

COVID-19 Recovery (Fast-track Consenting) Bill

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The current focus on COVID-19 has seen the introduction of the COVID-19 Recovery (Fast-track Consenting) Bill (Bill) on 16 June 2020, the purpose of which is to urgently promote employment growth to support New Zealand's recovery from COVID-19 and support the certainty of ongoing investment across New Zealand, while continuing to promote the sustainable management of natural and physical resources.

The Bill seeks to achieve this purpose by establishing new fast-track resource consenting and designation processes for infrastructure and development projects and enabling certain agencies to carry out specific works on existing infrastructure without the need for resource consent. The Bill is proposed to be repealed after 2 years.

Fast-track process

Two categories of projects have access to the fast-track process:

- Listed projects: The Bill lists 16 projects led by government agencies and Crown entities
- Referred projects: Projects can be referred to the Minister for the Environment and approved for fast-tracking through Orders in Council.

Resource consents and designations for listed and referred projects will be considered and determined by an expert consenting panel instead of local authorities. Panels will be chaired by a current or retired Judge, or suitably qualified resource management lawyer, and must include members nominated by relevant local and iwi authorities. Collectively, the panel must have expertise in resource management, technical matters relevant to the project, tikanga Māori and mātauranga Māori.

The fast-tracking process is intended to reduce typical processing timeframes in several ways. Instead of limited or public notification, the panel must invite comments from persons specified in the Bill (including owners and occupiers of adjacent land) no later than 10 working days after the application is lodged. Any comments must be made within 10 working days after the invitation. The panel must then issue its decision within 25 working days after receiving comments, with the option to double this timeframe if the scale of the project warrants it. No other timeframes can be extended, but the applicant has the option to request a suspension. The panel is not required to hold a hearing, but if a hearing is held, cross-examination may be permitted.

Ordinarily under the RMA, local authorities can only make recommendations on notices of requirement, with the requiring authority being the decision maker. However, under the fast-track process, the panel will make decisions on both consent applications and notices of requirement.

The panel may only decline a listed project if it would not be consistent with a national policy statement or the terms of any relevant Treaty settlement.

It has greater flexibility to decline a referred project when applying the usual resource consent and designation decision-making criteria in the RMA. However, the panel must also apply the purpose of the Bill alongside Part 2 of the RMA and must act (and decide) consistently with the principles of the Treaty of Waitangi and any relevant Treaty settlements.

Appeals are limited to points of law to the High Court and Court of Appeal, by the applicant, relevant local authorities, the Attorney-General, persons who provided comments, and any person who has an interest in the decision greater than that of the general public. The Bill does not affect any right of judicial review.

The applicant for the listed and referred projects will be responsible for the actual and reasonable costs incurred by the panel and the Environmental Protection Authority.

Applying for fast-tracking

Any person or organisation may apply to the Minister for the Environment to use the fast-track process. However, a project will not be eligible for fast-tracking if it is:

- A prohibited activity under a plan or national environmental standard
- On land returned under a Treaty settlement, within a customary marine title area, or has more than minor adverse effects on the exercise of protected customary rights, unless prior written approval has been obtained from relevant landowners and rights holders.

Before referring a project for fast-tracking, the Minister must obtain and consider a report from the Office for Māori Crown Relations – Te Arawhiti on Treaty settlement obligations and interests under the Marine and Coastal Area (Takutai Moana) Act 2011.

The Minister must also be satisfied the project will help to achieve the purpose of the Bill. In considering a project against the Bill's purpose, the Minister may consider:

- Economic benefits for communities and industries affected by COVID-19
- Social and cultural wellbeing
- Whether the project would likely progress faster under the fast-track process
- The potential for significant adverse effects
- Potential public benefit, such as generating employment, increasing housing supply, contributing to well-functioning urban environments, providing infrastructure, improving environmental outcomes, minimising waste, promoting historic heritage protection, strengthening resilience to natural hazard risks, and contributing to climate change mitigation and a low-emissions economy.

The Minister has wide discretion to decline an application for fast-tracking. If the Minister is satisfied a project is eligible for fast-tracking, the Minister must invite written comments from relevant local authorities and ministers, with the option to invite written comments from any other person. After considering comments received, the Minister may then decide to refer the project for fast-tracking and recommend an Order in Council be made.

Works on existing infrastructure

The Bill also enables the New Zealand Transport Agency and KiwiRail Holdings Limited to carry out specified works on existing infrastructure without the need for resource consent, subject to compliance with performance standards in the Bill. These works are generally limited to the operation, replacement, maintenance and minor upgrade of existing infrastructure.

However, activities will not be permitted under the Bill if they are:

- Categorised as discretionary, non-complying or prohibited activities under relevant plans and regulations
- On sites of cultural or historical significance
- Within outstanding water bodies or wāhi tapu sites
- Permanent water takes requiring resource consent under relevant plans.

The Bill anticipates that subsequent Orders in Council can authorise local authorities, Kāinga Ora-Homes and Communities and the Ministry of Housing and Development to carry out specified activities and works.

Prior to undertaking works, agencies must partner with relevant iwi, hapū and Treaty settlement entities to identify sites of cultural significance and how to manage them adequately. Agencies must also give prior notice of works to relevant local authorities, iwi, hapū and Treaty settlement entities. The notice must include a brief description of the works, a record of engagement undertaken, any management and monitoring plans, and an invitation to attend a pre-start or induction meeting. Iwi and hapū can also recover costs from agencies in relation to identifying wāhi tapu and other sites of cultural significance.

Conclusion

The Bill adds another process option to the growing resource management approval tool kit with the RMA providing a range of fall-back process options for projects that do not qualify under the Bill. As the requirements and processes in the Bill are extensive, and untested, they are far from a free and easy ride for applicants.

Robust information must be obtained by the applicant (especially as it is a 'one stop shop' with very tight timeframes and limited appeal rights). For referred projects a robust justification of the project will be needed for the Minister. With a hearing unlikely, clear documentation is critical, especially in relation to often complex policy and planning provisions. Applicants will need to focus on pre-application consultation and carefully develop conditions to address effects. Applicants will also need to consider conditioning opportunities for iwi/stakeholders/community involvement during design and construction of the project.

A significant amount of RMA reform was already underway before the Bill, including the progression of new National Policy Statements for freshwater management and indigenous biodiversity. A proposed Amendment Bill with the aim of reducing complexity, increasing certainty, reinstating public participation opportunities and improving freshwater management is awaiting its third reading before the House. Finally, a comprehensive long-term reform package for the RMA from the Resource Management

Review Panel is expected to be released soon. It will be a busy few months for RMA reform, and debate on its long-term future, before the election.

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