Champions for a climate positive, economically thriving and socially just Aotearoa New Zealand

SUBMISSION TO THE ENVIRONMENT COMMITTEE ON THE FAST-TRACK APPROVALS BILL

Submitter details

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A Introduction

1. This is a submission to the Environment Committee on behalf of Pure Advantage on the Fast-track Approvals Bill (**Bill**).

2. Pure Advantage is a registered charity led by business and thought leaders and supported by a collective of researchers and writers who investigate, communicate and promote opportunities for Aotearoa New Zealand to fulfil its potential for green growth.

3. Pure Advantage strongly opposes the Bill for the reasons summarised below and further detailed in the Environmental Defence Society's submission on the Bill, which we fully endorse.

4. We support efficient decision-making. However, we do not accept that this should or needs to be at the expense of environmental safeguards, due process, and adequate scrutiny and participation. Nor are we convinced that existing fast track processes that preserve these features are not fit for purpose.

5. The Bill risks further compromising the fragile state of New Zealand's natural advantages upon which we trade and take national pride: our unique and much-admired natural environment and the myriad of plant and animal species and landscapes that make Aotearoa a special place to live, work, and visit.

6. By further weakening environmental safeguards and curtailing opportunities for public participation and scrutiny, the Bill will exacerbate and accelerate already-deteriorating metrics for freshwater quality, biodiversity, and climate, with intergenerational implications for our social and economic well-being and prosperity.

7. Three Ministers will be primarily responsible for the worsening of New Zealand's ecological integrity and resilience that will inevitably result from consents granted under the Bill. But the effects will be felt by all New Zealanders, most of whom will have had no opportunity to

comment on the risk of their likelihood, let alone seek their avoidance or mitigation. The marginalisation of local voice is particularly egregious given the Bill's extensive reach and self-serving design.

8. Such an undemocratic and environmentally destructive approach to the consenting of infrastructure and development projects is completely outrageous and unjustified, and will materially undermine New Zealand's international reputation and credibility in both respects. The Bill should be withdrawn.

B Why Pure Advantage opposes the Bill

Executive summary

9. The Bill evinces a continuation of the new Government's utter disregard for New Zealand's imperilled natural environment. It smacks of an out-dated, shortsighted extractive ethos that views the natural environment as simply a suite of 'resources' to be plundered, thereby overlooking - or blatantly ignoring - that the wellbeing of nature underpins social and economic wellbeing.

10. New Zealand risks being out of step with a growing number of environmentally progressive economies (including our free trade partners) by prioritising grey infrastructure at the expense of our green infrastructure – our life support system - when the two need to be considered in concert.

11. Among the most troubling features of the Bill include:

    (a) Its sweeping application to authorisations required under a range of 'environmental' statutes, not just the Resource Management Act 1991 (**RMA**), the ramifications of which officials have not had time to adequately assess;

    (b) The Bill's pro-development purpose, which is not subject to any sustainable management qualifier;

    (c) Weak fast-track eligibility criteria and low threshold for determining whether a project will deliver "significant regional or national benefits", which together provide no meaningful environmental safeguards or requirement to support the transition to a low emissions economy;

    (d) Diminished advisory role of expert panels and conferral of ultimate decision-making powers (including to override the recommendations of expert panels) to the Ministers of Infrastructure, Transport, and Regional Development;

    (e) A substantively and procedurally dubious arrangement for the assessment and inclusion of "listed" projects for automatic fast-track referral; and

    (f) Limited opportunities for environmental and wider public oversight and participation in the fast-track consenting process, including the side-lining of the Minister, Secretary, and Parliamentary Commissioner for the Environment from assessments.

A disproportionate response to an unconvincing problem definition

12. The evidence base and therefore justification for the scope and design of the Bill is entirely unconvincing and disproportionate to the problem definition of addressing New Zealand's infrastructure deficit.

