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

SUBMITTER DETAILS

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Introduction

1. The Environmental Defence Society (**EDS**) thanks the Environment Committee for the opportunity to make a submission on the Resource Management (Consenting and Other System Changes) Amendment 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 decade to looking at the future of the resource management system in Aotearoa New Zealand.[1] It has become a leading voice in this space.

3. EDS wishes to appear before the Environment Committee to speak to the points raised in this submission.

EDS's position

4. The Bill proposes to amend core aspects of the Resource Management Act 1991 (**RMA**) in advance of wide-sweeping reform to national direction.

5. Many of the proposals interact with national direction making it difficult to assess the full implications of change. EDS considers the better way of implementing desired changes to the regulatory framework would be as part of the wider national direction and legislative reform process. This would promote greater coherence and enable implementation issues to be identified and addressed from a more holistic perspective.

6. The Bill contains some positive aspects. EDS supports specific amendments that will better enable councils to manage natural hazards and emergencies, fulfil compliance and enforcement functions and recover costs.

[1] For a list of EDS's resource management publications see here.

7. However, the Bill contains a range of proposals that are deeply concerning. EDS strongly opposes these proposals (as addressed below) because they either individually or collectively:

    (a) Weaken environmental protections.
    (b) Give excessive powers to central government without adequate safeguards.
    (c) Limit the ability of councils to consider local environmental factors and priorities in decision making. This is likely to be exacerbated by changes to national direction.
    (d) Result in less rigorous and participatory decision making.
    (e) Give rise to procedural fairness issues.
    (f) Adopt a narrow focus on specific activities, which threatens to undermine the ability of councils to assess and manage cumulative effects at meaningful scales.
    (g) Lack a clear evidence basis.

8. This submission provides comments on specific amendments by theme in accordance with the approach adopted in the Bill's explanatory note and Regulatory Impact Statements (**RISs**).[2] It is structured as follows: (1) farming and primary sector; (2) infrastructure and energy; (3) housing growth; (4) system improvements; and (5) natural hazards and emergencies.

Farming and primary sector: Proposals relating to "rules that control fishing"

9. The Bill proposes to clarify the relationship between the Resource Management Act 1991 (**RMA**) and the Fisheries Act 1996 (**Fisheries Act**) by introducing new provisions relating to "rules that control fishing". These changes will significantly limit the ability to include rules in regional coastal plans that control fishing impacts on marine biodiversity. EDS strongly opposes the package of amendments.

10. The RIS indicates that changes are necessary to address perceived issues at the interface of the RMA and the Fisheries Act. For instance, it states:[3]

> The current interface is complex and the lack of coordination between the RMA and Fisheries Act (and other marine management legislation) leads to duplication of efforts by central and local government. It also means that there is less clear accountability on who is responsible for managing particular issues in relation to fishing.

11. This problem definition fails to sufficiently recognise that case-law on this interface has developed clear guidelines for when it is appropriate to implement fishing controls under the RMA. The proposals in the Bill will override established RMA principles and introduce uncertainty into a settled area of law.

The current law

12. Currently, the law allows regional councils to impose controls on fishing activities in limited circumstances.

13. A regional council's authority to regulate activities (including fishing) in the coastal marine area (**CMA**) is set out in s 30 of the RMA. Of particular relevance is:

    (a) Section 30(1)(d)(i)): Control land and associated natural and physical resources;

[2] The Regulatory Impact Statements are available here.
[3] Ministry for Primary Industries and Ministry for the Environment "*Resource Management Amendment Bill no.2 – Addressing the Resource Management Act 1991 – Fisheries Act 1996 Interface*" (4 December 2024), available here, at 1.

(b) Section 30(1)(d)(ii): Control the occupation of space in, and the extraction of sand, shingle, shell, or other natural material from, the coastal marine area, to the extent that it is within the common marine and coastal area;
(c) Section 30(1)(d)(vii): Control activities in relation to the surface of water; and
(d) Section 30(1)(ga): To establish, implement and review provisions for the purpose of maintaining indigenous biological diversity in their regions.

14. The RMA interfaces with the Fisheries Act in s 30. Under s 30(2) of the RMA, a regional council must not perform the functions in s 30(1)(d)(i), (ii) and (vii) to control the taking, allocation or enhancement of fisheries resources for the purpose of managing fishing or fisheries resources controlled under the Fisheries Act. Notably, s 30(1)(ga) is not subject to s 30(2).

15. The Fisheries Act has a corresponding provision which prohibits regional plans from providing for the allocation of access to any fisheries resource (say, for example, between commercial and recreational fishers).[4]

16. The Court of Appeal in *Motiti*[5] considered the above provisions and the interface of the RMA and the Fisheries Act. *Motiti* was concerned with the Bay of Plenty Regional Council's ability to prohibit fishing activities in specified parts of the CMA to maintain indigenous biodiversity. The indigenous biodiversity the Council wanted to protect included fish species (i.e. snapper) which are regulated under fisheries legislation. The case arose because overfishing of snapper (and crayfish) was resulting in kina barrens.

17. *Motiti* confirmed that both the Fisheries Act and the RMA give powers to decision makers to impose controls to protect biodiversity in the CMA.[6] It held that:

(a) A regional council may control activities under the RMA to maintain indigenous biodiversity (s 30(1)(ga)). When dealing with a fisheries resource, controls needed to maintain indigenous biodiversity are *in practice* likely to require the exercise of functions subject to the s 30(2) restriction.[7] For example, a control to prohibit fishing for the purpose of maintaining biodiversity will also be a control of land and associated natural and physical resources. 'Land' includes the seabed and 'natural and physical resources' includes water.[8]
(b) Therefore, even though s 30(1)(ga) is not subject to s 30(2), controls established under it can be subject to s 30(2) where specified s 30(1)(d) functions are also invoked. Accordingly, a regional council may control fisheries resources under its s 30 functions *but only* if it does not do so to manage those resources for Fisheries Act purposes. **This ensures there is no overlap in terms of the purpose of protection under the RMA and under the Fisheries Act.**
(c) A Fisheries Act purpose is to control the taking, allocation or enhancement of fisheries resources for the purpose of managing fishing or fisheries resources controlled under the Fisheries Act (the s 30(2) restriction).
(d) When deciding whether a control would be for a Fisheries Act purpose and thus contravene s 30(2), the following provide some objective guidance that can be applied to any given factual setting (the Court's 'indica'):[9]

[4] Fisheries Act 1996, s 6.
[5] *Attorney-General v Trustees of the Motiti Rohe Moana Trust* [2019] NZCA 532.
[6] At [58].
[7] At [32] and [61]; s 30(2) RMA.
[8] At [33].
[9] At [64] – [65].

Necessity – whether the objective of the control is already being met through measures implemented under the Fisheries Act.
Type – controls that set catch limits or allocate fisheries resources among fishing sectors or establish sustainability measures for fish stocks would likely amount to fisheries management.
Scope – a control aimed at indigenous biodiversity is likely not to discriminate among forms or species.
Scale – the larger the scale of the control the more likely it is to amount to fisheries management.
Location – the more specific the location and the more significant its biodiversity values, the less likely it is to amount to fisheries management.

Implications of current law

18. Regional councils can only impose restrictions on fishing activity for a defined purpose, that is "*to maintain indigenous biological diversity*".

19. In doing so, councils are confined by the indicia set out by the Courts: Necessity, Type, Scope, Scale and Location.

20. It is unlikely that councils will be able to impose controls when the area is already adequately protected under the Fisheries Act i.e., they need to show that any provisions under the RMA are "*necessary*".

