

Regulatory Impact Statement: Overview of required information

Regulatory Impact Statement

Regulations deeming joint irrigation/hydroelectricity generation projects as network utility operations

Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Ministry for the Environment.

It provides an analysis of options to reduce barriers to the development of joint irrigation/hydroelectricity generation projects currently proposed or being undertaken by TrustPower, in particular through the enabling of access to requiring authority status and associated powers. All options are regulatory; there are no non-regulatory options proposed, as any such option is unlikely to achieve the policy objective, which is to facilitate the timely development of joint irrigation/hydroelectricity projects currently that have significant regional or national economic benefits.

There has been no consultation with territorial authorities or other stakeholders in respect of the options, all of which aim to allow TrustPower to apply to become a requiring authority and thereby seek to have designations put in relevant district plans. Because designations sought by TrustPower would override district plans, it is likely that territorial authorities would have an interest in these proposals, particularly in the relevant districts. However, there are two further steps before such designations would be sought and approved in district plans; these steps both provide opportunity for consultation with, or input from, territorial authorities and other stakeholders. Once TrustPower is deemed a requiring authority, it will also have access to compulsory land purchase provisions under the Public Works Act 1981. This will therefore have a direct impact on affected landowners. Landowners (and the general public) will also have an opportunity to make submissions in the designation process, including the right to appeal any decision to the Environment Court.

It is not foreseen that the policy options will impose additional costs on businesses, impair market competition or incentives on business to innovate or invest (rather, they are likely to create a more certain environment for investment), nor will they override fundamental common law principles. However, as mentioned above, the options are likely to have the effect of impairing private property rights.

Peter Brunt, Director, Resource Management System

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Status quo and problem definition

TrustPower has a number of proposed joint hydroelectricity generation/irrigation projects, which involve the construction of hydroelectric power stations on canals that will also transport water used for irrigation. (See Appendix for details of TrustPower's proposed projects.)

Both renewable electricity generation and irrigation have been identified as priorities by the government. The National Policy Statement for Renewable Electricity Generation 2011 reinforces that renewable electricity generation is a matter of national significance, and the government has identified that infrastructure for irrigation is an important factor underpinning economic growth in the primary sector.

In particular, there is a need for increased renewable electricity generation and security of supply of electricity in New Zealand. The cost of generation varies significantly from year to year, and from season to season, dependent on demand and supply factors such as lake levels. In addition, there is an increasing need for security of water supply for irrigation. A reliance on variable precipitation or river flows is becoming increasingly problematic for the agricultural sector, particularly in drier regions. There are high costs involved in providing the infrastructure involved in providing the infrastructure needed to store and use water for irrigation. The lack of reliability of water supply affects the confidence to invest in improved farm systems.

Joint projects are an efficient and relatively cost-effective way of delivering on both irrigation infrastructure and renewable electricity generation goals.

Under the status quo, TrustPower can apply for requiring authority status for its water distribution infrastructure. However, for the hydroelectricity components of its projects, it is required to go through the standard resource consent process under the Resource Management Act 1991 (the RMA) and does not have access to compulsory acquisition provisions of the Public Works Act 1981.

Most critically, the inability to compulsorily purchase land for the hydroelectricity components of the projects leads to uncertainty, as well as substantial costs, and where a landowner refuses to sell, can affect the viability of the project as a whole. For example, in the case of one of its projects, the Wairau Hydroelectricity Power Scheme, TrustPower has been in negotiations with the owners of the 60 affected landholdings for over ten years. It has spent in excess of \$10 million on a wide variety of compensatory measures including payment of rental, stock/vehicle access arrangements, fencing, drainage, new shed and yards, etc. Despite this, several key landowners are continuing to request purchase prices up to three or four times the market value of the land required, while other landowners are refusing to engage with TrustPower at all.

As a result, TrustPower is yet to secure land access for 42.7% of the total canal distance. Given the linear nature of these schemes, even one property owner refusing to sell can render a project unviable.

In the case of another proposed project, the Lake Coleridge Project, TrustPower have indicated that the project is not a feasible investment just as an irrigation conveyance structure, nor is it feasible just as a hydroelectricity generation operation. It requires a dual function in order to be financially viable. Following the normal RMA process without the access to requiring authority powers will mean that TrustPower cannot respond in a timely manner to water management initiatives currently under way in Canterbury. Should water from Lake Coleridge via the canal be required to support these initiatives, a time delay similar to that experienced to date in the case of the Wairau project would mean that this project would not be able to deliver on that need.

