









Memorandum to Infrastructure NPS policy team, Infrastructure Commission, MfE, MBIE, DoC re draft NPS Infrastructure.

Feedback from Workshops

Kia ora koutou

Thank you for hosting workshops to share current thinking on the shape on a draft NPS for Infrastructure (NPS-Inf) and how this may fit with a wider set of NPS review and reform.

The Electricity Sector Environment Group (ESEG) has previously provided separate feedback on a draft NPS REG to officials working on that document. Many of the observations we made in relation to that draft are also applicable to the draft NPS-Inf, so a copy of that feedback is appended to this memorandum.

A key message of that earlier feedback was to highlight the basic disconnect between the Government's ambition to *Electrify NZ* on the one hand, and the NPS drafting proposals being consulted on by officials on the other.

Minister Bishop has since announced the need to make "fundamental changes to our planning and regulatory settings" in order to achieve the Government's ambitious goals for boosting the economy and reducing emissions. We agree and our comments here are made in full support of that fundamental level of change required.

In addition, as we have repeatedly stressed through engagement with officials since the previous Government's NBEA reforms kicked off, if the intended more enabling NPS (for REG and Infrastructure) do not confront the issue of conflict with other national direction, they will serve no practical purpose and essentially fail in their objectives. REG and indeed infrastructure generally will be no further ahead if projects still need to clear unworkable pathways through the likes of the NZCPS, NPSIB and NPSFM. Decarbonisation and

electrification of the economy simply won't happen, and nor will well-functioning urban and rural environments be sustained.

The signalled intention to develop new national direction alongside the review of a number of existing NPS provides the ideal opportunity to finally confront the issue of conflict between instruments. However, ESEG is concerned that the range and extent of review currently being initiated is very ambitious and at a level never attempted since 1991. We are also concerned from the policy drafting reviewed to date that this work appears to be drawing on the failed attempt to develop a NPF under the repealed NBEA, perhaps to try and short cut the overall level of work required and make it more manageable. However, the NBEA based proposals were not fit for purpose and will not deliver the fundamental reform to our planning and regulatory settings as now expected by the Government.

We also note that the supporting material (illustrative drafting) follows a similar format to recently gazetted NPSs with high level objectives and policies and more detailed provisions contained within the implementation clauses. This format does not take into account the Environment Court Gibbston Vines decision[1]. This will delay key enabling provisions being applied to projects while Councils update their Plans, which in our experience can take many years or decades.

The examples of our primary concerns over the current drafting approach (as set out below) illustrate these points, and also identify what needs to be done instead to ensure our planning system lives up to the reputation being credited to it by the reform programme, rather than actually being a backward step.

The examples given build on comments in the appended memorandum regarding the NPS-REG specifically, as relevant here to the NPS-Inf drafting discussed at the most recent workshops. While we understand the NPS-Inf would not apply to REG, provisions of the drafting presented by officials appear to contradict that, [2] so we comment on both elements of the new NPS proposals (i.e. as to REG and Inf) at this stage, and request that this duplication or overlap in coverage is rectified.

First, however we question the wisdom of separate approaches for natural and built environments. Most linear (including electricity distribution) infrastructure transverses both natural and built domains, and most renewable generation encounters natural resources wherever located. As with the NBEA itself, there is a bias in the NPS-Inf drafting to supporting new infrastructure in the built environment over the natural,[3] so the separation into two NPS, or different policy approaches, simply further complicates the planning system without making any real impact on the REG planning deficit.

[1] Gibbston Vines Ltd v Queenstown Lakes District Council [2023] NZEnvC 265.
[2] Noting policy references to *meeting emission reduction targets* as a benefit of infrastructure and definition of 'specified infrastructure' as including electricity generation generally.
[3] See for example proposed Policy 1 (b) focused on benefits to well-functioning urban environments housing and business land, and with the additional direction regarding areas of Significant Environmental Value confined to the NPS-Inf for the natural environment, as discussed below.

Dealing now with the NPS-Inf and NPS REG as consulted on by officials to date, we remain of the view that aspects of the policy drafting are worse than the status quo arrangements and create new, additional and expanded consenting hurdles, which will add to (rather than remove or address) delay, uncertainty and cost.

We give the following principal examples to illustrate this level of concern over the drafting as it stands:

- The proposals to create a new category of protected values called Significant Environmental Values (SEVs). This is a hugely wide category that seems to include significant natural areas, rivers, natural character areas in the coastal environment, high value landscapes, heritage and cultural sites and values[4] - all regardless of whether already defined and mapped or not. Given renewable electricity generation unavoidably relies on natural resources it is hard to imagine any sites that would not be captured by such extensive definitions. We note there also seem to be differences between SEV inclusions in the NPS-REG and NPS-Inf drafting sighted to date, compounding the uncertainty presented.

