



T R A N S P O W E R

Resource Management (Simplifying and
Streamlining) Amendment Bill 2009

Submission by Transpower New Zealand Limited

3 April 2009

Summary

Transpower New Zealand Limited is the State Owned Enterprise that owns and operates the National Grid (high voltage electricity transmission network). Resource Management Act (RMA) approvals and processes are an integral part of projects to maintain and upgrade the National Grid.

Transpower supports the objective of this bill to streamline and simplify RMA processes and reduce costs and delays. We consider that this objective will benefit all parties involved with RMA issues and development (construction, upgrade, maintenance and operation) of transmission infrastructure.

Transpower supports and suggests improvements to the following aspects of the Bill:

- The call in process for proposals of national significance including the Environmental Protection Agency role in this process
- Direct referral to the Environment Court
- Clarification of notification requirements
- The ability to request Independent Commissioners for hearings
- Provisions for more effective National Instruments (National Environmental Standards (NES) and National Policy Statements (NPS))
- Some of the proposed amendments to plan processes

Transpower opposes changes to the decision making process for designations and outline plans.

Designations and outline plan changes

This is a step in the wrong direction as we consider this will erode the certainty of investment in network infrastructure, and increase costs and delays. We believe this change is counter to the objective of the Bill.

The Bill replaces the decision making of a requiring authority on notices of requirement and outline plans with that of the local authority. Transpower is concerned that as a result of this change:

- appeals will increase where notices of requirement are declined or unworkable conditions are placed upon designations and outline plans;
- increased technical resourcing and time will be needed for councils to inform their decisions on designations.

These changes will require increased resourcing for councils in order to assess notices of requirement and outline plans as councils will be the decision makers on matters that are often very complicated and technical (e.g. high voltage electricity transmission engineering). Obtaining such expertise could lead to increased costs for councils and applicants and further delays in processing designations.

Changes to the designation process are likely to increase the prospect of litigation with Environment Court appeals on council decisions (counter to the streamlining objective of Bill). This will drive requiring authorities to increasingly request call in of designation decisions to overcome the risk of the council hearings stage, further undermining council involvement.

We do however support the changes to the designations provisions for notification and direct referral to the Environment Court.

Call in of proposals of national significance

Transpower supports these changes which aim to strengthen the process for call in of proposals of national significance to a Board of Inquiry or the Environment Court. Our suggestions for further improvements to the call in provisions include:

- *Environmental Protection Agency (EPA) functions* – to include consideration of outline plans (for designations).
- *Direct applications to EPA* – clarifying how this mechanism will work and seeking that the views of the applicant are considered.
- *Call in of applications related to the main proposal* – clarifying what applications can be considered 'related' and how the process will work in terms of timing with Board or Environment Court hearings, and inclusion of the ability of outline plan requirements to be a 'related' application.
- *New call in criterion* – clarification of this new criterion.
- *Comments on draft decision of Board of Inquiry* – changes to clarify what comments can be made.
- *Decision within 9 months of notification* – suggestions to ensure the quality of decisions is not compromised with shorter timeframes (by resolving issues prior to hearing and setting a timeframe between lodgement and notification).

Direct referral to Environment Court

Transpower supports this amendment and suggests it could be improved by:

- Adding criteria for the local authority's decision on whether to accept a request for direct referral (e.g. public interest in the application and the scale of the activity proposed).
- Providing clear direction on how the Environment Court should consider the application.

Notification

Transpower supports the changes to the notification provisions to clarify the tests that apply to whether an application should be publicly notified or subject to public notification. We suggest that the new concept of 'special circumstances' as a test for public notification should be further defined.

Independent Commissioners

Transpower supports the amendment to allow requests for Independent Commissioners for hearings. We suggest timeframes are placed on making such a request and the local authority decision on such a request.

National Instruments

Transpower supports these changes which are aimed at making workable and effective National Instruments.

We outline some outstanding issues that need to be addressed in this Bill to allow effective drafting and implementation of NES.

The Bill should be amended so the NPS changes do not apply to the existing National Policy Statement for Electricity Transmission (NPSET). The NPSET was not made with the new processes (proposed in the Bill) for implementation of NPS in plans in mind.

Plan processes - Transpower supports some initiatives of this amendment (whole of plan appeals, decisions within 2 years of plan notification and combined district and regional plans).

Transpower opposes other amendments to plan processes (removing further submissions and limiting appeals) because they are likely to have unintended outcomes.

Introduction

- 1 Transpower New Zealand Limited (Transpower) is a State Owned Enterprise that owns and operates the network of high voltage transmission lines, substations, switchyards and a telecommunications network. This electricity transmission network is collectively known as the National Grid.
- 2 The National Grid covers 12,000 kilometres of high voltage lines, and 41,000 towers and poles around the country. It transports electricity from generating power stations to local lines companies that supply domestic users. Transpower also supplies some major industrial users of power directly. The National Grid is an essential part of the servicing infrastructure of all districts, regions and the nation as a whole.
- 3 Transpower has infrastructure investment located in the areas of all 85 councils in the country, and has experience working with nearly all councils. Transpower also has the recent experience of a call in to a Board of Inquiry for the North Island Upgrade Project (between Whakamaru and Brownhill (South Auckland), the first non-mandatory National Policy Statement (NPS), and proposals for National Environmental Standards (NES) for transmission.
- 4 Significant investment in upgraded and new transmission lines (and other components of the National Grid such as substations) will be needed across the country over the coming decade to meet the growing demand for electricity. Resource Management Act (RMA) approvals are a significant part of the process to develop any projects to upgrade and build new parts of the National Grid. In addition many activities necessary to maintain the National Grid involve seeking RMA approvals. Transpower is exposed to significant cost and uncertainty associated with RMA decisions for projects to upgrade or maintain the National Grid.
- 5 We support the objective of this bill to streamline and simplify RMA processes and reduce costs and delays. We suggest changes to improve the clarity and workability of a number of the new mechanisms proposed in the Bill which we hope will benefit any party involved in RMA processes.
- 6 The overarching issue for Transpower in any RMA reform is enabling security of electricity supply infrastructure under the RMA. Transpower is committed to ensuring that the grid is maintained, upgraded and operated in a manner that ensures security of electricity supply. The proposed NES for Transmission Activities under the RMA will help achieve certainty and consistency for the treatment of transmission activities under the RMA across New Zealand. The changes in this Bill to enable NES to work properly will also assist.

- 7 Another major issue for Transpower is under build of transmission lines. A NES has been proposed to address the risks to and from transmission lines from inappropriate activity (risks NES) and if this is progressed it could go some way to addressing this issue in the future.
- 8 Transpower's comments with regard to particular amendments and areas for improvement are covered in detail in our submission below. Attachment 1 contains some table of further technical corrections and suggestions for the Bill.