In the case of a third project, Mayfield Hinds, this project would also be rendered unviable if the required land cannot be obtained. This will in turn constrain the scope of efficient and effective water infrastructure in the Canterbury region and the public benefit this will generate. In this way, the need for certainty of land acquisition for the Coleridge project affects the viability of the Mayfield Hinds project and vice versa.

Objective and criteria

Objective:

Facilitate the timely development of joint irrigation/hydroelectricity generation projects that have significant economic benefits.

The achievement of this objective will be measured against the following criteria:

1. The proposal reduces uncertainty and risk for TrustPower or any utility network operator investing in joint irrigation/hydroelectricity generation projects.
2. The proposal enables joint irrigation/hydroelectricity generation projects that have significant benefits to either the regional or national economy to be developed and implemented in a timely and resource-efficient manner.
3. The proposal limits the diminution of opportunities for public/stakeholder input to the greatest extent possible.

Regulatory impact analysis

In the case of all options, the intended result of the proposal will be that joint irrigation/hydroelectricity generation projects – where specified or generally – be deemed as network utility operations. Trust Power (or other project owner) would then be a network utility operator with respect to these projects. Trust Power (or project owner) would then be able to apply to the Minister for the Environment to become a requiring authority, which would provide TrustPower/project owner with the ability to seek the designation of land in a district plan for these specified projects, by giving notice to the relevant territorial authority (or authorities) of its requirement for a designation. This notice of requirement undergoes a process similar to that of a resource consent application (for example, it is subject to submission and appeal to the Environment Court). However, unlike a standard resource consent procedure, local authorities are only able to make recommendations on the designation, rather than their usual role of approving (or otherwise) the designation.¹

Once a designation is beyond the appeal stage and is included in a district plan, a requiring authority has the ability to:

- a. undertake land use activities, in the same manner as if the use were permitted by the district plan or by resource consent, instead of obtaining land use consents under section 9(1) of the RMA;

¹ The relevant territorial authority makes a recommendation on the initial decision, but like any other submitter can make an appeal to the Environment Court. For an outline of the process, see: http://www.qualityplanning.org.nz/images/documents/plan_components/designations/overview/notices_of_requirements/flowchart-new-designation-operative-plan1.pdf

- b. where the designation is over another person's land, prevent the landowner from doing anything in relation to their land that would prevent or hinder the designated use without first obtaining consent from the requiring authority;
- c. give public notice that a work is intended for a particular piece of land, which enables the community to plan around it;
- d. apply to the Minister of Lands under section 186(1) of the RMA to have land required for a project or work compulsorily acquired or taken under the Public Works Act 1981;²
- e. go onto private land to undertake investigations under the Public Works Act 1981;
- f. undertake works in an emergency under section 330 of the RMA, and apply for resource consents after the works are completed.

Once a designation is approved, it can place restrictions on what anyone other than TrustPower can do on the designated land. (A notice of requirement – the prerequisite to the designation – has the interim effect of restricting potentially conflicting uses of land from the date the request is served on the local authority.)

Option 1: Make regulations providing for specified hydroelectricity/irrigation projects to be deemed network utility operations

Section 360(1)(e) of the RMA enables regulations to be made providing for a project or work to be a network utility operation for the purpose of section 166. Section 166 lists network utility operators who can apply to the Minister for the Environment to obtain requiring authority status. This list comprises operations of a predominantly linear nature (with the notable exception of airports, which nevertheless collectively form a network), and includes a person who undertakes distribution of water for supply (including irrigation). The list does not include hydroelectricity generation, which generally does not share these linear characteristics. However, in the case of TrustPower's joint projects, the hydroelectricity generation component will use the same linear infrastructure as the irrigation component.

Trust Power has identified three projects (the Wairau Hydroelectric Power Scheme, the Lake Coleridge Project and the Mayfield Hinds In Race Generation Project), that it has requested be deemed by regulation as network utility operations. These projects, if realised, will bring significant economic benefits to the regional, and national, economy, through their provision of a reliable, year-round supply of water for irrigation and through the supply of electricity. A description and status of each of these projects is set out in the Appendix.

Regulations under section 360(1)(e) to define a network utility operation for a specific project have only been made once before. This was for Project Aqua, which was also a joint hydroelectricity generation and irrigation project, and which also required the linear designation of land.

² Before a proclamation is made, an assessment is required that the land is necessary for a network utility operation. This includes assessment of the reasons why the taking of the land is considered reasonably necessary. And this assessment is subject to objection to the Environment Court. This process is set out in Part 2 of the Public Works Act, particularly under section 23.

