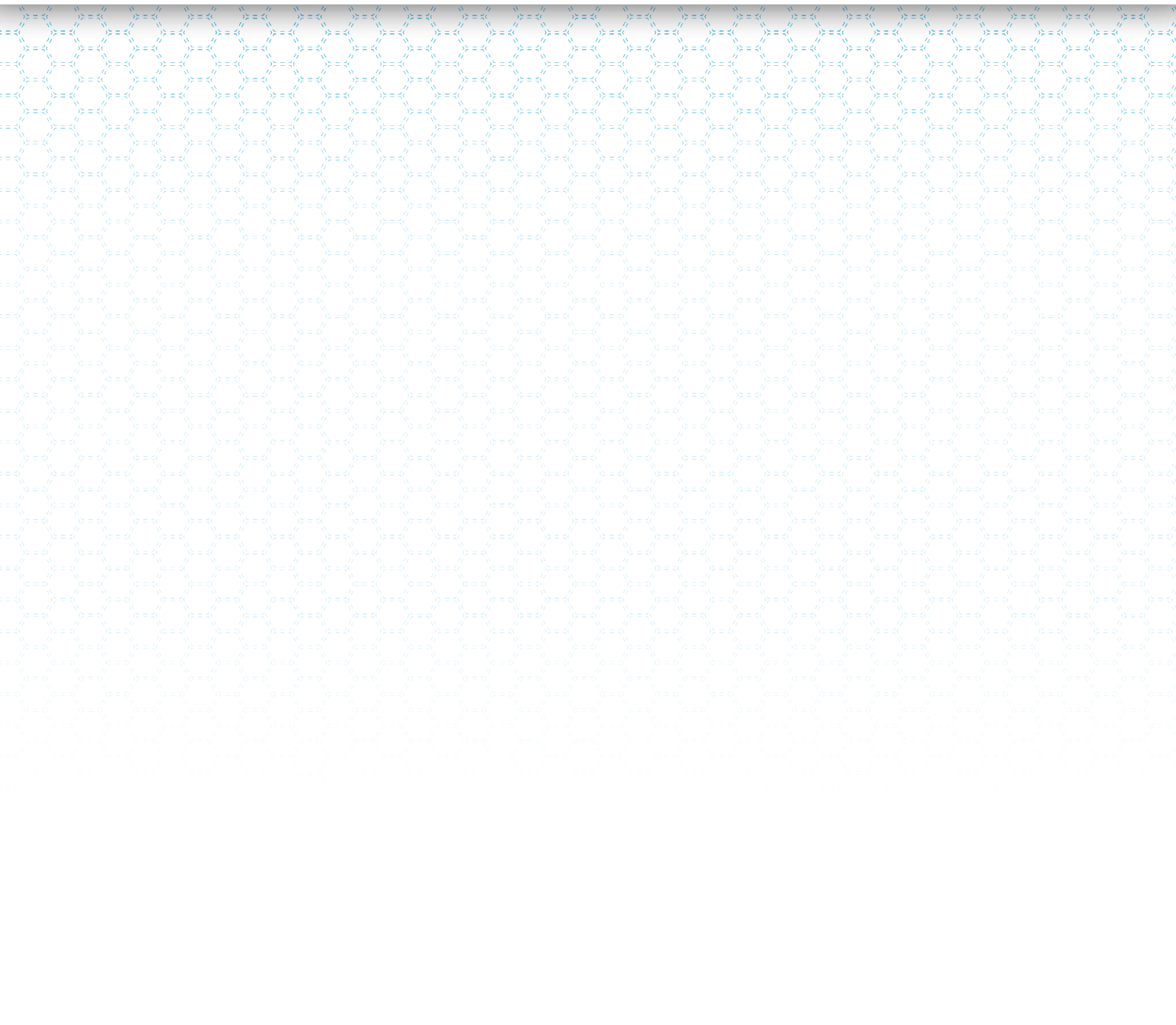




**Local Government
New Zealand**
te pūtahi matakōkiri



This report was prepared for *Local Government New Zealand* by



1 Introduction

This report discusses some of the issues associated with national instruments prepared under the RMA. It has been prepared as an internal “think piece” for Local Government New Zealand (LGNZ).

The primary purpose of the report is to:

- review the rationale for national intervention using the instruments available under the RMA that has been applied by central government; and
- offer an alternative rationale, if necessary, being that which might better deliver targeted, effective intervention that supports the work of local government.

2 Background

The RMA promotes a devolved model of environmental management where local authorities (at regional and territorial level) undertake both policy and regulatory functions as allocated to them under the Act.

However, central government (at executive and non executive levels) has always retained four primary means¹ of exercising national intervention:

- Regulations (under section 360 of the Act)
- National environmental standards (NESs)
- National policy statements (NPSs)
- Call-in of applications required under regional or district plans (or in absence of plans, under the Act)².

This report considers that first three of these means of intervention, being interventions focused on the policy environment or regulatory framework with which resource use must comply (rather than specific project level approvals).

As performance under the RMA became increasingly criticised (from 2000 on), stronger and more persistent calls for “national instruments” began to be made. Some commentators have argued that at the conclusion of the RMA reform process there was a clear understanding that the Crown’s standing back from day to day involvement in resource planning, (and “looseness” of Part 2 of the Act) was always intended to be compensated for by greater policy guidance and direction in the form of the instruments outlined above and, in particular, NPSs. They argue that the absence of national instruments is a lacuna in the system the filling of which would greatly improve RMA implementation.

The bemoaning of the lack of NPSs and NES has become a regular theme and *cause célèbre* in discussions about the performance of the Act. Whether we should

¹ There are other means including approving requiring authorities, and heritage protection agencies, issuing water conservation orders and approving regional coastal plans and appointing representatives on

² Note roll of EPA.

have them, what form they should take and on what subjects they should focus has been a defining, and dividing, issue in RMA implementation.

While there was initially some reluctance to consider such instruments (with government preferring the see the RMA “bed down” and local discretion protected), more recent governments have embraced the notion of government direction through these instruments as a means of expressing “leadership” and as a tangible (and, it seems, a perceived low risk/low cost)³ way to respond to stakeholder and public concerns with the Act and its implementation.

3 Stocktake: Where we are at

Although interest in national instruments has picked up over recent years (and various commitments have been made in party political manifestos and government releases), progress on these instruments has been modest.

The reasons for this are in themselves illuminating (and a potential point of debate). One previous analysis of the reasons for modest progress (particularly on NPSs) is attached as Appendix 1.

That analysis (by the author of this report) argues that there has not (as some other commentators have alleged) been some ideological predisposition against NPS from governments of any persuasion and that the obstacles are more practical than political. This paper adds some further dimensions to that analysis.

That aside, Table 1 sets out the instruments the government has funded and their current status as at March 2011.

Table 1 – Stocktake of current and proposed national instruments

	Instrument	Driver(s)	Status
NZCPS	NPS	Statutory requirement	Operative
Electricity Transmission	NPS	Energy constraints/desire to facilitate transmission	Operative
Biodiversity	NPS	Concern for environmental outcome (loss of biodiversity)/	Proposed
Freshwater	NPS	Concerns for environmental outcomes (i.e. concerns over deterioration in quality and over allocation)	Proposed
Renewable Electricity generation	NPS	Climate change/ desire to facilitate electricity generation from renewable sources	Operative (12 May)
Flooding and	NPS	Local government concern about	Work

³ As will discussed later in this report, this initial view is typically revised once the implications of an NPS are more fully appreciated.

stormwater		liability	discontinued
Electricity generation	NPS	Concern about energy constraints/desire to facilitate new generation capacity	Work discontinued
Urban Design	NPS	Pressure to improve quality of urban design	Work discontinued. (To be incorporated into Phase II RMA reforms)
Air Quality	NES	Concern about human health risk	Operative
Ecological flows and water levels	NES	Concern about water management and lack of consistency in approach, (uncertainty re good practice and hence on-going debates and litigation)	Proposed
Sea Level Rise	NES	Risk to property/liability for local government	Work discontinued
Plantation forestry	NES	Regulatory standardisation/cost reduction for industry	Proposed
Contaminants in Soil	NES	Concern about risks to human health	Proposed
On site waste water	NES	Regulatory standardisation/cost reduction for industry Concern about risk to human health	Withdrawn
Sources of human drinking water	NES	Concern about risk to human health	Operative
Telecommunications	NES	Regulatory standardisation/cost reduction for industry	Operative
Electricity transmission	NES	Regulatory standardisation/cost reduction for industry	Operative
Marine pollution	Regulations	International convention/commitment and human health	Operative
Measurement and reporting of water takes	Regulations	Improved information base of management	Operative

Although Table 1 includes some 19 proposals for national instruments, it is noteworthy that, at the time of writing, only five are operative (including only two NPSs – including the mandatory NZCPS). At least five national instrument

processes have been abandoned (or are in abeyance) after considerable policy work has been completed.

