# COVID-19 RECOVERY (FAST-TRACK CONSENTING BILL) 2020

**TO: The Environment Committee**

## Submission on behalf of the

## Resource Management Law Association of New Zealand Inc

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### INTRODUCTION

1. This Submission is made by the Resource Management Law Association of New Zealand Inc (RMLA) on the COVID-19 Recovery (Fast-Tract Consenting Bill) 2020 (Bill).

2. The RMLA is concerned to promote within New Zealand:

    a. An understanding of Resource Management Law and its interpretation in a multi-disciplinary framework

    b. Excellence in resource management policy and practice

    c. Resource management processes which are legally sound, effective and efficient and which produce high quality environmental outcomes.

3. The RMLA has a mixed membership. Members include lawyers, planners, judges, environmental consultants, environmental engineers, local authority officers and councillors, central government policy analysts, industry representatives and others. Currently the Association has some 1,100 plus members. Within such an organisation there are inevitably a divergent range of interests in views of members.

4. Given the severely truncated timeframes (three working days) for making submissions on the Bill, it has not been possible to consult and obtain feedback from the wider RMLA membership on the Bill, as would normally be done. This submission therefore reflects the input provided by the RMLA's National Committee and Knowledge Hub Leaders. As such, this submission does not (and cannot) purport to address all issues which members may wish to raise regarding the Bill. It should also be noted that a number of members may be providing their own individual feedback and those may represent quite different approaches to the views expressed here.

5. For these reasons, this submission does not seek to advance any particular policy position in respect of matters raised by the Bill. Rather, the submission provides high level comments on key issues from the Bill only.

6. It is hoped that the Select Committee finds these comments both constructive and of assistance. The RMLA wishes to be heard on the submission and is grateful for the opportunity it is being given for that to occur.

**SUBMISSION**

7. The RMLA recognises the need for the Bill and supports its general purpose (as stated in clause 4). That is, to "fast track" the necessary approvals under the Resource Management Act 1991 (RMA) for projects that will create employment opportunities, particularly in areas of New Zealand that have been most affected by the response required to address the potential health effects from COVID-19.

8. In particular, the RMLA is pleased to see (and supports) that the Bill:

    a. Includes consideration of whether projects support New Zealand's transition to a low emissions economy and improve New Zealand's resilience to climate change.

    b. Continues to promote the sustainable management of natural and physical resources in accordance with section 5 of the RMA and does not make Part 2 of the RMA subservient to the purpose of the Bill, in terms of the matters decision makers must consider in determining applications for listed and referred projects (see clauses 27, 29 and 31 of Schedule 6 of the Bill).

    c. Recognises that Environment Judges should play a key role in appointing and chairing Expert Consenting Panels (Panel). The RMLA strongly supports using the significant expertise and experience of the Environment Court in this way and considers this will be crucial to ensuring high-quality decision making. Further, having such oversight is particularly important in this case, given the significant constraints on public participation and appeal rights under the Bill.

9. Further to that general position, the RMLA wishes to comment on the following key matters raised by the Bill in more detail:

    a. The extent of discretion provided to the Minister(s) regarding which projects are able to access the fast-track consenting process.

    b. The appropriate process for transferring existing applications to the fast-track process which are either before the Environment Court or a Council and not yet heard.

    c. The ability to extend lapse dates under the RMA.

    d. The ability to decline applications for listed projects.

    e. The recognition of the Treaty of Waitangi and Treaty settlements within the Bill.

    f. Obligations regarding Treaty settlements under the Bill.

    g. Obligations regarding iwi participation legislation, Joint Management Agreements (JMA) and Mana Whakahono ā Rohe (non-Treaty settlement) under the Bill.

    h. The need to consult with iwi in considering whether a project should be fast-tracked.

    i. The potential for extending the two-year time frame of the Bill.

    j. The lack of appeal right to the Supreme Court.

    k. Matters to be considered when assessing listed and referred projects.

    l. The permitted activity standards for infrastructure.

10. In preparing this submission, the RMLA has chosen to focus on topics raising issues which, as an organisation of resource management practitioners, it has practical experience with. The provision of a selective response should not be taken to suggest that the Bill does not raise other issues which may be considered relevant by RMLA members.

**The extent of Ministerial discretion to refer projects for fast-tracking**

11. As currently drafted, clauses 18 and 19 of the Bill give the Minister for the Environment (Minister, although including the Minister of Conservation for matters in the coastal marine area) a very broad discretion as to what projects can be referred

to go through the fast-track process. Essentially, the only constraints on this discretion under clause 18 of the Bill are that:[1]

a. The project must not include an activity that is described as a prohibited activity in the RMA, regulations or relevant planning instrument, or that would occur on land returned under a Treaty settlement, unless the landowner has agreed in writing to the project; and

b. The Minister must be satisfied that the project will help achieve the purpose of the Bill.