21. Controls need to be targeted to areas where there is robust evidence of high biodiversity values and therefore these will almost always be small in "scale".

22. Controls also need to pass a s 32 assessment as being the most appropriate way to achieve the objectives of higher order planning directives and the purpose of the RMA.

23. Any restrictions on fishing activities imposed by councils therefore need to meet a high test. When they are imposed under the RMA, they play a very important role in filling gaps in protection not provided for under the Fisheries Act for areas of high indigenous biodiversity value.

24. Although it is possible to control fishing activities under s 11 of the Fisheries Act, including the area from which fish is taken and the methods used, this has rarely been done to protect marine areas of high biodiversity. The fisheries management system lacks any robust strategies, standards, plans or guidance for avoiding, remedying or mitigating the environmental effects of fishing on the aquatic environment,[10] maintaining the biological diversity of the aquatic environment,[11] or protecting habitat of particular significance for fisheries management.[12] This has left a significant gap when protecting marine habitats and biodiversity from fishing impacts.

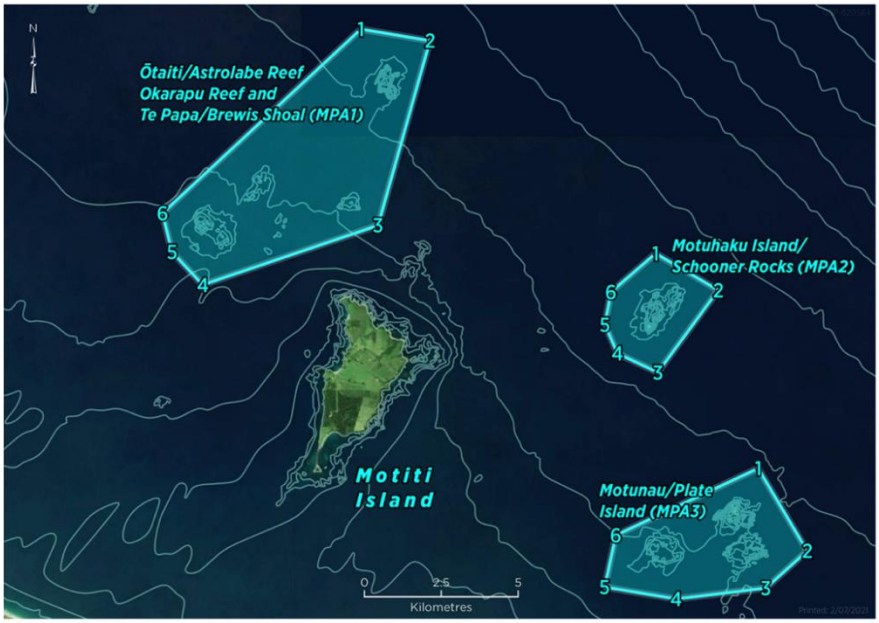
25. To the extent this situation changes in the future, and protections are put in place under the Fisheries Act or other legislation, the scope for council action will be narrowed under the "necessity" requirement. This is supported by the existing s 32 assessment because rules would not be justified if they did not provide for efficient and effective resource management. In this

[10] Fisheries Act 1996, s 8(2)(b).
[11] Fisheries Act 1996, s 9(b).
[12] Fisheries Act 1996, s 9(c).

way, the RMA and Fisheries Act regimes operate together in a complementary and agile manner to ensure marine biodiversity protection is addressed.

Application of the current law

26. Following the Court of Appeal's decision in *Motiti*, the Environment Court confirmed protection measures to be implemented in the proposed Bay of Plenty Regional Coastal Plan. In summary, the Plan prohibits the temporary or permanent damage, destruction or removal of plants or animals in the mapped Motiti Protection Area (below).



The three areas making up the Motiti Protection Area.

27. The Environment Court has applied *Motiti* to assess whether controls on fishing should be implemented in the proposed Northland Regional Plan. As notified, the plan did not contain any marine protected areas, policies or rules to control the effects of fishing on the values of significant ecological areas. Such provisions were sought by the Appellants (and supporting s 274 parties, including Māori entities).

28. The Court decided it was appropriate to apply marine protected areas to some locations. It rejected protection controls in areas where the Fisheries Act adequately protected the space and where there was insufficient evidence to justify the need for controls.[13]

29. Northland Regional Council is currently implementing the Court's decision. In summary, the Plan permits the temporary or permanent damage or destruction or removal of fish, aquatic life or seaweed in limited listed circumstances (including those involving specific scientific research, or the harvest of kina) and otherwise prohibits it. Within a listed area, the Plan also expressly prohibits bottom trawling, bottom pair trawling, Danish seining and purse seining.

30. Protective provisions have also been included in the proposed Marlborough Environment Plan, with the relevant provisions concerning fishing controls being settled by consent. These provisions prohibit dredging and bottom trawling, but not fishing, within any listed Category A or B Ecologically Significant Marine Site; and provide for the activities as a discretionary activity in buffer zones.

[13] At [209]-[214].

The proposed changes and issues with them

31. EDS opposes all the provisions proposed in relation to rules that control fishing.

Rules that control fishing must be included in notified plans

32. The Bill proposes to limit when fishing controls can be applied in RMA plans. Specifically, rules that control fishing can only be included in the notified version of a plan or (if subsequently inserted) related to an area to which a notified fishing rule applied.[14] After a plan is notified, a regional council can only make "*minor adjustments*" to the boundaries of such areas.[15]

33. This means submitters will no longer be able to seek inclusion of fishing controls in their submissions on plans. Rules can only be introduced when councils have taken the initiative to include them from the outset. Submitters will not be able to broaden the spatial application of notified fishing controls.[16]

34. Submissions provide an important opportunity to identify inadequacies in plans, introduce relevant information and test whether additional controls are required. Limiting the scope of public submissions means councils may not have access to the best available information when making decisions on plans.

35. The inevitable result of changing the law as proposed will be further loss of high value marine indigenous habitat and biodiversity. That is because:

    (a) Rules that protect high value indigenous biodiversity areas from fishing activity which have been inserted into RMA plans (in Bay of Plenty, Northland and Marlborough) originated from submissions i.e., they were not included in the notified plans.
    (b) The areas protected under these rules had inadequate protection under the Fisheries Act.
    (c) The evidence clearly demonstrated the need for protection.

36. In many cases the losses could be permanent, as many coastal areas are already highly degraded, are struggling under cumulative stressors (including climate change) and are approaching tipping points. For example, in Northland, the evidence is clear that the biomass of snapper and crayfish is seriously depleted and below management targets, with populations considered functionally extinct.[17] The seriousness and urgency of the issue was one of the main reasons why the Court ultimately imposed controls on fishing activities in some limited areas (the other being that the Fisheries Act was not doing the job).

37. The proposed changes not only remove the ability for the public to pursue rules that control fishing to maintain and protect indigenous biodiversity (via submissions on plans), they also make it much harder for councils to do it themselves.

Section 32 RMA assessment must include consideration of impacts on fishing

[14] The Bill, cl 16, which inserts new s 71(2) into the RMA.
[15] The Bill, cl 16, which inserts new s 71(3) into the RMA.
[16] The Bill, cl 70, which inserts new cl 6B into Sch 1 of the RMA.
[17] *Bay of Islands Maritme Park Inc v Northland Regional Council* [2022] NZEnvC 22 at [86].