13. Its application to a wide range of statutory consents, including those relating to the conservation estate and coastal marine area, is unrelated to the problems for which there is actual evidence.

14. Closer scrutiny of the evidence would reveal that consenting is not always primarily to blame for infrastructure deficits. An example of this is the considerable renewable electricity generation capacity already consented but not yet built, suggesting that consenting is not the barrier to deployment in this case.

15. In any event, we already have an effective fast-track model[1] based on the Covid-19 fast-track legislation. The average timeframe for decisions under that legislation has been just 97 days for referred projects, and 88 days for listed projects.

16. It is worth observing here that the timeframe within which the Bill would require panels to make recommendations comprises just 40 days – possibly extended to 65 – to assess complex proposals in respect of which there will be no merits appeals. On referral, panels have:

    (a) A maximum of five working days to invite written comments;

    (b) Only ten working days for comments to be received;

    (c) Just 25 working days from that point to issue recommendations, with the ability to extend this timeframe by up to a further 25 working days if they cannot.

17. Such compressed timeframes are completely unworkable for any meaningful participation and assessment to be properly conducted.[2]

Lack of comprehensive impact analysis underpinning Bill

18. The rushed and therefore deficient policy development process within which the Bill was prepared has meant that there has been very limited opportunity for proper analysis of its implications, including by Government officials, or for adequate consultation.

19. This is well evidenced throughout the Ministry for the Environment's Supplementary Analysis Report (**SAR**), which worryingly concedes that analysis of the Bill has not been as thorough as "would usually be expected for a Bill of this significance".[3] Indeed, the SAR and departmental disclosure statement variously observe that:

    (a) *"Due to time constraints, there has been very limited analysis on the problem definition associated with conservation, heritage and public works legislation."*[4]

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[1] Saved from the Natural and Built Environment Act by the government's repeal legislation.

[2] We also note concerns that there may be insufficient panel experts available to assess the volume and complexity of anticipated fast-track referrals, particularly within the timeframes required under the Bill.

[3] Ministry for the Environment, Supplementary Analysis Report (2024), at 5.

[4] SAR, at 4.

(b) *"No analysis has been provided by the Department of Conservation for the SAR on the conservation approvals contained in the fast-track regime."*[5]

(c) *"The changes proposed to the Fisheries Act were a late addition to the fast-track bill and have not been considered further in the SAR due to the time available for analysis."*[6]

(d) *"There has not been any assessment of the policy contained in the FT Bill against New Zealand's international obligations, other than for the United Nations Convention on the Law of the Sea (UNCLOS) for which no conflicts were identified."*[7]

(e) Limited data and evidence was available to assess policy proposals: "Ideally, we would have undertaken an analysis looking at the wider scope of options, impacts and spill-over effects of the policy";[8]

(f) Consultation and analysis "have been done in a compressed timeframe"[9] and concurrently, with no consultation having occurred on policy proposals for including non-RMA legislation.[10] The SAR notes that:[11]

> *"The relatively tight timeframe together with the complexity of the policy proposals for the fast-track regime means that some interested parties have not had sufficient time to make comprehensive submissions";*

and that:[12]

> *"Feedback from our engagement has emphasised that the tight timeframes and lack of opportunity to garner views on specific policy proposals (as they were being concurrently developed) has impacted the ability to provide comment.* ***The analysis therefore is unable to be as detailed or thorough in relation to the consulted criterion for SAR as would usually be expected for a Bill of this significance****."*

20. It is completely unacceptable that the introduction of legislation of this scope and significance is not underpinned by substantively comprehensive and procedurally appropriate interdepartmental, expert and public analysis and feedback.

