Phase 1
Reforms for Projects of National Significance

How will they work in practice?

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Why have the reforms been introduced?

• Very likely that decisions on nationally significant projects will be appealed.
• Often takes longer to obtain resource consents for large infrastructure projects than it takes to build them.
• Existing process causes:
  – Uncertain timeframes
  – Delays
  – Extra costs
• Potential to threaten viability of projects that are in the national interest...
### The old vs. the new

<table>
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<th>Current process</th>
<th>New options</th>
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<td><strong>Local authority consent process</strong></td>
<td><strong>‘Normal’ consent process</strong></td>
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<td>Application considered by elected representatives</td>
<td>• Application considered by elected representatives OR independent commissioner</td>
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<td></td>
<td>• Appeals <em>de novo</em></td>
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<td><strong>Appeal to Environment Court</strong></td>
<td><strong>Direct referral to Environment Court</strong></td>
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<td>Any party may appeal – hearing <em>de novo</em></td>
<td>Application determined by direct reference to Court if local authority agrees</td>
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<td><strong>Ministerial Intervention</strong></td>
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<td>Request that application ‘called-in’ by Minister if matter is, or part of proposal of national significance: (a)Referral to Board of Inquiry (b)Direct referral to Environment Court</td>
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<td><strong>Environmental Protection Authority</strong></td>
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<td>Application made to EPA if applicant considers matter is, or is part of proposal of national significance. EPA makes recommendation to Minister, who decides to call-in application or refer application back to local authority. If called in (a) or (b).</td>
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</table>
How will the reforms work in practice?

**Existing test - is the project of national significance?**

8 factors (to have regard to) listed in Section 141B(2) RMA:

- has aroused widespread public concern or interest regarding its actual or likely effect on the environment, including the global environment.

- involves or is likely to involve significant use of natural and physical resources.

- affects or is likely to affect any structure, feature, place, or area of national significance.

- affects or is likely to affect more than one region or district.

- affects or is likely to affect or is relevant to NZ’s international obligations to the global environment.

- involves or is likely to involve technology, processes or methods which are new to NZ and which may affect the environment.

- results or is likely to result in or contribute to significant or irreversible changes to the environment, including the global environment.

- is or is likely to be significant in terms of section 8 RMA (Treaty of Waitangi).
How will the reforms work in practice?

Reforms have added a ninth criterion:

*relates to a network utility operation that extends, or is proposed to extend, to more than 1 region in NZ.*

- Intended that this criterion will apply to proposals that may not *individually* be considered to be of national importance, but which will play a significant role in improving or maintaining the functioning and integrity of nationally significant networks (e.g. roads, railways, pipelines and electricity transmission).

- This is the only substantive change to the criteria.
How will the reforms work in practice?

Ministerial intervention/EPA

- Minister can intervene and call-in project if matter is, or is part of proposal of national significance.

- Applicant can apply to EPA to have project called in.

- No Ministerial intervention if already lodged application with EPA on same matter.

- Minister or EPA decide if proposal ‘nationally significant’:
  - If yes: proposal called-in and referred to Board of Inquiry or Environment Court. If notified, any public submissions received are also referred to the Board or Court.
  - If no: matter referred to local authority – normal process.
How will the reforms work in practice?

• If an applicant is in doubt as to whether project meets the criteria for a nationally significant project, early consultation with MfE is recommended.

• If matter to be ‘called in’ by either Minister or EPA, two options are available:
  – Environment Court
  – Board of Inquiry

Note: Retention of ability for ministerial intervention when have detailed EPA provisions –may lead to confusion.
1. ‘Normal’ consent process
   • Application to local authority.
   • Applicant can elect to have any publicly notified application heard by:
     • Elected representatives; OR
     • Independent hearings commissioner
   • Any person can make submissions to local authority up to 20 working days after notification.
   • Reports commissioned.
   • Council hearing and decision.
   • Appeal to Environment Court – de novo hearing.
   • Appeal to High Court – points of law.
How will the reforms work in practice?

2. Direct referral to Environment Court
   • Applicant can request any application be determined directly by Environment Court – provided local authority has first agreed.
   • Bypasses local authority.
   • Reports to be provided by local authority.
   • Appeal to High Court – points of law.
How will the reforms work in practice?