38. The Bill proposes to amend s 32 of the RMA so that if a council wants to include rules in its plan that control fishing in the CMA it must assess the impact of the rules on fishing.[18] This involves examining the extent to which the rules would affect recreational or commercial fishing interests in the area affected by the proposal.[19]

39. This proposal demonstrates a lack of understanding of the law relating to controls on fishing activities under the RMA.

40. Under s 30 of the RMA, regional councils have various functions which are required to give effect to sustainable management (the purpose of the RMA). These include the maintenance of indigenous biodiversity. Controls on fishing activities imposed in RMA plans are to ensure that councils are maintaining indigenous biodiversity. As set out above, the Court of Appeal has confirmed that, provided the controls are for that purpose, they can be imposed. The extent to which the controls impact fishing is irrelevant to that assessment. In any case, economic, social and other relevant factors form part of the ordinary s 32 assessment.

41. The law (as confirmed by the Court of Appeal) specifically states that controls cannot be inserted if they are for the purpose of the taking, allocation or enhancement of fisheries resources for the purpose of managing fishing or fisheries resources controlled under the Fisheries Act. The proposed s 32 of the RMA addition strays into that Fisheries Act purpose because it adopts a skewed focus on *fishing* impacts.

Councils must get concurrence of Director-General before notifying fishing controls

42. The Bill proposes a new ability for the Director-General of Ministry for Primary Industries (**MPI**) to veto a proposed fishing control.[20] A council cannot notify a fishing control unless the Director-General agrees to it. After a council completes a fishing impact assessment it must be submitted to the Director-General. Then, the Director-General must decide whether to concur with the assessment. They can *only* concur if they:[21]

    (a) Are satisfied that the assessment has given appropriate consideration to the impacts of the rule on fishing;
    (b) Are satisfied with the quality, clarity and accuracy of the information provided in the assessment; and
    (c) Have consulted Te Ohu Kai Moana about their proposed decision.

43. If the Director-General refuses to concur, they must provide reasons and recommend how to correct the assessment.[22] In other words, the Director-General can direct a council to undertake further assessment(s) and delay the planning process for a potentially indeterminate period.

44. This proposal inappropriately gives the Director-General wide powers to reject a fishing assessment (and practically preclude proposed fishing controls). Imposing fishing controls under the RMA for the purpose of maintaining indigenous biodiversity is a core function of regional councils. The Director-General has no role in protecting indigenous biodiversity under the RMA, and nor should it, given that MPI has different, and potentially conflicting, aims of promoting the *utilisation* of fisheries resources.

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[18] The Bill, cl 8 which inserts new s 32(2A) into the RMA.
[19] The Bill, cl 8, which inserts new s 32(2A)(a) into the RMA.
[20] The Bill, cl 70, which inserts new cl 4B into Sch 1 of the RMA.
[21] The Bill, cl 70, which inserts new cl 4B(2) into Sch 1 of the RMA.
[22] The Bill, cl 70, which inserts new cl 4B(4) into Sch 1 of the RMA.

45. The requirement to consult with Te Ohu Kai Moana is also inappropriate. The RIS indicates that Te Ohu Kai Moana does not support fishing controls being implemented under the RMA.[23] It has an opportunity to present its position during the ordinary public submissions process on plans.[24] It should not have two bites at the cherry. That is particularly so given the requirement to consult with Te Ohu Kai Moana has been inserted into the Bill by ministerial direction and no analysis of its implications has been provided in the RIS.[25]

46. These proposals could cause considerable delays in the planning process. Councils must wait for the Director-General to concur with its assessment of impacts on fishing and to consult with Te Ohu Kai Moana. There is no deadline for the Director-General's response, other than it being provided in a "reasonable time frame".[26]

47. These proposals are at odds with the Government's intent to speed things up and cut red tape. In effect, they are likely to slow things down and make it harder for regional councils to fulfil their statutory functions.

48. As concluded in the RIS:[27]

> On balance, we consider that any form of concurrence provision would add cost, risk, and complexity to the process and may be unnecessary given other changes being processed.

Rules to control fishing will not have immediate legal effect

49. Any fishing controls that make it into a notified regional coastal plan will not take immediate legal effect.[28] This is despite rules that protect areas of significant habitats of indigenous fauna or areas of significant indigenous vegetation (i.e. s 6(c) RMA matters) ordinarily taking immediate effect.[29]

50. There is no logical reason to delay the effect of rules that control fishing. Particularly where rules can only be included in a plan if they have been assessed for fishing impacts and received approval from the Director-General. This approach would allow ongoing fishing despite known risks to marine biodiversity and undermine the functions of councils.

National Environment Standards can classify fishing as a permitted activity

51. The Bill provides for a National Environmental Standard (**NES**) to classify fishing as a *permitted* activity in an area where fishing is otherwise prohibited.[30] This means the Minister could override existing protections that have been implemented following expert evidence and determination by the Environment Court. It is inappropriate to regulate exclusions to fishing controls (i.e. allow fishing in protected areas) at the national level and take powers away from councils who have knowledge of local issues and priorities.

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[23] Ministry for Primary Industries and Ministry for the Environment "*Resource Management Amendment Bill no.2 – Addressing the Resource Management Act 1991 – Fisheries Act 1996 Interface*" (4 December 2024), available here, at 37.
[24] The Bill, cl 26, which inserts new s 86H into the RMA.
[25] Ministry for Primary Industries and Ministry for the Environment "*Resource Management Amendment Bill no.2 – Addressing the Resource Management Act 1991 – Fisheries Act 1996 Interface*" (4 December 2024), appendix, available here, at 3 "*This paper does not cover the subsequent Ministerial request to add a consultation requirement with Te Ohu Kaimoana. This matter can be addressed in the Departmental Report at the Select Committee stage*."
[26] The Bill, cl 70(1), which inserts new cl 4B into sch 1 of the RMA.
[27] Above n 21, at 2.
[28] The Bill, cl 25(2), which inserts new s 86B(4A) into the RMA.
[29] Resource Management Act 1991, s 86B(2)(b) and (c).
[30] The Bill, cl 13, which inserts new s 43A(6A) into the RMA.

Existing controls may be reversed at next plan review

52. The Bill creates uncertainty in relation to the status of operative plan controls. When regional coastal plans come up for review, existing rules that control fishing will need to go through the Director-General process after consultation with Te Ohu Kaimoana prior to notification. This may prevent operative plan rules being rolled over.

Consistency with government commitments

New Zealand's international obligations

53. The maintenance of indigenous biodiversity was deliberately assigned to regional councils to give effect to New Zealand's obligations under the Convention on Biological Diversity (**CBD**).[31] Those obligations include:[32]

    (a) "*Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures*";[33]
    (b) "*Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings*";[34]
    (c) "*Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species*";[35]
    (d) "*Develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations*";[36] and
    (e) "*Adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity*".[37]

54. The Bill fails to adequately recognise or give effect to these obligations. For example, the proposals weaken the ability to implement controls on fishing to protect marine biodiversity. This is inconsistent with the obligation to "*maintain necessary legislation … for the protection of threatened species*". Moreover, the Bill seeks to introduce a specific requirement for councils to assess the impact of planning controls *on fishing*.[38] This is effectively a reversal of the obligation to assess and appropriately manage adverse effects of activities *on biological diversity*.