Bill's key design features contrary to officials' recommendations

21. Notwithstanding its rushed assessment of the Bill, the Ministry for the Environment (**MfE**) warned that the Bill:

(a) "*[P]resents a risk to the environment and the sustainable management of resources if the legislation is enabled to sidestep existing environmental protections agreed through RMA plans*"[13] – which it does;

(b) Will have "*greater impacts on wildlife and protected species*";[14]

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[5] SAR, at 4.
[6] SAR, at 4.
[7] https://disclosure.legislation.govt.nz/assets/disclosures/bill_government_2024_31.pdf at 3.1.
[8] SAR, at 4.
[9] SAR, at 5.
[10] SAR, at 5.
[11] SAR, at 5.
[12] SAR, at 5.
[13] SAR, at 19.
[14] SAR, at 24.

(c) Will enable "*[m]ore development [to] occur on public conservation land*."[15]

22. MfE further advised against several of the key design features in the Bill, two of which it categorised as being "much worse than doing nothing" in terms of environmental risk, even when assessed against the Bill's development-focused purpose.

23. MfE's preferred options were for:

(a) The legislative purpose to integrate environmental considerations;[16]

(b) Expert panels to make final consenting decisions, not Ministers;[17]

(c) No projects to be "listed" in the Bill (doing so would be "<u>much</u> worse than doing nothing" when assessed against environmental risk and Treaty obligations);[18]

(d) Prohibited activities not to be eligible for fast-track referral (doing so would be "<u>much</u> worse than doing nothing" in terms of environmental risk);[19] and

(e) RMA instruments to retain their current level of influence over decisions, including national direction.[20]

Legislative purpose

24. The Bill's statutory purpose is "to provide a fast-track decision-making process that facilitates the delivery of infrastructure and development projects with significant regional or national benefits."

25. Contrary to MfE advice, there is no reference to, or requirement for, such infrastructure and development projects to comply with the principles of, the sustainable management of natural and physical resources for current and future generations.

Eligibility criteria

26. The mandatory eligibility criteria that the joint Ministers (being the Ministers for Infrastructure, Transport, and Regional Development)[21] must consider when deciding whether to refer a project to an expert panel for fast-track approval are whether:[22]

(a) Referring the project is consistent with the purpose of the Bill;

(b) Access to the fast-track process will enable the project to be processed in a more timely and cost-efficient way than under normal processes;

(c) Referring this project will have an impact on the efficient operation of the fast-track process;

(d) The project would have significant regional or national benefits;

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[15] SAR, at 24.
[16] SAR, at 23.
[17] SAR, at 20.
[18] SAR, at 32.
[19] SAR, at 28-29.
[20] SAR, at 25-26.
[21] Bill, clause 4(1).
[22] Bill, clause 17(2).

(e) The application contains sufficient information to inform the referral decision.

27. These criteria do not provide any meaningful constraint on what can be referred for fast-tracking.

28. Although a Minister can refuse to refer an eligible project if it may have significant adverse environmental effects or it includes a prohibited activity under the Resource Management Act 1991, this is at the Minister's discretion, which is to be exercised within the context of the Bill's purpose: to facilitate development.

29. Indeed, the Bill expressly provides that "[a] project is not ineligible [for referral] just because the project includes an activity that is a prohibited activity under the Resource Management Act 1991",[23] notwithstanding that such activities have been identified by either local or central government as often having "significant environmental or human health effects."[24]

30. There is no requirement under the Bill to consider whether a project's impacts align with emissions reduction budgets or targets under the Climate Change Response Act 2002 or Paris Agreement.

Broad scope for determining whether project will have "significant regional or national benefits"

31. The "significant regional or national benefits" eligibility criterion is undefined, amorphous, and open to Ministerial interpretation.

32. Clause 17(3) of the Bill lists a number of considerations that the joint Ministers "may" consider in determining whether a project will have significant regional or national benefits. Several of these set a very low threshold against which to establish 'significant benefits'.

33. One of the discretionary considerations is whether the project has been identified as a priority project in a central or local government or sector plan or strategy or central government infrastructure priority list - a potentially self-serving consideration that the government can meet simply by identifying fast-track projects as "priority" projects.

