









Memorandum- Specific Drafting for Conflict Management

Introduction

The primary purpose of this memorandum is to set out drafting options intended to manage conflict as between the proposed NPS-REG and other national direction, in the manner discussed at the Teams meetings with Ministry officials on 26 September and 1 October 2024.

The drafting approach adopted in light of that discussion is one of targeted amendments to other national instruments to "disapply" provisions of that national direction (along with provisions of policy statements and plans that give effect to this other national direction) which are likely to be most problematic for REG consenting.

The drafting below has been prepared to test the viability of that option (and identify any issues raised by the approach) as opposed to a blanket 'override' clause in the NPS-REG itself (which would be more complete and potentially effective, but may have unintended consequences or raise legal issues of concern to officials?). We return to this point below.

As also discussed at the Teams meetings, the drafting set out and discussed in this memorandum assumes a revised approach whereby an REG activity "may be allowed" where it meets the requirements of the NPS REG as to effects management regarding areas of national importance, but otherwise leaves 104 evaluation intact.

Previous drafting preferred by the Group had provided that REG "must be allowed" in these circumstances (albeit the definition of 'allow' included plan provision for REG as a controlled activity).

This revised approach would at least aim to ensure that there are no fatal barriers to REG consenting either in other national direction (or provisions of plans/policy statements giving effect to that other national direction), with the balance of s 104 evaluation then informed by

the directive enabling policies of the NPS-REG, alongside other policy and s 104 considerations more generally.

This is not ESEG's preferred approach, but the drafting is submitted on this basis for consideration by officials, pending further RMA reform (Phase 3, including RMA replacement).

We **attach** an amended version of the NPS-REG (as submitted on 24 April 2024) reflecting this revised approach, along with certain other amendments made to that earlier drafting of the NPS-REG as explained further below.

Against that background, the targeted amendments proposed for other national policy statements are as follows.

Drafting to "Disapply" other specific National Direction

National Policy Statement for Indigenous Biodiversity (NPS-IB)

Insert new clause 3.11(6) as follows:

(6)(a) Clause 3.10(2) and any provisions of a policy statement or plan or proposed policy statement or plan that give effect to clause 3.10(2), do not apply to **REG Activities**.

(b) For the avoidance of doubt, any adverse effects of REG Activities on an SNA must be managed under the **NPS-REG 2024.**

Insert new clause 3.16(4) as follows:

(4)(a) Subclauses (1) to (3) and any provisions of a policy statement or plan or proposed policy statement or plan that give effect to subclauses (1) to (3), do not apply to **REG Activities**.

(b) For the avoidance of doubt, any adverse effects of REG Activities on indigenous biodiversity outside an SNA must be managed in accordance with the **NPS-REG 2024.**

Insert new definitions into the NPS-IB as follows:

REG Activities means renewable electricity generation activities as defined in the NPS-REG 2024

NPS-REG 2024 means the National Policy Statement – Renewable Electricity Generation 2024

Explanatory Note :

- The drafting set out above for the NPS-IB is proposed on the assumption that current clause 1.3(3) was intended as an interim or "holding provision" as explained during the Teams meetings, and so may be removed as part of the suite of NPS reforms under Phase 2.

- Proposed clauses 3.11(6)(b) and 3.16 (4)(b) ("*For the avoidance of doubt etc*") are intended to ensure that the effects management hierarchy as set under the NPS-IB does not apply to REG, even by a 'sidewind' (e.g. through some indirect reference in the NPS, or any lower order instrument giving effect to it). This is to better guarantee and deliver the intended 'one shop' approach.

National Policy Statement for Freshwater Management 2020 (NPS-FM)

Insert new clause 3.22(5) as follows:

(5)(a) Subclauses (1) to (4) do not apply to **REG Activities**.

(5)(b) For the avoidance of doubt, any adverse effects of REG Activities on a natural inland wetland must be managed under the **NPS-REG 2024.**

Insert new clause 3.24(5) as follows:

(5)(a) Subclauses (1) to (4) do not apply to the **Upgrading** or **Repowering** of any **Existing REG Assets**.

(5)(b) For the avoidance of doubt, any adverse effects of **Upgrading** or **Repowering** of any **Existing REG Assets** must be managed under the **NPS-REG 2024.**

Insert new definitions into the NPS-FM as follows:

Existing REG Assets has the meaning applied under in the **NPS-REG 2024**

Upgrading and **Repowering** have the meaning applied under the **NPS-REG 2024**

NPS-REG 2024 means the National Policy Statement – Renewable Electricity Generation 2024

Explanatory Notes :

- The wording *"and any provisions of a policy statement or plan or proposed policy statement or plan that give effect to clause…"* (as included for the NPS-IB clauses set out above) is not required for clauses 3.22 and 3.24 of the NPSFM, as these clauses effectively insert the provision directly into regional plans, i.e. that is where they operate from the outset (rather than being 'given effect' to in some more general way).

