

In Confidence

Office of the Minister for the Environment

Chair, Cabinet Environment, Energy and Climate Committee

Supporting implementation of the COVID-19 Recovery (Fast-track Consenting) Act 2020

Proposal

- 1 This paper seeks Cabinet agreement for exemptions to standard processes for the implementation of the COVID-19 Recovery (Fast-track Consenting) Act 2020 (the Act), including:
 - a. enabling the Minister for the Environment (the Minister)¹ to issue drafting instructions directly to the Parliamentary Counsel Office (PCO) for Orders in Council to refer a project to an Expert Consenting Panel (Panel) for consideration
 - b. to waive the requirement to complete a Regulatory Impact Assessment (RIA) for projects approved by the Minister to be referred to a Panel
 - c. an exemption from the 28-day rule relating to when regulations come into force².

Background

COVID-19 Recovery (Fast-track Consenting) Bill 2020

- 2 On 16 June 2020, the COVID-19 Recovery (Fast-track Consenting) Bill 2020 (the Bill) had its first reading in Parliament and was referred to the Environment Select Committee. Public submissions to the Select Committee closed on 21 June 2020 and the Select Committee reported the Bill back to the House on 29 June 2020. The Bill had its second and third reading on 2 July 2020 and received Royal assent on 8 July 2020.
- 3 The purpose of the Act is to urgently promote employment to support New Zealand's recovery from the economic and social impacts of COVID-19 and to support the certainty of ongoing investment across New Zealand, while continuing to promote the sustainable management of natural and physical resources.

¹ If the project is to be carried out wholly or partly in the Coastal Marine Area, the recommendation for an Order in Council would be made jointly with the Minister of Conservation [CAB-20-MIN-0182, paragraph 32 refers].

² It is a requirement of Cabinet that regulations must not come into force until at least 28 days after they have been notified in the New Zealand Gazette.

- 4 The Act establishes new fast-track resource consenting and designation processes (fast-track consenting process) for infrastructure and development projects, and enables smaller-scale work on existing infrastructure to occur without the need for a resource consent³.
- 5 Fast-track consenting processes are required as the standard consenting processes and timeframes under the Resource Management Act 1991 (RMA) would not provide the speed and certainty needed during the COVID-19 recovery period.
- 6 The Act provides two processes to fast-track resource consents and designations:
 - a. **Projects listed in the Act:** Schedule 2 of the Act lists projects that will be automatically referred to an Expert Consenting Panel (Panel) for consideration
 - b. **Projects confirmed through Orders in Council:** any person with a project can apply to the Minister for the Environment (the Minister) to fast-track their consent or designation. Following the usual process, the Minister approves an application and recommends an Order in Council be made for the project to be referred to a Panel for consideration.

Exemptions from standard processes are necessary

- 7 Some exemptions from standard processes are necessary to support the purpose of the Act and its fast-track consenting processes.
- 8 The role of the Minister in the fast-track consenting process is as a gatekeeper to determine whether a project should be referred to a Panel for consideration by an Order in Council. Once referred to a Panel, the Act speeds up usual RMA timeframes, such as by reducing the timeframes within which comments on an application must be made to a Panel (10 working days), and the decision by a Panel made (25 working days after comments are received, or 50 working days if extended).
- 9 To ensure projects proceed to a Panel in a timely manner, I consider exemptions to some Cabinet processes are necessary. Standard processes would require:
 - a. Cabinet agreement before drafting instructions can be issued to the PCO for Orders in Council to refer a project to a Panel for consideration
 - b. a Regulatory Impact Assessment for each project considered for referral to a Panel

³ The works on existing infrastructure are currently limited to the New Zealand Transport Agency and KiwiRail. The Bill enables three other agencies to access this aspect of the Act via Order in Council. Those Orders in Council are not the subject of this Cabinet paper.

- c. a 28-day period before the Order in Council comes into force i.e. a project is referred to a Panel.
- 10 I consider these steps are not needed due to the administrative nature of referring a project to a Panel and consider undertaking them would cause undue delay.

Delegation of authority to issue drafting instructions for Orders in Council

- 11 I propose that standard processes apply for the first Order in Council whereby Cabinet agreement is sought before drafting instructions can be issued to the PCO. This will provide Cabinet oversight of the first Order in Council.
- 12 For all subsequent Orders in Council that refer a project to a Panel, I seek Cabinet approval for the Minister for the Environment⁴ to issue drafting instructions to the PCO. This would enable drafting to occur without the need for a policy decision to be taken by Cabinet in the first instance.
- 13 By removing the requirement for Cabinet approval to issue drafting instructions, it is expected overall timeframes for referral to a Panel could be reduced by between 10 and 20 working days.
- 14 The Environmental Protection Authority (EPA) supports Panels once projects are confirmed through Orders in Council. To ensure the EPA is aware of projects likely to be referred to a Panel, I propose exposure drafts of Orders in Council will be shared with the EPA.⁵
- 15 There will be minimal impact on wider Ministerial input on the Order in Council process as Ministers will still have two opportunities to comment on projects proposed to be referred to a Panel:
- a. by submitting comments to the Minister for the Environment as the Minister is required to invite comments from other relevant Ministers on whether to proceed with an Order in Council
 - b. when Orders in Council to refer a project are taken to the Cabinet Legislation Committee, followed by Cabinet confirmation.