34. Other considerations appear unrelated to addressing the Bill's problem-statement and instead simply evidence policy biases consistent with the Government's industry-specific priorities, including whether a project will "support":

(a) Primary industries, including aquaculture; and

(b) The development of natural resources, including minerals and petroleum.

35. There is no 'sustainability' qualifier for these considerations, which are internally irreconcilable with other listed discretionary considerations, including whether the project will:

(a) Support climate change mitigation, including the reduction or removal of greenhouse gas emissions;

(b) Support adaptation, resilience, and recovery from natural hazards;

[23] Bill, clause 17(5).
[24] Ministry for the Environment Supplementary Analysis Report: Fast Track Approvals Bill (2024).

(c) Address significant environmental issues; and

(d) Be consistent with local or regional planning documents, including spatial strategies.

Schedule 2A listed projects

36. The Bill provides for the automatic referral of projects listed in Schedule 2A of the Bill to expert panels for assessment.

37. MfE recommended that the Bill should not provide for listed projects to get automatic referral due to procedural concerns (including lack of transparency and iwi engagement).[25]

38. No projects have been listed in the Bill as introduced. The Government has instead established a Fast Track Advisory Group (**FTAG**) – an unregulated, non-statutory body - to consider and recommend to Cabinet which projects should be listed.

39. We understand that the criteria against which the FTAG will assess fast-track applications and make recommendations to Cabinet are likely to be the same as the eligibility criteria under the Bill. However, given that these are still subject to amendment via the legislative process, there is a risk of subsequent inconsistencies.

40. Whilst applicants can submit projects to the FTAG for assessment, there has been no indication that affected persons, let alone anyone representing environmental or broader public interests, will be consulted or able to provide input. If this is correct, the assessment process for listed projects will be entirely one-sided.

41. This absence of scrutiny will be further exacerbated if the listing of projects in Schedule 2A will only be introduced during the Committee of the Whole stage via supplementary order paper, where there is no opportunity for public submissions and detailed examination by the select committee. The more this is so if – as intimated by Ministers - listed projects include proposals that have been declined consent previously because they fail to meet environmental safeguards, including marine farms, dams, and coal mines.

Ministerial decision-making

42. Contrary to MfE's recommendation, the Ministers for Infrastructure, Transport and Regional Development are responsible for both determining whether to refer proposals to the fast-track process,[26] and, on receipt of recommendations for an expert panel, for final decisions.

43. The Ministers for the Environment, Climate Change and Conservation are not involved in the referral process unless invited to comment as a "relevant portfolio Minister",[27] or as any other person at the joint Ministers' discretion.[28]

44. Allegations of inherent pro-development and industry bias will arise by virtue of the joint Ministers' portfolios, and will be cemented through the application and primacy of the Bill's exclusively pro-development purpose.

[25] SAR, at 34.
[26] Bill, clause 12.
[27] Bill, clause 19(1)(b).
[28] Bill, clause 19(4).

45. Actual or perceived risks of industry lobbying, unfair advantage, and conflicts of interest will undermine public confidence and expose Ministers to legal and political challenge.

46. Any "person", which includes the Crown, can apply for fast-track referral, which means Ministers can effectively be the developer, referral gatekeeper, and ultimate decision-maker.

Expert panels advisory only

47. Although all listed and referred projects proceed to expert panels[29] for consideration, their role is only to recommend to Ministers whether projects should be declined or approved, and what conditions should be applied.[30] They are essentially advisory bodies.