12. The Minister is also only required to reject a project for referral (in accordance with clause 23 of the Bill) if they are satisfied that the project does not meet the above, very broad criteria.

13. While clause 19 of the Bill provides a list of matters to guide the Minister's decision as to whether a project will achieve the Bill's purpose, this is discretionary, not mandatory. The Minister is also able to consider such guidance "*at whatever level of detail the Minister considers appropriate*".

*Requested amendment*

14. The RMLA submits that the Bill should provide more robustness around the Minister's discretion to refer projects for fast-tracking, by:

a. Amending clause 19 of the Bill to make the listed criteria mandatory (rather than discretionary) considerations; and

b. Amending clause 23 of the Bill to provide that the Minister must decline a referral application for any activity that, in the Minister's opinion:

i. is likely to give rise to significant adverse environmental effects; or

ii. is inconsistent with the transition to a low emissions economy; or

iii. will worsen New Zealand's resilience to climate change; or

iv. has an anticipated commencement date which means it is unlikely that the project will assist to meet the Bill's objective.

**Process for fast-tracking existing applications**

15. As currently drafted, the Bill does not provide a process by which existing applications before a Council or the Environment Court can be transferred to the fast-

[1] Noting that there are currently no activities that are likely to trigger clauses 18(2)(c) or (d) of the Bill.

track process. Such a transfer can therefore only be done by withdrawing the application and "starting again".

*Requested amendment*

16. The RMLA submits that the Bill should be amended to ensure that there is an efficient process for transferring existing applications to the fast-track process. Suggested drafting is **attached** as **Annexure A**. This is based on section 16 of the Canterbury Earthquakes Insurance Tribunal Act 2019.

**Ability to extend lapse dates under the RMA**

17. It is clear (from clause 35(2) of Schedule 6 of the Bill) that applications approved under the Bill are intended to have a maximum lapse date of 2 years. However, it appears that consent holders and requiring authorities would subsequently still be able to apply to extend that lapse date, in accordance with clauses 12(2)(b) and (4) of the Bill.

*Requested amendment*

18. The RMLA queries whether this was intended. If not, the RMLA submits that the Bill should be amended as appropriate to clarify that no application can be made under the RMA, to extend lapse dates for resource consents or designations approved under the Bill.

**Ability to decline applications for listed projects**

19. In combination, clauses 28 and 32 of the Bill indicate that it is mandatory to approve applications for a listed project, except where either of the specific circumstances from clause 32 apply. For example, a Panel would have no ability to decline approval if it considered it did not have sufficient information regarding the project and its potential effects, or that granting the application would be contrary to an applicable Water Conservation Order.

*Requested amendment*

20. The RMLA queries whether this was intended. If not, the RMLA submits that the Bill should be amended as appropriate, to further clarify the basis on which applications for listed projects can be declined.

**Recognition of the Treaty of Waitangi and Treaty settlements**

21. The RMLA supports the requirement for decision-makers under the Bill to act "*in a manner that is consistent with*" both the principles of the Treaty of Waitangi and

Treaty settlements.[2] This is a critical safeguard and should not be removed or watered down. It is also consistent with the 12 May 2020 COVID-19 Recovery (Fast-track Consenting) Bill Cabinet Paper (Cabinet Paper) that Treaty settlements are to be upheld.[3]

**Obligations in relation to Treaty settlements**

22. Clause 5 of Schedule 5 of the Bill addresses Treaty settlement legislation that provides for tailored appointments of hearing commissioners, notice requirements, consultation requirements or other procedural matters.

23. The Bill allows a Panel or Panel convenor to obtain the agreement of the relevant Treaty settlement entity to adopt a modified arrangement that is consistent with achieving the purpose of the relevant Treaty settlement or iwi participation legislation and the purpose of the Bill. The relevant Treaty settlement entity "*may not unreasonably withhold*" their agreement to a modified arrangement.

*Requested amendment*

24. The RMLA submits that both clause 5(3) and the text in brackets in clause 5(4) of Schedule 5 should be deleted from the Bill. As currently drafted, these provisions undermine hard-won provisions in Treaty settlements and RMA agreements. The Panels should be convened in compliance with any relevant Treaty settlement arrangements, JMAs or Mana Whakahono ā Rohe.