Designations and outline plan changes (clauses 108 – 117 and consequential amendments to Schedule 1)

- 9 One effect of these changes is to replace the decision making of a requiring authority on notices of requirement and outline plans with that of the local authority. Transpower **opposes these changes to the designations¹ decision making process** because they will undermine the designations process and erode an important facilitative framework for investment in essential network infrastructure.
- 10 **We seek that the proposed changes to alter decision making on notices of requirement and outline plans are removed from the Bill.**
- 11 Transpower is very concerned that these amendments will result in increased costs for infrastructure development and maintenance and there will be increased procedural delays. Designations are the most important, and in some cases only, tool in the RMA that enables long term infrastructure planning. These amendments do not appear to recognise the special characteristics of designations and raise complex issues which we do not think have been adequately evaluated.
- 12 A comprehensive review of the designations provisions of the RMA could be included in Phase 2 of the RMA reforms. This could consider the interactions of all legislation that interfaces with designations, including compensation provisions, and seek to strike the right balance rather than changing the designations provisions in a piecemeal approach. We also suggest that this wider review consider the criteria for approval to become a requiring authority. In our view appropriate granting of requiring authority status may be a solution to concerns with decision making. We suggest that a robust test for requiring authority status (and ability to review such status) may be one way to address concerns with the appropriateness of requiring authority decision making.
- 13 We understand that the major driver for these reforms is to improve the quality and certainty of decisions under the RMA and reduce delays and costs by simplifying procedures. We consider however that the changes to the decision making in designation processes proposed in this Bill are completely counter to this objective. If this objective is to be achieved for designations there are a range of

¹ A designation is a form of 'spot zoning' over a site or route in a district plan. The 'spot zoning' authorises the requiring authority's work or project on the site or route without the need for a land use consent from the relevant territorial authorities. The requiring authority (e.g. Transpower) may do anything that is in accordance with the designation, and the usual provisions of the district plan do not apply to the designated site.

technical changes that could be made in the Bill to improve designation procedures and assist with investment certainty for critical infrastructure. We set out below our further suggestions for changes to the designation provisions (see paragraph 35).

- 14 **We support the changes to the designations provisions for notification and direct referral to the Environment Court.**
- 15 With regard to notification we support the change in clause 109(2) of the Bill, section 169(2) RMA to allow notices of requirement for designations to be dealt with on a non notified or limited notification basis where appropriate.
- 16 With regard to direct referral we support the amendments in clause 108(2) of the Bill (section 168A(2) RMA) and clause 109(1) of the Bill (section 169(1) RMA) to allow for direct referral to the Environment Court of a notice of requirement (designation).

Designations (clauses 108 – 117 and Schedule 1 amendments)

Changes likely to result in increased costs and delays

- 17 The changes to alter decision making on notices of requirement and outline plans could lead to unworkable approvals where conditions are imposed through designations (including outline plans) that do not work with the nature of the infrastructure proposed. Transpower has experienced this under the current designation process and believes that unworkable decisions are likely to increase if the decision making process changes.
- 18 Some recent examples of recommended conditions placed on Transpower designations that are unworkable are:
- For a substation designation a requirement to notify the council each time a circuit breaker is used. This requirement fails to recognise the instantaneous and unplanned nature of circuit breaker use.
 - For a substation and switchyard designation a condition placed on Transpower requiring removal of distribution lines (where the lines in question are not owned by Transpower).
- 19 We consider that increased costs and delays are a likely result of the proposed changes as:
- Environment Court appeals will increase where notices of requirement are declined or unworkable conditions are placed upon designations and outline plans.
 - Increased technical resourcing and time will be needed for councils to inform their decisions on designations.

- 20 We are concerned that these changes to decision making will require increased resourcing for councils in order to assess notices of requirement and outline plans. We would expect a higher level of resourcing than councils currently have as they will be the decision makers on matters that are often very complicated and technical (e.g. high voltage electricity transmission engineering). Technical expertise necessary to assess notices of requirement is likely to be difficult for councils to resource internally and the likely result is there will be increased outsourcing. This could lead to increased costs for councils and applicants and further delays in processing designations.
- 21 Changes to the designation process are likely to increase the prospect of litigation with Environment Court appeals on council decisions (counter to the streamlining objective of Bill). This will drive requiring authorities to increasingly request call in or direct referral of a designation decision to overcome the risks of the council hearings stage, further undermining council involvement.

Not counter to 'natural justice'

- 22 At present, councils make recommendations to the requiring authority on whether to approve designations and any conditions, or whether to modify or withdraw the notice of requirement for a designation. The government policy justification for the proposed changes to the decision making process is that allowing requiring authorities to decide on notices of requirement is counter to principles of natural justice.
- 23 Transpower's view is that the process is not counter to natural justice as there is an opportunity for all parties to be heard and views considered. At present it is mandatory for all notices of requirement to be publicly notified which allows full public participation through the submission process. In addition there is opportunity for comment where a designation is 'rolled over'² in a plan change. At present there is considerable opportunity for public and council participation in the decision making process for designations through the hearing of submissions and the ability for councils to make recommendations on notices of requirement. The current process for designations allows for council and local input which is valuable in reaching practical local outcomes. Likewise, any party can appeal the decision of the requiring authority to the Environment Court.

Decision making of requiring authority provides public benefit of utilities

- 24 We consider that designations are an essential tool in the RMA as they are a mechanism that provides for long term planning of infrastructure that cannot be achieved through any other mechanism

² A roll over designation is a designation that was in the district plan and that the requiring authority requests to have included ('rolled over') when a new plan is proposed.

in the RMA. The designation gives providers of network utilities and public facilities certainty and the ability to plan ahead for activities. Designations can protect a site or corridor from other incompatible land use and provide a link to the Public Works Act land acquisition mechanisms. There is no other RMA instrument that provides these essential elements for long term infrastructure planning. It is for these reasons that a designation cannot be considered the same as a resource consent.

- 25 We consider that the wider public benefit from the public infrastructure that requiring authorities provide justifies the need for requiring authorities to determine designations. Public infrastructure such as the National Grid is of national importance, but the providers of such infrastructure are often limited in their choice of sites or corridors and require long term planning. That is the policy reason for having enhanced planning provisions for public infrastructure.
- 26 We consider that there is a need for requiring authority decision making because it enables the wider community matters (e.g. long term public infrastructure benefits) to be weighed against local effects and issues (immediate issues with the infrastructure development). It is for these reasons that we consider that the granting of requiring authority status is the appropriate way to address any concerns with requiring authorities rather than changing the decision making process.
- 27 We do not agree with the idea that because the designation mechanism is counter to the RMA 'one stop shop' approach it is a mechanism that has no merit. We understand that one view expressed is that designations only provide 'land use' consent equivalence and do not provide for other activities (e.g. water use etc) therefore they do not provide a 'one stop shop'. Our view is that this idea is misplaced as there are clear merits in the designation mechanism. Approval for land use is the main issue with any development of public infrastructure and utilities. There is no other mechanism in the RMA that provides what a designation can provide, namely the long term planning benefits and 'protection' from other uses that may 'prevent or hinder' a designated use.

Numerous issues with designations decision making process not resolved

- 28 These amendments to alter decision making on designations raise complex consequential issues that are not resolved by the amendments. It is our view that these amendments should be deferred to allow consideration of these consequences including:
- uncertainty as to the scope for territorial authorities to modify requirements or set conditions, and to guide the Court on appeals;
 - uncertainty as to whether a council decision to cancel a notice of requirement means that the land is no longer protected from development by other land users (pending resolution of appeals);

- confusion as to the scope of appeal rights in relation to designations rolled over or added to plans using the process in Schedule 1 RMA;
- uncertainty as to how far councils can go in requiring changes to outline plans (e.g. no new conditions should be imposed and no compromise to the purpose of the designation) and the timeframe for a council to respond to an outline plan lodged with them for approval.