National Party commitments

55. The Bill is inconsistent with the National Party's environmental election commitments which are to "advance marine protection initiatives" in order "to ensure the effective protection of our marine biodiversity".[39]

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[31] The legislative history is summarised in *Attorney-General v The Trustees of the Motiti Rohe Moana Trust* [2019] NZCA 532 at [53]-[55].
[32] United Nations Convention on the Law of the Sea 1833 UNTS 397 (opened for signature 10 December 1982, entered into force 16 November 1994) [**UNCLOS**].
[33] CBD, art 14(1)(a).
[34] CBD, art 8(d).
[35] CBD, art 8(f).
[36] CBD, art 8(k).
[37] CBD, art 10(b).
[38] The Bill, cl 8, which inserts new s 32(2A) into the RMA; and cl 70 which inserts new cl 4B into Sch 1 of the RMA.
[39] Commitment 4.1, Blueprint for a Better Environment, at 9.

56. The proposal is also inconsistent with the National Party and New Zealand First Coalition Agreement which includes "enhance primary sector including fish"[40] and "remove regulations that impede the productivity and enormous potential of the seafood sector".[41]

57. This is because it is increasingly evident that loss of healthy biogenic habitat is a major roadblock to fisheries productivity due to the 'bottleneck' this creates for juvenile survival and recruitment into the fishery as well as in the availability of suitable habitat and food sources for adult fish. For example, loss of suitable habitat has impacted the productivity of green-lipped mussels, scallops, blue cod, rock lobster and pāua in the Marlborough Sounds and has likely impacted the snapper stock there as well (which has not recovered to anything like the same extent as the adjacent Tasman and Golden Bay stock).[42] Similar issues are being experienced in the Hauraki Gulf, Bay of Islands and Bay of Plenty.

58. Removing the ability of regional councils to step in and protect marine biodiversity, when there is a gap in this area in fisheries management, will only exacerbate the current loss of productivity in many inshore stocks.

Alternative approach

59. The proposed changes are inconsistent with the objectives of the Bill, which include "*simplifying the planning system*" and "*enhancing the primary sector*".[43]

60. As an alternative to the proposed set of changes set out, the Bill could provide greater clarify as to when councils can impose controls on fishing activities by codifying the Court of Appeal's indicia.

Farming and primary sector: Streamlined process for changing marine aquaculture consents

61. The Bill proposes to create a more permissive regime for consenting changes to marine aquaculture by:

    (a) Enabling NESs to include directions requiring councils to assess applications for changes to consents as a controlled activity or restricted discretionary activity;[44] and
    (b) Amending the current requirement that councils must assess changes of conditions as a discretionary activity to provide for the above.[45]

62. In principle, EDS supports amendments that enable a nationally consistent approach to assessing changes to consents for marine aquaculture. However, it is important that adequate safeguards are included in the Bill to ensure councils can effectively assess and manage the effects of such changes. The Bill does not do this.

[40] Ibid, page 5.
[41] Ibid, page 7.
[42] See, for example, Anderson T, R Stewart, R D'Archino, J Stead and N Eton, 2020, *Life on the seafloor in Queen Charlotte Sound, Tory Channel and adjacent Cook Strait*, NIWA, Wellington; Brough T E, E M Leunissen and M Beentjes, 2023, *Habitat use and the impact of multiple stressors on blue cod populations off Canterbury and in the Marlborough Sounds*, New Zealand Aquatic Environment and Biodiversity Report No 323; Hale R, O Lam-Gordilla, D Lohrer, J R Williams, S Handley, P Olmedo-Rojas and I Middleton, 2024, *Cumulative effects of stressors on scallops and scallop habitats in the Marlborough Sounds*, New Zealand Aquatic Environment and Biodiversity Report No 337; and Hinojoa I A, B S Green, C Gardener and A Jeffs, 2015, 'Settlement and early survival of southern rock lobster, *Jasus edwardsii*, under climate-driven decline of kelp', *ICS Journal of Marine Science*, 71 (Issue Supplement 1), i59-i68
[43] The Bill, explanatory note, at 1.
[44] The Bill, cl 13(1) which inserts new s 43A(6)(b) into the RMA.
[45] The Bill, cl 44 which inserts new s 127(3)(b) into the RMA.

63. The Bill proposes blanket permissive rules to be mandated by national standards. This approach is not sufficiently cautious in the context of marine aquaculture. There is a paucity of information on the baseline state of the CMA in many regions and considerable uncertainty as to how cumulative stressors (e.g. climate change) will impact the marine environment through time.

64. Requiring councils to treat every application for changes in conditions as either a controlled or restricted discretionary activity will significantly limit their ability to account for local environmental conditions and assess cumulative effects at meaningful scales (i.e. defined coastal units). This approach is too prescriptive.

65. EDS submits that the Bill should be amended to ensure councils can effectively assess the range of effects associated with changes to consented aquaculture. This could be achieved by clarifying that:

    (a) Applications to change conditions for consented marine aquaculture can only be treated as a controlled or restricted discretionary activity "*if there would be no material difference in adverse effects as a result of the proposed change*" or similar; and
    (b) Regional councils may apply more stringent rules than the permissive default options where it is appropriate in the circumstances.

Farming and primary sector: Approval of Freshwater Farm Plan certification and audit services

66. The Bill proposes to shift approval of freshwater farm plan (**FW-FP**) certification and audit services from regional councils to the Minister.[46]

67. The RIS indicates that this change is necessary because existing industry organisation programmes typically apply to more than one region. Consequently, industry organisations would need to apply for multiple approvals from separate regional councils, which "*creates unnecessary costs and duplication and limits national consistency*".[47]

68. EDS supports aspects of the proposed approvals process, which include:

    (a) Requiring that regional councils monitor the delivery of certification or audit services by approved industry organisations.[48]
    (b) Making the Minister responsible for approval of suitable industry organisations.[49]
    (c) Requiring the Minister to consult with relevant regional councils prior to approving a suitable industry organisation.[50]
    (d) Providing for the Minister to request information from an industry organisation before approving it.[51]
    (e) Enabling the Minister to revoke an approval[52] and if an approval has been revoked, ceasing any related existing industry auditors or certifiers.[53]

[46] The Bill, cl 57, which replaces s 217KA of the RMA.
[47] Ministry for the Environment and Ministry of Primary Industries (12 September 2024) "*Regulatory Impact Statement: Amendments required to Part 9A of the Resource Management Act to provide for Industry Organisation delivery of freshwater farm plan certification and audit services*", available here, at 1.
[48] The Bill, cl 56(2), which inserts new s 217I(1)(e) into the RMA.
[49] The Bill, cl 57, which replaces s 217KA of the RMA.
[50] The Bill, cl 57, which replaces s 217KA. See proposed s 217KA(1)(b).
[51] The Bill, cl 57, which replaces s 217KA. See proposed s 217KA(6).
[52] The Bill, cl 57, which replaces s 217KA. See proposed s 217KA(3).
[53] The Bill, cl 57, which replaces s 217KA. See proposed s 217KA(5).

(f) Retaining the ability for regional councils to request a certified FW-FP from farm operators for inspection.[54]
(g) Enabling regional councils to request information from approved industry organisations.[55]
(h) Providing for regional councils to notify the Minister of any significant or persistent concerns regarding the performance of approved industry organisations.[56]

69. This support is qualified by EDS's concern that aspects of the Bill could weaken the auditing role in the FW-FP regime and make it harder for councils to monitor the cumulative effects of farming activities on freshwater values (e.g. at the catchment scale).