4 Making decisions on national instruments

There are two dimensions to how decisions are made on whether to prepare a national instrument:

- The *process* for making the decision (who is involved and at what stage)
- The *decision-making criteria* applied to the decision to initiate a national instrument.

These are reviewed in turn.

4.1 Administrative process

At a broad level, the process for preparing an NPS or an NES is set out in the Act. Those processes are not reviewed here in detail. In short:

- An NES can be prepared by any process the Minister considers gives public and iwi authorities adequate time and opportunity to comment on the subject matter;
- An NPS can be either be referred to a Board of Inquiry (BoI) to invite submissions and hold hearing or, where certain circumstances apply, use a process of the minister's choosing (s 46A).

The process for development NESs has settled into a regular format with the release of a *discussion document* setting out the issues, objectives, options and the proposed NES in broad terms (along with an assessment of costs and benefits).

MfE have a clearly defined process for developing NESs (see Appendix 4). This tends to have been applied consistently⁴.

The process for preparing NPSs, however, has been much more variable. Although the BoI process has been used for all processes (excepting, at this point, the proposed biodiversity NPS), the front end of the processes (whereby the "go/no go" and draft content decisions are made) have followed many different paths⁵.

Moreover, now that the Minister may choose his/her own process to take forward an NPS proposal⁶, there is much uncertainty about how future decisions will be made. (It is understood that at this point MfE proposes to use the NES process described above with necessary modifications).

More specific and detailed arrangements have previously been specified in Cabinet Office minutes/circulars. However it appears that no such minute/circular is currently operative/applied.

⁴ Although, exceptions exist. It has been signalled, for example, that the NES on Plantation Forestry will have a second round of consultation with submitters on an amended NES

⁵ Furthermore, as discussed later in respect of the Freshwater NPS the post BoI process may also vary.

⁶ As introduced by the 2005 RMA Amendment and further modified by the Resource Management (Simplifying and Streamlining) Amendment Act 2009

The only point of certainty is that, once Cabinet has approved, in principle, the preparation of an NPS, under section 46 of the Act the Minister for the Environment must “*seek comments from relevant iwi authorities and persons and organisations the Minister considers appropriate*” and “*prepare an NPS*”. That is the statutory starting point but, as noted, in practice this is invariably preceded by a front-end process that involves Cabinet approval for process initiation; verification of the value of the instrument (often through an external “expert process”); together with development of draft wording. (Some examples are highlighted in Section 5 of this report).

4.2 Decision-making criteria

Whatever process is used, at some point, someone needs to apply some decision-making criteria to determine whether to initiate, proceed with and/or complete national instrument processes.

Such criteria go to the heart of this project with the key question being “on what basis should decisions be made about when a national instrument should be prepared; and how should the issues to be addressed by national instruments be prioritised?”

4.2.1 Statutory matters

The Act itself includes criteria (section 45) for the Minister to apply in deciding whether it is desirable to prepare an NPS. These criteria are included as Appendix 2.

The criteria are sensible but broad in nature. In practice they are used to rule things in rather than rule them out. They are not a sound basis to answer the questions posed above.

4.2.2 Previous work

In 2001 MfE commissioned a report⁷ to assess the value of national policy statements (NPSs) as mechanisms to resolve environmental issues. The report was designed as an internal discussion document to assist the Ministry for the Environment respond to requests for NPSs and, where necessary, to prioritise between competing demands for NPSs.

The report developed criteria to evaluate the efficacy and appropriateness of NPSs (derived from the wording of the Act itself and underlying policy principles) and applied these to the various requests for NPSs that had been received at that time.

The criteria used for that study were as follows:

- 1) *The subject matter must be relate to a matter of national significance. That is, it must correspond to an issue that:*
 - a. *occurs at a sub national scale but has national economic, social, cultural or environmental implications; or*
 - b. *occurs nationally and either:*

⁷ *National Policy Statements: Assessment Criteria and Evaluation of Options, Hill Young Cooper 2001*

- i. has national economic, social, cultural or environmental implications; or*
- ii. requires a nationally consistent response (or at least a degree of national consistency).*

This criterion is largely a legal test since section 45 states that NPSs may only be promulgated in respect of issues of national significance. Assessing the threshold of economic, social, cultural or environmental implication can only be a matter of political judgement. However, section 6 matters, or any matter that is the subject of an existing national strategy (or non-statutory policy) will almost certainly meet this criterion.

Whether an issue requires a nationally consistent response will depend on:

- the level of cost that might be incurred by an inconsistent response; and
- the technical justification for national variability.

- 2) *The issue is of a nature that requires a long-term response (i.e. it is not something that requires a “quick fix” solution).*

The process of promulgating an NPS and giving effect to an NPS through regional and district plans makes in unsuited to issues that require an immediate or urgent policy response. The process of preparing an NPS is such that it is probably only worthwhile for long term and persistent environmental issues. The criterion requires an examination of the nature of the issue.

Project level issues (such as the need to facilitate a particular development) or problems associated with short-term events (e.g. the Rugby World Cup) would be ruled out by this criteria.

- 3) *The government is in a position to say something clear and definitive about the issue having regard to:*

- a. political mandate; and*
- b. available technical knowledge/research on subject matter.*

The criterion is a pragmatic one. In many cases, issues are considered by public interest groups to be candidates for NPS because they are difficult to resolve (or because they have not been resolved to the satisfaction of the group) at the local level. It is usually the case that issues that are difficult to resolve at the sub national level are *at least* as difficult to resolve at the national level. Contrary to popular opinion, there is no guarantee that a national process will succeed where local processes have failed.

It is not the *scale* at which the issue is considered that is important. It is the quality of information and analysis and the public mandate (note this does not mean consensus). Unless these exist an NPS is unlikely to be specific or definitive and is likely to add little value.

Issues that have been the subject of considerable research and public debate, and/or have been the subject of broad consultation processes in the past are those most likely to meet this criterion.

- 4) *The subject must relate to a matter that is within the powers, ability and interest of local government to resolve.*

This criterion requires consideration of whether the issue is one that can be addressed by local government given the functions and resources available. It requires a consideration of what other agencies have a role in the issue and the extent to which success of any policy statement is dependent on others working outside the RMA framework.

This is partly a legal criterion and partly a practical issue. Local authorities need to be able to address the issue within their RMA functions and they need to have the financial and technical resources to be able to do so.

Issues that rely on the decisions and actions of others to be resolved will not meet this criterion. Issues that impose a level of technical or financial burden that is beyond the means of most local authorities will similarly fail to meet the criterion unless the NPS is presented as part of a wider package of government assistance.

- 5) *The issue at stake must be one that is most efficiently and effectively addressed by the RMA.*

This criterion is closely related to the above. It requires an examination of the extent to which the RMA can solve the issue. It also requires an assessment of what other government policy approaches are under consideration or development and whether an NPS will add materially to, or conflict with, those alternate policy approaches.

This is largely an economic criterion that must be assessed by rigorous cost effectiveness analysis (to the extent that such analysis is possible). In most cases, this will involve an assessment of whether regulation under RMA is a more or less cost effective means of achieving the desired outcome than other forms of regulation or some form of economic instrument.

Obviously, issues that can be shown to be more cost effectively addressed by means other than the RMA will not meet the criterion

- 6) *An NPS must be the most appropriate means of influencing RMA practice*

RMA practice can be influenced in many ways. An NPS is possibly the most costly of these options (administratively) and the “added value” of this cost needs to be demonstrated.

Where it can be shown the one of the other methods (or a combinations of those methods) can achieve the same or similar effect as an NPS, the criteria will not be satisfied.

- 7) *An NPS must be necessary having regard to the effectiveness of district and regional plans and policies (policies refers, in this context, to any non-regulatory programmes being carried out by local authorities)*

Existing and proposed plans must be assessed as being ineffective or potentially ineffective and other means of influencing plans are likely to be more effective than an NPS.

In a practical sense this criterion can probably only be assessed by considering past experience and the results of any monitoring.

Issues that can be shown to be being effectively addressed by existing plans and policies will not satisfy the criterion.