3. Referral by EPA or Minister to Environment Court

- Bypasses local authority.

- No provision for local authority to provide report – ability of Court to commission a report remains discretionary.

- Minister (without delay) provides Court with all matters, submissions on those matters, and other information received.

- No indication given as to timeframes for decisions.

- Appeal to High Court – points of law.
4. Referral by EPA or Minister to Board of Inquiry

- Bypasses local authority.
- No provision for local authority to provide report – ability of Board to commission a report remains discretionary.
- Minister appoints Board (3-5 members one of which is current or former Environment Judge) – as soon as practicable after public notice of direction is given.
- Minister must (without delay) provide Board with all matters, submissions on those matters, and other information received.
- If hearing held:
  - Shall not be more than 25 working days from closing date of submissions on application.
  - Board to give at least 10 working days notice of hearing to applicant and submitters.
How will the reforms work in practice?

- Board has same powers and duties as local authority except that Board may permit cross-examination and must keep full record of its hearings.

- Board produces draft report.
  - Invites persons to whom it sends report (applicant, local authority, submitters) to send Board comments on minor or technical aspects of report within 20 working days of invitation.
  - Minor/technical aspects = comments on minor errors, comments on wording of conditions BUT NOT comments on Board’s decision or reasons for decision.

- Board produces final report.
  - As soon as practicable after those 20 working days – but no later than 9 months after public notice of direction was given.
  - Board may apply to Minister to extend timeframe – but not more than 18 months.

- Appeal to High Court – points of law

- No appeal to Court of Appeal but to Supreme Court in exceptional circumstances (which can remit to Court of Appeal)
Which option is best?

1. Normal consent process
   - Applicant bears cost of commissioned reports.
   - Local perspective.
   - First instance decision must be given regard.
   - Having application heard by independent commissioners has potential to mitigate concerns regarding independence or skills of elected decision-makers.
   - Decisions can be appealed to Environment Court – cost and delay for all parties.
   - 2 stage process can flush out issues and provide opportunities to resolve concerns.
Which option is best?

2. Environment Court (direct referral)
- Viable alternative process for applications that may not fit national significance criteria.
- Direct referral must be agreed to by consent authority.
- Consent authority can commission reports.
- Saves time if matter likely to be appealed to Court at outset.
- Court can order any party to:
  - pay to any other party costs and expenses (including witness expenses) incurred that Court considers reasonable.
  - pay to Crown all or part of the Court’s costs and expenses.
- If application declined, no appeal on merits.
- One stop shop – no opportunity to test or refine evidence, strategy.
- Window for negotiations limited.
Which option is best?

3. Environment Court (call-in)

- Bypasses local authority hearing process.
- Saves time if matter likely to be appealed to Court at outset.
- As with direct referral, Court can order any party to:
  - pay to any other party costs and expenses (including witness expenses) incurred that Court considers reasonable.
  - pay to Crown all or part of the Court’s costs and expenses.
- If application declined, no appeal on merits.
- One stop shop – no opportunity to test or refine evidence, strategy.
- Window for negotiations limited.
Which option is best?

4. **Board of Inquiry (call-in)**
   - Consideration at national level – removes local bias.
   - Board of Inquiry decisions – 9 month timeframe.
   - All costs incurred by Board can be recovered from applicant except those of appointing Board.
   - Appeals limited to High Court on questions of law and to Supreme Court in exceptional circumstances.
   - Potential for tactical requests for further information – potential for delays.
   - Board may require detailed information and stakeholder alignment. Example: Contact’s 12 month adjournment:
     - Sufficient information
     - Expert evidence
     - Early stakeholder consultation
   - Recommendation only – Minister has final decision.
Discussion

**Call-in powers:**

- Long formed part of RMA framework but not used much until recently.
- Only five projects called-in to date.
- Scorecard: two consents granted, one declined, one adjourned for 12 months and one yet to be heard:
  - North Island Grid Upgrade Project - called in August 2007 – granted.
  - Turitea wind farm proposal – called-in December 2008 – yet to be heard.

Case Studies:
A copy of these slides will be available to download from our website from 1pm today.

www.bellgully.com