



# Cook Island Permitting Process

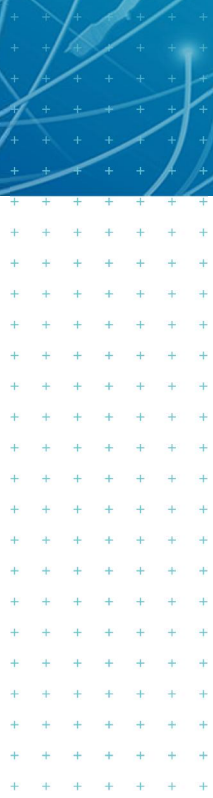
## Gap analysis

Prepared for  
Infrastructure Cook Islands

Prepared by  
Tonkin & Taylor Ltd

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## Abbreviations

Cook Islands National Action Programme for Sustainable Land Management	NAP SLM
Environment Act 2003	Environment Act
Environmental Impact Assessment	EIA
Environment (Permits and Consents) Regulations 2011	Draft Regulations
Environmental Significance Declaration Form	ESD Form
Infrastructure Cook Islands	ICI
Integrated Coastal Management	ICM
Integrated Water Resources Management	IWRM
Ministry of Health	MoH
NES	National Environment Service
Pacific R2R Ridge to Reef Program	R2R Program
Te Kaveinga Nui National Sustainable Development Plan 2016-2020	NSDP

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## 1 Introduction

This report has been prepared by Tonkin + Taylor International (T+TI) for the Reef to Ridge Program (R2R Program) to provide a gap analysis of the existing permitting process for sustainable development in the Cook Islands. Our analysis builds on previous reviews undertaken by others between 2004 and 2017 on various aspects of the environmental regulation regime in the Cook Islands, which also identified relevant gaps which are included within this report.

The recommendations in this report seek to assist sustainable development in the Cook Islands, and are aligned to the outcomes set out in Program Component 2 (Improved Governance for Integrated, Climate resilient land, water, forest and coastal management) of the R2R Program which are to achieve:

- 1 Enhanced policies, regulations and institutions for integrated Ridge-to-Reef approaches in place in Pacific Island countries; and
- 2 National and local capacities for Integrated Coastal Management (ICM), Integrated Water Resources Management (IWRM), Sustainable Land Management (SLM) and Sustainable Forest Management (SFM) are improved to enable best practice in integrated, climate resilient Ridge-to-Reef approaches in natural resource management.<sup>1</sup>

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<sup>1</sup> See R2R Program website, <https://www.pacific-r2r.org/about-us/our-work/programme-components>, accessed on 20 May 2019

## 2 Legislation Review

A thorough legislation review was undertaken to identify the gaps, overlaps and opportunities of the current permitting regime. This section provides an overview of this review, and the key gaps.

### 2.1.1 Overarching permitting framework

Land development in the Cook Islands is regulated by three Acts of Parliament under three different regulatory agencies summarised in Figure 2.1 below. The focus of permitting for land use development is principally the Environment Act, administered by the NES however there are overlaps and different requirements depending on the nature of the development. In a situation where project proponents require permits under all three Acts, the three regulatory agencies have agreed a linear process whereby applicants submit their application firstly to NES, then to MoH and finally to ICI.

As shown in Figure 2.1, the Acts are all intended to be supported by regulations and standards, however these are in various stages of development and are discussed in greater detail in the following sections specific to each Act.