- 8) *It is likely that in the absence of an NPS a local cost or benefit will prevail over a national costs or benefit.*

This is a key criterion that introduces conceptual integrity by requiring consideration of whether overturning the presumption of devolved policy making is justified (and whether the principle of subsidiarity can hold true). It requires an assessment of where costs and benefits fall and a demonstrated pattern of behaviour by local authorities.

The criterion will be met when it can be shown, from past experience, that national level benefits over ride concern for local benefits or costs. The criterion is especially pertinent when the national benefit is an *environmental* benefit.

The criterion will be met when it can be shown that long term or strategic environmental gains are being eroded or foreclosed through local decision-making.

The process then proposed for applying these criteria is illustrated in Appendix 3.

Although the above criteria were used in a Cabinet Paper on NPSs for network infrastructure in 2004, it is unclear what, (if any) formal observance there has been to the 2001 criteria since that time.

It is clear though that while the criteria developed in 2001 are helpful in providing “gateway tests” they fall short of being truly useful for deciding when to (a) initiate a national instrument process; or (b) whether to conclude such a process by recommending a national instrument (noting here that seven processes have not resulted in decisions to proceed with national instruments).

In short, the criteria arguably remain too broad and their application too subjective. However, as discussed below, some of the concepts identified in 2001 do seem to be instrumental in decisions taken by government.

5 When does government favour national intervention

Although there is no formal criteria (and variable process) prescribed to evaluate whether a national instrument is appropriate, governments have clearly reached a range of decisions on the basis of “something” over the past few years.

This section reviews in greater detail seven operative or previously proposed national instruments (five NPSs and two NESs) with a view to identifying what key criteria have been applied either explicitly or, more commonly, implicitly. It seeks to reveal why some proposals have succeeded while others have not and why some have sailed relatively swiftly through the process while others have encountered lengthy delay.

5.1 NPS on Electricity Transmission

5.1.1 Process

The process of developing the NPS on Electricity Transmission (“the transmission NPS”) began with the Government’s 2004 infrastructure stocktake. That stocktake identified existing and potential infrastructure concerns, some of which were attributed to the RMA. It concluded that RMA processes were generally focused on local or regional needs and did not contain incentives to balance local and national benefits and costs. Network infrastructure was identified as the priority.

Consequently, later in 2004 Cabinet agreed to pursue NPSs on electricity transmission, electricity generation, telecommunications facilities, gas and pipeline installations and land transport noise and stormwater run-off⁸.

A *reference group* was established in 2005 to outline what the proposed NPS would cover (and not cover); confirm whether an NPS appeared likely to be beneficial and identify and scope related National Environmental Standards. The reference group consisted of a representative from each of the following: key government agencies (MfE, MED, DoC, MAF and EECA), Federated Farmers, Transpower and one nominee from local government. The process was overseen by MED but managed by an independent planning policy expert.

At the same time the Ministry for the Environment commissioned a report⁹ on the extent to which national benefits were expressly recognised in regional and district plans. That report concluded:

...that the New Zealand planning framework does not regularly or consistently recognise national benefits of network infrastructure and consequently there is no certainty that these national benefits will be taken into account in decision making and planning. It is therefore reasonable to conclude that national policy statements and standards would add significant value in this regard.

Based on the Transmission Reference Group’s report, Cabinet approved a draft NPS on transmission and referred it to a Bol. The Bol subsequently went through the process prescribed by statute, Cabinet accepted the Bol’s recommendations and the NPS was finally gazetted in March 2008.

5.1.2 Purpose

The purpose of the NPS is clear from the stated objective. Although mention is made of the need to manage the effects of transmission the primary purpose of the NPS is *to facilitate the operation, maintenance and upgrade of the existing transmission network and the establishment of new transmission assets*.

This reflects the driver of the process (as outlined above) and the central role the Transpower played throughout the process.

⁸ As it transpired only the first two were progressed.

⁹ Stocktake and Analysis of Regional and District Plans and Policy Statements - Review of the Provision for the National Benefits of Infrastructure, Beca 2005

Although the NPS is itself a relatively brief and high level document it is clear that it aims to “tip the playing field” on substantive decisions in favour of transmission. Although there are policies relating to the management of adverse environmental effects associated with transmission there is little evidence that these add to what was already established practice (a point noted in the section 32) report.

Also relevant in the decision to proceed with the transmission NPS was the NZ Energy Strategy, which heavily favoured renewable energy. This had implications for transmission and the likely need for new and additional investment going forward.

Primary beneficiary: Transpower

5.1.3 Section 32

The transmission NPS section 32 report (MfE 2007) noted that, because of its high level nature, precise quantification of costs and benefits was not feasible. It did, however, describe some benefits in narrative terms noting that:

- Because the NPS should be instrumental in producing rules and policies more amenable to transmission requirement, there should be some reduction in the transaction costs for Transpower.
- Local government would incur costs associated with changing plans
- Government would incur implementation costs
- Landowners may incur small costs and benefit
- Electricity users should generally receive some benefit from more timely maintenance and upgrade activity.

The section 32 report acknowledged lack of information and uncertainties. While it did not expressly conclude that the NPS was necessary, or that the benefits outweighed costs it did seem to place weight on the proposition that *“In the absence of an NPS, unnecessary relitigation over the importance of electricity transmission and any subsequent delay could result in risks to electricity supplies and the facilitation of renewable electricity generation”*.

5.1.4 Assessment against 2001 criteria

National significance	Vulnerability associated with delay in transmission investment/maintenance would qualify as nationally significant given network nature of assets. Whether that was genuinely at risk in the absence of the NPS was not fully tested.
Long term response	Some aspects of the issue were long term in nature (particularly on going provision for maintenance and protection of assets from third party effects). However other aspects were project specific (recognised by the calling-in of the Waikato transmission project at the same time as the NPS was developed).
Ability to be clear and definitive	The government was able to be clear that transmission ought to be given predominance in decision and policy-making at local levels but could not be clear and definitive about specific conflicts or trade-offs, hence the high level nature of the NPS (which might arguably limit its value).
Within powers of local government	Although the provision and maintenance of transmission is ultimately determined by Transpower and by the government electricity regulatory environment, local government does have the ability to manage the RMA risks to that investment.

Efficiency and effectiveness	Given that the problem to be resolved by the RMA is (largely) focused on avoiding unnecessary impediments arising from the RMA the issue is clearly efficiently and effectively addressed through RMA intervention.
Appropriateness	The appropriateness of an NPS versus other RMA influencing options is always difficult to test. Transpower was able to demonstrate that considerable effort had been expended to influence practice (submissions etc) without desired result. No evidence was available to show otherwise.
Effectiveness of existing local plan responses	Although this will always be debateable, evidence was brought that plans did not expressly recognise national interests and that existing transmission-related rules were variable around the country. As there had been no significant investment in transmission under the RMA it was not possible to demonstrate the local government competency.
Likelihood of local costs prevailing over national benefit	This was considered to be a material factor although the argument was theoretical rather than demonstrated fact.

5.2 Proposed NPS on Renewable Electricity Generation

5.2.1 Process

The Renewable Electricity NPS had its origins in same process as outlined above for transmission. A separate reference group was established at the same time as the transmission reference group was convened to consider electricity generation generally. Similar to the transmission group the generation reference group (consisting of similar representation) concluded that a high level NPS that stated that electricity generation is a nationally significant activity, and that the benefits associated with generation (particularly renewable energy) should be taken into account by decision-makers, would add value.

It is noteworthy that the endorsement was less strong than for transmission and there were some dissenting views. As with the transmission report, there was no consultation of the generation NPS reference group report (although subsequent consultation on the draft New Zealand Energy Strategy provided some support for a national policy statement).

Despite the generation reference group's recommendation the proposal fell into abeyance until 2007 when Cabinet considered the matter and invited the Minister for the Environment to commence the NPS preparation on renewable energy. Subsequent to that a small "expert" planning group (two consultants and an RMA lawyer) collaborated with MfE on possible scope and content. This narrowing of focus reflected the energy and climate change policy that had emerged in the intervening period with the greater favouring of renewable energy.

The draft NPS was referred to a BoI in 2008 with hearings held in 2009. The government has just released the final NPS and it will have legal effect from 12 May 2011.

5.2.2 Purpose

As with the transmission NPS, the purpose is to require recognition of the national significance of renewable electricity generation and thereby "tip playing field" such that the importance of renewable generation is given prominence in decision and policy making processes under the Act. In that sense it aims to increase the weight

decision-makers might otherwise give to the benefits of renewable generation (again, based on the assertions that in the absence of such intervention local adverse effects may prevail over national benefits). There is no detailed policy related to management of trade-offs of identifying limits of tolerable and intolerable effects (for example). In that sense it is of no value to managing the effects of renewable electricity generation and it is difficult to see that it will assist local authorities decision-making in any practical sense.