70. Our concern relates to proposals to shift information and reporting requirements out of the RMA and into discretionary regulations. Specifically, cl 55 of the Bill proposes to remove the following audit requirements from s 217H of the RMA:[57]

(a) That a farmer must provide an up-to-date copy of the FW-FP and any relevant information to an auditor;
(b) That a farmer must provide any information that an auditor requests;
(c) That an auditor must provide the farmer with a report of the auditor's findings on whether the farm achieves compliance with the certified FW-FP;
(d) If an auditor finds that a farm achieves compliance, it must provide that report to the relevant regional council; and
(e) If an auditor finds that a farm fails to achieve compliance, after giving a farmer reasonable opportunity to respond to an initial report, it must provide the regional council with a final report of findings and recommendations.

71. The Bill proposes to move these requirements (generally) into discretionary regulations. For instance, cl 58 of the Bill would enable the Minister to make regulations that:

(a) "*provide for the form and manner in which a farm must be audited for compliance with a certified freshwater farm plan*…";[58] and
(b) "*the information that the farm operator must provide to the auditor for the purpose of the audit*".[59]

72. EDS opposes this approach. Auditing is a key role in the FW-FP regime. To ensure a robust audit process, it is essential that auditors have access to all relevant information and that councils are provided with auditing reports so they can effectively monitor compliance.

73. These minimum requirements should be retained in the RMA not deferred to discretionary regulations, which can be changed on the recommendation of the Minister. This would provide for greater certainty and ensure regional councils retain an appropriate level of oversight in the FW-FP regime.

[54] The Bill, cl 56(3), which amends s 217I(2).
[55] Ibid.
[56] Ibid.
[57] The Bill, cl 55, which replaces s 217H(3) to (5) of the RMA.
[58] The Bill, cl 58, which amends s 217M(1)(g) of the RMA.
[59] The Bill, cl 58(6) which inserts new s 217M(1)(g)(v) into the RMA.

Infrastructure and energy: Managing discharges as a permitted activity

74. Currently s 70 of the RMA prevents regional councils from applying permitted activity status to certain 'high risk' discharges. These include discharges to land that may enter water if specified effects, including "significant adverse effects on aquatic life", are likely to arise in receiving waters after reasonable mixing.

75. The Bill proposes to amend the scope of s 70 to clarify that regional councils can include permitted activity discharge rules in their plans when an activity may have significant adverse effects on aquatic life if:[60]

    (a) The receiving waters are already degraded;
    (b) The rule includes standards that must be met to achieve permitted activity status; and
    (c) Those standards will contribute to a reduction of effects (i.e. an improvement) in the receiving waters over a specified timeframe.

76. EDS supports this proposed approach because it limits the ability of councils to include permitted discharge rules unless contaminant loads will decrease over time (i.e. 'a staged reduction approach' can be achieved). This is consistent with the National Policy Statement for Freshwater Management 2020 (**NPS-FM**), which recognises the need to set ambitious and *reasonable timeframes* (i.e. within 30 years) for achieving improvements in freshwater outcomes.[61]

77. However, EDS has concerns about the proposed wording of s 70(1). Specifically, cl 15(1) of the Bill would replace the term "*Before*" with the phrase "*Except as provided in subsection (3), before…*".[62] This amendment is problematic because it removes the requirement that a regional council must assess whether the mandatory performance standards (above) can be met *before* including a permitted discharge rule in a plan.

78. This issue was recently addressed in *Federated Farmers Southland Inc v Southland Regional Council.*[63] The High Court observed:[64]

> the language of s 70 requires the regional council to be satisfied, before it includes a rule permitting a discharge in a regional plan, that none of the effects in r 70(1)(c)-(g) [sic] are likely to arise in the receiving waters. I accept that the requirement [to] be satisfied "before" the permitted activity rule is inserted indicates the need for an inquiry as part of the planning process as to what the evidence says about the effects of the class of discharge being considered. This is particularly important in the present case where there will be practical difficulties in determining whether a specific discharge complies given such issues are not readily able to be assessed on a case by case basis and where there will be a live question as to cumulative effects. Council officers granting resource consents should not be tasked with the very enquiry that s 70 envisages will take place prior to the rule being included in the plan.

79. EDS opposes this change. It is important that an assessment is undertaken by a council *prior* to a rule being included in a plan. This step operates as a safeguard that prevents rules from being implemented where they cannot achieve a staged reduction approach. It is not appropriate to defer this to the resource consenting stage because:

[60] The Bill, cl 15(2) which inserts new s 70(3) of the RMA.
[61] National Policy Statement for Freshwater Management 2020 (as amended in 2024), cl 3.3(2)(b) and (c).
[62] The Bill, cl 15(1) which amends s 70(1) of the RMA.
[63] *Federated Farmers Southland Inc v Southland Regional Council* [2024] NZHC 726.
[64] At [83].

(a) It creates a risk that rules could be included in plans that provide for ongoing degradation of freshwater values.
(b) It creates uncertainty and elevates the risk of litigation and associated delays where activities are challenged on the basis that they do not meet the performance standards in s 70 (i.e. the rule is invalid). It would be more efficient and effective to resolve any issues about the validity of the rule at the planning stage.
(c) As outlined above, the High Court has indicated that deferring an assessment to the consenting stage could undermine the ability of regional councils to assess the cumulative effects of permitted discharges at appropriate scales (e.g. catchment level). This could result in worse outcomes for freshwater values over time.

80. EDS requests that the proposed amendment to s 70(1) be withdrawn from the Bill and the status quo version of this provision be retained. This is necessary to ensure that the proposed safeguards in proposed s 70(3) (i.e. the performance standards) are effectively implemented.

Infrastructure and energy: Doubling the default lapse period for renewable energy projects

81. The Bill proposes to increase the default lapse period for consents related to renewable energy projects from five years to 10 years.[65] EDS opposes this amendment.

82. It is unnecessary to double the default lapse period for renewable energy projects because:

(a) A longer lapse period can already be granted where it is appropriate. For example, the Environment Court granted a 10 year lapse period for coastal permits to enable a significant tidal energy generation project because of the project's large scale, national importance and staged design.[66] While the lapse period was not the core issue on appeal, the Court found that a lapse period of 10 years was "*entirely appropriate*" in the circumstances and granted the request.
(b) A consent holder can apply for an extension of the lapse period under s 125(1A)(b). Councils must consider certain criteria, including whether substantial progress has been made towards giving effect to the consent and the effect of an extension on the objectives and policies of any plan or proposed plan. Then, an applicant can object if the Council decides not to grant the extension.[67]
(c) The RIS appears to acknowledge that the status quo has operated effectively. For example, it states "*evidence shows that a small number of consent applicants seek extensions to lapse periods, and these extensions are usually granted*".[68]
(d) A much *shorter* default lapse period could be suitable for certain types of renewable energy generation. For example, in a recent RNZ article, Wind Energy Association Chief Executive Kevin Hart was quoted as saying "*It generally takes anywhere from seven to eight, sometimes 10 years to get a consent, and only about two-and-a-half years to build a wind farm*".[69] This suggests a 10-year default lapse period is unnecessary.

83. EDS prefers the status quo. The planning context can change significantly over a period of five years let alone 10 years. It is important that councils retain the ability to determine when it is appropriate to grant an extension by considering the specific circumstances that apply to any given project.

[65] The Bill, cl 43 which inserts new s 125(1C) into the RMA.
[66] *Crest Energy Kaipara Limited v Northland Regional Council* [2011] NZEnvC 26 at 10.
[67] An applicant can object under ss 357A and 357C of the RMA and has a further right of appeal under s 358.
[68] Ministry for the Environment (2024) "*Regulatory Impact Statement: Consenting II package*" (20 September 2024), available here, at [132].
[69] Farah Hancock (18 December 2024) "*How the Fast-track Approvals Bill became law*" RNZ available here.