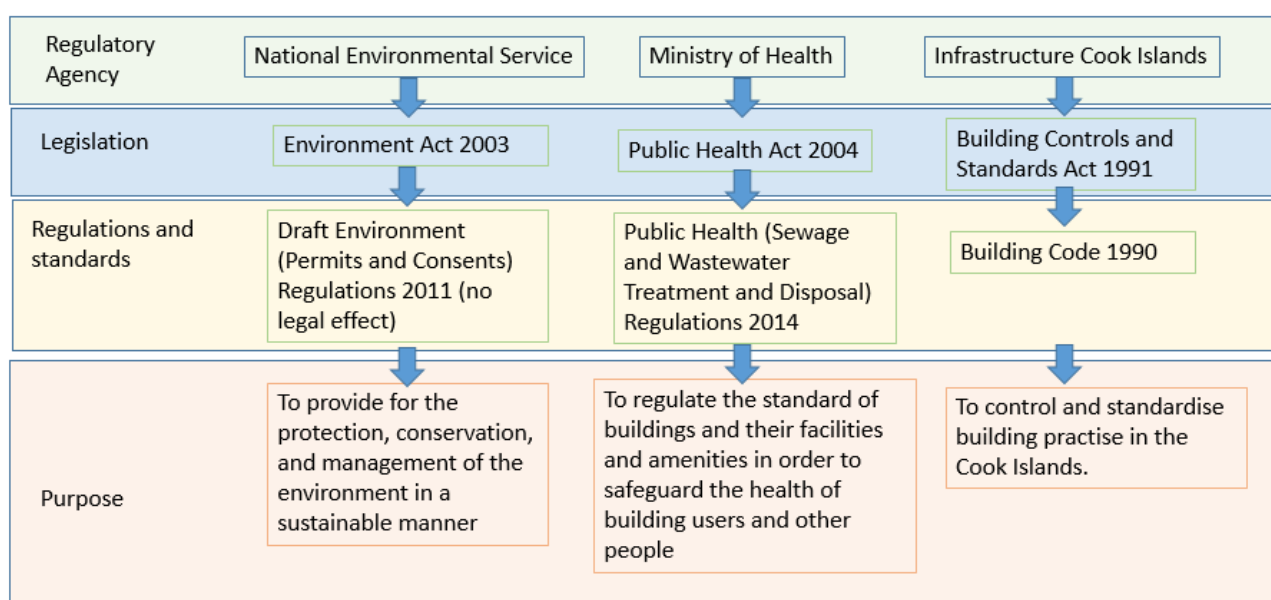


Figure 2.1: Cook Islands land development regulatory framework

### 2.1.2 Environment Act 2003

The purpose of the Environment Act is to provide for the protection, conservation and management of the environment in a sustainable manner. The Act applies to Rarotonga and Outer Islands where Island State Governments have functions, powers, or duties under the Island State Government Act 2003. It does not apply to the island of Suvarrow, a National Park in the northern group of the Cook Islands.

The Environment Act contains provisions for management plans and protected areas however, these have not been implemented. Therefore, development is managed almost solely through the permitting process (noting that a number of marine protected areas are managed by the Ministry of Marine Resources through the ra'ui process which is taken into account in the permitting process).<sup>2</sup>

<sup>2</sup> The Land Use Act 1969 contains provisions for zoning but has never been enforced.

Under the Environment Act:

- project permits are required for any activity which causes or is likely to cause significant environmental impacts (section 36); or
- the written consent of the permitting authority is required for activities in specific areas of concern, which include:
  - the foreshore and Cook Island waters (Section 50);
  - pollution of Cook Island waters and inland waters (Section 51);
  - excavations on sloping land (Section 57); and
  - protection of wetlands (Section 58).

The Act is drafted with the intent that some sections are to be supported by regulations. The Environment (Permits and Consents) Regulations 2011 ('Draft Regulations') have been drafted under the Environment Act (the Act and draft Regulations are attached in Appendix A and B respectively) however, these have not been formally adopted and do not have legal effect.

Permitting under the Environment Act broadly involves applications submitted to NES, who administer the permitting process and make recommendations to the permitting authorities (the decision makers). The permitting authorities are the Island Environment Authorities (IEAs). Membership of IEAs includes appointed members, Kavana Tutara or Konitara Tutara, and Members of Parliament (see Schedule 1 of the Environment Act, attached in Appendix A). Administration and assessment of applications is undertaken by Environment Officers based in the NES (Advisory & Compliance Division). This includes public notification of applications under Section 36 of the Environment Act.

Monitoring and enforcement of project permits (or activities which require project permits) is undertaken by Environment Officers in the NES, under the provisions contained in Part 4 and Part 8 of the Act.

#### 2.1.2.1 Identified gaps

Our review of the Environment Act identified the following gaps.

Gap / issue	Overview
Lack of regulations to support legislation	<p>The Act does not currently effectively achieve its purpose. This is, in part, due to legislation being drafted with the intent that supporting regulations would be developed to give full effect to the Act. Section 70 of the Act sets out the wide range of matters that could be managed via regulations, including for example (in summary):</p> <ul style="list-style-type: none"> <li>· controlling soil erosion and siltation;</li> <li>· regulating or prohibiting the taking of gravel, sand, and other materials;</li> <li>· providing for the preservation, protection and conservation of trees; and</li> <li>· preventing and controlling the clearing (and other means of removal) of trees and other plants.</li> </ul> <p>The lack of any supporting regulations means that the Environment Act is not effectively nor fully implemented. This results in unclear requirements, responsibilities and procedures for project proponents under the Act and regulators. As a consequence, management of permits is also not achieved in a robust manner.</p>
Lack of management plans or protected areas	<p>While there is provision in Part 6 of the Environment Act for management plans and protected areas, we understand that these are rarely (if ever) used due to the procedural and resourcing requirements involved in preparing these under the Act. This means that there is no strategic framework to assist in assessing impacts of</p>