Assessment hierarchy favours development

48. Recommendations to grant consent for RMA approvals are likely given the hierarchy of assessment criteria,[31] which requires that panels ***must give weight "to the following matters, if relevant, in the order listed (greater to lesser):***

(a) the purpose of this Act; *and*
(b) the purpose of the Resource Management Act 1991 set out in section 5 of that Act; and
(c) the matters for consideration in section 6 of the Resource Management Act 1991; and
(d) the matters for consideration in section 7 of the Resource Management Act 1991; and
(e) the provisions of any of the following, if relevant, made under the Resource Management Act 1991:
(i) any national direction:
(ii) operative and proposed policy statements and plans:
(iii) iwi management plans:
(iv) Mana Whakahono ā Rohe:
(v) joint management agreements; and
(f) the relevant provisions of the Resource Management Act 1991 or any other legislation that direct decision making under the Resource Management Act 1991."

49. The purpose of the Bill, which seeks to facilitate the delivery of infrastructure and development projects with significant regional or national benefits, is at the top of the hierarchy. That objective is not qualified by reference to any environmental considerations. Evidence-based environmental safeguards developed with extensive public input are expressly subsidiary matters.

50. The assessment hierarchy excludes reference to section 8 of the RMA and therefore consideration of *te Tiriti* principles altogether.

[29] Appointed by an independent panel convenor in consultation with Ministers and with skills and experience "relevant to the purpose of the Act" (development focused), "matters specific to the project", Te Tiriti, tikanga, and "if appropriate", conservation expertise.
[30] Bill, Schedule 3, clause 1(4)(b).
[31] Bill, Schedule 4, clause 32.

Climate impact assessment not mandatory

51. And although section 7 of the RMA requires particular regard to the effects of climate change, there is no express reference in the assessment hierarchy to the importance of reducing greenhouse gas emissions, or aligning consenting decisions with emissions reduction plans, budgets and targets.

52. In the Ministry for the Environment's Supplementary Analysis Report, its Climate Implications of Policy Assessment (**CIPA**) Team "notes that expediting infrastructure and development through fast-track approvals could lead to significant indirect emissions impact through increased construction activity."[32] And although "[i]ndividual projects undergoing the fast-tracking approvals process may undergo an emissions impact assessment", the CIPA Team acknowledges that "this is at the Minister's discretion."[33]

53. A climate impact assessment, including on emissions, should be a mandatory requirement to avoid locking in avoidable emissions, whether direct or indirect. In light of the Bill's focus on development at speed, with environmental considerations being lower-order (effectively inconsequential) concerns, there seems a high likelihood such assessment, if not mandated, will simply be bypassed.

54. Furthermore, the Bill provides that "section 104D of the Resource Management Act 1991 does not apply to a panel's consideration of a resource consent for a referred project."[34] Section 104D prevents non-complying activities from being granted consent where the activity would have more than minor adverse environmental effects, or be contrary to plan objectives and policies.

Ministers can reject expert panel recommendations

55. The Joint Ministers can choose whether to accept or reject panel recommendations, subject to the constraint that they "must not decide to deviate from a panel's recommendations unless they have *undertaken analysis of the recommendations and any conditions included in accordance with the relevant assessment criteria*."[35]

Ministers can refer recommendations back to expert panel for reconsideration

56. The Joint Ministers can also, "[i]n determining a substantive application, … refer a part or the whole of the panel's recommendations back to the panel to reconsider, *and give the panel any directions the Ministers think appropriate* as to the reconsideration of a part or the whole of the recommendations."[36]

57. There are no parameters for the exercise of this discretion, which could include adjusting conditions recommended by expert panels. This would be contrary to MfE's observation that "[s]etting conditions requires expert knowledge which does not reside with Ministers or officials,

[32] SAR, at 129.
[33] SAR, at 130.
[34] Bill, Schedule 4, clause 35(5).
[35] Bill, clause 25(4).
[36] Bill, clause 25(5).

which expert panels are best placed to provide".[37] The ability for Ministers to interfere with and override expert panel recommendations make a nonsense of the panel's role and expertise.

Lack of transparency with limited opportunities for public participation and oversight

58. Opportunities for public participation under the Bill are extremely limited.

59. The Bill only requires Ministers to invite written comment (in respect of which standing to appeal on questions of law derives) from local government, other relevant Ministers and various Māori entities when making referral decisions.[38] But there is no requirement to notify or invite submissions from anyone else on a referral application, including owners or occupiers of land affected by the project.