**Obligations in relation to iwi participation legislation, JMAs and Mana Whakahono ā Rohe (non-Treaty Settlement)**

25. The Bill treats Treaty settlements differently to iwi participation legislation, JMAs and (potential) Mana Whakahono ā Rohe. In summary, the latter are all documents that provide protection for Maori rights and interests within the RMA processes, as follows:

*a. Iwi participation legislation*

Iwi participation legislation (such as the Hawkes Bay Regional Planning Committee Act 2015) does not settle Treaty claims but was developed alongside Treaty settlements.

*b. JMAs (section 36B, RMA)*

JMAs are a tool available to iwi and local authorities under the RMA. They set out how local authorities and iwi authorities will work together to discharge specified

[2] Bill, clause 6.
[3] Cabinet Paper, paragraph 51.

responsibilities of local authorities under that Act. JMAs recognise Māori interests that exist regardless of whether or not a Treaty settlement has been completed and do not technically require separate legislation. Only two JMAs have been agreed under section 36B of the RMA.[4]

*c. Mana Whakahono ā Rohe (sections 58L-58U, RMA)*

Mana Whakahono ā Rohe are agreements between iwi authorities and local authorities about how they will work together under the RMA. As far as the RMLA is aware, no Mana Whakahono ā Rohe have been agreed to date.

26. These agreements are linked to Treaty rights and interests. As such, there does not appear to be a sound policy rationale for treating them differently from Treaty settlements under the Bill.[5]

*Requested amendment*

27. The RMLA submits that the Bill (specifically, clauses 27(4), 29(10) and 31(8) of Schedule 6) should be amended to provide for iwi participation legislation, JMAs and Mana Whakahono ā Rohe to be considered by the Panels for listed and referred projects in the same way that Treaty Settlements are.

**Requirement to consult with iwi regarding fast-tracking a project**

28. Under the Bill, upon receipt of an application the Minister must copy the application to, and invite written comments from, the relevant local authorities and the relevant Ministers.[6]

29. The original proposal outlined in the Cabinet Paper stated that the Minister would "*need to consider comments from key stakeholders and Treaty partners*" at this juncture.[7] Key stakeholders were then described as including relevant local authorities and the relevant Ministers. In that regard, the current drafting of the Bill is inconsistent with the Cabinet Paper.

*Requested amendment*

30. The RMLA submits that clause 21 of the Bill should be amended to require the Minister to seek comment from relevant iwi authorities when considering whether

[4] Tūwharetoa & Taupō District Council (2009) - about consenting on Māori land; Ngāti Porou and Gisborne District Council (2015) - about decision making in the Waiapu catchment.
[5] JMAs and Mana Whakahono ā Rohe are provided for procedurally in the Bill in terms of who the Minister provides the application to and when Panels are being convened.
[6] Bill, clause 21.
[7] Cabinet Paper, paragraph 59.

a project should be referred to a Panel, for the following reasons:

a. The Minister is receiving comments from local authorities and relevant Ministers at this stage anyway, so it does not impose an additional procedural requirement on the Minister or result in further potential delays.

b. Receiving comment from iwi will assist with the Minister's decision-making (alongside the required Te Arawhiti report).[8]

c. Critically, it provides iwi with early notification that a project may be referred to a Panel. This allows iwi time to prepare to engage with the application and select a Panel nomination (or, where there is more than one iwi authority, engage with one other about the nomination). This is particularly important given the short 10 working-day timeframe to provide feedback on a referred project to the Panel. Some of the projects will be substantial such that 10 working days will simply not be enough time. This runs the risk of the Panel not having the information it needs to make an informed decision. Providing earlier notification, and seeking comment, will go some way to assisting to resolve this issue.

**The processes under the Bill do not have a two-year life span**

31. The two-year self-repeal date in the Bill[9] is intended to ensure the temporary nature of the fast-track process.[10] However, the RMA considers as currently drafted, it is somewhat misleading to state that the Bill will only apply for a period of two years.

32. While the Bill self-repeals two years from enactment, the Minister will still be able to recommend an Order in Council for a referred project up until the two-year deadline (i.e. the week before, given it is understood that Orders in Council are able to be developed quickly). As drafted, the RMLA considers that this may incentivise a late rush of applications for fast-tracking. This could result in a number of projects being considered and referred to Panels in months 20-24. Practically, this means that the Panel process will run well past the two-year period, taking into account appeals and judicial reviews.

33. Subsidiarity and public participation in environmental decision-making are important principles of international environmental law (Rio Declaration, Principle 10) that have been adopted by New Zealand's resource management system. This Bill almost entirely limits public input into consent decisions. As such it is critical that it is for a fixed duration and that other safeguards are provided.