Outline plan process for designations (clause 116, section 176A)

- 29 The object of the outline plan³ process is to provide the detailed design of works that are within the purpose of an established designation. Outline plans often contain technical details that were not available at the time of the hearing into the requirement. Public comment is not sought by councils on the outline plan process, although the requiring authority can choose to consult on its outline plan. The outline plan must comply with any conditions in the designation.
- 30 By giving councils the final say on outline plans, significant additional council resourcing will be required and costs to councils in assessing outline plans will escalate. Changing the outline plan provisions to allow consent authorities to require changes to outline plans will mean that councils have to decide on the details of sometimes very complex engineering specifications (e.g. substations, transformers and switchyards) that they may not be well placed to determine. In our view it would be inappropriate for the council to be the final arbiter of complex engineering works and this could lead to unworkable outcomes. It is likely that this process will substantially delay the ability to implement critical infrastructure investment and upgrade works.
- 31 No policy justification has been made for this change to alter decision making on outline plans. The only statement made is with respect to the 'designation process', that it is 'counter to natural justice'. If that same reasoning is intended to apply to outline plans we submit that it is misplaced. The current outline plan process does allow councils to be heard and input on outline plans by making requests for changes (rather than 'requiring' changes as proposed in this amendment). It has never been the case that the outline plan process involved public input as this is offered through the primary process of commenting on a publicly notified notice of requirement (for a designation).
- 32 It is also counter to the nature of designations to have to obtain local authority approval of outline plans. Designations are intended to provide for the authority to develop the detailed design or change

³ An outline plan is a plan or a description of works that a requiring authority proposes to carry out on the designated site. It is submitted to the local council for comment.

an existing design that is within the purpose of the designation (that has already been confirmed). In essence a designation is a provision in a district plan to enable certain work subject to conditions. Once a designation is approved there should be some investment security to allow infrastructure to be designed in detail and built (involving the outline plan details), as the primary decision to approve the designation has already been made.

- 33 An example where this might create further problems would be a proposal that has been called in, and a Board of Inquiry appointed to hear evidence arising from the notices of requirement. Following extensive deliberations, and the close of evidence, the Board of Inquiry is likely to impose specific conditions addressing environmental effects raised in submissions and evidence, including from Councils. The changes to the outline plan process proposed by the Bill could then result in Council requirement for further technical changes to an outline plan. Such changes could include issues previously raised by Councils in evidence and already decided on by the Board of Inquiry. The only opportunity to address this disagreement would be by the requiring authority appealing to the Environment Court, thereby imposing a second appeal phase on issues that have already been litigated and resolved in a primary Board of Inquiry hearing.
- 34 We make suggestions below with regard to the ability for a Board or environment court to consider 'outline plans' as a 'related application' to a proposal of national significance. We also suggest that the Environment Protection Agency should be given the ability to consider outline plan requests (as an alternative to the local council) where an outline plan forms part of a proposal of national significance that is 'called in' (these suggestions are discussed further in the next section of our submission).

Further suggestions for improvement of designations provisions of RMA in Phase 2

- 35 Transpower has suggestions for further changes to the designations regime that would create an effective and workable regime that assists with essential infrastructure planning and development as follows:
- enabling greater opportunity to designate transmission works in advance of Electricity Commission approval by simplifying the level of detail anticipated for notices of requirements;
 - lowering the threshold of 'necessity' in RMA designations provisions to clarify that it is not subject to Electricity Commission approval. We consider that it is not appropriate for matters regarding economic regulation to be considered within the RMA effects based assessment. This and the first bullet point would enable the early designation of transmission 'corridors';

- providing a timeframe for local authority recommendations on notices of requirement and outline plans;
- clarifying the definition of 'financial authority' to enable distributors and generators to designate works on Transpower's behalf;
- better aligning the designation process with public works negotiations and acquisitions;
- clarifying the extent to which consideration of alternatives is required where the requiring authority has an interest in the land (section 171(1)(b)(i) interpretation);
- clarifying the extent to which alternative options require consideration under section 171, to ensure that the focus remains on environmental effects and not technical issues;
- Clarifying what is required to 'give effect' to a designation.

Call in for proposals of national significance (Clauses 90 – 106) and Environmental Protection Agency (Clause 35, Part 4A, sections 42B and 42C)

- 36 Transpower conditionally supports the changes to the call in process and has some suggestions for improvement.

Environment Protection Agency (EPA) functions (Clause 35, Part 4A, sections 42B and 42C)

- 37 Transpower suggests an addition to the EPA's functions in section 42C so the EPA can consider outline plans for designations that are part of a proposal of national significance that is 'called in'. We consider that the option for the EPA to consider (and comment on) the outline plan for a designation that is 'called in' is appropriate as the EPA can provide a national level of consideration for designations that may span a number of districts. We also consider that given the EPA can consider certificates of compliance it is warranted that they can also consider outline plans. The current provision for a local authority to consider and comment on outline plans (under section 176A) would remain as an option where the designation (that the outline plan relates to) is part of a proposal of national significance.
- 38 Our view is that this new function for the EPA (to consider outline plans) is needed in addition to the ability for a Board or Environment Court to consider outline plan requirements as satisfied or waived (as suggested below in relation to clause 93, new section 141AAG(1)). This is because outline plans may be prepared at different stages in the development of a proposal of national significance (not always during the hearing of the notice of requirement) and sometimes well after a designation is confirmed. Therefore the flexibility to have the EPA consider an outline plan would assist in creating an effective process.

Direct applications to Environmental Protection Agency (EPA) and power to intervene under clause 94, section 141A (Clause 93, section 141AA- 141AE)

- 39 Transpower supports the new provisions in clause 93 for applications for call in of proposals of national significance to be made to the EPA (with a recommendation then made to the Minister). However we think clarity is required in respect of the different routes to the call in of proposals of national significance under clauses 93 to 94. We also seek that the views of an applicant are considered where the request for call in of a proposal of national significance is not made by the applicant.

Different routes for call in of a proposal of national significance

- 40 It appears that the amendments provide two different routes to have a proposal called in where the matter is of national significance. In addition, different parties (the applicant, local authority or Minister) are able to request call in. The routes appear to be:
- Direct lodgement by the applicant of an application for call in with the EPA (under section 141AA) with the decision on call in made by the Minister (on report from the EPA);
 - Call in by the Minister under section 141A(1) on application by the local authority, applicant or the Minister of his or her own volition. This provision is currently in the RMA and is not amended by the Bill.
- 41 Our view is that there should be only one route for call in so the process is very clear and can be resourced in a manageable way. Having two processes could cause confusion and inefficiencies. Our preference is to have one route through an application to the EPA from the applicant.
- 42 While the Bill precludes an application being made to the EPA and the Minister at the same time (under clause 93, new section 141AA(6)), it provides no guidance about when an application should be made to the EPA under section 141AA, rather than the Minister under section 141A.
- 43 It is not certain what role the EPA would have in assisting the Minister in relation to applications that are made directly to him under section 141A (or in relation to the Minister intervening on his or her own accord). If the EPA is to assist the Minister we question why the application is not made direct to the EPA.

Views of applicant to be sought in relation to call in requested local authority or initiated by Minister for applicant's proposal

- 44 Our view is that it is appropriate for the applicant's views to be considered in a call in of their application. Given that there is the ability for call in of a proposal to be initiated by the local authority or Minister (rather than the applicant) it is possible to have a situation where the views of an applicant are not sought in relation to a decision to call in a proposal. Consultation with the applicant (where they themselves do not request call in) would allow the applicant's views about the appropriateness of call in to be considered.
- 45 **In summary we suggest the following changes to the process of initiating call in:**
- amend section 141AA, so that it relates to the ability to apply for call in;
 - amend section 141A, so that it is limited to instances where the Minister *initiates* call in (and does not include an alternative route for applicants or the local authority to seek call in);

- require consultation with the applicant for consent/designation before any decision is made to call in their proposal;
- require the view of the applicant to be taken into account in any decision to call in their proposal.

