Areas of National Importance Effects Management Framework Policy	Rationale
Areas of National Importance or ANI means: (i) Areas of the coastal environment with outstanding natural character as identified or mapped in any operative plan or policy statement; (ii) Outstanding water bodies, that are identified or mapped in any operative plan or policy statement, and any water bodies that are included within significant natural areas under (iii) below. (iii) Significant natural areas as defined in the National Policy Statement for Indigenous Biodiversity 2023 (excluding geothermal SNAs) that are identified or mapped in any operative plan or policy statement. (iv) Outstanding natural features and landscapes identified or mapped in any operative plan or policy statement; (v) Sites of historic heritage identified or mapped in any operative plan or policy statement; (vi) Sites of significance to Māori including wāhi tapu identified or mapped in any operative plan or policy statement.	**What is covered?** As discussed at the meeting with MBIE/MfE officials on 25 March (and noted in Attachment A to the 21 March memorandum) it is important to ensure a broad scope (at 'point of entry') to the effects management framework (**EMF**), which covers all relevant matters of national importance falling within s 6 of RMA, and otherwise subject of national direction addressing such matters. This is to ensure 'complete coverage' and avoid argument over any residual need for either direct recourse to Part 2 (in *King Salmon* terms) or to another NPS in assessing an REG activity. We return to this 'one shop' point and objective below. This definition has been substantially revised from the February 2024 and ESEG 2023 NPS-REG proposals accordingly, through now referencing Areas of National Importance (**ANI's**), and deliberately moving away from the previous NBEA style '*areas of significant environmental value*' language/prescription. While the intended coverage is broad (i.e. a wide net is cast), qualitative filters are applied such that (for example) areas of moderate or high (but not outstanding) natural character pass through to consideration under Policy 5, and are not captured by Policy 4 as set out below (which triggers engagement of the EMF). The same applies to SNA's, ONL's, heritage areas etc, which would need to be mapped in an *operative* plan or policy statement, such that the resource attributes and extent have been fully tested, in order to engage Policy 4. Note that this wording deliberately modifies the NPS-IB definition of SNA in that respect, which would otherwise include an area *notified* in a proposed plan. As to water bodies, ESEG proposes (as its preferred approach) reference to 'outstanding' water bodies (drawing on Policy 8 of the NPS-FM) as the qualitative filter, and any water bodes such wetlands falling within identified SNA's under the NPS-IB. While the NPS-IB principally has a terrestrial focus, SNA mapping can extend to cover wetlands, at least once assessed as

	significant ecologically or in biodiversity terms through the planning process (refer NPSIB clause 1.3(2)). An alternative is that no such filter is applied to water bodies. This would better serve the 'coverage' point, but conversely would open the door to the need to apply Policy 4 (and the EMF, as set out below) to a potentially very wide range of freshwater bodies as covered by the NPS FM. Again, by contrast with the February draft, there is also now a more nuanced approach to how the EMF applies, i.e. offsetting and compensation would only apply to the ANI's in (i) to (iii), as discussed further below. *For clarity, there is no intention for this drafting or the NPS-REG to affect land subject to treaty settlements, customary marine title etc.*
Allow means: (i) In the case of a plan or policy statement, to provide for the activity as permitted or controlled, subject to development standards; (ii) In the case of a notice of requirement, to confirm the requirement subject to conditions imposed, or proposed or agreed to by a requiring authority under s171(1B) of the RMA; (iii) In the case of a resource consent application, to grant the resource consent, subject to conditions imposed, or proposed or agreed to by an applicant under s104(1)(ab) of the RMA.	**What does allow mean?** Building again on the discussion at the meeting on 25 March 2024, we have given very careful thought to the 'outcome' of application of the EMF. Options discussed included whether successful passage of a project through that framework would mean the activity *had to be approved,* or whether it was simply *eligible to be approved*. On reflection, ESEG's strong preference remains the former (including as being more consistent with *Electrify NZ*), albeit with the qualification that appropriate conditions/development controls could be imposed on any approval, including offset and compensation measures as volunteered by an applicant under e.g. s 104(1)(ab) of the RMA. We also now propose a specific definition as to what is meant by the term "allow" (the term employed under the NPS-REG 2023 (clause 3.6)), covering the various types of 'planning decisions' being made pursuant to the NPS-REG. The term 'allow' is considered to be appropriately directive, effectively putting the converse of what the Supreme Court found to be a directive "*do not allow*" policy of the NZCPS (Policy 23(2(a)), in the *East West Link* decision (see paragraph 103[d]). For completeness on this point, we note that the Supreme Court found that even highly directive policy of the 'avoid' character must admit of 'true exceptions', where a decision in a given case would otherwise subvert the