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Gap / issue	Overview
	individual developments on significant areas or cumulative impacts of multiple developments over time.
Currency of “specific areas of concern”	<p>“Specific areas of concern” are identified by the Act however, these may require updating to deal with current and emerging issues (such as natural hazards and climate change).</p> <p>For example, matters such as discharges to land are not directly captured under the current Act. It is unclear whether the definition of sloping land captures all development which should be captured in a Cook Islands context. Similarly, the Environment Act is unclear in its application to marine areas (particularly the Cook Islands exclusive economic zone).</p>
Integrated management of environmental impacts	A permit under the current legislation is required only if activities have significant adverse impacts or are included as a specific area of concern. Therefore, small to medium sized projects are not covered by the Environment Act, although these may still affect the environment. This means that, in combination with the lack of strategic planning, integrated management of environmental impacts is difficult.
Considering cumulative impacts	The permitting authority may not unreasonably refuse to grant a consent for excavations on sloping land or works within wetlands under sections 57 and 58, which means that cumulative impacts from earthworks or wetland reclamations are difficult to respond to (particularly with the lack of strategic framework).
Provisions for necessary Infrastructure	There is no requirement for consideration for provision of necessary infrastructure associated with the environmental permitting process. We note in this regard that the Infrastructure Act 2019 has recently passed into law. Section 33 of the Infrastructure Act 2019 provides for a general obligation to obtain permission of affected infrastructure manager before undertaking works which would affect roads or other infrastructure. This will provide for an additional requirement for land development and will go some way to amending this gap.
Transparency	<p>The IEAs, being the decision making authority under the Environment Act, have a political majority and therefore there is risk of political influence in the permitting process. This does provide for robust or transparent decision making for applicants.</p> <p>We also note that Section 36(5) of the Environment Act requires public notification of applications, and comments from the public can be received for 30 days following the public notice. Comments are to be requested from any Government department or agency, or person affected by or having expertise relevant to the proposed project or its environmental impact. However, there is no particular requirement for the IEAs to have regard to these comments in their decision. This means there is no transparency or assurance for submitters that their comments have been given due consideration.</p>
Definitions / terminology	<p>Some definitions or sections in the Act are overly complex or unclear.</p> <p>For example, the definition of foreshore under the Act includes “every estuary, stream or river, together with the bed of any stream or river”, which broadens the definition beyond its common meaning (being “the part of a shore between high- and low-water marks”). Similarly, Section 51 (Pollution of Cook Island waters and inland waters) could be revised to make it clearer.<sup>3</sup> Essentially, the section deals with discharges and disposal of waste into water or onto land in a manner that where pollution could enter water. In relation to compliance and enforcement, the Act’s structure is currently confusing with NES responsibilities located in several parts of the Act.</p>

<sup>3</sup> Section 15 of New Zealand’s Resource Management Act 1991 could provide guidance in this regard. We also note that some terminology used in this section (e.g. refuse matter, shore) is used only in this section. There other defined equivalent words in the EA (e.g. litter, pollution, bank) which could be used for consistency.

## 2.2 Public Health Act

The Public Health Act's purpose is to regulate the standard of buildings and their facilities and amenities in order to safeguard the health of building users and other people. It sets out building health standards in Section 13, which include:

- a *An adequate and convenient supply of water for human consumption;*
- b *An adequate and convenient supply of water for sanitary purposes;*
- c *Adequate and convenient means (including suitable appliances) for storage and disposal of waste;*
- d *Adequate and convenient toilets;*
- e *Adequate drainage for safe and efficient removal and disposal of surface water and wastewater;*
- f *Adequate lighting, space, and ventilation.*

Regulations provide detail on the implementation of the main Act. Specifically, the MoH issues permits for on-site sewage treatment systems under the Public Health (Sewage and Wastewater Treatment and Disposal) Regulations 2014 [prepared under the Act]. Relevant forms are attached in Appendix C.