Call in of related applications (Clause 93, new sections 141AAG – 141AAI)

- 46 Transpower supports this change to allow applications for activities that are related to works in the main proposal (proposal of national significance) to also be called in.
- 47 **We suggest that some definition or criteria are provided to specify what constitutes a ‘related’ application.** Our view is that ‘related’ applications are those that are necessary to give effect to a designation or resource consent that forms part of the main proposal. These can be applications required under other plans (e.g. regional plans) that are additional to the main (land use based) applications. A practical example of a ‘related application’ would be consent for access tracks to allow work on the upgrade of a transmission line which was the subject of a proposal of national significance.
- 48 We are concerned that the process in new sections 141AAG to 141AAI does not guarantee that a related application would be determined by a Board of Inquiry or Environment Court that heard the primary proposal. Instead the process mirrors that for call in of the primary proposal. While it might be possible for the same Board or Environment Court to hear the related applications if the hearings on the main proposal are not yet completed, this will not always be possible.
- 49 Our view is that the benefit of these provisions can only be realised if the same panel (Board or Environment Court) hears the applications. This is because a different panel would require much of the evidence to be repeated and therefore there would be no benefit over a hearing by the local council. Having a different panel hear the related applications also adds additional cost and time to the process.
- 50 We would like the Board or Environment Court that heard the main proposal to have some residual powers to hear and determine applications related to the main proposal. **We suggest that amendments are made to these provisions to ensure that any related applications are (where practicable) heard by the same Board or Environment Court (panel), or substantially the same panel, that heard the primary applications.** This might require the initial appointment of the panel (through the direction by the Minister to the Board or Environment Court) to include the ability to hear related applications at a later date.

51 **We also seek the inclusion of requests to consider outline plan requirements (as being satisfied or waived) in clause 93, new section 141AAG(1).**

52 It is often necessary to submit the detail of an outline plan during the call in process as it is necessary to provide the detail of works to occur within a proposed designation during hearings. However under section 176A the territorial authority still has the residual power to consider the outline plan afresh at a later stage. The territorial authority also has the only power to waive an outline plan requirement under section 176A(2).

53 We consider that the Board or Environment Court should be able (on request) to state that sufficient information has been provided (during the call in process) with the notice of requirement to satisfy the outline plan requirement. In effect the Board or Environment Court should be able to state that the outline plan requirement is met (just as the territorial authority can under section 176A(2)(b)) or waive outline plan requirements). Given the Board or Environment Court are 'in the shoes' of the territorial authority during call in and can now consider related applications under section 141AAG (as proposed in the Bill), we consider it appropriate that a Board or Environment Court can determine outline plan requirements. This should be added to the list of related applications in section 141AAB(1) that may be called in with a main proposal.

54 **We also consider that where the Board or Environment Court has considered an outline plan or waived an outline plan requirement there should be no further requirement for the local authority to consider the outline plan under section 176A** (unless a further or amended outline plan request is needed at a later stage). This change would prevent a dual approval process and re-litigation of outline plan approvals (if considered by a Board or Environment Court and subsequently by a council).

New call in criterion (Clause 95, new section 141B(2)(i))

55 Transpower supports the Minister having another factor to consider in deciding whether a matter is part of a proposal of national significance. We think this factor should recognise the importance of national infrastructure networks and we believe this was the policy intent of this amendment.

56 We consider that the drafting of this new criterion does not clearly reflect this policy as it may require the matter to extend to 'more than one region'. It is unclear whether this new criteria means that the matter (proposal) itself must be in more than one region or just the network utility operation. Often a matter (the proposal) is a project affecting national infrastructure but is not itself in multiple regions.

- 57 **We suggest this is amended to clarify that the matter: ‘relates to a network utility operation that extends, or is proposed to extend, to more than 1 *district or region in New Zealand*’ [new words inserted in italics]**

Comments on draft decision of Board of Inquiry (Clause 102, new section 148(4))

58 Transpower supports the proposed amendments to section 148(4) to clarify what comments can be made in relation to a draft decision of a Board of Inquiry (in relation to a proposal of national significance that is called in). We agree with the policy that comments on the merits of the Board’s decision and reasons for the decision should be prevented. However, we have some comments on how the amendment could be improved to further clarify what may be included in comments on a Board’s decision and avoid misdirected comments.

59 It is unclear what is to be included within the term ‘technical aspects’ of a report under clause 148(4). We are concerned that this might be perceived as allowing an opportunity to comment on technical evidence.

60 We are also concerned that although there is the specific ability to comment on conditions there is no ability to comment on the existence, rather than the wording of, new conditions. We believe that there should be the ability to comment on the workability and consequences of new conditions as this may impact on the viability of a project and the practicality of its implementation.

61 **We therefore suggest the following changes to section 148(4):**

- clarification that comment cannot be made about the ‘merits’ of the Board’s decision;
- clarification of what is meant by the phrase ‘technical aspects’ (so that it does not allow technical evidence to be revisited but does allow comment on conditions);
- allowing general comments on conditions (including the workability and practicality of new conditions proposed by the Board that were not already the subject of consideration at hearings).

Decision within 9 months of notification (Clause 103, new section 149(1))

62 Transpower supports this change to require a decision on a proposal that is called in to be reached within 9 months, extendable to a maximum of 18 months. Whilst we hope that all proposals can be heard within a maximum of 18 months there may be exceptional circumstances where, for reasons outside a Board’s control, meeting

this timeframe is not possible. If that were to occur there is a risk the inquiry would have to be held over again, or worse the proposal declined by default. **Consideration needs to be given to what would happen where there are exceptional circumstances which mean a hearing cannot be completed within the 18 month timeframe.**

- 63 We also seek that this amendment to have a timeframe on the making of a decision is supplemented with the following supporting changes:
- Emphasis on the use of mechanisms to resolve issues prior to hearing e.g. use of the officers report (to summarise issues in the application and submissions), further information provisions, pre hearing conferences and mediation;
 - An appropriate timeframe from lodgment of an application to notification of a direction (as this is where delay can occur).

Ability to resolve issues prior to hearing (Clauses 29 – 32, Section 41-41D and Clause 101, section 147(5))

- 64 Our view is that there is not sufficient emphasis placed on a Board of Inquiry having the ability to resolve issues prior to hearings. The benefit of emphasising powers to assist with resolution of issues prior to a Board hearing would be to simplify the hearings and reduce cost and delays.
- 65 The Bill retains the discretion for a Board of Inquiry to require an officer's report. We believe the officer's report is a useful tool for identifying issues for the hearing (and allowing for submitters to focus their cases). It can be the only practical tool where there are a large number of submitters (and pre hearing meetings or mediation have been of limited benefit). Therefore we suggest that an officer's report sought by the Board of Inquiry should be required (rather than discretionary). In contrast, an officer's report is mandatory where an application is directly referred to the Environment Court and must include conditions (under the new section 87D).
- 66 We consider that a Board of Inquiry probably has the powers to hold pre hearing meetings and mediation and to resolve or limit matters. However, to ascertain this it is necessary to cross refer to numerous provisions. It would be useful to clarify the cross references (and in turn the Board's powers) by stating clearly in the call in provisions, a list of the powers of a Board.
- 67 The ability of the Board to exercise these powers could also be emphasised by a statement in the Minister's direction to the Board that explicitly lists the Board's potential powers. Without this there will always be some uncertainty with regard to the extent of a Board's powers.