Option 2: Make regulations that deem TrustPower a Network Utility Operator for hydroelectricity generation/irrigation projects it undertakes

Under this proposal, a regulation would deem hydroelectricity generation/irrigation projects undertaken taken by TrustPower as network utility operations, enabling TrustPower to apply for requiring authority status for each or all projects. However, in contrast to Option 1, this would not be specific to defined projects, beyond the requirement that they be undertaken by TrustPower.

Option 3: Amend the definition of network utility operator under section 166 to include persons who undertake joint hydroelectricity generation and irrigation projects

This would require a change to the primary legislation to include persons who undertake joint hydroelectricity generation/irrigation operations within the definition of a network utility operator. This would mean that all present or future owners of hydroelectricity generation/irrigation projects would be able to apply to be a requiring authority for a particular project or work.

Analysis of benefits, costs and risks and performance against objectives

Option 1

Benefits

These benefits accrue only when TrustPower gains requiring authority status, the intended consequence of the proposed regulation(s):

- Greater investment certainty for TrustPower in relation to the specified joint hydroelectricity generation/irrigation projects
- Greater certainty for community as to what projects are deemed network utility operations
- Greater certainty for community/stakeholders as a whole, as the specified projects are less likely to be delayed by uncertainty relating to land purchases
- Potentially shorter timeframes for development of joint hydroelectricity generation/irrigation projects
- Network utility operation status would attach to the specified project(s) and would be likely to continue if ownership of a project transferred to a party other than TrustPower

Costs and their distribution

These costs will accrue when TrustPower gains requiring authority status, the intended consequence of the proposed regulation(s):

- As a requiring authority, TrustPower will be able to apply to the Minister of Lands to have land compulsorily acquired. This will lead to a diminution of property rights, in that it will mean property owners will lose their ability to refuse to sell their land.
- As a requiring authority, TrustPower can seek to have designations in the relevant district plans, a process in which the local authority can only make a recommendation, rather than play its usual role of decision-maker (unless the project is called in or is appealed to the Environment Court by the territorial authority or a submitter). There is no public submission process on the next step of the process – the outline plan. Therefore the regulations may lead to a diminution of local democratic participation.

Risks

- The limitation of the regulations to three specified projects may result in TrustPower having to re-apply to amend or extend the regulations in future if they require additional projects to be network utility operations.

Performance against the objective/criteria

Option 1 achieves all the stated criteria. It reduces uncertainty and risk for TrustPower in investing in these specified joint irrigation/hydroelectricity generation projects. It enables these joint projects, which have significant benefits to either the regional and national economy, to be developed and implemented in a timely and resource-efficient manner. The proposal limits the diminution of opportunities for public/stakeholder input to the greatest extent possible, because the powers associated with requiring authority status would only apply to these three specific projects.

It can therefore be said to achieve the overall objective, which is to remove barriers to the development of joint irrigation/hydroelectricity generation projects that have significant economic benefits.

Option 2

Benefits

- Greater investment certainty for TrustPower for all joint hydroelectricity generation/irrigation projects they undertake
- Greater certainty for community/stakeholders as a whole, as a project is less likely to be delayed by uncertainty about land purchases
- Potentially shorter timeframes for development of Trustpower's joint hydroelectricity generation/irrigation projects

Costs

These costs will accrue when TrustPower gains requiring authority status, the intended consequence of the proposed regulation(s).

- As a requiring authority, TrustPower will be able to apply to the Minister of Lands to have land compulsorily acquired. This will lead to a diminution of property rights, in that property owners will lose their ability to refuse to sell their land.
- As a requiring authority, TrustPower can seek to have designations in the relevant district plans, a process in which the local authority can only make a recommendation, rather than its usual role of decision-maker. Therefore, as with Option 1, the regulations may lead to a diminution of local democratic participation.
- Because the projects are unspecified, communities will not have certainty over what projects will accrue powers associated with requiring authority status.

Risks

- To prescribe all hydroelectricity generation/irrigation projects undertaken by TrustPower as network utility operations risks being unlawful for being beyond the scope of section 360(1)(e), the empowering provision (in other words, be ultra vires).
- Some TrustPower hydroelectricity generation/irrigation projects may not warrant requiring authority status and it may be more appropriate for these projects to go

through the standard plan making and consenting process. Deeming all TrustPower hydroelectricity generation/irrigation projects as network utility operations, and thereby making it possible for TrustPower to apply for requiring authority status for each of them, without understanding the specific nature of the each project could undermine the initial justification for the regulations.