	purpose of the RMA (at eg [101] to [105] of the Court's decision). We consider the same logic must apply for directive *enabling* policies. These are at the end of the day 'policies', and in a truly exceptional case, a given REG activity might not actually be allowed, despite compliance with Policy 4. As also discussed at the meeting, given this preferred function (and consequence) of application of the EMF, careful thought needs to be given as to what policy considerations addressing the protection of nationally important resources (subject to s 6) would apply under section 104 of the RMA. To deliver a "one stop" solution in that regard, we firstly propose that the equivalent of the EMF (as under NPS-REG 2023 clause 3.6) be nested within the policy prescription of the NPS itself, rather than in an implementation clause (this would also address the issue raised by the Environment Court in *Gibbston Vines Ltd v Queenstown Lakes District Council* to the effect that consent authorities are not bound by the terms of an implementation clause – particularly the Environment Court). The EMF is therefore proposed to be comprehensively defined in section 1.3, rather than prescribed in the implementation section (former clause 3.6). We recognise that the way the definition is framed does require the definition to do quite a bit of 'work' (particularly as to how functional and operational need are assessed), and another option would be to spell this out more directly in the Policy section itself. *In essence though, and in addition to being enabling in a sufficiently directive way, the policy drafting in this iteration would also include the 'code' for how nationally important resources are protected for REG proposals, as through application of the EMF (see proposed wording below).* Framed in this way, we do not consider there to be a need for decision makers (planners or consent authorities) to expressly apply the objectives and policies of other national direction, plans or policy statements under s 104– again serving the one stop shop objective. That said, as noted in Attachment A to the 21 March 2024 memorandum, it is acknowledged that there is a need for some firm "bottom line" protections for residual adverse effects under that approach, as addressed further below (see Schedule 1 below, but now as expanded to cover a wider range of significant resource values).

Policy 4: Managing adverse effects in Areas of National Importance Planning decisions **Allow** REG activities on sites in **Areas of National Importance**, where the adverse effects of the activity are managed through the **Effects Management Framework** in order to protect such areas, and the nationally significant benefits of the activity outweigh the residual adverse effects; **Policy: 5 Managing adverse effects in other areas** Planning decisions **Allow** REG activities on sites that are not within Areas of National Importance, provided any adverse effects are avoided, remedied or mitigated to the extent practicable. **Policy 6: Relationship with other national direction, policy statements and plans** Planning decisions for REG activities are made in accordance with this national policy statement and any plan or policy statement that gives effect to it, instead of the provisions of any other national policy statement, regional policy statement, or plan.	**The Key Policies to both enable and protect** Building on the comments above (including as to the Supreme Court's *East West Link* decision), and drafted in the way now proposed, the policy platform in Policies 4-6 provides effective consenting certainty in line with *Electrify NZ*, "*near automatic provided national rules are met*"). By contrast, and unlike the 2023 drafting proposed by ESEG (but as with the February 2024 drafting of the EMF), the policy does not 'deem' that all provisions of other national direction and plans protecting environmental values are met (see below on this point). The drafting of Policies 4 and 5 (as with the February 2024 proposal, and indeed NPS-REG 2023) adopts the same 'within' v ''outside' ANI dichotomy structure (but previously set with reference to *"areas with significant environmental values"*), and whereby for the latter (Policy 5), the EMF does not apply (and instead focus is simply on avoiding, remedying or mitigating as far as practicable). As with Policy 4 of the NPS-REG 2023, REG activities within areas of significant value (i.e., now, ANI's) are enabled ("allowed') if the benefits of the activity outweigh residual adverse effects, after application of the EMF. Policy 6 would leverage off the amendment to s45A to the RMA raised at the meeting on 25 March, and since put to Minister Bishop (refer letter attached) to resolve any uncertainty over the *vires* of such a provision (refer Attachment A of the March 21 memorandum). Policy 6 also supersedes previous clause 1.4, which has been redrafted in line with this provision, making it clear that a 'one shop' approach is intended. This provision also addresses the point made in the 21 March memorandum to the effect that there should be a provision addressing a 'deadlock' situation, and this Policy is intended to achieve exactly that. Again, responding to a point made in Attachment A to the 21 March memorandum, the reference to "nationally significant benefits" in the 'balancing' test (under Policy 4) would be complemented by policy direction (as also proposed by ESEG) that ensures decision makers recognise the nationally significant benefits of REG *at any scale* (see revised Policy 3).