Building permits cannot be approved under the Building Controls and Standards Act 1991 until a sewage construction permit has been issued for the sewage system under the 2014 Regulations.

In general, the Public Health Act and associated Regulations are reasonably clear in relation to the management of public health impacts of discharges from domestic wastewater treatment systems. Other MoH responsibilities listed in Section 13 of the Public Health Act are not subject to regulations and therefore the means of addressing these matters is less clear.

### 2.2.1.1 Identified gaps

The following gaps have been identified.

Gap / issue	Overview
Overlap of responsibilities	<p>The Public Health Act overlaps with responsibilities of other regulatory authorities. In particular, there are overlaps between:</p> <ul style="list-style-type: none"> <li>• NES and MoH responsibilities in relation to the environmental and public health impacts of discharges from domestic wastewater treatment systems, and</li> <li>• MoH and ICI in relation to structural integrity of these systems and other responsibilities that MoH hold under the Public Health Act e.g. adequate drainage for safe and efficient removal and disposal of surface water and wastewater.</li> </ul> <p>This overlap means that there is potential for inefficiencies and duplication of effort for applicants during the permitting process.</p>

## 2.3 Building Controls and Standards Act 1991

The purpose of the Building Controls and Standards Act 1991 is to control and standardise building practise in the Cook Islands. This is supported by the Building Code, the purpose of which is to *'ensure that acceptable standards of structural sufficiency, fire safety, health and amenity, are maintained for the benefit of the community and in the future'*.

Applications are made to the Building Controller at ICI. Once a building permit is issued, an appropriately qualified person must supervise the building works, which are inspected at key points in the process. These are set out in the forms attached in Appendix D.

### 2.3.1.1 Identified gaps

The following gaps have been identified.

Gap / issue	Overview
Modernisation of legislation	<p>The Act and associated Building Code require modernisation as they have not been updated since they were written in the early 1990s<sup>4</sup>. They do not provide adequate protection against the current intensity of cyclones and tsunamis.</p> <p>An updated Building Code was prepared as part of the 2017 review, but this will not come into force until the Building Act is revised and regulations are adopted. The review was thorough and we have not considered gaps associated with the Building Act any further. However, we note that the revised Building Code is much more complex than the current code and will require careful communication with stakeholders.</p>

## 2.4 Integration of existing legislation with new legislation and policies

In addition to the specific comments in relation to each of the main Acts, integration with new legislation and policies is required as set out below:

Gap / issue	Overview
Integration with new legislation and policies	<p>The Infrastructure Bill 2019 has been passed into law as of 14 June 2019. Section 33 of the Infrastructure Bill 2019 provides for a general obligation to obtain permission of affected infrastructure manager before undertaking works which would affect roads or other infrastructure. This will provide for an additional requirement for land development.</p> <p>In the marine environment, we understand that marine spatial planning is intended under the Marae Moana Act 2017. There are a number of existing ra'ui or marine protected areas administered by the Ministry of Marine Resources, which are taken into account during the EIA process under the Environment Act however, these do not have statutory effect and consideration will need to be given as to how these will integrate with current provisions.</p> <p>A number of broad policies have been developed at a national level for the Cook Islands e.g. the Solid Waste Management Policy, Sanitation (Wastewater Management) Policy and Integrated Water Resource Management Policy. However, none of the policies are recognised in the Environment Act, Public Health Act or the Building Act and therefore these do not have statutory weight in relation to the permitting process.</p>

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<sup>4</sup> See Beca, *Cook Islands Building Code – Inception Report*, dated 28 April 2017 and *Cook Islands Building Code Review – Proposed Updates*, dated 20 June 2017

## 2.5 Non-legislative documents

### 2.5.1 Documents reviewed

We have reviewed a range of documents which relate to landuse development and environmental permitting in the Cook Islands, including:

- Island Friends Ltd. for SPREP, *Cook Islands priority environmental problems (PEC) report: a review and assessment of the priority environmental concerns*, IWP-Pacific Technical Report (International Waters Project) No. 11, 2004
- de Romilly & de Romilly Ltd for Ministry of Finance and Economic Management, *Cook Islands: Legal and Institutional Strengthening of Environmental Management*, Asian Development Bank Project Number 33375, June 2006
- Thomas Fraser for Ministry of Finance and Economic Management, *Cook Islands: Final Report for Preparing the Infrastructure Development Project*, Asian Development Bank Project Number 40287, April 2009.
- Tuaere Tangianau Upoko for National Environmental Service, *National Stocktake Report: National Capacity Self Assessment for Global Environment Management Project*, August 2005
- Kelvin Passfield and Teariki Rongo for the NES, *Cook Islands Fourth National Report to the Convention on Biological Diversity*, 2011
- M. McIntyre and the NES, *Cook Islands National Action Programme for Sustainable Land Management (NAP SLM)*, 2013
- Beca for Ministry of Infrastructure (Cook Islands), *Cook Islands Building Code – Inception Report*, 2017

### 2.5.2 Identified gaps

Our review of these reports supports a number of gaps identified as follows.

