to review the methane science and targets in 2024 for consistency with no additional warming from agricultural methane emissions.

        'No additional warming' is not a suitable target for agricultural methane. It is a misreading of the science and economic drivers to conclude that real emissions reductions of methane are not required. They are required if New Zealand is to meet its emissions reductions obligations, maintain its reputation as a good global citizen and retain market access.

        In New Zealand, 91% of biogenic methane emissions are from the agricultural sector. The reduction of agricultural methane emissions is paramount for mitigating New Zealand's contribution to global warming.

        If the agricultural sector does not pull its weight, that burden will fall on other sectors of the economy and on taxpayers. It would be a massive subsidy.

    (c) As detailed above, the Government intends to repeal and replace national direction on freshwater management which would have (if left to be implemented) required transformation of New Zealand's agriculture sector, towards more sustainable practices.

        Over the last three decades, New Zealand has witnessed a surge in agricultural intensification. As water underpins primary production, especially dairying, this land use change has significantly impacted the health of the country's rivers, lakes, aquifers, and freshwater species. Regulation is required to address these historical issues but it is being cut for export and trade benefits.

Article 22.12 Commitment to conserve biological diversity

41. Under Art 22.12, the Parties "shall":

- Take appropriate measures to protect and conserve native wild fauna and flora that it has identified to be at risk … including by taking measures to conserve the ecological integrity of specially protected natural areas.
- Promote and encourage the conservation and sustainable use of biodiversity.
- Promote the conservation of marine ecosystems and species, including those in the areas beyond national jurisdiction.

42. We submit that the New Zealand Government's actions are inconsistent with its obligations in Art 22.12 because:

    (a) The Government repealed the NBEA which included biophysical (ecological) bottom lines which development had to adhere to.

    (b) The Government is proposing to pause implementation of the NPS IB and review it. The NPS IB is crucial policy that responds to New Zealand's biodiversity loss. It provides direction to councils to map areas of ecological significance and manage the adverse effects of human activities on flora and fauna within these areas, thereby protecting and restoring indigenous biodiversity. The NPS IB has a particular focus on protecting and avoiding adverse effects on species listed as Threatened or At Risk in New Zealand's Threat Classification System. New Zealand's flora and fauna is unique and highly endemic and some 4,000 species are threatened or at risk across multiple domains. Without the NPS IB, protection of indigenous flora and fauna on private land will be *ad hoc*, patchy and ineffective.

    (c) The Government's decision to review and replace the NPS FM and change the hierarchy of obligations comprised in Te Mana o te Wai undermines the protection of freshwater indigenous biodiversity. The NPS FM requires limits on contaminant loading and water takes to ensure that water bodies can support healthy ecosystems. This includes providing appropriate habitat of indigenous freshwater species and ensuring there is an abundance and diversity of biota living in the water body, including microbes, invertebrates, plants, fish and birds.

    (d) The Government blocked the implementation of a decision taken by consensus at an international fisheries forum to protect at least 70% of ecologically vulnerable seamounts in the South Pacific from the destructive impact of bottom trawling.

Transparency

43. Chapter 29 (Transparency) of the FTA contains provisions that commit both parties to the promotion of transparency in government decision-making, and encourage the participation of the private sector and civil society in these pursuits. We consider that the provisions of this chapter have been infringed by New Zealand's changes to environmental and climate law and policy.

44. First, the Government has suspended Regulatory Impact Statements (**RIS**) for some proposals in its 100-day plan, meaning the changes will not be subject to proper process before becoming law. For other proposals in the 100-day plan, where RISs are preserved, their quality assurance requirement has been removed.

45. The purpose of the RIS system is to ensure Ministers and the wider public are aware of key consequences of proposed changes, including costs, benefits and other impacts. This shift has meant that the repeal of the NBEA and SPA was not subject to an appropriate level of regulatory scrutiny.

46. Second, the pace at which the Government is seeking to action its programme of environmental deregulation is such that there is insufficient opportunity for meaningful participation during the genesis of the policy by the private sector or civil society (for example, the proposed fast-track consenting law).

47. The consequence of these two actions by the New Zealand Government is that the requirements of Art 29.2.2 to publish at an early-stage consultation documentation to enable the UK Government and any interested parties to have a reasonable opportunity to comment has not been fulfilled for the removal of the electrical vehicle incentive, the removal of the Auckland regional fuel tax or for changes to domestic planning law.