84. EDS is concerned that doubling the default lapse periods could result in perverse outcomes by locking up resources for longer periods without any justification. For example, the RIS states "*developers may not utilise consents to "land bank" or engage in anticompetitive behaviour*".[70] This risk is not new. It was recognised in a report by the Electricity Authority in 2022, which invited further investigation of the merits and feasibility of applying "*pro-competitive conditions on consents for renewable generation ('use-it-or-lose-it' conditions)*" to accelerate quick builds and encourage competition.[71] Despite this, the RIS only considered options that adopted 10-years as a starting point (along with the status quo).

85. Experience suggests applicants are likely to seek extensions to default lapse periods. The Bill does not preclude this. This creates an elevated risk that resources will be locked up for *longer* than the proposed default period of 10 years.

86. Given the above, EDS requests that the proposed extended lapse periods be withdrawn from the Bill. They are unnecessary and risk disincentivising renewable energy generation by allowing consent holders to delay delivery for *at least* 10 years.

87. In the alternative, EDS requests further amendments to clarify that councils can set different default lapse periods for certain activities where it is appropriate. This could be achieved through the inclusion of suitable policies in national direction rather than embedded in the RMA.

Infrastructure and energy: Designation assessment processes

88. The Bill proposes to amend the assessment process for designations where:

    (a) A requiring authority has an interest in the land that is sufficient for undertaking the work; and
    (b) The work is likely to result in a significant adverse effect on the environment.

89. Currently, decision-makers must consider the effects on the environment of a notice of requirement (**NoR**), having particular regard to:[72]

    (a) Whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work ('adequate consideration test'); and
    (b) Whether the work is reasonably necessary for achieving the objectives for which the designation is sought ('reasonably necessary test').

90. The Bill proposes to insert a new requirement that an NoR must include an assessment of environmental effects which describes "*possible alternative locations or methods for undertaking the activity*"; and to remove requirements that decision-makers must have particular regard to the adequate consideration and reasonably necessary tests.[73]

91. EDS supports the need for a robust assessment of effects accompanying a NoR; and considers there could be merit in inserting a new requirement into s 168 to achieve this (as proposed).

92. However, it is concerning that the proposals would enable a requiring authority to undertake works (on land it owns) that generate significant adverse effects where there are suitable

[70] Ministry for the Environment (2024) "*Regulatory Impact Statement: Consenting II package*" (20 September 2024 at [138].
[71] Electricity Authority (2022) "*Promoting competition in the wholesale electricity market in the 100% renewable electricity transition: Issues Paper*" available here at vi.
[72] Resource Management Act 1991, s 168A(3) and s 171(1).
[73] The Bill, cls 49 to 51.

alternatives available. There is also a lack of clarity around how adverse effects on significant values should be managed.

93. For the above reasons, EDS opposes the proposals in their current form. Further amendments are necessary to ensure that decision-makers can adequately consider whether NoR conditions would appropriately address significant adverse effects; and (where available) require an alternative approach if this cannot be demonstrated.

Housing growth: New intervention powers to ensure compliance with national direction

94. The Bill proposes to enable the Minister to direct local authorities to:

    (a) Prepare or amend any "*document*" required by a national policy statement (**NPS**);[74] and
    (b) Prepare a plan change or variation to address any non-compliance with a NPS, including which planning process must be used.[75]

95. EDS opposes these amendments. They reserve excessive power to central government without adequate checks and fail to address the root causes of "*non-compliance*" with national direction.

96. At the highest level, EDS queries why these proposals have been grouped under the "*Housing*" package of amendments in the Bill and related analysis.[76] This emphasis is misplaced given the powers would apply to *any* NPSs. Not just the National Policy Statement for Urban Development 2020 (**NPS-UD**). Given there are a range of NPSs,[77] the scope of the proposals is much wider and could have implications for most aspects of the resource management system.

97. This is concerning because the Government intends to make wide-sweeping changes to national direction next year. Minister Bishop has described the scope of reform as "*the largest change in national direction in this country's history*".[78] At this stage, it is uncertain what the new and amended NPSs will contain or require local authorities to achieve. It is premature to enable the Minister to direct councils to comply with NPSs that are yet to be confirmed.

98. There has been a trend towards increasingly prescriptive NPSs over recent years. This has restricted the ability of councils to consider local circumstances when making plans. This trend may be carried through to future changes to national direction. For instance, Minister McClay has signaled an intent to remove the ability for councils to implement more stringent rules in relation to commercial forestry.[79] Enabling the Minister for the Environment to double down and direct councils to change their plans without accounting for local circumstances is likely to result in worse environmental outcomes.

99. The proposals do not address the underlying reasons for non-compliance with NPSs. For instance, a review of the New Zealand Coastal Policy Statement 2010 (**NZCPS**) found a range of resourcing issues were impacting on implementation including competing priorities directed by

[74] The Bill, cl 6, which inserts new s 25A(3) into the RMA.
[75] The Bill, cl 7, which inserts new s 25A(4) into the RMA.
[76] The Bill, explanatory note; Hon Chris Bishop "*Second RMA Amendment Bill introduced to Parliament*" (12 December 2024), available here; the RISs accompanying the Bill (available here).
[77] For example, the NPS-Renewable Electricity 2011; the NPS Freshwater Management 2020; the NPS-Highly Productive Land 2022; the NPS-Indigenous Biodiversity 2023; the New Zealand Coastal Policy Statement 2010.
[78] Hon Chris Bishop "*Speech on replacing the Resource Management Act*" (20 September 2024) available here.
[79] Hon Todd McClay "Resource Management reform to make forestry rules clearer" (5 September 2024) available here.

other NPSs and onerous information and planning requirements.[80] This problem is acknowledged in the Supplementary Analysis Report. It states: [81]

> Some councils may face challenges with balancing new implementation requirements against existing council resourcing – particularly where proposals require resource intensive plan change processes or consent reviews, such as the housing growth, or primary sector proposals.

100. Issuing a new direction to comply with existing policies (which may already include strong directives) is unlikely to achieve a different outcome unless these systemic issues are fixed.

101. In any case, the proposals are unnecessary. Under the RMA, the Minister already has the ability to include strong directives regarding implementation in NPSs so long as the correct process is followed;[82] and local authorities must take any action that is directed by an NPS.[83]

102. The Minister also has existing powers to investigate and make recommendations to address poor performance by local authorities.[84] The Minister can take action if a local authority fails to comply with a recommendation.[85] Consequently, the Minister could enforce compliance with an NPS if warranted. The proposals in the Bill effectively duplicate this power but make it easier for the Minister to direct action where it is not justified.

103. EDS submits that a better approach would be to include implementation directives in NPSs as part of the reform process. This would give interested parties an opportunity to provide input during the standard process for preparing NPSs.[86] That process, which includes public submissions, operates as an important check on the Minister's powers and enables resource constraints to be identified and addressed in a more constructive manner.