- Clause 3.24 is only disapplied in relation to existing REG assets, noting the critical role of existing hydro assets as a substantial part of the base generation capacity in New Zealand which is sought to be doubled under *Electrify NZ,* and bearing in mind the previous/historic loss of river extent and values inherent to these assets as they stand regardless (this point being made in line with the 'existing environment' concern discussed at the Teams meetings and prior).

- Careful consideration needs to be given to how the 'disapply' for clause 3.24 would operate alongside clause 3.31(Large Hydro-Electric Schemes). One option would be to remove Clause 3.31 altogether (with the proposed disapply being more complete/effective in relation to those schemes, as to clause 3.24 at least). The converse option would be to strengthen Clause 3.31 (as a disapply to the NPS-FM more broadly). A third option would to be provide that it applies *subject to* new clause 3.24(5), so clause 3.31 is not interpreted as being in any way more restrictive for the Large Hydro Schemes, in relation to clause 3.24.

NZCPS

Add new Policy 11(2) (and renumber existing Policy 11 as Policy 11(1)), as follows:

(2) Policy 11(1) and any provisions of a policy statement or plan or proposed policy statement or plan giving effect to Policy 11(1), do not apply to REG Activities, except as expressly referred to in the NPS-REG 2024.

Add new Policy 13(3) as follows:

13(3) Policy 13(1) and any provisions of a policy statement or plan or proposed policy statement or plan giving effect to Policy 13(1), do not apply to REG Activities.

Add new Policy 15(2) (and renumber existing Policy 15 as Policy 15(1)), as follows:

15(2) Policy 15(1) and any provisions of a policy statement or plan or proposed policy statement or plan giving effect to Policy 15(1), do not apply to REG Activities.

Insert new definitions into the NZCPS as follows:

REG Activities means renewable electricity generation activities as defined in the NPS-REG 2024

NPS-REG 2024 means the National Policy Statement – Renewable Electricity Generation 2024

Explanatory Notes :

- The highlighted wording above for Policy 11 reflects that our NPS-REG drafting draws on Policy 11 of the NZCPS in within Schedule 1 (ANIs where significant residual effects of new REG must be avoided in in the EMF).

- *No "For the avoidance of doubt"* clause is required, as unlike the NPS-IB and NPSFM, the NZCPS doesn't have an alternative EMF/EMH clause.

Other Matters – General Considerations

As noted above, we refer to the attached revised NPS-REG wording (compared with that submitted on 24 April 2024).

Policy 4 has been amended to direct that planning decisions *may* allow REG Activities (where managed in accordance with the EMF) rather than that they must allow activities, such that s 104 would be left to operate including with reference to all other national direction, policy statements and plans, other than as specifically disapplied in the drafting set out above. This amendment has also been made to Policy 5.

On that basis, Policy 6 as previously proposed would no longer be needed and has been deleted. Similarly, the wording beginning "For the avoidance of doubt" in the ESEG Effects Management Framework definition has been deleted, as this point is covered in the 'disapply' drafting above.

Discussion- conflict generally

We have also deleted previous clause 1.4 but do note as to the history of that clause that under the NPS-REG (2023) as originally proposed, the drafting was express that the NPSFM and the NZCPS prevailed over the NPS-REG.

It would undermine everything we have discussed and the drafting set out above to reinstate a provision of that kind. This is why the Group has made various suggestions to redraft that clause, including in February and April this year.

Clearly 'conflict' provisions (addressing the relationship with other national instruments) are considered permissible under the RMA by Ministry officials, for example as employed under clause 1.4 of the NPSIB as it stands, and this previous clause of the NPS-REG 2023. If there is any residual any doubt about that in Officials' minds, we strongly recommend inclusion of the proposed amendment to s 45A proposed in our 5 April letter to Minister Bishop within the second amendment Bill, again as reiterated at our Teams meetings.

As a related point, the proposed "disapply" clauses for the NPS-FM, NPS-IB as set out above would address the principal constraints within those instruments as they appear within implementation clauses.