68 In summary, **we suggest the following changes would assist in the resolution of issues prior to hearing:**

- An officer's report should be a mandatory step for Boards of Inquiry for applications that are called in.
- Clarification of the Board's powers with regard to pre hearing meetings, mediation and resolving issues for hearing by stating clearly in the call in provisions the powers of a Board in this respect (rather than by cross referencing).
- The Ministers direction to the Board should explicitly list the Board's powers, including in terms of resolving issues prior to hearing.

Timeframe between lodgement and notification for call in (Clauses 93- 95, sections 141AA-141AAI, s141A, 141B and 142)

69 With the new call in processes the EPA must make a recommendation to the Minister on the application within 10 working days (under section 141AAB). However there is no timeframe set for the Minister to consider the recommendation and decide whether to notify a direction to call the matter in or refer back to a local authority. We are concerned that this period can cause delay which will result in an applicant not knowing for many months whether the call in of their application will occur.

Timeframe for Minister's decision on call in

70 While we consider that the 9 to 18 month timeframe (including any extensions) for a decision is admirable there is still room for considerable delay prior to notification. The RMA currently and the Bill do not include any timeframes for the Minister making a decision on whether to call in a matter (regardless of whether the application is made to the EPA or the Minister direct).

71 We consider that it is a reasonable expectation to have a certain timeframe between when a request for call in is made and an actual decision by the Minister. In our view a reasonable timeframe would be 2 months from the date of receiving the EPA recommendation, with the ability to extend if the circumstances make meeting that timeframe unachievable (i.e. during an election period). We note that it is not unprecedented to have a specific timeframe for Ministers making decisions. For instance section 119 (proposed to be repealed by the Bill) has a 20 working day timeframe for the Minister for Conservation to make a decision on a recommendation in relation to a restricted coastal activity.

Timeframe and process for EPA recommendation

72 Although there is a 10 working day timeframe for the EPA to make a recommendation to the Minister (with regard to an application for a proposal of national significance to be called in) there is no notification given to the applicant that this timeframe has been met.

This 10 working day timeframe could also extend well beyond that period if further information or some other report is sought by the EPA. New section 141AAC(5) allows this 10 working day timeframe to be reset and it does not recommence. There is also nothing in section 141AAB that limits the number of times the EPA can make requests and therefore reset the timeframe. Additionally, new section 141AAC does not set a timeframe for when a report commissioned by the EPA must be made available (just that it must be a reasonable time).

73 The result of these various aspects is that there will be no certain timeframe for the EPA recommendation and it would be unclear to the applicant when they can expect the EPA to make a recommendation to the Minister.

74 **To create a timeframe between lodgement and notification we suggest:**

- the applicant is notified when the EPA has made a recommendation to the Minister. Note that this would be notification of the fact of the recommendation (not substance);
- a limit to the further information requests the EPA may make;
- the timeframe of 10 working days (to make a recommendation to the Minister) recommence when further information requests are received (or otherwise concluded) or commissioned reports received;
- the Minister must make a decision on whether to call a matter in within 2 months of the date of receiving the EPA recommendation, with the ability to extend if the circumstances make meeting that timeframe unachievable;
- a timeframe for reports commissioned by the EPA of 20 working days.

Direct referral to the Environment Court (clause 59, sections 87C- 87G)

- 75 **Transpower supports this amendment.** This is a new process (in addition to call in for proposals of national significance) to allow resource consent applications and designations (that are not of national significance) to be directly referred to the Environment Court under a new process.
- 76 **We consider that this amendment could be improved by including some criteria for the local authority's decision to agree to a request for direct referral.** Without the inclusion of some boundaries for making this decision the local authority may be provided too much discretion and open to judicial review. It will also be unclear to applicants whether their application could be eligible for direct referral if there are no criteria.
- 77 We suggest that it would be appropriate to include criteria based around the public interest in the application and the scale of the activity proposed (i.e. the activity is of regional significance).
- 78 We are also concerned that section 87E gives insufficient direction on how the Environment Court should consider the application. Given that the Environment Court will be the first instance hearing under a direct referral we consider that clarification is required with regard to how the Environment Court provisions (Part 11) of the RMA should apply. We note that the same issues arise with call in of a proposal and referral to the Environment Court under section 150AA. **We suggest that in addition to the powers under Part 11, the Environment Court should have the powers of the consent authority that would have considered the application at first instance.**

Notification (clauses 68 and 69, sections 94- 95)

- 79 **We support the changes to the notification provisions** as they aim to clarify the tests that apply to whether an application should be publicly notified or subject to limited notification.
- 80 We are however concerned that the new section 94AAE creates a new concept in the tests for public notification, namely 'special circumstances'. This new test allows a consent authority to determine what 'special circumstances' might include. Our view is that this is a very open test for public notification which leaves too much discretion to councils. **We seek that the meaning of 'special circumstances' be further defined** so that councils and applicants are aware of how this provision might be used. We suggest that 'special circumstances' should be tied to environmental effects and public interest concerns.

Ability for applicant or submitter to seek appointment of Independent Commissioners (clause 73, section 100A)

- 81 **Transpower supports** the ability for an applicant or submitter to seek the appointment of Independent Commissioners to hear an application. This amendment will add another tool to the RMA to assist in timely and effective decision making.
- 82 **We think changes are required to section 100A so there is a timeframe for making decisions on such requests and a timeframe for making requests.** As currently drafted it is not clear whether the local authority must make a decision on a request for an Independent Commissioner (under section 100A (3)) within the same timeframe that a hearing date must be fixed (under section 101). We consider that the local authority should have to make a decision on a request under section 100A within ten days of the date of the request. We also consider that this decision should still be able to be made within the overall timeframe of 25 days to fix a hearing from closing of submissions (under section 101(2)). This may also require the request under section 100A (for an Independent Commissioner) to be made by the date submissions close.

National Instruments - National Environmental Standards (clauses 6 – 15, clauses 38 – 41 and multiple clauses throughout the Bill) and National Policy Statements (clauses 41- 48)

- 83 **We support these changes** which are mostly technical fixes to enable NES and NPS to work effectively and for these National Instruments to be readily implemented.
- 84 As an overall comment we think that the effectiveness of NES and NPS could be improved with combined central government direction on national significance priorities, including the ability to have combined NPS and NES on the same issues. A combined approach might provide clarity with regard to linkages between NPS policies and NES rules so that it is clear what parts of the NPS the NES responds to. This may be something that is considered in Phase 2 of the RMA reforms.
- 85 We have a general comment with regard to the new process in section 55 to allow NPS implementation without the Schedule 1 process (directly into plans and policy statements). In order for this 'direct' approach to work effectively we consider that the NPS drafting and process for development of the NPS will have to take into consideration how the proposed NPS will 'fit with' plans and other NPS. Given the nature of NPS (objectives and policies) this may be difficult to achieve.
- 86 We have a number of other suggestions to improve and clarify the current amendments for NPS and NES (see below).