60. Although Ministers can invite written comment from any person, this is at their discretion.

61. Similarly, panels can invite comment from any person they consider appropriate. But the Bill expressly precludes panels from public or limited notification of a consent application.[39]

62. Bizarrely, the Minister for the Environment is not listed as a relevant Minister from which panels must seek feedback for listed and referred projects, nor is the Secretary or Parliamentary Commissioner for the Environment, or indeed any person or entity representing the environment outside government (aside from Māori groups) or within government other than the Minister and Director-General of Conservation.

63. As a result, decisions made under the Bill, including the exercise of executive power, will be made in the absence of transparency and oversight, including any genuine environmental expert scrutiny or input. This should not be tolerated in a well-functioning democracy.

Trade risks

64. There is a considerable risk that the Bill would be inconsistent with a number of general and specific obligations under our free trade agreements, including (but not limited to) in relation to maintaining high levels of environmental protection, not weakening environmental laws to encourage trade and investment, and (when the NZ-EU Free Trade Agreement takes effect from 1 May 2024) refraining from acts or omissions that materially defeat the object and purpose of the Paris Agreement.

65. Private sector interests in counter-party jurisdictions, that are subject to more stringent environmental safeguards, could therefore take issue with the easy ride the Bill provides for environmentally questionable development projects, including those that "support primary production" and are therefore deemed regionally or nationally significant for fast-track eligibility purposes.

66. The argument would be that the Bill could have the effect of unfairly advantaging the market-competitiveness of New Zealand export producers, thereby frustrating the underlying objective of environmental protection commitments in our free trade agreements.

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[37] SAR, at 21.
[38] Bill, clause 19.
[39] Bill, Schedule 4, clause 20.

67. A primary producer who receives an approval under the Bill that does not require compliance with standard environmental safeguards may be able to produce and sell more products at a lower cost.

68. Clause 17(3)(f) of the Bill also specifically refers to supporting the development of natural resources, including "petroleum", the effect of which is that projects that "support" fossil fuel exploration and extraction "may" be considered to be regionally or nationally significant and thus eligible for fast-track referral.

69. Based on the best available and accepted international climate science, there is an argument to be made that enabling such a facilitative approach[40] to fossil fuel extraction, coupled with a legislative purpose and hierarchy that gives precedence to development and diminishes environmental safeguards, is likely to materially defeat the object and purpose of the Paris Agreement.[41]

70. Irrespective of our counter-parties' appetite to engage in consultation or other dispute settlement processes pursuant to the terms of our free trade agreements, New Zealand should expect reputational consequences - particularly if well-publicised - that inform consumer preferences for New Zealand export products and services, including for tourism. New Zealand is a geographically isolated, trade-dependent nation that prizes and trades on its 'clean, green' credentials. The effect of reputational risks for "NZ Inc." and the wider economy as a result of this "fast-trash" Bill should not be underestimated.

C Concluding remarks

71. New Zealand's natural environment is in a critical state across a range of metrics. We simply cannot afford to have a fast-track consenting pathway under which environmental safeguards are lower-order concerns and opportunities to participate and scrutinise decision-making so significantly diminished.

72. We already have an effective fast-track consenting model that does not overreach in this way.

73. The Bill thus presents a disproportionate and unjustified response to a poorly evidenced problem.

74. It should be withdrawn, and the Government's reckless disregard for environmental protection, due process, and public participation stopped.

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[40] In terms of meeting the eligibility criteria for fast-track referral but also as the combined result of the Bill's facilitative purpose, absence of mandatory climate change considerations, diminution of environmental safeguards, limited opportunities for public participation, and Executive powers of override.

[41] Which requires substantial reductions in the production and consumption of fossil fuels, and an assumption of common but differentiated responsibilities.