In light of the *Gibbston Vines* decision referred to in the 24 April covering letter, the principal impediments for consenting purposes may in fact arise (at least so far as the Environment Court is concerned) within the substantive policies (the Court effectively saying it is not bound by nor need it apply the implementation clauses in making consenting decisions). On that interpretation we would not be much further ahead for consenting purposes despite 'disapplying' various implementation clauses, i.e. despite their very stringent wording on its face, they would not be where the principal consenting issue/barrier lies.

It is unclear whether the current reforms would address the implications of the Environment's Court decision in *Gibbston Vines,* but as it stands this issue does need to be resolved for this drafting approach to be effective to its intended outcome.

There is a range of policies in both the NPS-IB and NPS-FM (including for example policies 6 to 10 of the NPS-FM) which could prove highly problematic for consenting purposes,

notwithstanding disapplication of the implementation clauses of these instruments in the manner drafted.

For all of these reasons, and noting these residual issues with the substantive policies of the NPS-IB/NPS-FM themselves, we propose the following "sweeper" conflict management provision (in place of all previous options, including as submitted on 24 April 2024), as follows:

> The provisions of this National Policy Statement prevail over the provisions of any other National Policy Statement if there is a conflict between them. For the avoidance of doubt, a planning decision may allow an REG activity as defined by this policy statement, despite anything to the contrary in another National Policy Statement or the provisions of a policy statement or plan or proposed policy statement or plan giving effect to that other National Policy Statement.

We note that this provision does not "disapply" any other wider provisions of national direction, including the NPS-IB and NPS-FM policies of concern to ESEG.

It simply aims to resolve conflict where those provisions are otherwise brought to bear on a specific consenting situation, to ensure it is clear that an REG activity *may be* allowed notwithstanding those provisions. The relative strength or directive nature of the competing provisions would then be as determined by that consent authority in deciding whether to actually grant consent, but without a necessarily fatal outcome for a specific REG proposal.

Residual Effects test

As also discussed at the most recent Teams meeting, there is the question of "value add" versus additional complexity associated with any residual effects threshold test (balancing option or otherwise) in an EMF provision.

We had accommodated the 'balancing' option (benefits greater than residual effects, reflecting Option B in the *NPS-Inf* drafting addressed in the September workshop) in our previous policy wording (Policy 4), but in light of the discussion at the meetings, have now deleted that.

A residual effects threshold remains inherent to the EMF as drafted, sheeted to those resources identified in Schedule 1.

NPS- Infrastructure

In this regard, we raise an issue regarding the relationship between the NPS-REG and the intended NPS infrastructure. While we understand that only the latter is intended to apply to REG activities, this needs to be made clear in the drafting, noting that the definition of "specified critical infrastructure" in the NPS-INF (Natural Environment) drafting presented at the September workshops includes reference to electricity generation generally as would otherwise include REG. We would not want the prospect of a consent authority deciding that the provisions of both instruments need to be brought to bear on a given consent application, having so carefully framed the NPS-REG as bespoke to that category of infrastructure and the

specific role REG plays in terms of electrification/ decarbonisation in line with the *Electrify NZ* ambition.

ANI Definition

As also discussed at the 1 October Teams meeting, the ANI definition has been amended to refer to proposed (notified) policy statements and plans. The intention is to avoid the prospect of an ANI surfacing in a consent process, other than through notification of a new planning instrument following section 32 evaluation and (likely) consultation on a draft plan/policy statement before it is notified. A more nuanced approach is applied to areas of cultural heritage.

We draw attention to (and reiterate) the deliberate reference to Areas of National Importance rather than Significant Environmental Values for the various reasons explained including in our memorandum submitted following the workshops regarding the NPS Infrastructure. The Group's strong, firm and clear preference is for the "ANI" approach sheeted directly to the values inherent to s 6 matters of national importance, on the comprehensive basis previously discussed.

Functional and Operational Need

We also draw attention to the EMF definition delimiting the factors that inform functional and operational need for REG purposes, and confirming the test does not require an assessment of alternative sites as also discussed at the Teams meetings.

Offsetting and Compensation Principles

For completeness, we recommend that a separate workstream now be commenced (which the Group is happy to initiate with appropriate expert input) to draft offsetting and compensation principles targeted to the nature and effects of REG activities, to be applied instead of those in the NPS-IB/NPS-FM. This point and need for this work was also raised at the last Teams meetings and in our covering letter of 24 April. This body of work is likely to take some time and could usefully be progressed ahead of formal notification of the NPS-REG in early 2025. ESEG is happy to initiate this workstream based on an agreed Terms of Reference with appropriate expert input. The approach to offsetting established under the Auckland Unitary Plan is considered to be a workable starting point for this exercise