This purpose is linked back to the (former) government's energy strategy and its 90% renewable target¹⁰. This was in turn devised to assist in response to international (Kyoto Protocol) commitments.

Primary beneficiary: Renewable electricity generators.

5.2.3 Section 32

The Section 32 report emphasised the need for additional electricity generation capacity and the desirability of that being renewable given government policy preferences and the intention (at that time) to legislate out the ability to develop new thermal generating capacity. The benefits identified therefore related to security of electricity supply and the minimising of exposure to fossil fuel prices rise and liabilities on the intentional carbon market.

The benefits were not costed but the costs were given at NPV \$23.5 million. These costs did not, however, include any assessment of the added environmental cost associated with renewable development that would likely proceed as a result of the NPS (when it otherwise would not). The costs considered were all administrative in nature (in terms of the costs of agencies and stakeholders understanding and applying the NPS).

5.2.4 Assessment against 2001 criteria

National significance	Security of electricity supply is undoubtedly of national significance. Whether that is at threat without the NPS is another matter that was not tested.
Long term response	As electricity demand rises with population and economic growth new generating capacity is required. In that sense the issue is long term in nature.
Ability to be clear and definitive	Only at a high level. Renewable generation comes in many forms with many potential effects. Whether renewable energy development should always trump adverse effects is doubtful and Government is not in the position to be clear about the level/nature of adverse effect that ought to be tolerable. Hence the draft was high level.
Within powers of local government	To the extent that the RMA may be an obstacle yes.
Efficiency and effectiveness	Whether lowering the RMA hurdle (or "tipping the balance" in policy terms) is the most efficient and effective means of ensuring security of supply is a debated point. However, as part of a "package" of other policy measures this may be a defensible position. In so far as the RMA may be characterised as the problem, influencing RMA implementation is an efficient and effective response
Appropriateness	Again, evaluating the effectiveness of an NPS compared to other means of influencing RMA implementation is difficult. There is no established methodology for comparing different options in a rigorous manner. Instead,

¹⁰ This target continues in the new national energy strategy

	section 32 reporting has fallen into a standard, formulaic description of the limitations of other options. An NPS is only appropriate relative to other RMA influencing tools when other less costly tool would not be successful. That was not proved in either the transmission or renewable generation contexts.
Effectiveness of existing local plan responses	The s.32 report found that <i>“much of the country does not have an explicit [regional and district plan] policy framework to guide the assessment of applications to use and develop renewable energy resources. Without this guidance, generators can find themselves having to negotiate a patchy regulatory system where local authority’s plans are skewed towards identifying and evaluating the potential adverse effects of renewable electricity generation projects”</i> . While this is debatable (all plans have a framework for assessing effects and positive benefits are invariably proposed by applicants and relevant under the Act) the evaluation at least expressly considered the issue.
Likelihood of local costs prevailing over national benefit	As with transmission NPS, this was considered to be a material factor although, as with the transmission NPS the argument was theoretical rather than demonstrated fact.

5.3 Proposed NPS on Freshwater

5.3.1 Process

The Proposed NPS on Freshwater has its roots in the former Sustainable Water Programme of Action (SWPOA). This process has a long history, but in brief:

- A draft freshwater NPS was prepared by MfE and referred to a Bol in 2008.
- The Bol fundamentally rewrote the draft NPS in its report back having completed the statutory process (issued in 2009).
- The new government (2008) referred the Proposed Freshwater NPS to the Land and Water Forum (LaWF) for advice.
- The LaWF addressed the NPS in its 2010 report to government suggesting the NPS was needed and that the Bol draft was a basis to work from” (although a series of specific changes for consideration were highlighted).
- At time of writing we are still awaiting a response (although the proposed NPS is known to have been substantially rewritten again – through an internal MfE process).

This latest rewrite was apparently motivated by two related concerns being the questionable *vires* of the approach proposed and the lack of balance in the policy approach adopted (and hence significant economic costs)¹¹.

5.3.2 Purpose

Although there has now been three quite different versions, the purpose has not changed greatly.

Fundamentally, the Freshwater NPS is motivated by a desire to improve freshwater outcomes in terms (in particular) of water quality and reduction in over-allocation. Each of the versions do this with varying degrees of direction and explicit balance between environmental values and anthropogenic need.

¹¹ Although the LaWF report was more diplomatic is alluded to similar issues in it’s proposed changes

Primary beneficiary: Those advocating for improved freshwater outcomes

5.3.3 Section 32

The initial s.32 report identified a range of costs and benefits of the policies across each of the “four well-beings”. As with previous efforts there was little quantification. Where quantification was attempted data were of very limited reliability.

Overall, the evaluation concluded that the NPS would provide, on balance, significant benefits to New Zealand’s freshwater resources, and by implication, to New Zealanders.

A further s.32 report is known to have been produced but is not currently available for review. Unless this considers the impact on water users and takes into account recent experience of regional councils in establishing water management regimes it is unlikely to be of any real value. Based on past experience with such reports this seems unlikely.

5.3.4 Assessment against 2001 criteria

National significance	By definition, freshwater issues only present on a catchment by catchment (or reach by reach) basis. However the counter-argument is freshwater risks and issues are so ubiquitous that they do present around the country and that water outcomes overall are important to the image of NZ inc. The government’s support for the Land and Water Forum in 2010 also indicates that freshwater quality and quantity issues are, in the collective, nationally significant.
Long term response	Yes. Many issues with require inter-generational responses
Ability to be clear and definitive	Highly doubtful. Government can perhaps be clear and definitive about the basic methodological/management approaches to take but is unlikely to be able to clear about outcomes except at the very highest level – as evidenced by the earlier work on defining a visions for freshwater. This is demonstrated by the drafts which all focus (largely on) methodology.
Within powers of local government	Yes insomuch as water is managed by regional councils. However there are powers that regional councils do not have that might enable better management and /or constraints on how existing powers may be exercised. These were not fully investigated.
Efficiency and effectiveness	If the problem is characterised is poor RMA implementation then an NPS is an efficient and effective tool. If the problem is poor outcomes in certain catchments or by certain sectors then there may well be other approaches outside of the RMA than could be pursued.
Appropriateness	As with other issues this is difficult to gauge. As above, much depends on how the “problem” is characterised. If there is a desire to standardise the approach taken to managing certain water issues (e.g. diffuse discharges) then NPS is arguably an appropriate tool.
Effectiveness of existing local plan responses	Section 32 concluded that: <i>The first key conclusion is that the existing framework of district and regional plans and regional policy statements is not delivering the desired environmental results. This status quo framework may improve over time, and some regions will continue to be ahead of others in terms of their policy framework and approach to implementation. However, even with an evolution in regional and district plans, there remains a significant risk to the sustainable management of freshwater resources, and therefore further national direction is needed to address the issues identified above.</i> The statement seems to lack an analysis of why plans have not delivered desired environmental results (which is in itself too bold a statement). There does seem a leap here that this is because of a lack of national direction.

Likelihood of local costs prevailing over national benefit	Does not seem to have been demonstrated since the issue relates to poor outcomes – which would suggest that benefits (local or national) are prevailing over the local costs. The issue here is more than local benefits maybe prevailing over national costs. Whether than is true depends upon
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5.4 Proposed NPS on Biodiversity

5.4.1 Process

The biodiversity NPS has followed the longest and most tortuous process. It began in 1999 with the appointment of a ministerial advisory committee. That committee recommended other measures before an NPS was prepared. Various drafts were subsequently prepared by MfE and limited consultation has occurred on at least some of those drafts. Delays occurred for various reasons including disagreements between government agencies on the appropriate policy, concerns about the possible costs of compliance and changes in Government. The latest draft (again developed internally in 2010) was put forward, in large part, following a political commitment made to the Maori Party.

The Biodiversity NPS will be the first NPS to be progressed using an alternative process to the Bol – justified on the basis that the issue has been publicly discussed previously.

5.4.2 Purpose

The purpose of the biodiversity NPS is (publicly at least) to secure better protection of indigenous vegetation and habitats to make sure that nationally significant areas, habitats and species are recognised locally and given appropriate protection.

Rather than “tipping playing field” the Biodiversity Act delves into the specifics of land use planning by requiring specific priorities to be recognised in plans and by requiring protection or off-setting for loss.