Gap / issue	Overview
Land use zoning	As set out by the NAP SLM (2013) and Beca (2017), the Cook Islands has no land use zoning (the Land Use Act 1969 provides for this but has not been implemented). Due to the land ownership model in the Cook Islands, this is a sensitive issue. SPREP (2004) identifies that land is the 'backbone' of the financial system and tends to be developed for the highest economic use, which has led to development of sensitive areas. <sup>5</sup>
Inventories / data bases	The NAP SLM also identified that the development of a comprehensive inventory of natural resources and development conditions (a Geographic Information System [GIS]) would provide a consistent base for integrated physical planning, coastal area management, biodiversity conservation and water resource management).
Lack of proactive / integrated decision making	The NAP SLM states that the current Environment Act <i>...relies on the interpretation of 'significant impact', and doesn't cater for the incremental impacts of 'small' development e.g. badly located minor development. It becomes a reactionary system of decision-making which is expensive to maintain, and doesn't allow the community to set aside areas for best possible future uses.</i> <sup>6</sup>

<sup>5</sup> Island Friends Ltd. for SPREP, *Cook Islands priority environmental problems (PEC) report: a review and assessment of the priority environmental concerns*, IWP-Pacific Technical Report (International Waters Project) No. 11, 2004, p14

<sup>6</sup> M. McIntyre and the NES, *Cook Islands National Action Programme for Sustainable Land Management*, 2013, p32

Gap / issue	Overview
Overlap of responsibilities	The NAP SLM concludes that clarification and rationalisation the roles of agencies, networks and institutions would improve efficiency and accountability in managing the environment and natural resources, reduce duplication and maximise cost effectiveness. The creation or strengthening of existing national agencies would to strengthen their collective capacity to effectively manage the island's ecosystems in an integrated manner (i.e. land development, coastal zone, water resources, and biodiversity). <sup>7</sup>
Coordination of permitting process	Beca (2017) identified that improvements to the current three-step permitting system (involving the submission of documents to the NES, MoH and ICI) was supported by stakeholders. In particular, a 'one-stop-shop' for Building Permit applications was preferred.
Appeal process	Further investigation of the use of an Appeal Board for application procedures was discussed during the review of the Building Code (Beca, 2017). Under the current Building Act, an Appeal Board is required, however it has never been initiated due to lack of funding.

## 2.6 Files provided by the National Environmental Service

### 2.6.1 Files reviewed

Due to the gaps associated with the Environment Act in particular, we specifically reviewed documentation provided by the NES. The NES provided a range of documentation as follows:

- The NES Compliance, Enforcement, Monitoring Division Working Manual (dated 2003)
- The Environmental Significance Declaration Form (ESD Form) used as an initial screening tool
- List of local engineers
- Project checklist
- Sequence of events form
- Flowcharts for EIA and technical reports (attached in Appendix E)
- A range of EIA files for sites in Rarotonga, including:
  - Maintenance dredging in the channel at Avarua Harbour
  - An extension of the existing breakwater at Avatiu Marina
  - Construction of an additional 16 accommodation units and an underground water tank development at an existing resort
  - Establishment of a new rock quarry
  - Vegetation clearance on sloping land, associated with residential development
  - Sediment removal (dredging) at Vaiterenga Stream and foreshore, Muri
  - Culvert extension and foreshore protection
  - Reclamation of a wetland.

We also analysed records in the NES electronic building permit Microsoft Access database (for the years 2010-2015 and 2018) and the NES Project Logbooks from 2003 (when the Environment Act was implemented) to 2005, and from 2011-2018.

<sup>7</sup> NAP SLM, p32

## 2.6.2 Identified gaps and issues

### 2.6.2.1 NES documentation

The applications we reviewed showed a wide range of environmental matters are being assessed by the team at NES. The files and project checklist are clear and easy to follow. Several of the Environment Officers have been working with NES for a number of years and are highly familiar with the current process.