National Policy Statements (Clauses 41- 48 (particularly section 55) and clause 154)

- 87 **For NPS we seek that the transitional provision (clause 154) be amended so that the current amendments do not apply to the existing National Policy Statement for Electricity Transmission (NPSET).** We consider that the current transitional provision would make it unclear how the NPSET should be implemented by councils as the words of the NPSET itself state that a 4 year, Schedule 1 planning process should apply. This needs to be clarified by amending the transitional provision so that the amendments in this Bill do not apply to the NPSET.
- 88 Transpower would prefer that the NPSET is implemented in a way that was intended when the NPSET was made. We consider that the NPSET was considered and drafted in a way that a Schedule 1 process was envisaged (rather than as policies and objectives that should be directly inserted into planning documents). Some councils may have already begun work to prepare plan changes to implement

the NPSET and this will have been done on the basis of the Schedule 1 process as it stood when the NPSET was made (in April 2008).

National Environmental Standards (Clauses 6 – 15, clause 38 – 41 and other clauses amending terminology and cross references)

89 We support the intent and substance of the amendments for NES in the Bill as they will assist in creating a workable NES regime. **We highlight below the main outstanding issues for NES which we consider are important to address in this Bill. If these issues are not addressed there will be some continued uncertainty in drafting and implementing workable NES.**

NES – Part 3 relationship (clauses 6, 9-12)

90 We support the amendments in the Bill that address the referencing to NES in sections 9 and 11-14 of the RMA. **We think the intention of this amendment cannot be realised as there is nothing to confirm that activities or uses that contravene Part 3 or plan rules, but are expressly authorised by NES, are entitled to proceed.** It would be good to make this crystal clear so there can be no confusion when NES are implemented by councils and other parties.

NES – plans and consents (clause 38 and 39)

91 We consider that the sections addressing the relationship between NES and rules in plans and resource consents are still unclear. **We consider that the following further amendments would assist in a fully workable NES regime:**

- Sections 43A(1)(c), 43A(1)(e) and 43A(5) require amendment to enable individual NES to define their relationship with plans, including by providing that existing rules cease to have effect.
- Amend section 43A so that an NES could specify when notification is not required.
- Amend section 43B so that individual NES can determine implications for existing resource consents.

92 Subsections 43B(5)-(8) have been amended (clause 39). However we have remaining concerns with the interface to the Part 3 restrictions. There need to be consequential amendments to subsection 43B(1)-(4) to clarify how these provisions (addressing plans and resource consents) relate to redrafted subsections (5)-(8) (which address various categories of land use and subdivision consents and discharge and water permits).

93 The addition of proposed section 44A regarding plan rules and NES goes some way to addressing the interface of rules and NES. However it only deals with plan rules that are duplicated in an NES and are more stringent or lenient than the NES. It is still unclear how this may interface with sections 43A(1)(e) and 43A(5).

NES and Designations (clause 39)

- 94 **We suggest that section 43D is amended to clarify that NES may specify that a designation can prevail over a NES.** Clause 39 of the Bill does not address this issue. This lack of flexibility can be a problem and lead to a lack of clarity in the relationship between new NES and existing designations. Designations are relatively easily identified (as they become district plan provisions). Therefore we consider that it would be relatively simple to have a regime that allowed for the NES itself to provide for when it did or did not apply to projects or works authorised under a designation.
- 95 We note a further complexity to this in that the designation provisions of the RMA do not refer to NES or section 43D. While the Bill now makes explicit reference to NES in section 9 this would not cover designations (given section 176 excludes the application of section 9). Further amendments to the designations provisions of the RMA to refer to NES should be made for completeness (refer to Table A in Attachment).

Implementing NES - Permitted activities and 'significant adverse effects' constraints (clause 38, section 43A(3))

- 96 We think that there is a gap in the amendments to the NES provisions that it would be useful to address. The Bill does not amend section 43A(3) which relates to permitted activities and 'significant adverse effects' constraints. Currently under this section, if an activity 'has significant adverse effects on the environment' the NES cannot class it as a permitted activity (or one for which no consent is required). This leads to a practical problem where an NES may have a permitted activity rule (supported by experts' assessments that the effects will not be significant) and yet this could be challenged in the Courts (if unanticipated effects arise in implementation of the NES somewhere in New Zealand). This means there will always be residual uncertainty with regard to an activity permitted by an NES.
- 97 In our view this gap constitutes an unnecessary constraint on central government decisions on NES (e.g. prevents government from determining that important infrastructure roll-out should be allowed to proceed on basis it is consistent with Part 2 RMA). We note that there is no equivalent constraint on the making of permitted activity rules in plans.
- 98 **We suggest that this can be addressed by removing the restriction (deleting section 43A(3)).** Section 44 could also be bolstered if this was deemed necessary, for example to refer to Part Two rather than just the purpose of the Act and section 5.

NES and issue of certificate of compliance (CoC) (clause 90,section 139)

99 The Bill proposes to amend section 139 so that a certificate can be issued where a proposal or activity complies with a NES *or the plan*. **We have identified two issues with section 139 with this amendment which need consideration and further amendment:**

- This wording leaves open the prospect of a certificate of compliance (COC) being issued where the activity complies with the plan but not a new NES, or conversely, where the activity complies with the NES but not any “live” provisions in the plan (e.g. provisions dealing with “different effects” of a permitted activity under section 43A(5)). Either a COC should be able to state that the activity complies with all requirements, or state that it complies with the NES *or the plan* (where one does not imply the other).
- It is not sufficiently clear that a COC can be issued for an activity if an NES requiring a resource consent to be obtained is introduced after the COC has been applied for, but before the application has been processed. The issue here is with the relationship between subsections 139(3) and (5).

Making of an NES – delegation (clause 21, new section 29(1)(c))

100 **We are concerned that changes to section 29(1)(c) and (n) will allow the making of an NES to be delegated inappropriately.** Our view is that NES are a primary regulation and it is appropriate that the administrative power to approve such regulations is held by a Minister and Cabinet.

Plan processes (clause 148, amendments to Schedule 1 and a number of other sections of the Act)

- 101 We support the broad objective to reform plan processes so they are streamlined and simplified. We also observe that plans can sometimes become too complex and lack strategic focus which would be assisted by more rigorous analysis at the outset of plan processes (through the section 32 analysis and compulsory officer's reports).
- 102 We support some initiatives of this amendment (whole of plan appeals, combined district and regional plans and decisions within 2 years of plan notification) and do not support others (removing further submissions and limiting appeals).
- 103 We are opposed to some amendments because they are likely to have unintended outcomes and further policy decisions required for these amendments to work. In our view the changes we are opposed to are not appropriate to the common planning situation which may involve complex issues.

Decisions to be issued within 2 years of the date of notification of a plan (clause 148(12), Schedule 1, new clause 10)

- 104 **We support** this as we consider that 2 years is a very reasonable timeframe and it will assist in reducing delays in the planning process. We consider that there should be no ability to extend this timeframe.

Removing whole of plan appeals (clause 148(17), Schedule 1, clause 14(2)(b))

- 105 **We conditionally support** this amendment as we cannot see any merit in the ability to challenge a district plan as a whole. We consider that it is important that any relief that seeks the withdrawal of a plan in its entirety is addressed early in the plan process. It is common for parties to seek a general catch all relief in relation to the whole plan (with no intention of progressing it) and we hope that this amendment will also address this practice. **We seek however that the ability to appeal and seek withdrawal of the whole of a change or variation to a regional policy statement or regional or district plan be retained.** This is because these are often confined to a small part of the plan or policy statement or have a narrow focus.