Significantly biodiversity is the subject of a national strategy (required by international convention) and that strategy does commit to an NPS.

Primary beneficiary: Those advocating for improved biodiversity outcomes.

5.4.3 Section 32

A section 32 report has been prepared. Costs are identified as accruing to landowners (who might have land “protected” when it might otherwise have been used for production) and to local authorities who will have to change plans to give effect to the NPS. At this point there is a lack of information to be able to assess the magnitude of that cost. Some comparison of NPS provisions against existing plans as has been undertaken as has some analysis of land areas affected by the NPS. Further work is required to fully understand potential costs. The benefits of biodiversity are of course difficult to quantify and will likely need to be assessed by political judgement.

5.4.4 Assessment against 2001 criteria

National significance	Yes – as discussed in the national Biodiversity Strategy
Long term response	Yes threats to biodiversity are inherent in all on-going resource use
Ability to be clear and definitive	Yes. Thanks to significant prioritisation and GIS/mapping tools (such as LENZ) the government can be clear on outcomes (although the ability to be clear and definitive in the face of inevitable costs and trade-offs is difficult – the off-setting policy attempts to deal with this to some degree).
Within powers of local government	Yes
Efficiency and effectiveness	Yes (although there are some threats – e.g. pests – which are clearly not best addressed by the RMA).
Appropriateness	Clearly there are other tools to influence practice and these have been used with some success (i.e. submissions and appeals, local government capacity building, guideline). However if it can be demonstrated that the problem persists despite such efforts there is a strong case that an NPS is appropriate
Effectiveness of existing local plan responses	Biggest area of uncertainty. Further work is required.
Likelihood of local costs prevailing over national benefit	As with freshwater, the opposite is likely – but that remains a relevant factor. Such unbalanced decision-making does seem possible in some instances. This is particularly problematic in the biodiversity context because an area or habitat may be rare nationally but relatively common locally. In the absence of policy requiring the national context to be considered such areas are likely to be undervalued

5.5 Proposed NPS on Flood and Stormwater

5.5.1 Process

Consideration of the issue began with the government's flood risk management review in 2004.

In March 2007 Cabinet agreed that it was desirable to prepare a NPS on flood risk management. The section 46 process was carried out in mid 2007 (seeking comment from stakeholders). This acted as the scoping exercise. A draft NPS was released for comment in late 2007.

The BoI was appointed in August 2008 consultation on the draft National Policy Statement ended in December 2008, and a high level analysis of costs and benefits took place in February 2008.

5.5.2 Purpose

The draft NPS is no longer publicly available and a copy has not been able to be located for this study. It is understood that the purpose of the draft NPS related to providing policy support for council interventions seeking to mitigate flood risk (through appropriate land use control and stormwater management planning) and introducing greater consistency in response around the country.

Primary beneficiary: Local government and potentially affected communities.

5.5.3 Section 32

Although submissions called for the process was discontinued before hearings were held. There is no record of a formal section 32 report being prepared. Rather the “high level analysis” referred to above raised questions about the benefit and the process discontinued following that assessment¹².

5.5.4 Assessment against 2001 criteria

Insufficient information is available to assess the proposal against the 2001 criteria.

5.6 Proposed NES on Forestry

5.6.1 Process

The process began with the formation of a reference group to investigate the possibility of an NES in 2009. The reference group included officials from central and local government, the forestry sector, and other interest groups such as iwi representatives.

A standard NES-type discussion document was released in September 2010 with a six week period given for submissions. Public workshops were held during this period.

Submissions are currently being analysed. A policy development group (involving key stakeholders) was convened by MfE and has met regularly. A second round of consultation (and submissions) on an amended NES has been signalled.

The refinement of the NES through the policy group shows it has been difficult to develop the NES without overarching policy framework (such as an NPS might provide).

5.6.2 Purpose

The intent of the proposed standard is “to improve national consistency in local authority plan rules relating to plantation forestry and certainty for those involved in the management of plantation forests”

In other words the NES aims to assist forestry companies by ensuring they operate within a regulatory environment that has a highly degree of consistency across the country that currently exists. Greater consent is likely to result in reduced compliance costs for forestry companies operating at a multi-regional scale and reduce any advantages/disadvantages that a company working in a single regional may enjoy over those operating in different regions.

Primary beneficiary: Forestry companies

5.6.3 Section 32

A separate section 32 report was commissioned (in addition to discussion of benefits and costs in the discussion document).

¹² It is also understood that the Minister altered priorities at that time effectively diverting resources from this project.

Like other s 32 reports it noted the limitations of coast benefit analysis given various uncertainties. With respect to location-specific impacts it conclude:

As there may be up to 15 terms and conditions for each of the eight activities, determining the impacts across each of the 85 different districts and regions could mean analysing around 1,500 different variables. Analysis of this complexity is outside the scope of this report

While it did evaluate some “ball-park” national (one-off implementation/adjustment) cost it concluded

At this point it is not possible to determine the overall total magnitude of each cost or benefit without estimating the number of councils, plan changes and forestry operations that would be affected by an NES.

However, although the total magnitude of many of these nationwide impacts is uncertain, the fact that there is likely to be a range of benefits that would continue to accrue over time suggests that these may well exceed the expected costs, which are more likely to be of a one-off, transitional nature

Overall the s.32 concluded that:

This analysis suggests that the total impact of nationwide effects is likely to be a net benefit, whereas the total impact of the various location-specific effects is uncertain. Consequently, it is not yet possible to determine the likely overall net impact of an NES.

5.6.4 Assessment against 2001 criteria

National significance	It is nationally consist according to definition in the 2001 criteria since it occurs nationally and (for equity) arguable requires a consistent response
Long term response	Yes. Forestry operations are on-going n nature
Ability to be clear and definitive	Yes. The discussion document was able to spell out clearly the specific the matter to be regulated at each stage in forestry cycle.
Within powers of local government	Yes
Efficiency and effectiveness	Only non RMA method addressed by discussion document was non RMA standards. Given objective (standardise forestry regulation under the RMA) the RMA is by definition most effective tool to use.
Appropriateness	Dealt with in discussion document in standard way. Probably appropriate given stated objective (as noted the real issue with this example is whether the objective is appropriate)
Effectiveness of existing local plan responses	Clearly considered ineffective hence proposal for NES. Unsure of extent to which local/regional variation was appropriate was tested
Likelihood of local costs prevailing over national benefit	Not relevant given purpose of NES. Consistency defined to produce a national benefit.

5.7 Proposed NES on Sea Level Rise

5.7.1 Process

In 2008 MfE commissioned an external consulting firm to scope a proposal for an NES on sea level rise. That scoping study was a desk-top study of different potential approaches to, and within, an NES.

As per the established NES process, a discussion document was prepared in 2009 setting out the issue, proposal, options and cost and benefits evaluation.

The assessment of benefits and costs drew on another external study on the way SLR was dealt with by regional and district plans.

Although the discussion document was prepared in mid 2009 it has not been progressed, allegedly due to concerns about the strength of case for the NES taking into account the benefit cost evaluation.

5.7.2 Purpose

The stated purpose of the NES was:

1. A reduction in risk exposure from coastal hazards exacerbated by sea level rise by providing national consistency on the magnitude of sea level rise to plan for, and
2. A reduction in the risk of re-litigation of the issues, which will assist councils to undertake effective planning.

Primary beneficiary: Local government and potentially affected communities (including future generations)

5.7.3 Section 32

The section 32 evaluation included in the draft discussion document concluded

The identification and weighing of costs and benefits of an NES on sea level rise as proposed here is limited by the absence of data. Furthermore, the nature of the instrument proposed, being a simple input into a process required by other instruments, means that there are few costs that can be attributed to the NES in isolation.

It went on to say:

On balance, the marginal costs of the NES are assessed as low, mostly (and perhaps ironically) because most local authorities already use very similar projections to that proposed to be “endorsed” by the NES. The potential benefits, on the other hand, though assessed as modest, are considered to outweigh the costs.

One of the principal reasons for that conclusion is that there is a clear asymmetry of risk. That is, there is a very low risk of the NES (in isolation) imposing high costs in terms of leading to unreasonable regulatory decisions.