48. Where a party seeks to make changes to policy, law or regulations that affect the operation of environmental provisions of the FTA there should be sufficient time allowed to enable the other party to consult the civil society organisations of the other party on the implications of the change. Where these changes are likely to result in an increase in the externalisation of the environmental cost of production the party seeking to make changes to law, policy and regulation should allow sufficient time to also seek input from companies with a presence in the other party that may be adversely affected by unfair competition arising from lowered environmental standards. This is particularly important to enable an effective and appropriate implementation of Art 19.5 on consultation between parties.

Repercussions of failing to uphold commitments

49. Failure to comply with obligations of the FTA can lead to various consequences for the Parties, from procedural issues to potential impacts on trade relations between countries.

50. Should the Parties fail to fulfill their obligations and commitments, the Joint Committee will take the necessary actions to address the differences between them, including resorting to Dispute Settlement procedures. The Environment Chapter is enforceable through the FTA's dispute settlement provisions.

51. Failure to comply with the FTA not only poses the risk of Dispute Settlement but also has the potential to create diplomatic tensions, prompt legal action and lead to economic consequences. Both Parties must uphold their environmental obligations to avoid the

risk of damaging trade relationships, eroding trust among market participants and citizens, and calling into question the Parties' international reputation.

Conclusion

52. For the reasons set out in this submission, we submit that the New Zealand Government is not acting consistently with the obligations of the FTA or is otherwise failing to carry out its obligations therein, specifically in relation to Articles 22.4, 22.6, 22.8, 22.9, 22.10 and 22.12. We ask that the Sub-Committee report to the Joint Committee accordingly. If there are opportunities to be heard in support of this submission, we seek to do so.

APPENDIX C – EDS SUBMISSION ON THE FAST-TRACK APPROVALS BILL

Environmental Defence Society submission on the Fast-track Approvals Bill

SUBMITTER DETAILS

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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 as a litigator, policy think tank, and 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.[126] 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 resource management 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

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

the exact opposite and 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 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 cross-party legislation (introduced by Labour, improved and passed by National). It was evidence-based, and reflected New Zealand's international commitments, domestic environmental challenges and cultural context. EDS acknowledges the need for resource management reform. 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 business.

9. The Bill has also not been adequately considered for compliance with New Zealand's free-trade agreements, including with the UK and Europe. These agreements require that the Government upholds 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. Attached to this submission as **Annexure A** is a memorandum which analyses the Bill against environment commitments in New Zealand's free-trade agreements.

10. The Bill is contrary to the National Party's 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.

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[127]
- 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 1987, Wildlife Act 1953, Reserves Act 1977, Crown Minerals Act 1991, and Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (**EEZ Act**).
- Step 1 is where projects enter the fast-track process. There are two ways by which this can occur: Ministers can determine, upon application, whether to refer proposals to the fast-track process (certain eligibility criteria must be met, but there are additional factors which provide for ministerial discretion); projects can be listed in the Bill and given automatic entry into the process. Other projects can be listed in the Bill and not given automatic entry into the process, but their listed status has weight in a Ministerial referral decision.
- Step 2 involves consideration of the project by an independent expert panel. The panel provides recommendations (whether to grant or decline, and conditions) to Ministers.
- Step 3 involves a decision by Ministers whether to grant or decline 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. This allows for

[127] Fast-track Approvals Bill, Schedule 4

listed projects to proceed to panel consideration even if they would otherwise have been ineligible for fast-track.[128] In theory, 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. Further, for RMA approvals, criteria preventing the referral of projects are not replicated when it comes to panel recommendations and ministerial decision-making later on, meaning that projects listed in Schedule 2A do not have to be declined, by law, even if they would have been ineligible at the referral stage.

16. Given the decision-making process described below, once they are sent to panels, approval for these projects is basically guaranteed. Being listed in the Bill is therefore a significant advantage for projects. It is akin to a grant of consent.

17. No listed projects have been included in the Bill as introduced. Rather, the Government has established a Fast Track Advisory Group to consider which projects should be listed in the Bill and recommend the same to Cabinet.[129] The Advisory Group is non-statutory and entirely unregulated. That is an unacceptable position given the power of the Group to recommend projects for listing in the Bill.