Further submissions (clause 148, Schedule 1, clause 8)

- 106 **We oppose** the amendment to remove the ability to make further submissions as we see there is value in this process. Often issues in a plan are identified late in the process rather than at the outset of the process so the further submission process allows for input later where a new issue arises. An example in Transpower's situation is

where a council has put forward a rule with regard to the width of a transmission corridor, we accept that rule and therefore choose not to submit. A submitter could raise this rule and seek for the corridor to be decreased. If this amendment passes we would not have the opportunity to comment on the submitter's reasoning because Transpower would have no right to make a further submission.

- 107 For this amendment to work it would be necessary for councils to know what the interests of every person are, which is not possible. It is unreasonable and impractical to expect councils to do this. For example, Transpower is still not notified of all resource consents affecting its transmission corridors.
- 108 If further submissions are removed this will result in a practice of lodging wide ranging 'holding submissions' in the early phase because parties will need to support all the provisions that they don't want to see changed. It is unnecessary to force submitters into this position in order to protect themselves should an issue arise later in the hearings process. This could clog up the planning process and not achieve the outcome that is the objective of this amendment (simplify and streamline).
- 109 **The further submissions process should be retained.** Consideration could be given to improving the further submission process with:
- public accessibility of submissions and summaries of submissions;
 - focusing of the rights to make further submissions, including that a further submitter must have more than a general interest in the matter in order to submit.

Limiting appeals to questions of law (clause 148(17), Schedule 1, Clause 14(2A) and new section 280A and 290AA)

- 110 **We oppose** these amendments as we consider the policy justification is flawed and the amendments proposed incomplete. We would prefer if these proposals were considered in the Phase 2 reforms when the interaction of the NES and the EPA's role can be further developed. We believe that NES and a role for the EPA in administering NES may lessen the need for such reform of the appeals on plans. This need may be lessened because quality assurance with regard to rules that apply nationally may be achieved through NES at the outset and 'fed through' in council plans. In turn this may reduce pressure to appeal plans where the plan rules are contested.
- 111 We also consider that this proposal is premature because there may be other ways to address this issue, including:

- compulsory requirements for officer's reports so that issues are identified earlier in the planning process;
 - encouraging engagement between parties earlier in the process.
- 112 This aspect of the plan process reforms should not proceed in the current amendment as it requires significant further policy analysis and drafting to make it work. The major flaw we see is that the new process under section 280A to have leave granted by the Environment Court to appeal on the merits will become an additional procedural step added to the appeal process. The grounds for such an appeal include such wide open factors as impact on existing property rights, failing to give effect to Part 2 and 'unclear meaning or effect' (proposed section 280A(3)). This further application step is likely to add significant process and delay with submitters held up in a procedural court process before being able to appeal. We consider that adding such a step is counter to the aim of this reform to streamline and simplify.
- 113 We note on a specific point that the mention of existing property rights in the proposed section 280A is of concern on its own as this is the first place that the RMA attempts to address property rights. RMA should only address land use not property rights.

Combined district and regional plans (clause 55 and 57, section 80)

- 114 **We support** this amendment as long as it is very clear which rules in a combined plan are district rules and which are regional rules. Regional and district rules apply in different ways so it is not appropriate to group them together as that will make it very difficult to apply the rules. It may be necessary to require in section 80 that the rules for the district and region are not bundled within a plan.

Removing non-complying activity status (clause 60, section 87A and 87B, clause 147 and a number of other consequential amendments including sections 77A and 77B, 104B and 104D)

- 115 This amendment proposes to remove the activity category of 'non-complying'. Applications will default to discretionary if changes are not made in the plan within 3 years.
- 116 This category is sometimes used as an arbitrary default position (contrary to section 9 RMA) so we can see some merit in removing this category. However there are cases of 'reverse sensitivity' where this activity status has been useful. We ask that consideration of effective replacements for non-complying activity rules to address reverse sensitivity effects be undertaken as part of the Phase 2 RMA reforms. We consider that greater emphasis should be placed on restricted discretionary activities and this should be promoted in the RMA.

- 117 The reforms to remove the non-complying category appear not to have been fully carried forward, for example into the NES and NPS regime. In the transitional period for removing the non-complying activity status it will still be unclear whether the objectives and policies of an NPS apply to consideration of non-complying activities. If an NES is made during the transitional period that contains non-complying activities it will be unclear how that activity should be treated.

**Susannah Sharpe
Corporate Counsel**

For Transpower New Zealand Limited

Attachment 1 - List of detailed technical suggestions for Bill

Table A – NES Provisions – Comparison of remaining technical issues⁴ with RMA provisions for NES and the Bill’s position on each

RMA Section(s) & NES Issue	The Bill
<p>77B (Types of activities) Sections 77A and 77B related to the powers and duties of councils in relation to classes of activities and controlled and restricted discretionary activities.</p> <p>Lack of proper reference to NES in defining various types of activities, inconsistent with section 43A and resulting in uncertainty as to effect of standards and matters of control/discretion specified in NES (section refers to regulations as means of describing activity status, but not as providing for these matters).</p>	<p>Clause 53 - Sections 77A and 77B have been repealed/ replaced (clause 53)</p> <p>Sections 87A-87G have been inserted (clause 60). Section 87A includes cross reference to NES instruments but closer examination is required to ensure these amendments achieve their intentions. However, the provisions (e.g. section 87A(2)(b)) refer to discretion being restricted to matters to which the consent authority has reserved control. This would not sit well if it is the NES that has reserved such control so there needs to be a further amendment to allow for matters to which the consent authority or the NES has reserved control over.</p>
<p>77C(1)(a) and (b) (Certain activities to be treated as discretionary activities or prohibited activities)</p> <p>Lack of reference to NES as either providing for activities subject to Part 3 restrictions or as requiring resource consent to be sought for activities.</p>	<p>Section 77C has been repealed (clause 54).</p> <p>Proposed section 87B replaces section 77C and is similar to its predecessor. There is no mention of NES within the new proposed section 87B and, accordingly, this remains as an outstanding issue.</p> <p>Suggest inserting reference to regulations/NES in each 87B.</p>
<p>77D (Rules for certain activities may include restrictions on notification)</p> <p>Section fails to provide for NES to specify when notification is not required.</p>	<p>Section 77D has been repealed (clause 54).</p> <p>The Bill introduces proposed section 94AAD which allows a consent authority to specify in its plan the types of activities for which consent</p>

⁴ Listed with most critical issues first (highlighted in table).

RMA Section(s) & NES Issue	The Bill
	<p>applications should be publicly, or otherwise, notified. It would be useful to have a similar regime for NES reflected in the Act. This could be achieved by an amendment to section 43A.</p>
<p>94A (Forming opinion as to whether adverse effects are minor or more than minor), 94B (Forming opinion as to who may be adversely affected)</p> <p>Sections fail to refer to activities permitted in NES (in terms of effects that can be disregarded) and matters of discretion/control specified in NES.</p>	<p>The Bill does not make this amendment to section 94A. The section requires amending to appropriately refer to NES (to refer to activities permitted/allowed in NES (in terms of effects that can be disregarded), and matters of discretion/control specified in NES).</p> <p>The Bill repeals section 94B (clause 70). Proposed section 93A is the replacement section. The section requires amending to appropriately refer to NES (to refer to activities permitted/allowed in NES (in terms of effects than can be disregarded), and matters of discretion/control specified in NES).</p>
<p>104(2) (Consideration of applications)</p> <p>Lack of reference to activities permitted/allowed by NES in relation to “permitted baseline” (may mean more difficult to consent activities provided for in NES rather than plans).</p>	<p>The Bill does not make this amendment. This means there is no permitted baseline for permitted activities under an NES. This is a significant gap, which requires remedying.</p> <p>Suggestion - insert reference to NES/regulations (so that effect may be disregarded if plan <i>or relevant NES</i> permits an activity with that effect).</p>
<p>104A(b) (Determination of applications for controlled activities), 104C (Particular restrictions for restricted discretionary activities)</p> <p>Lack of reference to matters of control/discretion specified in NES.</p>	<p>Section 104A(b) has been amended but the wording chosen needs refinement. There is no reference to matters over which control/discretion is reserved within the NES itself, rather than by a consent authority in a plan/proposed plan (clause 78).</p> <p>The Bill amends section 104C to</p>