5.7.4 Assessment against 2001 criteria

National significance	The issue of SLR will arise nationally and has significant implication across all well-beings. Must be considered nationally significant
Long term response	Clearly

Ability to be clear and definitive	Yes – Proposal to be based on IPCC projections which are quantified and scientifically defensible.
Within powers of local government	Yes – Coastal hazard management a function of local authorities under the RMA and they have specific responsibilities under the NZCPS
Efficiency and effectiveness	Yes issues falls squarely with RMA bailiwick. No other feasible options for issue management.
Appropriateness	Yes, Guidelines have been in existence for some time. IPCC projections are available bit not consistently applied.
Effectiveness of existing local responses	Mostly effective with some exceptions
Likelihood of local costs prevailing over national benefit	Not really application. Issue more about local benefits (coastal development) prevailing over local and/or national future costs

5.8 Overview

Two matters have been confirmed from the stocktake (Table 1) and the more detailed review of seven instruments above.

- First, there is *no standard process* for developing NPSs – processes and involvement of key stakeholders (including local government) have varied considerably.
- Second, there does not appear to be a clear rationale for when NPSs are proposed and when they are not.

A further point that should be made is that although the 2001 criteria do not appear to have been expressly applied in recent years most of the relevant matters are addressed in section 32 reports and associated documents. The effectiveness of existing plans and the perception of unbalanced decision-making (with local costs outweighing national benefit or local benefit outweighing national cost) being obvious foci of attention in most, if not all, processes.

It is also important to note that, while they are valid considerations at the conceptual level, the 2001 criteria are very difficult to apply in practice in large part because of distinct lack of robust information (but also, in some cases, because of a lack of agreed methodology) on which to base the evaluation. In that context, the apparent political nature of decision-making is understandable. Analysis of the sort delivered to date is of limited value to decision-makers.

That conclusion leads to the obvious question: what are the *political touchstones* that govern the go/no go decision?

In that regard a number of matters do appear to be relevant.

- a. Obviously, government delivers on mandatory policies/regulations¹³ (e.g. the NZCPS and marine pollution regulations). Whether an issue is linked indirectly to an international commitment may also be relevant (with the Kyoto Protocol and International Convention of Biodiversity relevant here)

¹³ That is mandatory under statute or international convention.

- b. Whether the NPS is preceded by higher-level national policy direction (in the form of a national strategy or similar). Both the biodiversity and renewable energy NPSs benefited from this policy “ground work”.
- c. Whether there is clear evidence of economic costs (or risks of cost) for the national economy from the status quo (as argued in the case of the transmission NPS, for example);
- d. In light of the above matter, whether the policy aims to *facilitate* a “desirable/ favoured” activity (as opposed to restricting activities in order to maintain or protect environmental conditions). Again, the transmission and the renewable energy NPSs fall into this category;
- e. Whether government’s aims are perceived to be able to achieved by a high level “tip of the balance” policy rather than those aims requiring detailed policy with much more definable costs and risks.

Although it would be wrong to suggest that the government has not attempted NPSs outside of these broad parameters there are few examples and it is notable (unsurprisingly) that governments appear to have had most difficulty in proceeding with NPSs when they have done so.

This is particularly true in the case of NPSs directed at protecting or promoting environmental (biophysical) outcomes. On the two issues it has attempted this (biodiversity and freshwater) there have been substantive procedural delays as Governments have been uncertain of economic costs and consequences¹⁴. This has led, to the politicisation of proposed NPSs with associated policy processes consequently becoming stop/start affairs depending on whether there is perceived political advantage or political risk from their continuance.

5.8.1 Discussion: Cost and risks

This uncertainty fundamentally reflects the difficulty Government has in setting meaningful policy in the absence of detailed information about issues faced at regional and local levels.

This experience serves to highlight the difficulty in justifying NPSs given that, by the nature of policy, discretion is left to local authorities or, if policies are highly prescriptive, they are likely to have highly diverse impact around the country. In either case, the likely affect of NPSs cannot be meaningfully assessed at a national scale and therefore cannot be known with any certainty. Governments are generally reluctant to act where there is uncertainty and political risk. In some ways that is a serious limitation of the NPS as a policy tool.

It seems most likely that it is for these reasons that governments have tended to favour (or at least only agree to) high-level NPSs with obvious potential benefit - that is, where the NPS favours an activity that is undeniably critical to national welfare. This approach goes some way to assuring stakeholders of the appropriateness of the

¹⁴ Delays with the mandatory NZCPS may be attributed to this also. This suggests that were it not mandatory a NPS on the coastal is probably unlikely to have been progressed

instrument even if the NPS cannot be shown to be needed on the basis of demonstrated failure of the existing local government planning regimes.

In taking such an approach governments have sought to tread that fine line between saying something that justifies the intervention but not being so directive as to highlight obvious costs that might arise from that intervention. It is not clear that this is deliberate obfuscation but it is seemingly a necessary part of securing agreement of key stakeholders (both within and outside government). The old policy fall back position of “consensus through ambiguity” is, it seems, applicable.

Having said that, high-level non-specific policies that “lend a hand” in judicial interpretation are undoubtedly useful and such efforts should not necessarily be dismissed as being of low value.

On the issue of failure of local government being a justification for national intervention, suffice to say that while the claim is routinely made in section 32 documentation, analysis tends to be lightweight relying on superficial reviews and interpretation of existing planning provisions with little or no acknowledgement of how decisions are taken in practice or what policy development work may be in progress at regional and local levels. Or indeed, that fact that issues may not be experienced uniformly across the country (and there responses need not be uniformly prioritised).

It is notable for a review of section 32 reports, where there is an apparent absence of “government-favoured” provisions in existing regional and district plans little effort has been expended in understanding why that is so (i.e. whether the position taken is due to actual or perceived legal, political, practical impediments – and therefore what form of national intervention might best assist).

5.8.2 “No go” factors

It is clear that the government has been reluctant to proceed with national instruments that do not fall within the circumstances described in (a) to (e) above.

In some instances, it has simply not progressed proposals past initial stages ostensibly for the reasons explained above.

The primary factors, it seems, are whether there is real benefit to be gained from the intervention and if so what level of economic and political risk might be attached. “No go” factors are low benefit and/or high risk.

Of course the assessment of benefit and risk is being undertaken from a central government perspective. Under this rubric, benefits that might accrue to local government receive comparatively little emphasis. Hence the proposal for an NPS on flood management (or the NES on SLR) which would assist in supporting local authorities to make decisions that mitigate risk to communities and locally provided infrastructure have not been progressed¹⁵. This class of NPS has the added disadvantage, under the dominant decision-making rubric, of posing a potential risk for central government (by redirecting possible liability from local to central

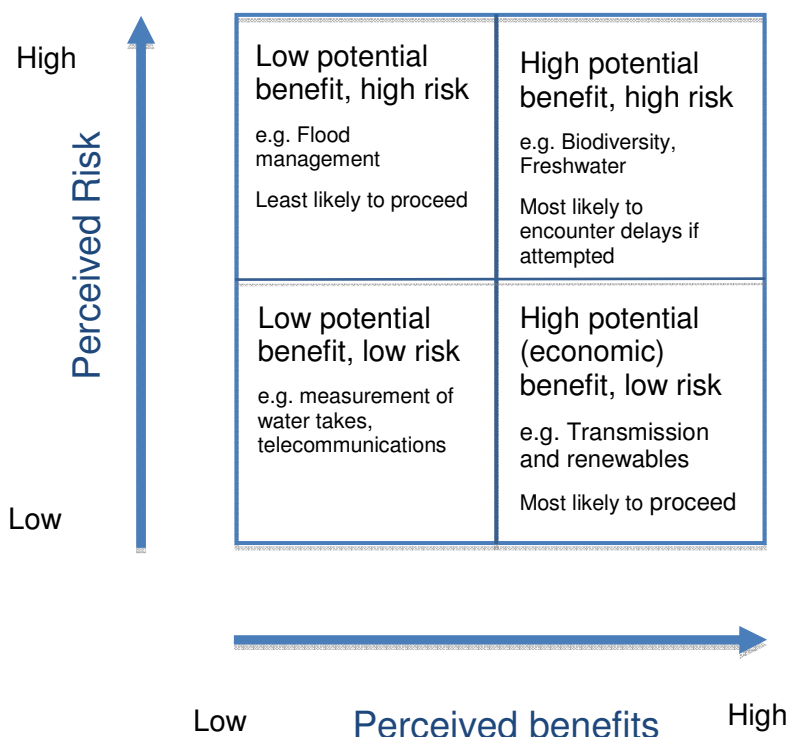
¹⁵ Both those instruments are identified here as having local government as the primary beneficiary. It is noteworthy that neither have been progressed past initial stages.

government). This class of NPS is located (from the government perspective) in the top right hand quadrant of Figure 1.