18. Like the Group itself, criteria under which projects merit being listed are non-statutory. As we understand it, the criteria will be the same as the referral criteria contained in the Bill. This is a significant problem because the referral criteria in the Bill have not been confirmed and are still subject to amendment via the Select Committee and the Committee of the Whole processes. If criteria used to list projects in Schedule 2A are not the same as those used to refer projects, the new law will be internally inconsistent, with two sets of projects proceeding through fast-track processes on two different bases. Further, as discussed below, the referral criteria are woefully inadequate and are not an appropriate basis for determining eligibility for the fast-track process.

19. We are deeply concerned that this non-statutory process for listed projects will place pressure on the Select Committee to not make changes to the referral criteria. It is inappropriate to put the Select Committee in that position.

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

[128] Fast-track Approvals Bill, clauses 18 and 21
[129] Beehive media release: https://www.beehive.govt.nz/release/one-stop-shop-major-projects-fast-track

21. Cabinet will decide on the final mix of projects to be listed in the Bill, and action this via the legislative process. Current indications are that the Advisory Group will be active until July 2024 (and accepting applications until 3 May 2024).

22. Both of those dates are well after the closing date for submissions to the Select Committee, meaning that submitters will not know which projects have applied for listing let alone whether their inclusion has been recommended. A constitutionally important step in the law-making process - public submission to select committee - is simply being skipped.

23. This means that some of the most concerning aspects of the legislation - specific projects that go straight to panels - may remain completely unscrutinised by the public, and without even the weak statutory tests for referral outlined below. 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.

24. It is very unlikely that there will be time for Cabinet to make decisions on listed projects in the period between the end of the Advisory Group process (July) and the conclusion of the select committee process (likely, we understand, to be September). Even if such decisions *are* made before September, that would not provide adequate time for the Select Committee to consider Schedule 2A in any meaningful way. We understand that the actual listing of projects in Schedule 2A will only occur via supplementary order paper at the Committee of the Whole stage.

25. This is an unacceptable use of the legislative process. It means that the Select Committee, the place where detailed examination and questioning of laws is meant to occur, will not be able to scrutinise some of the most important provisions in the Bill. Instead, scrutiny will occur via a series of ten-minute speeches. It is the proper role of the Select Committee 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*.

26. 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 restart the process so it can be scrutinised in the normal way by select committee, including allowing public submissions on its entirety.

27. Ironically, 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, bypassing even a single stage of submissions to select committee.

28. 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.

29. 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.

30. The Ministry for the Environment recommended that the Bill should *not* provide for listed projects to get automatic referral, for procedural reasons (e.g. lack of transparency and iwi engagement).[130] EDS agrees.

Project eligibility - referred projects

31. 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.

32. 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 (see below).

33. Projects listed in Schedule 2B suffer from the same objections raised above with respect to Schedule 2A projects (i.e. the process for giving them a 'leg up' is undemocratic and untransparent, because they will only be inserted late in the legislative process and without public submission).

34. Additionally, we are concerned that listing in Schedule 2B may in practice become a 'fall back' option if the non-statutory Advisory Group does not have the time or capacity to consider all applications in depth by July 2024 (of which there may be hundreds). If that is the case, it would be equally inappropriate to include such projects in Schedule 2B as in Schedule 2A, since to do so would be to deem them to have met the main eligibility criterion anyway.

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

35. 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.

36. 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 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

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

38. Although the Bill contains criteria to assess whether a project would have significant regional or national benefits, the criteria are:[131]

    (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 normal processes under 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).

[131] Fast-track Approvals Bill, clause 17(3)

39. 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".

40. 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.

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

No real threshold for ineligibility on environmental grounds

42. 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.[132]

43. 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.[133] Mining on conservation land is also referred to but the effect of this is less clear, as discussed below.

44. 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".[134]

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

[132] Fast-track Approvals Bill, clause 18
[133] 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)
[134] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024)

(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);[135] or
(f) Breach international law, such as projects in the coastal marine area that are prohibited under the London Dumping Protocol.[136]

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

47. 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).

48. Ministers can refuse to refer a project, even if it meets eligibility criteria, if:[137]

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

49. 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

50. The "joint ministers" responsible for referral decisions do not include the Minister for the Environment.[138] Instead, the Ministers for Regional 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.

51. 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).

52. 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.

[135] For example, Te Waikoropupū Springs in Golden Bay
[136] 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)
[137] Fast-track Approvals Bill, clause 21(2)
[138] Despite that Minister being responsible for core legislation being overridden by the Bill

Decisions - process and decision-making criteria for RMA approvals[139]

53. 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.

54. 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).[140] Expert panels do not make final decisions. That is done by Ministers.[141]

The expert panel assessment

55. Although panels have the power to recommend that consent for a 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.