[8] Bill, clause 17(2).
[9] Bill, clause 3.
[10] https://www.newsroom.co.nz/2020/06/16/1233647/rma-fast-track-saving-time-and-jobs.

*Requested amendment*

34. The RMLA submits that clause 27 of the Bill should be amended, to require that the Minister is only able to recommend that referral orders are made for a period of 18 months from the Commencement Date, to ensure that fast track process is completed (and generally comes to an end) within the two-year timeframe (or thereabouts).

**No rights of appeal to the Supreme Court**

35. In accordance with clause 42 of Schedule 6 of the Bill, final appeals are to the Court of Appeal, not the Supreme Court. The acknowledged exceptional nature of the legislation makes it important to preserve rights to appeal to the Supreme Court. In terms of a truncated appeal process, there exists precedent in the Board of Inquiry model, where appeals are heard by the High Court and then proceed to the Supreme Court (subject to the granting of leave).

*Requested amendment*

36. The RMLA submits that clause 42 of Schedule 6 of the Bill should be amended to preserve rights to appeal to the Supreme Court directly from the High Court (as is the case with Boards of inquiry appeals under the RMA).

**Matters for consideration when assessing listed and referred projects**

37. The Bill creates bespoke legislation with processes distinct to the RMA.

38. However, parts of the RMA are carried over. Some apply in the same way as they do in the RMA and some do not. One part that does not apply in the same way is the obligation on Panels to revert back to Part 2 of the RMA in their assessment of listed and referred projects. The relevant clauses of Schedule 6 (being clauses 27, 29 and 31) provide that in determining matters before them, a Panel:

    a. Must consider whether granting consent, subject to any conditions, would promote Part 2 of the RMA and the purpose of the Bill; but

    b. Must apply clause 6 of the Bill (Treaty of Waitangi) instead of section 8 of the RMA (Treaty of Waitangi).

39. However, as drafted, the matters for consideration do not include the purpose of the Bill and (with respect to referred projects), the reasons the project was referred.

*Requested amendment*

40. The RMLA submits that the Bill should be amended as appropriate, to:

    a. Avoid any confusion as to whether *R J Davidson Family Trust v*

*Marlborough District Council*[11] applies to projects considered under the Bill. In this regard, it is noted that the Cabinet Paper indicates the intention is to refer back to Part 2 of the RMA under the fast-track process.[12] It therefore appears clear that the current drafting of the Bill, being different to that in section 104 of the RMA, is intentionally different.

b. Require consideration of the purpose of the Bill and (with respect to referred projects), the reasons the project was referred, when determining applications.

41. The RMLA also notes that there is an important difference in the requirement to apply clause 6 of the Bill, which has a stronger legal weighing than section 8 of the RMA. The RMLA considers that this is a critical safeguard that should be retained in the Bill.

**Permitted activity standards for infrastructure**

42. RMLA generally supports the provision of a suite of permitted activity standards for infrastructure maintenance. However, it is concerned that some of these standards are overly permissive to the point that they are inconsistent with the RMA's sustainable management purpose. In particular, the ability to remove up to 1,000 square metres of vegetation from a significant natural area (clause 19, Schedule 4), without an assessment of the effects of that removal on significant indigenous vegetation and significant indigenous fauna appears to be inconsistent with s 6(c) of the RMA and the New Zealand Biodiversity Strategy. The earthworks standard is similarly permissive.

43. Schedule 4 of the Bill uses the term "natural wetland" in various permitted activity clauses. That term is not defined. This introduces uncertainty which undermines the purpose of the exclusions or additional controls where "natural wetlands" are potentially affected.

44. Clause 32 of Schedule 4 enables clearance of indigenous vegetation within the coastal marine area up to 100 square metres in area. This is inconsistent with Policy 11 of the New Zealand Coastal Policy Statement.

*Requested amendment*

45. RMLA submits that Schedule 4 of the Bill be amended to:

[11] [2018] NZCA 316: Where the Court of Appeal held that in most cases there is no need (or ability) to refer back to Part 2 in determining an application for resource consent.
[12] Cabinet Paper, paragraph 77.

a. Exclude significant natural areas (clause 19(1) of Schedule 4) from the permitted activity standard;

b. Refer to "wetland" rather than "natural wetland"; and

c. Delete the permitted activity standard for indigenous vegetation clearance in the coastal marine area (clause 32 of Schedule 4).