The simple government applied benefit-risk decision-making framework depicted in Figure 1 needs to be interpreted with some care however. In practice government might well act irrespective of whether local government is performing well (and therefore there is little potential benefit) if it perceives such action as low risk and politically advantageous. The absence of robust information on the performance of local government is, in the context, not a disadvantage.

Conversely government has been reluctant to act where the economic risk is likely to be perceived as high even where the environmental benefit is correspondingly high. Current proposals for biodiversity and freshwater may prove exceptions. (Although effort will undoubtedly be expended to minimise economic risk before any NPS is issued on these matters – and all indications are that that is precisely the experience with the Freshwater NPS. The policy challenge is to decouple risk from potential benefit – success in doing that is a major factor in the go/no go decision).

Figure 1 – Benefit/risk decision-making framework



In summary, this paper postulates that political decisions on whether to proceed with a national instrument have tended to follow (implicitly) the much simpler test than the application of the eight 2001 criteria described earlier. That test is described above and depicted in Figure 1 below. That is, whether the intervention can be sold on

demonstrable potential benefit and whether there is potential for cost on individuals, specific sectors or the economy generally that translates to political and or financial risk for central government. On this later point it seems the “political nose” of Ministers may be more accurate and determinative than formulaic and inevitably partial section 32 analyses produced to date.

In other words, as noted at the outset, notwithstanding at times heroic (and certainly voluminous) efforts at analysis by government agencies, decisions on national instruments seem to be currently more political than analytical.

5.8.3 NESs

The above discussion has focused largely on NPSs. The review of experience with NESs indicates that these are most likely to proceed where there is:

- (a) clear evidence of benefits from avoidance of duplication in respect of activities whose effects are nationally homogenous; and/or
- (b) there is demonstrable risk to human health.

In that sense the above discussion about benefits and risks of NPSs also applies to NESs. The difference may be that the costs and risks are more clearly identifiable¹⁶ and therefore Government can act with greater surety.

6 The way ahead

This report has characterised the “problem” with national instruments as:

- An inconsistent process “front end” of any Bol process or lack of agreed alternative to the Bol process.
- Because of the above, variable opportunity for local government (and other stakeholders) to participate in decision-making processes
- An absence of formal, transparent decision-making criteria for go/no go decisions on national instruments.
- The criteria that do appear to be applied though, rational in concept, are difficult to apply in practice due (largely) to a lack of quality information (often related in turn to the complexity of the issues and the dispersed nature of the required data).
- Because of the above, decisions on national instruments appear strongly influenced by national political considerations rather than, necessarily, a desire to ensure the effective implementation of the Act (which we must assume is the underlying purpose of national instruments).

It is also worth noting that there is a case to be made for local government to have a much more central role in national instruments, in what the priorities should be and when there are warranted. As noted above, there is currently a (variable) opportunity

¹⁶ Because, by definition, NESs standardise requirements, remove variation and “extremes” there is invariably a case for benefits to be made that cannot be made with the same authority in respect of NPSs

for local government to participate along with other stakeholders but no “special” status accorded notwithstanding its dominant role in NPS/RMA implementation.

While the national government will always retain the right to govern in accordance with its elected mandate, in our system of devolved environmental management there would seem sense in a much more collaborative approach being taken between central and local government on this issue. Local government after all is best placed to understand implementation issues and when a “pan-council” response is required. It also has direct access to the information to justify (or not) intervention options.

There would seem to be at least three ways in which local government could have a more central role, or elevated status, in national instrument decisions. These are discussed below.

6.1 Local government as a statutory applicant

First, an opportunity could be given for local government (individually or collectively) to request a national instrument. This could be done in a statutory sense (in much the same way as, for example, a group may currently apply for Water Conservation Orders at a national level or a party may apply for a private plan change at a local level).

This could take the form of an “invitation” to consider a proposal or a more formal “application” with, for example, draft wording and accompanying analysis. This would put the onus on local government to make sound proposals and relieve central government of the responsibility so may not be a far fetched as it may first appear. Under such a process the Minister would retain the right to accept or decline a proposal (with or without public consultation) and give reasons for the decision.

A less formal approach might be provided outside of the statute such that the Minister (through, for example, the central/local government forum) provides an annual opportunity for local government to suggest candidate issues for national instruments and undertakes to provide a formal response (with reasons) within a defined timeframe.

6.2 Local government in collaborative decision-making

The second option would see the establishment of a joint central-local government decision-making process on national instruments. Of course this could not usurp Cabinet’s right to make the ultimate decision but it could operate at the “front end” of processes to agree priority issues for consideration and the scope of draft instruments to be submitted to the statutory process¹⁷.

This would seem consistent with the LaWF report’s proposal for a “beefed up” Chief Executives Forum that would (amongst other things) *focus and consider the need for national solutions and tool development (including NPSs and NESs and non*

¹⁷ This would involve a more structure opportunity to that already taken in recent central/local forums.

statutory guidelines) to assist regional implementation and bring consistency where appropriate".¹⁸

This would undoubtedly need clear operating rules and careful facilitation, however, it would put central and local government decision-makers on an equal footing ensuring balanced consideration of potential risks and benefits.

6.3 Joint central local national instrument guideline

The third option is for a protocol or guideline to be developed between central and local government on the criteria to be applied to decision-making on national instruments.

This might include agreement on criteria and, just as importantly, methodologies for applying the criteria.

This would likely to be challenging to develop to a point where there is the requisite clarity. For that reason it might be best considered as an option to be used in combination with one of the first two options.

One key criterion that should, however, be considered could be structured in three interlinked questions as follows:

1. Are decisions not being made by regional and local decision-makers under the RMA that, if they were to be made, would produce a net benefit that would be in the national interest?
2. If so, are those decisions not being made by regional and local decision-makers because they have not been able to defend, or consider they would not be able to defend, such decisions consistently if challenged through local political or legal proceedings?
3. If so, would provision of "higher level" policy support for the said decisions alter that consideration by regional and local decision-makers (i.e. would it reduce the risk of challenge and or the perception of that risk?)

If the answer to the final question is yes then there ought to be provide a *prima facie* case for a national instrument to be developed (or at least submitted to the statutory process).

Such a decision-making formula would need to include some agreed definition of the "national interest". That should to be the focus of further discussion but would need to include outcomes that may be local in scale but which are widespread in distribution such that the cumulative effect is of more than local significance.

6.4 The evaluation test

A final issue worthy of further consideration ought to be the question of whether the current section 32 test is "fit for purpose" in the context of national instruments.

The review of s.32 reports conducted as part of this paper suggests a need to rethink the evaluation tool and tests that ought to apply. Report after report talks of the

¹⁸ See paragraph 203 of the Land and Water Forum Report 2010

inability to assess costs and benefits or reach a definitive view. The limited quantification that is applied tends to be highly speculative and, frankly, unreliable.

In short, section 32 reports in respect of national instruments have become formulaic and unconvincing. This in turn feeds indecision by policy-makers and politicians. The inability to clearly justify the need for/value of NPSs in terms of the threshold tests set by Section 32 (and, to a lesser extent, Cabinet Regulatory Impact Statements) is said to be a major impediment.

While there clearly needs to be some gateway test to ensure rigour and responsible intervention, this test needs to be designed with knowledge of the limitations of possible analysis given the characteristics of the tool in debate.

The scope of this paper does not allow for deeper consideration of that issue. There is undoubtedly a range of options available. Some matters to be considered ought to be whether local and central government agree to the intervention. It may also be appropriate to consider allowing a national instrument to proceed even where national level cost benefit analysis is inconclusive provided regional/local section 32 analysis is conducted prior to implementation at that level.

7 Conclusion

Although it is possible to loosely categorise current and proposed national instruments as falling into one or other “box” based on likely perceptions of benefit and risk, the development of national instruments has not appeared to follow a clear or consistent path. A strong case can be made for improvements to both the process of making decisions on whether to proceed with an NPS (i.e. the “front end” of the statutory process); and to the decision-making criteria that apply.

However, it is likely to be difficult to clearly articulate such criteria, which makes the *process* of decision-making (and methodological tools to inform that process) critical. Given the absolutely central role of local government to effective and efficient implementation of the Act – a matter that must be regarded as being in the national interest – a strong case can be made for local government to enjoy a more elevated status in these decision-making processes rather than being regarded as “just another stakeholder”.

Appendix 1 – Obstacles to NPSs

In a paper prepared for an Environmental Defence Society Seminar in 2008, Gerard Willis identified seven key obstacles to NPS development. These are summarised as follows.