	While there is no 'residual effects' threshold in this policy itself (unlike original clause 3.6 of the NPS-REG 2023), as with the February draft, this is inherent to the effects management framework (but now with a considerably broader scope relative to Schedule 1 than in the February draft).
The Effects Management Framework is as follows: (a) Subject to (b) and (c) below, (i) Adverse effects are avoided where practicable; (ii) Where adverse effects cannot practicably be avoided because: • For new REG activities, there is an operational or functional need for the activities to be on the site proposed in an ANI, or. • For existing REG activities, they are already in an ANI. they are mitigated where practicable, or. (iii) Where adverse effects are not mitigated, they are remedied where practicable; or (iv) Where more than minor residual adverse effects on ANI's (i) to (iii) are not avoided, remedied or mitigated, offsetting is provided [where possible]; or (v) Where more than minor residual adverse effects on ANI's (i) to (iii) are not offset, compensation is provided [where appropriate]. (b) For new REG activities, significant residual adverse effects on the ANI's identified in Schedule 1 must be avoided. (c) The functional or operational need for a new REG activity to be on a site in an ANI: (i) must be determined by considering the extent to which the site:	**What does the EMF require?** In reponse to Attachment A of the March 21 memorandum, and the discussion at the 25 March meeting, an avoidance step has been reinstated at the outset of the framework. ESEG nevertheless strongly remains of the view that s 5 (2)(c) of the RMA does not set a continuum or sequence i.e. (hierarchy, starting with avoid first, *then* remedy, *then* mitigate etc) as confirmed by the Environment Court in *Winstone Aggregates v Auckland Regional Council* (A 49/02) and with there being no decision of any higher Court since saying to the contrary, to the best of our knowledge and understanding (i.e. including *King Salmon*). For that reason, the language employed (as also discussed at the March 25 meeting) is that of a 'framework' rather than 'hierarchy'. The conjunctive 'or' is set at each stage to ensure they are able to be applied as options, ***apart from the first (avoidance) test,*** which is in effect mandatory . This avoidance test in (i) is however deliberately linked to the question of *functional and operational need* whereby through technical evaluation and options assessment, the capacity to avoid effects is first determined, and if there is an alternative site or location (or potentially, method) which would avoid an impact, it would have to be selected by the applicant. Going any further beyond that into questions of design etc would stray into the *mitigation* arena. Conversely, as with the February draft, the *functional and operational need test* would only apply to <u>new</u> assets/activities; it is not considered helpful/appropriate for existing REG (location is settled by previous investment/development, again as submitted by ESEG on the 2023 proposal). With all of this said, the ESEG is concerned at how the functional and operational test might be applied in a given case, and over the risk that this may stray into consideration of alternatives by decision makers, in particular. This risk is most acute for solar REG projects, where an argument can always be made that (unlike wind or geothermal), any number of sites have would

• gives access to the renewable energy resource required for the REG activity, at a scale, level or quality needed to sustain the activity proposed; • enables REG the activity to connect to supporting infrastructure, such as transmission or distribution networks; • has sufficient land available to enable the effective operation of all activities required to support the generation, storage, transmission or distribution activities; and/or • is accessible for construction, operation, maintenance, relocation, and upgrading purposes, but (ii) does not require an assessment of alternative sites either within or outside the ANI. .	