Waiver of requirement for Regulatory Impact Assessment

- 16 The Treasury determined that the Bill was a direct COVID-19 response and on that basis suspended the requirement for a Regulatory Impact Assessment (RIA) in accordance with Cabinet decision⁶.
- 17 The temporary suspension of RIA requirements for direct COVID-19 responses has now ended, however I consider the same waiver should apply to projects referred under the Act. Orders in Council to refer projects to Panels do not

⁴ For any projects to be carried out wholly or partly in the Coastal Marine Area, the recommendation for an Order in Council would also be made jointly with the Minister of Conservation [CAB-20-MIN-0182, paragraph 32 refers].

⁵ In accordance with Cabinet Circular CO 19(2) Attorney-General's Protocol for Release of Draft Government Legislation outside the Crown.

⁶ CAB-20-MIN-0138 refers.

consent the projects directly, therefore in and of themselves do not have regulatory impacts. The impacts of each project are best considered by each Panel, which will have fuller information on each project than the Minister will have when determining whether to refer a project to a Panel.

- 18 Analysis of each application for referral will be undertaken against the requirements in the Act. I consider this analysis, and the advice I will receive from my officials, will provide the same or similar information that would ordinarily be covered in a RIA.
- 19 Therefore, I seek agreement to waive the requirement for RIA for Orders in Council for referred projects.

Waiver of the 28-day rule

- 20 It is a requirement of Cabinet that regulations must not come into force until at least 28 days after they have been notified in the New Zealand Gazette. The 28-day rule reflects the principle that the law should be publicly available and capable of being ascertained before it comes into force.
- 21 It is appropriate in this instance to waive the 28-day rule as this would cause unnecessary delay and because the Orders in Council to refer a project to a Panel do not themselves make consenting or designation decisions.

Consultation

- 22 An abridged consultation process was necessary to expedite the implementation of the new Act. The Ministry for the Environment sought comment on this paper from the Ministry for Culture and Heritage, Department of Corrections, Ministry of Social Development, Heritage New Zealand – Pouhere Taonga, Te Arawhiti, The Treasury, Kāinga Ora, Kiwirail, Environmental Protection Authority, Ministry of Transport, Department of Conservation, Ministry of Business, Innovation and Employment, Ministry for Primary Industries, New Zealand Transport Agency Waka Kotahi, Ministry of Housing and Urban Development, Department of Prime Minister and Cabinet, Ministry of Health, Te Puni Kōkiri, New Zealand Defence Force, New Zealand Infrastructure Commission, Land Information New Zealand and Department of Internal Affairs.
- 23 Eleven agencies responded with most indicating support for some or all of the procedural changes.
- 24 The Treasury noted the value of the transparency and scrutiny of the RIA to the Order in Council process which they say may not otherwise be available through the process. The analysis of which projects meet (or do not meet) the conditions for referral is essential to demonstrate the manner in which projects are taken forward under the new process.
- 25 I consider that the transparency and scrutiny usually provided for through a RIA are matters incorporated into the Panels process and considerations. The referral is a procedural step to help determine the suitability of projects for

referral against criteria in the legislation and is not a substantive policy decision. The impacts of projects will be considered as part of the resource consent process considered by a Panel.

- 26 The Department of Conservation noted risks in delegating decision-making to only the Minister for the Environment and Minister of Conservation. Te Arawhiti consider it would be preferable to maintain collective Ministerial oversight. Bundling of several projects into one Order in Council that follows the usual route was suggested for meeting the time saving objective sought by these proposed changes.
- 27 I consider the Act's requirement for the Minister to consult relevant ministerial colleagues on proposed projects for referral, and the scrutiny of an Order in Council by the Cabinet Legislation Committee and Cabinet are sufficient expressions of collective oversight for this procedural step.
- 28 PCO is concerned with an ongoing exemption to the requirement for Cabinet to approve policy before drafting begins on new legislation as this would enable the PCO to be instructed to draft an unknown number of Orders in Council for the two years during which the Act is in force. These requirements are an important safeguard to protect the PCO's resources by ensuring that the PCO is instructed to draft only matters that have Cabinet's prior approval.
- 29 Officials will work closely with the PCO to ensure it has a clear view of the upcoming pipeline of projects seeking referral to a Panel and the likely workload to draft Orders in Council.
- 30 I will be reporting back to Cabinet on implementation of the legislation in August 2020 [CAB-20-MIN-0282 refers].

Conflicts of interest

- 31 No conflicts of interest have been identified.

Timing and Publicity

- 32 There is significant public interest in the Act. The delegation to issue Orders in Council is integral to the implementation of the Act.

Recommendations

The Minister for the Environment recommends that Cabinet:

- 1 **Note** that standard procedures for issuing drafting instructions to the Parliamentary Counsel Office will apply for the first Order in Council to refer a project to an Expert Consenting Panel (Panel)

- 2 **Agree** that for all subsequent Orders in Council that refer a project to a Panel the Minister for the Environment⁷ can issue drafting instructions directly to the Parliamentary Counsel Office
- 3 **Note** an intention to release exposure drafts of Orders in Council to the Environmental Protection Authority in accordance with Cabinet Circular CO 19(2)⁸
- 4 **Agree** that a Regulatory Impact Assessment is not required for Orders in Council relating to projects to be referred to a Panel
- 5 **Agree** to waive the 28-day rule so that Orders in Council made under the COVID-19 Recovery (Fast-track Consenting) Act 2020 can come into force as soon as they are notified in the New Zealand Gazette.

Authorised for lodgement

Hon David Parker

Minister for the Environment

⁷ For any projects to be carried out wholly or partly in the Coastal Marine Area, the recommendation for an Order in Council would also be made jointly with the Minister of Conservation.

⁸ Attorney-General's Protocol for Release of Draft Government Legislation outside the Crown.