Housing growth: Proposed changes to the SPP

104. The Bill proposes to establish a modified Streamlined Planning Process (**SPP**).[87] As previously indicated, the Minister will be able to direct councils to use the modified SPP to address non-compliance with NPSs.[88] Key aspects of the modified SPP include:

    (a) A council must "*notify*" the Minister for a direction to proceed with the SPP.[89] This differs from the ordinary SPP where a local authority must apply to the Minister for a direction to use the SPP and then the Minister must decide whether or not to allow it.[90] Effectively, this makes it easier for the Minister to enforce use of the modified SPP.
    (b) Unlike the ordinary SPP, the Minister is not required to consult with other relevant Ministers, private plan change applicants or requiring authorities on a proposed SPP that he or she intends to direct.[91] Given the broad scope of NPSs this could enable the Minister to issue a direction for an SPP that affects the CMA (e.g. to enforce compliance

[80] Department of Conservation (2017) "*Review of the effect of the NZCPS 2010 on RMA decision-making: Overview and key findings – Part One*" at 7.
[81] Ministry for the Environment (2024) "*Supplementary Analysis Report: Resource Management Amendment Bill 2 – analysis to support introduction*" (27 November 2024), available here, at [99].
[82] Resource Management Act 1991, s 45A.
[83] Resource Management Act 1991, s 55(3).
[84] Resource Management Act 1991, s 24A.
[85] Resource Management Act 1991, s 24A.
[86] Resource Management Act 1991, s 46A.
[87] The Bill, cl 70 which amends cl 70(4) to (22) of Sch 1.
[88] The Bill, cl 7, which inserts new s 25A(4) into the RMA.
[89] The Bill, cl 21, which inserts new s 80CA into the RMA; and cl 70 which inserts new cl 75A into Sch 1 of the RMA.
[90] Resource Management Act 1991, s 80C; and cls 75-77 of Schedule 1.
[91] The Bill, cl 70(9), which inserts new cl 76(4) into Sch 1 of the RMA.

with the NZCPS). It is concerning that the Minister of Conservation would not need to be consulted in this situation.

(c) A local authority must establish an "*SPP panel*" to receive submissions and make recommendations on a plan.[92] The Bill defines an "*SPP panel*" as "*an independent hearings panel of 1 or more independent commissioners…*".[93] However, *hearings* are not compulsory and an SPP panel may make recommendations on the basis of written submissions.[94] Hearings are an important part of the planning process. The Minister has wide powers to direct use of the modified SPP to address a range of matters that impact on public interests. Once plans have been made, they are hard to change and will have long-term implications. It is important that decisions are well informed and accurately made. Particularly in the context of limited appeal rights (addressed below).

(d) The Minister may direct the composition of the SPP panel, the expertise required of the panel and appoint up to half the members of the panel.[95]

(e) A local authority must decide whether to accept or reject each of the SPP panel's recommendations.[96] This differs from the ordinary SPP where the Minister makes decisions. In principle, EDS supports this approach as it provides a check on the Minister's intervention powers. However, it is not sufficient (on its own) to prevent the Minister from exerting undue influence on planning outcomes.

(f) If the council decides to reject a panel recommendation, it must decide an "*alternative solution*" and undertake an evaluation in accordance with s 32AA.[97]

(g) There are limited rights of appeal. A person who made a submission may appeal a council's decision to *reject* a panel's recommendation to the Environment Court and then the High Court (final appeal).[98] The right of appeal is limited to the extent a council's alternative solution differs from the panel's recommendation.[99]

105. Overall, EDS opposes the proposed new SPP in the context of wider powers of ministerial intervention. Collectively, the proposals:

(a) Limit the ability of councils to choose when it is appropriate to use the standard Schedule 1 process for plan changes affecting a wide range of matters.

(b) Fail to provide adequate checks on the Minister's powers to direct use of the SPP. The Minister could direct a council to use the SPP immediately following reform of national direction, without giving the council sufficient time to implement changes.

(c) Enable the Minister to exert undue influence in planning outcomes. For instance, by directing use of the SPP, appointing half of the SPP panel and then limiting appeal rights.

(d) Limit others from participating in the SPP. For instance, relevant Ministers and the public.

(e) Impact on access to justice by limiting rights of appeal on a wide range of matters engaging core aspects of the resource management system.

System improvements: Council hearings on resource consents

106. Currently councils must hold a hearing for resource consents if requested by an applicant or submitter.[100] They may also hold a hearing if they consider it necessary.[101] The Bill proposes to

[92] The Bill, cl 70(15) which amends cl 83 in Sch 1.
[93] The Bill, cl 19, which inserts new definitions into s 80B(3) of the RMA.
[94] The Bill, cl 70(15), which replaces cl 84 of Sch 1 of the RMA.
[95] The Bill, cl 70(13), which inserts cl 78(4A) into Sch 1 of the RMA.
[96] The Bill, cl 70(15) which replaces cl 85 in Sch 1.
[97] The Bill, cl 70(15) which replaces cl 85 in Sch 1. See proposed new cl 85(1)(b) to (c).
[98] The Bill, cl 70(21) which inserts new cl 93A into Sch 1.
[99] The Bill, cl 70(2) which inserts new cl 93A into Sch 1.
[100] Resource Management Act 1991, s 100(b).
[101] Resource Management Act 1991, s 100(a).

remove mandatory hearing requirements and to restrict the council's discretion to hold a hearing. Specifically, the Bill provides that a council *must not hold a hearing* if it determines that it has sufficient information to decide an application.[102]

107. EDS opposes this proposed change. It effectively displaces the presumption that a council will hold a hearing where necessary or requested. This gives rise to several concerns that cannot be fixed with legislative tweaks.

108. The RIS suggests the intent of the proposed amendments is to improve consent processing efficiency.[103] EDS submits that the proposals are unlikely to realise desired efficiencies because they elevate the risk of litigation by:

    (a) Restricting the ability of councils to hold a hearing where an applicant or submitter requests it. This would likely be where an application involves complex consenting issues (i.e. complicated or uncertain effects) and/or high level of public interest. In these situations, hearings provide an important opportunity to identify contentious matters, test evidence and conditions, and resolve issues (often through amendments to the original application) before a decision is made.
    (b) Requiring a council to determine the adequacy of information provided with a consent application. Aggrieved submitters are likely to challenge the council's decision not to hold a hearing, which would lead to protracted delays in the consent process.

109. The RIS does not provide any quantifiable evidence demonstrating that hearings on resource consents are causing significant delays that would justify the proposed changes. For instance, the RIS states "*targeted engagement with local government representatives suggested that the key reasons consents take more than one-year to process are inadequate applications, further information requests, hearings and complex consenting issues*."[104] While hearings may contribute to delays in some instances, the core issues relate to inadequate information and delays associated with filling gaps in information filed with an application.

110. Hearings provide a useful opportunity for public participation in the consenting process. They enable submitters to call expert evidence and test information in an application. Points of disagreement can be clarified or resolved, which can reduce the risk of subsequent challenges. This also improves the information basis for council decisions. For instance, by enabling errors to be fixed and appropriate conditions to be imposed that effectively address environmental effects.

111. The proposals create a decision-making process that is procedurally unfair. For instance, if a council determines not to hold a hearing, a submitter will not have any opportunity to respond to the council's s 42A reports or to rebut concerns raised by other parties. This is a departure from the usual process where s 42A reports and submitter evidence are provided in advance of a hearing.[105] This will significantly limit the ability of submitters to consider all the available information. It is likely to result in submitters casting a wide net from the outset and constructing strawman arguments to retain appeal rights rather than focusing on contentious issues. This will make it harder for applicants to address submitter concerns. Litigation is likely to follow.

[102] The Bill, cl 34, which replaces s 100(1) of the RMA.
[103] Ministry for the Environment (23 august 2024) "*Regulatory Impact Statement: Consenting 1 package*", available here.
[104] Ibid at [35].
[105] Resource Management Act 1991, s 103B.

112. The approach adopted by the Bill effectively limits the opportunity for a submitter to prepare a case that supports or opposes a consent application. A submitter would only have 20 working days to file fulsome evidence in support of their position.[106] This is not enough time to prepare an entire case in the context of partial information (e.g. where the council's position is not known and no supplementary information has been provided about the application).