access to solar energy, and an alternative location might avoid (say) a wetland, stream or other resource value on the applicant's chosen site. We have therefore drawn on the tests that were proposed under the consultation draft for the first National Planning Framework under the NBEA (clause 12.2.8(3)) to give greater clarity as to how functional or operational need would be established. ESEG considers it is very important to ensure this part of the EMF does not descend into an alternative sites inquiry, of the kind that has beleaguered REG consenting under the RMA. We note that in the Mt Messenger case (*Poutama Kaitiaki v Taranaki Regional Council*), the High Court cautioned against consideration of alternative route possibilities for a roading corridor, and in doing so noted that the functional and operational need definitions (as drawn from the National Planning Standards) are focused on environments, rather than specific locations. Conversely, the drafting needs to be careful as to its employment of the terms 'sites' and 'areas'. The functional and operational need inquiry pertains to the proponent's selected site within an ANI. There should not be a need to establish the REG activity has to be in an ANI *per se*, Finally, as noted above, offsetting and compensation are confined to natural character, outstanding water bodies and SNAs (under (iv) and (v) of the EMF clause, referring to ANI's (i) to (iii)), again as discussed at the March 25 meeting, and reflecting the origin of these concepts (as opposed to landscape and heritage/cultural resources). Clause ((b)) sets the residual effects threshold back at the significant level (consistent with the NPS-2023 drafting) and is confined to new REG (as with the February drafting), but now covering a wider range of resources (per schedule 1). This element of the EMF clause means that it is arguably more stringent than the NPSIB/NPSFM equivalents (which have no residual effects constraint), but conversely they allow effects (on wetlands and SNA's) rather than directly informing the policy direction as to whether infrastructure projects themselves should be "allowed".

For the avoidance of doubt, the Effects Management hierarchy as defined in the National Policy Statement for Indigenous Biodiversity 2023 and the National Policy Statement for Freshwater Management 2020 must not be applied to an REG activity.	The wording in this final clause ("For the avoidance of doubt) has been applied in response to the comment in Attachment A to the March 21 memorandum that there needs to be clarity as to exactly which effects management hierarchies are displaced, and noting there is no intention through this part of the drafting to displace the NZCPS.
Schedule 1 1. Any taxa, habitat, ecosystem or area in the coastal environment covered by Policy 11(a) of the New Zealand Coastal Policy Statement 2010. 2. Any area of outstanding natural character in the coastal environment as identified or mapped in any plan or policy statement. 3. Significant natural areas (excluding geothermal SNAs), as defined in the National Policy Statement for Indigenous Biodiversity2023, that are identified or mapped in any operative plan or policy statement.	**The bottom line- residual adverse effects** As noted, schedule 1 has been expanded, but the rationale from the February drafting otherwise applies. As also noted above, the schedule 1 resources must be as mapped in an operative planning instrument to qualify for inclusion, to ensure the resource attributes and extent have been fully tested, and give certainty to application of the NPS. This includes for SNA's under the NPSIB, which can extend to cover natural inland wetlands, at least once assessed as significant ecologically or in biodiversity terms through the planning process. Beyond that, a broad range of habitats, ecosystems and areas (*marine, freshwater and terrestrial*) within the coastal environment would be covered by the NZCPS Policy 11 (a) reference. A less preferred alternative would be to also expressly include reference to natural inland wetlands in schedule 1 (given the predominant terrestrial focus of the NPSIB), but to set a *minimum area* or *qualitative threshold* so that nominal wetland areas or wetlands of marginal ecological value aren't inadvertently caught. However, any spatial threshold is likely to be (at least somewhat) arbitrary, and applying the SNA filter (secured through assessment under the NPSIB) would address the qualitative threshold concern (a wetland would have to be significant for representativeness, diversity rarity and distinctiveness, or ecological context reasons to be included).