56. When making recommendations, panels must give weight "to the following matters, if relevant, in the order listed (greater to lesser)":[142]

> **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).

57. 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. It is not even qualified by any reference to traditional concepts of "costs" in economic cost-benefit analysis, including opportunity cost.

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[139] Fast-track Approvals Bill, Schedule 4
[140] See Schedule 3, cl 1(4)(b) of the Fast-track Approvals Bill. 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
[141] Fast-track Approvals Bill, cl 25, Schedule 4, cl 40
[142] Fast-track Approvals Bill, Schedule 4, cl 32

58. 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.

59. Instead, clause 32 creates a clear hierarchy that favours infrastructure and development objectives, over the sustainable management purpose and principles of the RMA.[143]

60. 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.

61. 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*[144] and *Davidson*[145] 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.[146] 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.

62. 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.

63. 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.

64. Finally, section 104D of the RMA is expressly disapplied to a panel's consideration of a resource consent for a referred project.[147] 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. And it is not

[143] This is a similar approach to legislative drafting that was used in the Housing Accords and Special Housing Areas Act 2013, but because of its much broader scope and powers, is far more significant
[144] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593
[145] *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283
[146] 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
[147] Fast-track Approvals Bill, Schedule 4, cl 35(5)

clear how prohibited activities are to be treated; the Bill is clear they can be granted consent, but not what activity status they are to be given for the purposes of assessment.

65. 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.[148]

Independence, expertise and timeframes of panels

66. Panels are to be convened by a panel convener,[149] 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.

67. 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.

68. There is also a requirement that panel conveners consult with Ministers when appointing panel members and chairs. This is unlike previous fast-track processes, where conveners had no such consultation requirement and were therefore more robustly independent. This is not to impugn the impartiality of a panel convener or any panel members; it is simply to point out that Ministers should not be put in a position where pressure can be brought to bear on the selection of panel members, since it erodes public confidence in the process.

69. The timeframes under which panels must make recommendations are unworkable.[150] From the point at which projects are referred to panels, they have a maximum of five working days to invite written comments. Ten further working days are provided for comments to be received. From that point, panels have 25 working days to issue recommendations. Panels may extend this timeframe by up to a further 25 working days if they cannot do so. Overall, panels have just 40 days (possibly extended to 65) to assess the most complex of proposals. There are no merits appeals to test the adequacy of any element of that assessment. This reinforces to us that panels are intended to be rubber stamps.

Ministerial decision-making

[148] Rather than the development-focused ones in the National Development Act itself. 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

[149] Strangely, under cl 2(5) of Schedule 3 of the Bill, the functions of the panel convenor are said to be to appoint panels for RMA approvals only, even though panels themselves are expected to make recommendations on all sorts of other approvals

[150] Fast-track Approvals Bill, clauses 20, 21, 39

70. 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.

71. The only constraint on final Ministerial decisions is that:[151]

> "*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.*"

72. 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.

73. The Ministry for the Environment considers that approval is likely to be given under this framing:[152]

> "*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*."

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

75. Direct political decision-making leaves Ministers open to considerable legal and political risk. 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). Even if this does not actually occur, the public will likely perceive this as a risk, undermining confidence in the process.

76. 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

[151] Fast-track Approvals Bill, section 25 (read in conjunction with cl 40 of Schedule 4)
[152] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 26-27

panel.[153] (And it will increase costs to the Crown, as officials would need to support the Minister in another stage of decision-making.)

77. We also note the existence of a report to the Acting Attorney-General assessing consistency with the Bill of Rights Act 1990, which concludes that the Bill appears to be consistent with its rights and freedoms, and that any limits on the right to natural justice specifically are justified under section 5 of that Act.[154] However, the report does not address the issue of potential bias (that no one may judge their own cause) as a key element of natural justice, despite referencing Legislation Guidelines that specifically address such issues.[155] Instead, it focuses only on the right to be heard.

78. 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*."

79. 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.

80. 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."[156]

81. 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.

82. 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

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

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[153] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 21
[154] Ministry of Justice *Consistency with the New Zealand Bill of Rights Act 1990: Fast-track Approvals Bill* (LPA 01 01 24) at [14], [15]
[155] Ministry of Justice *Consistency with the New Zealand Bill of Rights Act 1990: Fast-track Approvals Bill* (LPA 01 01 24) at [11], referencing Legislation Design and Advisory Committee *Legislation Guidelines* 2021 edition [4.5]
[156] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 21

84. When making referral decisions, Ministers must invite written comment from local government, other relevant Ministers and various Māori entities.[157] 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.