- May be seen as setting a precedent for industry-specific regulations, and perceived as favouring one type of industry over another

Performance against the objective/criteria

Option 2 achieves the first and second of the stated criteria. It reduces uncertainty and risk for TrustPower in investing in joint irrigation/hydroelectricity generation projects. It enables joint irrigation/hydroelectricity generation projects, which may have significant benefits to either the regional and national economy, to be developed and implemented in a timely and resource-efficient manner.

However, in respect to the third objective, the powers associated with requiring authority status would potentially also accrue to projects not yet proposed or fully scoped at this stage. Therefore, an assessment cannot be made at this point as to whether these projects would bring benefits significant enough to warrant such powers. For this reason it cannot be said that this proposal limits the diminution of opportunities for public/stakeholder input to the greatest extent possible.

Option 3

Benefits

- Greater investment certainty for TrustPower and any other owners of joint hydroelectricity generation/irrigation projects in relation to these projects
- Greater certainty for community/stakeholders as a whole, as a project is less likely to be delayed by uncertainty about land purchases
- Potentially shorter timeframes for development of joint hydroelectricity generation/irrigation projects

Costs

These costs will accrue when TrustPower gains requiring authority status, the intended consequence of the proposed legislative change:

- As a requiring authority, TrustPower will be able to apply to the Minister of Lands to have land compulsorily acquired. This will lead to a diminution of property rights, in that it property owners will lose their ability to refuse to sell their land.
- As a requiring authority, TrustPower can seek to have designations in the relevant district plans, a process in which the local authority can only make a recommendation, rather than its usual role of decision-maker. Therefore, as with Options 1 and 2, the regulations may lead to a diminution of local democratic participation.
- Because the projects are unspecified, communities will not have certainty over what projects will accrue powers associated with requiring authority status.

Risks

Amendments to the RMA to include hydroelectricity generation/irrigation projects as network utility operations:

- may risk undermining the original policy intention underpinning network utility operation status by expanding the current list of qualifying operations, which all relate to linear infrastructure with properties of a network, and producing a broad public benefit. (Crown Law have advised that a common theme for the network utility operators listed in s166 is that of a 'service network'. This is reflected both in the name *network* utility operation but also is the nature of the listed operations which all require a interconnection of constituent parts (with the possible exception of airport operations and control services – s166(g) and (h)).
- may result in applications from other parties seeking network utility operator status for operations outside of the intended class of network utility operations.

Performance against the objective/criteria

Option 3 achieves the first and second of the stated criteria. It reduces uncertainty and risk for TrustPower in investing in joint irrigation/hydroelectricity generation projects. It enables joint irrigation/hydroelectricity generation projects, which may have significant benefits to either the regional and national economy, to be developed and implemented in a timely and resource-efficient manner.

However, like Option 2 above, it does not achieve the third objective, which is that the proposal limits the diminution of opportunities for public/stakeholder input to the greatest extent possible. This is because this option would be much broader in its effect, in that the powers associated with requiring authorities would likely accrue to a potentially greater number of projects, not just the three specified in option 1. Therefore, an assessment cannot be made at this point as to whether these projects would bring benefits significant enough to warrant such powers.

Consultation

There has been no consultation with territorial authorities or other stakeholders on the proposal to make regulations deeming TrustPower a network utility operator for the electricity generation components of specified joint irrigation/electricity generation projects.

There is no statutory obligation for the Minister to consult with territorial authorities or other stakeholders before making such regulations. Nevertheless, this proposal will deem TrustPower a network utility operator and therefore make it eligible to apply to become a requiring authority. This in turn would allow TrustPower to seek designations that will override district plans. Therefore, territorial authorities are likely to have a strong interest in the proposal.

However, there are two further steps before designations are approved in district plans, both involving scope for consultation with, or input from, territorial authorities and other stakeholders.

These steps are:

1. Applying to the Minister to be deemed a requiring authority under section 167.
2. Seeking to have a designation included in a relevant district plan.

In respect to the first step, under section 167, the Minister must be satisfied of a list of considerations. In particular, under section 167(4)(b), it is standard practice to seek input from relevant territorial authorities as to whether the applicant is likely to carry out the responsibilities of a requiring authority and will give proper regard to the interests of the environment and affected stakeholders.