46. Again, the RMLA appreciates the opportunity to make and be heard on this submission.

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**Date:** 21 June 2020

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## ANNEXURE A

## SUGGESTED DRAFTING FOR TRANSFER OF EXISTING APPLICATIONS TO THE FAST-TRACK PROCESS

### A NEW PROVISIONS TO BE INSERTED

### 15A Transfer of applications of resource consents before the Environment Court under the Resource Management Act 1991

(1) If a resource consent application under the Resource Management Act 1991 is under appeal before the Environment Court, the Court may, on the application of the applicant, order that the proceedings be transferred to the EPA to be determined under this Act.

(2) If a notice of requirement under the Resource Management Act 1991 is under appeal before the Environment Court, the Court may, on the application of the requiring authority, order that the proceedings be transferred to the EPA to be determined under this Act.

(3) An order to transfer may be made under subsection (1) or subsection (2) only if—

(a) The proposed resource consent or designation, as the case may be, relates solely to 1 or more listed projects or referred projects;

(b) The consent application or notice does not breach clauses 2(3)(c) or (4) of schedule 6;

(c) The applicant or requiring authority is an authorised person;

(d) The other party or parties to the proceedings have been given a reasonable opportunity to comment;

(e) The proceeding has not yet been set down for a hearing; and

(f) The Court making the order believes that the order is consistent with the purpose of this Act.

(4) The order may be made subject to any terms that the Court sees fit, including as to costs.

### 15B Transfer of applications of resource consents before a consent authority under the Resource Management Act 1991

(1) If a resource consent application under the Resource Management Act 1991 is before a consent authority, the authority must, on the application of the applicant, transfer the application to the EPA to be determined under this Act.

(2) If a notice of requirement under the Resource Management Act 1991 is before a territorial authority, the territorial authority must, on the application of the requiring authority, transfer to the EPA to be determined under this Act.

(3) The transfer may be made under subsection (1) or subsection (2) only if—

(a) The proposed resource consent or designation, as the case may be, relates solely to 1 or more listed projects or referred projects;

(b) The consent application or notice does not breach clauses 2(3)(c) or (4) of schedule 6;

(c) The applicant or requiring authority is an authorised person;

(d) The application or notice has been publicly or limited notified, and the time for lodging submissions has expired; and

(e) The commencement of the hearing of the application or notice has not been fixed to begin within 35 working days of the application for transfer.

(4) The consent authority or territorial authority may specify additional documents which are to be filed with the EPA in accordance with section 15C(2)(d).

**15C Processing of applications and notices transferred to the EPA**

(1) If an order is made under section 15A, the applicant will promptly lodge with the EPA copies of the following—

(a) A copy of the order in accordance with section 15A(1) or (2);

(b) The application or notice to which the appeal relates;

(c) All submissions lodged with the consent authority or territorial authority;

(d) The s42A report of the consent authority or territorial authority;

(e) All documents relating to the hearing of the application or notice placed before the consent authority or territorial authority;

(f) The Notice of Appeal;

(g) Any notices received under s 274(2) of the Resource Management Act 1991;

(h) Any other information which the Court directs pursuant to section 15A(4).

(2) If an application or notice is transferred under section 15B, the consent authority or territorial authority must promptly lodge with the EPA copies of the following—

(a) The application or notice to which the appeal relates;

(b) All submissions lodged with the consent authority or territorial authority;

(c) The s42A report of the consent authority or territorial authority (if any);

(d) Any other information which the consent authority or territorial authority specifies under section 15B(4).

(3) If an application or notice is transferred to the EPA pursuant to subsections (1) or (2), the application or notice becomes a consent application or notice of requirement under this Act.

(4) Despite clauses 3 and 4 of schedule 6, the EPA must provide the application or notice to a panel appointed to determine that application or notice.

(5) Nothing in subsection (4) shall restrict the power of the panel to request further information pursuant to clause 24(1) of schedule 6.

(6) If an order is made under section 15A, for the purpose of an application under this section, clause 17(4) of schedule 6 is substituted by persons who were a party to the proceeding before the Court.

(7) If a transfer is made under section 15B, for the purpose of an application under this section, clause 17(4) of schedule 6 is substituted by persons who were a submitter on the application or notice.

(8) For the avoidance of doubt, nothing in subsections (6) or (7) shall affect the discretion of the panel pursuant to 17(5) of schedule 6.

(9) The panel may have regard to any information lodged with the EPA under subsection (1) and (2), and it is not necessary for that evidence to be given again unless the panel requires it.

## B AMENDMENTS TO SCHEDULE 6, CLAUSE 26(3)

Amend to read:

(3) Except where section 15A or 15B apply ~~However~~, a person who has lodged an application for a resource consent or a notice of requirement under the Resource Management Act 1991 in relation to a listed or referred project must withdraw that application or notice of requirement before lodging a consent application or notice of requirement under this Act for the same, or substantially the same, activity.