85. Public and limited notification of a consent application or notice of requirement is not allowed by panels.[158] 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).

86. 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. the Department of Conservation)
- Requiring authorities having designations on the land or adjacent land

87. 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.

88. 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.)

89. 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

[157] Fast-track Approvals Bill, cl 19
[158] Fast-track Approvals Bill, Schedule 4, cl 20

surprising that the Parliamentary Commissioner for the Environment does not have to be invited to comment by Ministers (referring) or panels (recommending).

90. 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.

91. 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.[159] EDS has explored these issues in its report on reforming the environmental advocacy system.[160]

92. 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.[161] This Bill appears to be intentionally designed to exclude people or groups representing the environment from contributing to fast-track approval processes.

93. 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.[162]

94. 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.

95. 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.

96. 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

[159] 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
[160] G Severinsen *Environmental advocacy in the future resource management system* (Environmental Defence Society, 2023)
[161] National Development Act 1979, s 8
[162] Even prohibited activities – which by definition are environmentally harmful – are eligible for fast-tracking and therefore little public scrutiny

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.[163] Under the Bill, there is no provision for independent testing of ministerial or panel decisions.

Concerns specific to conservation legislation

97. 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.

98. 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).[164] Final decisions are made by the Minister of Conservation, not the joint Ministers responsible for RMA approvals.[165] But there are still significant elements of concern.

99. There is no longer a requirement that concessions be consistent with conservation management strategies and conservation management plans.[166] 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.[167]

100. 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.[168]

101. 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

[163] 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

[164] Fast-track Approvals Bill, cl 18(h)

[165] Fast-track Approvals Bill, Schedule 5, clauses3(a), 18, 23

[166] Fast-track Approvals Bill, Schedule 5, cl 4(i)

[167] Fast-track Approvals Bill, 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

[168] Fast-track Approvals Bill, Schedule 5, cl 4(b), 4(g), which disapplies sections 17SB and 17U(3) of the Conservation Act 1987

part of the conservation estate having lower impact,[169] only "consideration" of this.[170] There is to be no public notification of application for easements and licences on conservation land, despite it being publicly owned.[171]

102. 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.[172] 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.[173] It is unclear whether the panel's recommendatory role is intended to be narrower than the role performed by the Minister.

103. 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.

104. 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.

105. The Bill also allows for conservation covenants to be amended or revoked by the Minister of Conservation.[174] 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.

106. 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.[175] 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

[169] Fast-track Approvals Bill, Schedule 5, cl 4(h), which disapplies section 17U(4) of the Conservation Act 1987
[170] Fast-track Approvals Bill, Schedule 5, cl 5(a)
[171] Fast-track Approvals Bill, Schedule 5, cl 4(c)
[172] Fast-track Approvals Bill, Schedule 5, cl 5
[173] Fast-track Approvals Bill, Schedule 5, cl 6
[174] Fast-track Approvals Bill, Schedule 5, cl 23
[175] Fast-track Approvals Bill, Schedule 6, cl 1(2)(a)

consideration.[176] The ability to provide for offsetting and even compensation[177] 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 Deficient and At-Risk species. The approach provided for in the Bill will increase the risk of species being pushed towards extinction.

107. 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.[178] 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.[179]

108. 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.

109. 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.[180]

110. 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.*"

111. 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".[181] 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.[182]

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[176] "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."
[177] Fast-track Approvals Bill, Schedule 5, cl 1(2)(e)
[178] Fast-track Approvals Bill, Schedule 5, cl 2
[179] Fast-track Approvals Bill, Schedule 4
[180] Crown Minerals Act 1991, s 61(1A). See also sections 53 and 54
[181] Crown Minerals Act 1991, s 2
[182] 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.

112. This means that the Bill would allow access arrangements 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 panel. It may even allow referral of proposals to mine in national parks and marine reserves.[183] The only land category obviously protected is national 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.[184]

113. 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.

114. One 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.

115. 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.[185]

116. 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.[186] Perhaps this is why such drafting issues (if that is what they are) have arisen.

117. 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).