RMA Section(s) & NES Issue	The Bill
	refer to NES (clause 79). There are problems with this however, as it refers to restriction of Council discretion, rather than restriction of discretion within an NES.
<p>17(1) (duty to avoid remedy or mitigate effects), 17A(1) (recognised customary activity)</p> <p>Lack of reference to NES (sections refer to plans and resource consents only).</p>	<p>Reference to NES has been inserted into section 17(1)(b) (clause 15).</p> <p>The Bill does not amend section 17A(1). This remains as a minor technical issue.</p>
<p>Existing use rights under sections 10, 10A, 10B, and 20A</p> <p>Clarifying how interaction of existing use rights sections and NES.</p> <p>Section 43B(9) provides that <i>if a national environmental standard requires a resource consent to be obtained for an activity, sections 10, 10A, 10B, and 20A(2) apply to the activity as if the standard were a rule in a plan that had become operative.</i></p> <p>This is effective to allow existing activities to continue without resource consent notwithstanding the introduction of an NES (although subject to the time periods within which resource consent must be sought under sections 10A and 20A(2)).</p>	<p>The Bill could clarify that section 43B(9) means that those sections apply at the time that a NES comes into force (rather than when it is notified in the <i>Gazette</i>). This is a technical point that could be clarified by an amendment to section 43B(9).</p>
<p>85 (Compensation not payable in respect of controls on land)</p> <p>Section does not refer to controls on land imposed by an NES.</p>	<p>The Bill does not make this amendment to section 85 to refer to NES. This remains as a technical issue.</p>
<p>85A (Plan or proposed plan</p>	<p>The Bill does not make this</p>

RMA Section(s) & NES Issue	The Bill
<p>must not include certain rules)</p> <p>Restriction in relation to recognised customary activity does not apply to NES.</p>	<p>amendment to section 85A to insert reference to NES. This remains as a technical issue.</p>
<p>168A(3) (Notice of requirement to territorial authority), 171(1) (Recommendation by territorial authority)</p> <p>Lack of direction to have regard to any relevant NES when considering requirement for designation.</p>	<p>The Bill does not make this amendment. This amendment should be made for completeness.</p>
<p>176 (Effect of designation)</p> <p>Lack of reference to NES or acknowledgment of section 43D.</p>	<p>Suggestion – amendment to section 176 to clarify relationship between section 176 and 43D for NES.</p>
<p>178(1) (Interim effect of requirement for designation or heritage order), 194 (Interim effect of requirement)</p> <p>Lack of reference to NES (in that sections for designations do not expressly override NES).</p>	<p>This amendment has not been made to refer to NES.</p>
<p>207(c) (Matters to be considered), 212(b) (Matters to be considered by environment court)</p> <p>Lack of direction to have regard to any relevant NES when considering/conducting inquiry into water conservation order.</p>	<p>The Bill does not make this amendment. References to NES should be made for completeness.</p>
<p>319(2)(a) (Decision on application), 325(5) (Appeals)</p> <p>Sections fail to restrict making of an enforcement</p>	<p>The Bill does not make this amendment so we suggest inserting references to NES. Those acting in accordance with an NES should be protected from abatement notice/</p>

RMA Section(s) & NES Issue	The Bill
order/confirmation of an abatement notice where person is acting in accordance with a NES.	enforcement order action.

Table B – Other technical issues and suggestions for Bill

Clause and Section	Issue
<p>Clause 61(2), section 88A(1)(b)</p>	<p>This amendment appears to have an error in that the phrase 'under section 88, or for which the activity is treated under section 77C' is omitted. We think this phrase should not be omitted and the new words should be inserted after this phrase.</p>
<p>Further information provisions – section 92-92B and 41BA-41D</p> <p>The intention of the Bill is to have two separate processes for requesting information and commissioning reports under Sections 92-92B (when the consent authority is not to hold a hearing) and sections 41BA-41D (when a hearing is to be held).</p>	<p>These two processes could result in a gap in the RMA as there will be no provisions that apply when a consent authority was deciding whether or not to hold a hearing. It will mean that a consent authority will first need to decide whether a hearing was to be held before it applies one of these processes for further information. We suggest that there is ability for a consent authority to request information or commission reports prior to deciding about notification of an application.</p>
<p>Clause 101 - Call in - Board of Inquiry process and notification of notices of requirement.</p> <p>Cross referencing gaps: Section 147(8)(b) provides that a Board of Inquiry 'must apply sections 37, 169 to 171 and 175 as if it were the territorial authority'. This is not amended by the Bill.</p> <p>Section 169(1) provides that 'Subject to section 170, sections 87C to 87G, 92, 92A, 92B and 95-103 apply with all necessary modifications in respect of requirement notified under section 168'</p> <p>Section 169(2) is amended by the Bill and states 'the territorial authority....under section 94 to 94AAE' (these are the new notification provisions for public or limited notification)</p>	<p><i>Issues with applying section 169(1) to a call in of a notice of requirement and Board of Inquiry.</i></p> <ul style="list-style-type: none"> • Section 87C to 87G should never apply to a call in (as these are the sections for direct referral to an Environment Court) • Sections 92-92AB do not apply as these set out a process for requesting information and commissioning reports where there is no hearing held (and a Board is a hearing body). • Sections 95-97 do not apply as these relate to making submission to a consent authority (and under call in the Board of inquiry receives submissions from the Minister). • Sections 100-100A, 102 and 103 relate to an obligation to hold a hearing, appointment

<p><i>General solution to numerous likely cross referencing issues.</i></p> <p>As a more general point we think that the generic references in section 147 should be set out in a single provision that clearly sets out all the powers of a territorial authority that may or must be exercised by a Board of Inquiry. We have not done a full examination of all cross references so we would support clear setting out of these powers to avoid doubt with any cross referencing to provisions that should not apply. Such clear powers will also assist with implementing these provisions effectively.</p>	<p>of independent commissioners and holding a joint hearing (none of which apply to call in to a Board).</p> <p><i>Issues with applying section 169(2) to call in of a notice of requirement and Board of Inquiry.</i></p> <p>Applications that are called in would already be notified under section 144 so the notification tests in 94 – 94AAE do not directly apply when the application is called in (prior to a local level notification of the NOR under section 169(2)).</p> <p><i>Specific solution</i></p> <p>We suggest amendment to section 147(8)(b) to delete the reference to section 169 and replace with references to sections 98, 99, 99A and 101.</p>
<p><i>Clause 104, Section 149A – Appeals on points of law – timeframe for lodging application for leave to appeal</i></p>	<p>We note that the timeframe for lodging an application for leave to the Supreme Court is only 10 working days. This period is shorter than the current periods for making applications for leave to appeal to the Court of Appeal and Supreme Court. We consider that the timeframe for lodging application for leave to appeal should be consistent.</p>