First, the government is only asked to prepare NPSs on *difficult, usually highly contentious*, policy areas. The reality is that if issues are difficult to address at the local level they will be equally (or arguably more) difficult to address at national level. This is due to many of the reasons that follow and also because the national policy making environment tend to be better organised and more hotly debated than local policy development processes. (Local processes, for example, are not subject to contestable advice from different arms of the organisation nor are they subject to as much intense scrutiny and lobbying from relatively well funding national lobby groups).

Second, government agencies hold none (or very little) of the *information* on which a considered policy can be developed. You can't make policy in a vacuum – if you try it will not withstand scrutiny and/or will be so vague as to add little value. The information needed to develop good national policy either exists in different formats and levels of currency only amongst the 70-odd local authorities or (as is more often the case) has not been collected. It is very difficult to add value through a national policy when you don't know precisely what it is you are trying to protect or promote—where and how much of it. Take the NPS on transmission for example. A useful NPS on transmission might, you might think, have something to say about the areas/landscapes transmission routes ought, other things being equal, to avoid. No such information exists and in its absence national policy-makers inevitably retreat to the generality of sections 6, 7 and 8. (Initial attempts at a Biodiversity NPS suffered from precisely the same problem).

A related point then is that there are certain building blocks missing in the NPS development process. If we are to go down an NPS route we would ideally have an overall strategy which sequences policy development so that one builds on and integrates with subsequent policy development process – unfortunately there seems to have been little focus on a programme or strategy but simply pointing to NPSs to address one-off problems

Third, and I hinted at this earlier, it is all very well calling for government leadership and for the Government to set out what it expects. But the reality is that Government does not have a *single policy position*. The system of contestable advice almost invites departments to take contrary (often sectoral) positions meaning that forging a single “government view” is extremely difficult and time-consuming. In practice, this system of contestable advice tends to lead to lowest common denominator policy (with policy included only where officials can agree – meaning that only short and often vague NPSs with limited value ever see the light of day).

Fourth, historically *local government* has been somewhat “schizophrenic” in its support for NPSs. Governments have been very reluctant to foist NPSs on an unwilling local government sector. The reality is that the sector has been divided on

the question of NPSs – or if they do want an NPS they want *their* NPS. Recall, for example, that LGNZ did not initially support the NPS on biodiversity.

Fifth, officials have been hamstrung by *conservative legal advice*. Very often they have been told that they cannot say what they proposed to say or that they cannot say things that could be construed as contrary to Part 2 of the Act, or which unreasonably fetter discretion or which subvert local authorities' section 32 processes. In short, there has been a history of uncertainty about what may and may not be included in an NPS. I understand that every fledgling NPS development process has resulted in Crown Law advice being sought.

Sixth, officials tend to see the NPS development process as daunting. Until recently there was a Cabinet decision that imposed a welter of process requirements in addition to those set out in the Act. While that has now been superseded the requirement for inter-departmental processes and external (expert) participation and public/stakeholder consultation *before* the statutory process is begun does ring alarm bells for some departmental managers with other priorities and calls for resources.

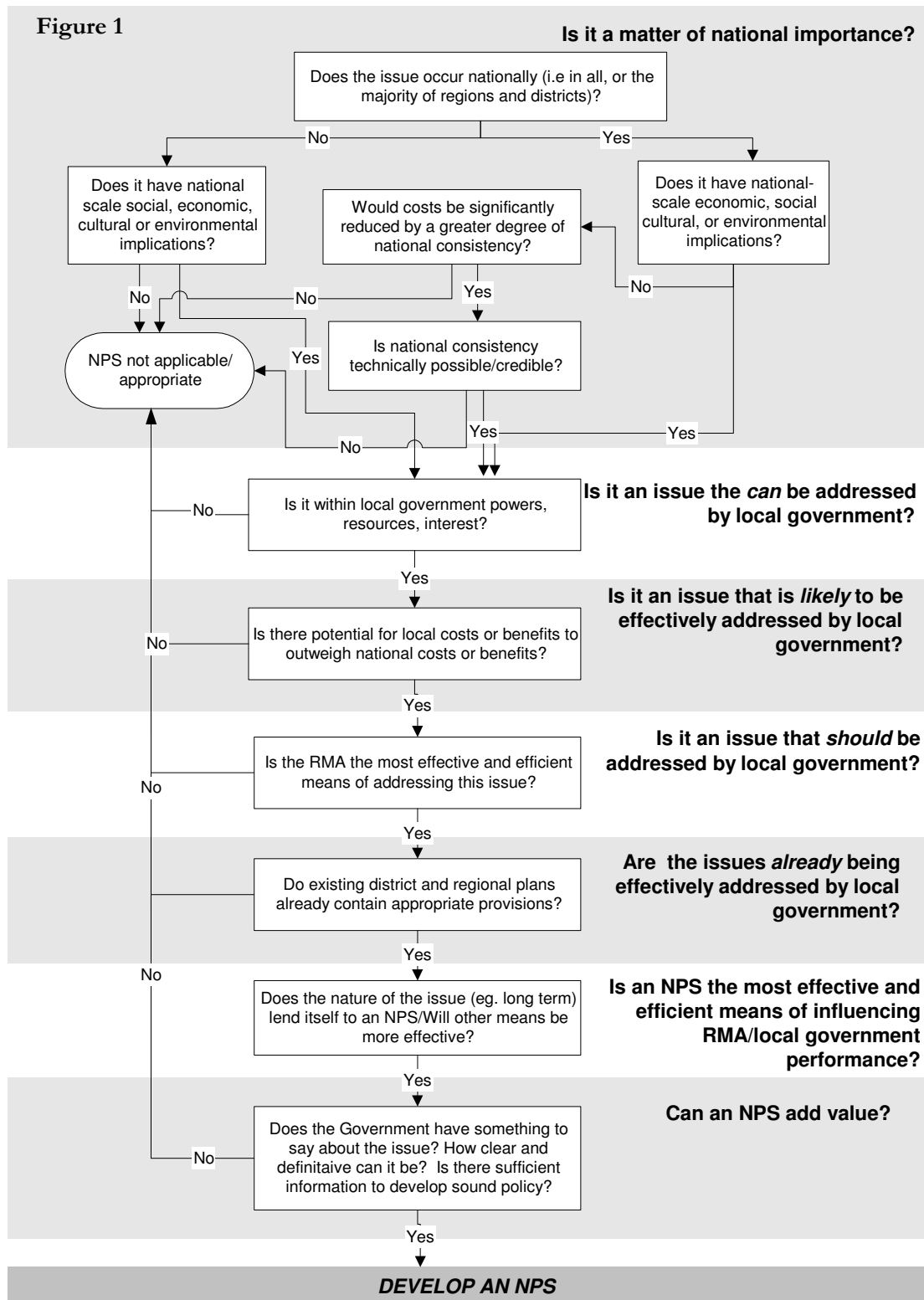
Seven, *Section 32* applies to the development of NPSs yet it is virtually impossible to apply to an NPS because of the uncertainty surrounding the NPSs effect. How can we possibly know what the benefits and costs will be when policies are open to interpretation at the local level? Efforts to prepare section 32 evaluations for NPSs have been less than useful for the very reason that there is just so much uncertainty. Governments are much less inclined to lay down policy when the benefit cost cannot be shown to clearly stack up.

Appendix 2 – Criteria of Section 45 of the RMA

(2) In determining whether it is desirable to prepare a national policy statement, the Minister may have regard to—

- (a) the actual or potential effects of the use, development, or protection of natural and physical resources:*
- (b) New Zealand's interests and obligations in maintaining or enhancing aspects of the national or global environment:*
- (c) anything which affects or potentially affects any structure, feature, place, or area of national significance:*
- (d) anything which affects or potentially affects more than 1 region:*
- (e) anything concerning the actual or potential effects of the introduction or use of new technology or a process which may affect the environment:*
- (f) anything which, because of its scale or the nature or degree of change to a community or to natural and physical resources, may have an impact on, or is of significance to, New Zealand:*
- (g) anything which, because of its uniqueness, or the irreversibility or potential magnitude or risk of its actual or potential effects, is of significance to the environment of New Zealand:*
- (h) anything which is significant in terms of section 8 (Treaty of Waitangi):*
- (i) the need to identify practices (including the measures referred to in section 24(h), relating to economic instruments) to implement the purpose of this Act:*
- (j) any other matter related to the purpose of a national policy statement*

Appendix 3 – NPS Decision-Making Logic (2001)



Appendix 4 – NES development process

Two Speed NES Process