113. For the above reasons, EDS requests that the Bill retain the requirement that a hearing must be held if a submitter or applicant requests it.

System improvements: Cost recovery

114. The Bill proposes to widen council powers to set administrative fees related to:

    (a) Reviewing consents when required by national direction.[107]
    (b) Reviewing consents when the holder is in breach of conditions.[108]
    (c) Permitted activity monitoring. This will reduce barriers that currently exist for such monitoring. It is particularly important in the context of wider resource management reform given Cabinet has indicated it will move towards increased use of permitted activity standards.[109]
    (d) Investigations to determine if someone has contravened the RMA.[110] However, it is important that appropriate checks on this ability are retained in the RMA (i.e. the criteria in s 36AAA) to ensure people are not charged excessive costs for unnecessary or unjustified investigations.

115. EDS supports these proposals.

System improvements: Compliance and enforcement

116. The Bill includes a suite of proposals aimed at strengthening compliance and enforcement provisions. These include amendments that will:

    (a) Increase maximum fines.[111] This will strengthen the deterrence power of financial penalties.
    (b) Remove the ability to insure against penalties.[112]
    (c) Introduce an ability to consider poor compliance history in consent decision-making[113] and then decline applications on this basis[114] or impose conditions to mitigate future risk of non-compliance.[115]
    (d) Introduce an ability to review a resource consent if the holder has contravened a condition of consent.[116]
    (e) Increase the term of excessive noise directions from 72 hours to eight days.[117]

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[106] Resource Management Act 1991, s 97. If public or limited notification is given and (in the case of limited notification) an earlier date is not specified by the council.
[107] The Bill, cl 10(3), which amends s 36 of the RMA. See proposed new s 36(1)(cb)(v).
[108] The Bill, cl 45, which amends s 128 of the RMA. See proposed new s 128(1)(aa).
[109] The Bill, cl 10(1), which amends s 36 of the RMA. See proposed new s 36(1)(caac).
[110] The Bill, cl 10(1), which amends s 36 of the RMA. See proposed new s 36(1)(caab).
[111] The Bill, cl 65 which replaces s 339(2) to (3) of the RMA.
[112] The Bill, cl 66 which inserts new s 342A into the RMA.
[113] The Bill, cl 36(1) which amends s 104 of the RMA. See proposed new s 104(2EA).
[114] The Bill, cl 36(2) which amends s 104 of the RMA. See proposed new s 104(6A).
[115] The Bill, cl 39 which amends s 108 of the RMA. See proposed new s 108(1)(da).
[116] The Bill, cl 45, which amends s 128 of the RMA. See proposed new s 128(1)(aa).
[117] The Bill, cl 61, which replaces s 327(3) of the RMA.

(f) Amend the scope of abatement notices to include circumstances of non-compliance or (not and) adverse effects.[118]
(g) Introduce a new process for applications to the Environment Court to revoke or suspend a consent due to ongoing, significant or repeated non-compliance.[119]
(h) Authorise the Minister of Conservation to appoint enforcement officers with powers to enforce compliance with regional coastal plan rules related to specified offshore islands (e.g. the Kermadec and Subantarctic Islands).[120]

117. EDS supports these proposals.

Further System Improvements: Jurisdiction of the Environment Court

118. EDS submits that further amendments to Part 12 of the RMA are required to clarify that the Environment Court has sufficient discretion to oversee the administration and implementation of all aspects of the RMA.

119. The Environment Court is a specialist court with jurisdiction over a wide range of environmental and resource management matters.

120. The primary function of the Court is to hear appeals against decisions of local authorities under the RMA. The Court hears appeals 'afresh' and reviews the merits of decisions. Resource management appeals often involve complex facts and technical evidence so this ability enables Environment Court judges and commissioners to examine the relevant context and make findings based on their specialist knowledge and expertise.

121. The Court performs a critical role in overseeing the administration and implementation of the RMA. For example, by interpreting and applying policies that were developed by central and local government. This is an important function because such policies can have significant long-term implications for people, communities and the environment.

122. The Environment Court has adopted an increasingly narrow view of its jurisdiction in recent years.

123. For example, in 2024, the Court found it did not have jurisdiction under s 310 of the RMA to make contested declarations concerning aspects of the National Environmental Standards for Plantation Forestry 2017 (NES-PF).[121]

124. EDS had sought declarations on the basis that certain regulations enabled forestry activities that resulted in significant adverse effects (through sedimentation) on environmental values in Pelorus Sound.[122] The declarations involved contested facts. EDS filed evidence to support its position. However, the Court disregarded the evidence and found it did not have jurisdiction to make the declarations. This involved a narrow interpretation of s 310 that was highly deferent to the role of central government in the RMA process.

125. EDS finds this trend concerning because it arbitrarily limits the ability to seek appropriate relief from the specialist Environment Court. It is particularly problematic given the Bill proposes to

[118] The Bill, cl 60 which replaces s 322(1)(b) of the RMA.
[119] The Bill, cl 59 which inserts new s 314A into the RMA.
[120] The Bill, cl 12(2) which repeals cls 38(3) and (4) of the RMA.
[121] *Environmental Defence Society Inc v Minister for the Environment* [2024] NZEnvC 24.
[122] *Environmental Defence Society Inc v Minister for the Environment* [2024] NZEnvC 24.

grant wider ministerial powers to intervene in RMA processes. If the Environment Court continues to adopt a highly deferent approach it will leave parties with no choice but to seek relief from the High Court.

126. EDS requests further amendments to Part 12 of the RMA, including s 310, to clarify that the Environment Court has discretion to oversee all aspects of the administration and implementation of the RMA. In particular, it should be explicit that the Environment Court can review the contents and implementation of national direction (i.e. NPS and NES) against the statutory framework and grant relief where such instruments are found to contravene the RMA.

Emergencies and natural hazards

127. The Bill proposes to strengthen the ability of councils to respond to emergencies and manage natural hazard risks by:

    (a) Introducing an ability to decline or impose conditions on land-use consents where the proposal would create or increase a significant risk from natural hazards;[123]
    (b) Giving immediate legal effect to natural hazard rules from notification of a plan or plan change.[124]
    (a) Introducing an ability to decline a controlled activity if it creates or increases natural hazard risk.[125]
    (c) Extending timeframes for retrospective consent for emergency works from 20 to 30 days.[126]
    (d) Including new regulation-making power to respond to and recover from emergencies.[127]

128. EDS supports these proposals. It is important that councils are empowered to better manage natural hazards through consenting and planning processes.

129. However, giving councils stronger powers could also create risk of litigation. For instance, where councils reject applications for land-use consents on the basis of a risk assessment. In the past, determination of coastal hazard lines has been strongly contested by home-owners. Clear guidance to support councils in exercising powers to manage natural hazards is needed.

130. EDS requests that the Government prioritise releasing the NPS for Natural Hazard Decision-making in a timely manner as part of the national direction reform to support implementation.

[123] The Bill, cl 37, which inserts new s 106A into the RMA; and the Bill, cl 40 which amends s 108AA to recognise new s 106A.
[124] The Bill, cl 25(1) which inserts new s 83B(3)(f) into the RMA; and the Bill, cl 46 which amends s 149N to include new s 149N(8)(a)(iv).
[125] The Bill, cl 27 which amends s 87A to include reference to s 106A; and cl 37 which inserts s 106A.
[126] The Bill, cl 63 which amends s 330A of the RMA.
[127] The Bill, cl 64 which inserts new s 331AA.