In the designation process, territorial authorities have the opportunity to make a recommendation on the notice of requirement for a designation, but are not the decision-maker. The general public (including landowners affected by a designation/project) also have the opportunity to make submissions on the notice of requirement. All parties, including territorial authorities and affected landowners, may appeal the decision on the designation to the Environment Court, and subsequently, to the High Court on points of law.

No formal consultation with departments has been undertaken in respect of this proposal. However, it has been discussed with officials at Land Information New Zealand to enable MfE officials to better understand the process for acquiring land under the Public Works Act 1981.

Conclusions and recommendations

The options are comparable in their measurement against the three objectives, in that they would all lead to the same intended result: a more timely and efficient process for developing joint irrigation/hydroelectricity projects with potentially significant regional economic benefits. However, option 1 performs best against the first objective (remove barriers to the development of joint irrigation/hydroelectricity projects that have significant economic benefits, *while maintaining the appropriate checks and balances of the decision-making process*) in comparison to options 2 and 3, because the latter options are much broader in their effect. As noted, the powers associated with requiring authorities would likely accrue to a potentially greater number of projects, not just the three specified in option 1. Some of these projects may not warrant such powers.

Most critically however, it is the risks that are the differentiating factor. There is a significant risk that option 2 is ultra vires, and it is therefore not recommended. While option 3 is feasible from a legal standpoint, it would risk undermining the original policy intent of the provisions, and therefore, like option 2, it is not recommended.

On this basis, option 1 (Make regulations providing for specific hydroelectricity/irrigation projects to be deemed network utility operations) is the preferred option. This option is consistent with the scope of the regulation-making power, and the specific nature of regulations (for specific projects) means that implications of enhanced powers are better known (as compared to broad regulations, or broad enabling amendments to the primary legislation).

Implementation

Once a regulation (or regulations) has been made by Order of Council, TrustPower would be able to apply to become a requiring authority for the purpose of the specific projects set out in the regulation/s. This would in turn enable TrustPower to seek designations for the joint projects and apply to the Minister of Lands to compulsorily acquire land where necessary.

Monitoring, evaluation and review

The proposal will only allow TrustPower to apply for requiring authority status with respect to the specified projects. An appropriate outcome to monitor is whether TrustPower applies for requiring authority status for the specific projects, and if so, whether it is granted.

Furthermore, it will be useful to assess how access to requiring authority powers assists in the development of projects and decision-making throughout the process. This information can be gained readily by requesting that TrustPower updates MfE or the Minister on the status and progress of the relevant projects at specified milestones or within specific timeframes. Information gained in this way would help inform policy advice in relation to any future requests for similar regulations.

Appendix: Outline of projects for which TrustPower seeks regulations to deem it as a network utility operator

1. The Wairau Hydroelectric Power Scheme is a proposed 42 kilometre canal with six power stations. It will have a capacity of 73 megawatts and expected generation in an average year of 370 gigawatts hours. It will also enable up to 6,500 hectares of irrigation within the Wairau Valley. Resource consents for this project were confirmed by the Environment Court in 2010.

Process to date/status:

2003 - 2005: TrustPower announced the proposal for the Wairau Hydroelectric Power Scheme and lodged its resource consent application with Marlborough District Council

2006: Resource consents were publicly notified and a hearing was held between June and December. An interim decision was issued and a draft set of resource consents were circulated to interested parties.

2008: A hearing on the draft conditions was held and the resource consents were issued in July

2010: Environment Court decision was released that confirmed the resource consents for the scheme.

2. The Lake Coleridge Project will use the existing storage capacity in Lake Coleridge and supply water to irrigators through a new 30 kilometre canal and conveyance infrastructure. TrustPower intends to construct four to five new power stations along the canal route, to provide between 40 and 50 megawatts of new generation capacity.

Process to date/status:

2011 – 2012: To enable TrustPower to apply for the necessary consents for the Lake Coleridge Project in the future, it first required amendments to the National Water Conservation (Rakaia River) Order 1988. TrustPower applied for this amendment in July 2011, the application was publicly notified and a public hearing was held in 2012.

3. The Mayfield Hinds In Race Generation Project is an existing irrigation scheme located on the mid-Canterbury plains. It is the largest privately owned irrigation scheme in New Zealand and covers approximately 33,000 hectares. TrustPower is currently consulting on a proposal to construct, operate and maintain seven new small scale hydroelectric power generation facilities on a modified Mayfield Hinds canal.

Process to date/status:

2013: TrustPower is currently consulting on the proposal.

TrustPower is aiming to lodge a resource consent application in late 2014.