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[183] 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

[184] Fast-track Approvals Bill, cl 18(i)

[185] Except activities on specified parts of the Coromandel Peninsula, which are specifically excluded from ineligibility

[186] "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

118. The Ministry for the Environment has stated that there will be:[187]

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

119. 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.[188]

The rationale for the Bill – a disproportionate and irrational response

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

121. 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."* [189]
>
> "*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*."[190]

122. A focus on fast-tracking renewable electricity generation like wind farms ignores the fact that there is a considerable amount of capacity already consented but not started. Consenting is not a hurdle here.

123. 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

[187] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 11
[188] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 31-32
[189] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 3
[190] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 4

analysis was not as thorough as "*would usually be expected for a Bill of this significance*".[191] 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*."[192]

124. Overall, the Ministry rates the Bill most favourably compared to alternatives: "*this option best aligns with the criteria, and the policy objectives*".[193] 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.[194]

125. 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.[195] The Ministry is to be commended for its clear messages here. In particular, it notes the following about the Bill:

> "*Some of the design choices present a risk to system coherence.*"[196]
>
> "*The net impacts are likely to be negative for broader Māori rights and interests.*"[197]
>
> "[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.*"[198]
>
> "*There will be greater impacts on wildlife and protected species*"[199]
>
> "*More development will occur on public conservation land.*"[200]

126. 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:

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[191] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 5
[192] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 4
[193] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 19
[194] 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
[195] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 19
[196] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 2
[197] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 19
[198] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 19
[199] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 24
[200] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 24

- Expert panels to be the decision-maker, not Ministers.[201]
- 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).[202]
- RMA instruments to retain their current level of influence over decisions (including national direction).[203]
- 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).[204]
- 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).[205]

127. EDS supports the Ministry's preferred options.

128. We also note that local government will be expected to monitor and enforce compliance with RMA approvals granted under the Bill, creating potential implementation issues (e.g. having to enforce conditions for large scale activities that may be prohibited by, or be an ill fit with, council plans and policies, or the RMA itself where a project undermines a water conservation order).

Concluding comments

129. 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.

130. The Bill bears little resemblance to existing fast-track processes, which are currently operating adequately. As per an official information request submitted to the Environmental Protection Authority, the Covid-19 fast-track legislation has seen an average timeframe of just 97 days for referred projects and 88 days for listed projects. The current fast-track model, saved from the NBA by the government's repeal legislation, is closely modelled on this. As such, if the purpose of the Bill is to actually speed up consenting processes, we already have a model that does exactly that.

131. The Bill 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.

132. We have seen no analysis of the opportunity cost that may be incurred by the projects facilitated by the Bill. New Zealand has a limited construction and development capacity, and there are serious questions to be asked as to whether large-scale, environmentally destructive proposals should be facilitated at the expense of smaller scale, less harmful and more necessary work renewing existing infrastructure (notably for three waters). There is also

[201] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 20
[202] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 23
[203] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 25-26
[204] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 32
[205] Ministry for the Environment *Supplementary Analysis Report: Fast Track Approvals Bill* (2024) at 28-29

nothing in the Bill that would favour projects that would keep profits in New Zealand; there is a risk that offshore companies may be the largest beneficiaries of the process, with the environmental and other effects being shouldered by future generations of New Zealanders.

133. The Bill 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.

134. Given how extreme this Bill is, there is a significant risk that a future government will simply unwind it, especially given its implications for New Zealand's international reputation. Even approvals granted under the Bill (and given effect to within the requisite two-year timeframe) run the risk of their 'rights' not necessarily being permanent or immune from modification in the future (e.g. via stronger review provisions, shortened duration, reopening financial arrangements,[206] and additional conditions). They might be put under a special arrangement given the special way in which they were granted. As such, anyone seeking to use this process should be put on notice that their approvals may lack social license and be highly unstable in the long-term. We have spoken to some development interests who are not intending to pursue this route for such reasons.

135. For those who do, a gold-rush of applications for listing and referral during the current term of government will put immense pressure on panels (if enough panel members can even be sourced). Even if they are paid commercial rates, we see a practical risk of bottlenecks that may render a fast-track not nearly as fast as envisaged (or result in even weaker testing of environmental impacts). Similar pressures are likely to exist on officials in agencies responsible for advising Ministers, especially in light of concurrent cuts to the public sector and reductions in use of contractors.

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

137. 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.

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

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

Greg Severinsen / Shay Schlaepfer

[206] For example, charges for concessions on the conservation estate

Annexure A

Memorandum on consistency of Fast-track Approvals Bill with obligations under New Zealand's free trade agreements

As enclosed above