- ESEG submitted drafting for the NPS-REG in April that would have minimised this concern, focused on Areas of National Importance or ANI's (as relevant under s 6 of the RMA) rather than carrying over the baggage of SEV terminology from the NBEA. ANIs as drafted by ESEG were also confined to areas mapped in operative plans to avoid the prospect of new areas surfacing in a consent process, which can mean the very significant investment in the process for a new REG asset is effectively wasted and the application sent back to the drawing board. To date we have had no effective response to this (ANI v SEV) proposal and why it should not be preferred.

- The requirement to prove an 'operational and functional need' for individual consent applications can extend into unhelpful, intractable and costly debate over alternatives that should (at the very least) be irrelevant for upgrades or repowering of existing infrastructure (especially given the policy intent to make more effective use of existing infrastructure). We acknowledge and support the intention to rely on 'existing information' in the latest NPS-Inf drafting, clarifying that it is the role of the infrastructure provider to select the most suitable location for infrastructure. However this doesn't go far enough, existing infrastructure should be exempt, and functional and operational need simply applied by the applicant to determine what effects can be avoided at the outset of site and project feasibility assessment. Again, our previous drafting on the NPS-REG exemplified this approach.

- Requiring adherence to an Effects Management Hierarchy (EMH) drawing on offsetting and compensation principles as currently set under the NPS-FM and NPS-IB which are directed at achieving no net loss (or even 'net gain'), and extending to the

[4] Refer NPS-REG proposals consulted on by officials in 6 August paper, as substantially based on 2023 NBEA linked proposals.

incredibly wide set of values applicable in SEVs (as discussed above). Currently an EMH applies only to wetlands under the NPS-FM, however our members have direct experience from a wide range of recent consenting processes confirming how complex, litigious, and uncertain this one EMH requirement can be, and how extensive the cost and delay it alone can add to REG projects. Expanding the application of this concept to cover all infrastructure in the 'natural environment' runs directly counter to intentions of these reforms.

- Again, ESEG submitted a proposal that would have addressed this concern applying a 'framework' rather than 'hierarchy' approach reflecting the express wording of s 5(2)(c) of the RMA, and with no case law including decisions of the higher Courts suggesting a hierarchical "avoid, then mitigate (etc)" approach is mandated by the RMA.

- While acknowledging and (again) supporting the option in the 'natural environment' NPS-Inf proposal that would mean infrastructure with benefits outweighing residual effects *may* be allowed, this contradicts application of the offsetting and compensation principles in the NPSIB/NPS-FM (confining offsetting to where no net loss or net gain can be achieved, as noted above). More fundamentally, even under that drafting option (and as with the earlier NPS-REG proposals consulted on) a new infrastructure or REG project would only be 'allowable', not actually approved. The project would still have to run the full gauntlet of s104 evaluation under the RMA*,* with the new NPS *essentially achieving nothing or worsening status quo in terms of consenting certainty*, as a result.

To be at this point after 5 or more years of engagement with officials is incredibly disappointing. Our membership collectively has decades of RMA experience to draw on in making these comments, but we do not feel the messages have been understood or acted upon by officials over this time. The time to act needs to be now, or another three years of worsening uncertainty, cost and complexity will result.

As noted in our earlier feedback on the NPS-REG (attached) we are aware there is a relatively fundamental difference of view as to how far one NPS can go in driving the section 104 evaluation process under RMA, and in directing the relationship with other NPS provisions in particular. As noted again at the outset of this memorandum, until that challenge is confronted, we will be no further ahead. An REG or infrastructure project *may*[5] be able to successfully navigate the likes of the NPS-REG or NPS-Inf, only to then smack into a brick wall in the form of the NZCPS or NPS-FM.

We have requested direct engagement between our legal advisors and those advising Ministry officials over this point and repeat that request as we otherwise appear to be at cross purposes.

[5] Noting the significant concerns over whether that actually would be the case as outlined above.

That aside, and in addition to the various specific concerns over the current drafting approach evident on the NPS proposals sighted to date (as outlined above), we strongly recommend that a more targeted and realistic NPS reform package be advanced, rather than trying to do all things for all purposes across all instruments and failing in the attempt.

A strongly enabling NPS-REG (and indeed NPS-Inf) would be a great start towards delivering the fundamental change of our planning settings referred to by the Minister and there are aspects of the NPS-Inf drafting that are supported by ESEG to that end, in so far as they go. But beyond that more enabling policy provision, discretely even surgically resolving how these instruments would operate alongside other national direction is mission critical to the fundamental reset required.

It is clear that an NPS can say that it doesn't apply to certain activities (as with the NPS-IB *at present* not applying to REG). This type of straightforward approach along with amendment to the RMA (in the second Bill) to remove any doubt that an NPS can direct how conflict with another instrument is to be resolved by decision makers,[6] needs to be taken seriously rather than dismissed out of hand.

Again, we ask that officials engage with the Group in advancing these proposals as we have with specific drafting for the NPS-REG now on several occasions over the past three years in particular, seemingly without impact.

We look forward to your response the content of this memorandum and (in the meantime) to the requested meeting being set up between our respective legal advisors as a matter of urgency.

[6] Again as proposed by ESEG, refer appended letter to Minster Bishop proposing specific amendment to s 45A of the RMA for this purpose.