We understand that the Draft Regulations are applied to the permitting process to provide more certainty for applicants and NES around the permitting process. The application of these regulations partly fills the gaps identified above in relation to the lack of supporting regulations to help implement the Environment Act. However, the Draft Regulations do not currently have legal effect, and therefore the overall process currently being applied is strictly *ultra vires* (beyond NES' legal authority). This is particularly an issue in relation to the ability to charge for processing costs including specialist/technical input for review of applications, and enforcement provisions including fines.

In addition, there are a number of gaps or issues in the process as implemented under the Draft Regulations and recorded in the applications files:

Gap / issue	Overview
Fees	Fees charged under the Draft Regulations do not reflect the actual cost of the time taken to process applications by NES Environment Officers.
Unclear definition of 'significant environmental impact'	The current definition of 'significant environmental impact' relies on a project-by-project judgement on the degree to which a project will impact on, for example, public health and safety, unique or unknown risks are taken, the relative controversial nature of the project, precedent for future action, cumulative effects, climate change etc. This is difficult to do without a robust supporting assessment toolbox.
Alternative assessments	Tests for alternative assessments are not clear and therefore, these assessments can be shallow and unclear.
Outdated 'assessment toolbox'	The current 'assessment toolbox' for management of environmental impacts includes the ESD form attached in Schedule 2, the list of activities requiring an EIA report in Schedule 3 and the list of projects and activities requiring technical reports identified in Schedule 5 of the Draft Regulations. While the lists contained in Schedule 3 and Schedule 5 are helpful, they are not exhaustive. The initial impact assessment via the ESD form provides a different list of matters to consider in a 'yes/no/unsure' checklist. This may not necessarily provide Environment Officers with the information required to assess the relatively impacts of a proposal, particularly in relation to cumulative or complex/technical impacts. We also note that the latest World Bank Environmental and Social Framework 2016 has moved to a risk-based approach to the EIA process. <sup>8</sup>
Land use disputes not resolved	Land use disputes are often played out in the EIA process, during the mandatory public notification period. This discussion would be more appropriately be addressed by the Ministry of Justice.
Internal process review	There are some updates to the current permitting process that could be improved through review of internal processes, without requiring legislative change, for example updating recommendations and decision templates to include statutory tests, updating the standard condition set to better articulate the environmental impacts that need to be managed, and by whom so that these are more easily enforceable and the applicant's responsibilities are clear, and an update of

<sup>8</sup> World Bank, World Bank Environmental and Social Framework, 2016

Gap / issue	Overview
	environmental management techniques e.g. erosion and sediment control., and to the 2003 Compliance, Enforcement, Monitoring Division Working Manual.

### 2.6.2.2 Application records

Based on a review of the available electronic data for building permits, an average of 72% of building permits are for residential buildings, with other permits issued for buildings such as garage/storage units, pools, tourist accommodation, schools and commercial buildings. Building permits for residential buildings are unlikely to cause 'significant environmental impacts' when assessed individually. Only 14% (approximately) of the total number of building permits issued annually are noted as being located in an area of concern, being either on the foreshore or on a sloping site.

On this basis, and given ongoing urbanisation in certain catchments (e.g. Muri on Rarotonga), it seems unlikely that environmental impacts of land development are being captured in a holistic or integrated manner.

Records of applications under the Environment Act are incomplete as the previous database was corrupted during a move to a different mapping system several years ago and was not able to be retrieved. NES is re-building this over time, with GIS locations mapped via phone app. However, resourcing capacity is constraining the speed of this process.

Figure 2.2 below shows the number of projects undertaken pursuant to s36 or Part 8 of the Act, as recorded in the NES Project Logbook.<sup>9</sup>

This records basic information only, which means that it shows general trends only. There is an overall downward trend for permits issued under Section 50 of the Environment Act (developments in the foreshore and Cook Islands waters), but an increasing trend for permits to be issued under Section 36 ('significant environmental impact'). Permits issued for wetland development (s58 of the Environment Act) make up a very small number of the total permits issued over time.

We understand from discussions with NES that this may be because wetland and foreshore development are considered to have 'significant environmental impacts' and are therefore processed under s36 of the Environment Act. However, the way this is recorded means that the effectiveness of the Environment Act in protecting the specific areas of concern defined in Part 8 of the Environment Act is unclear.

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<sup>9</sup> Note that this is based on the author's count and relies on the matters recorded in the logbook.

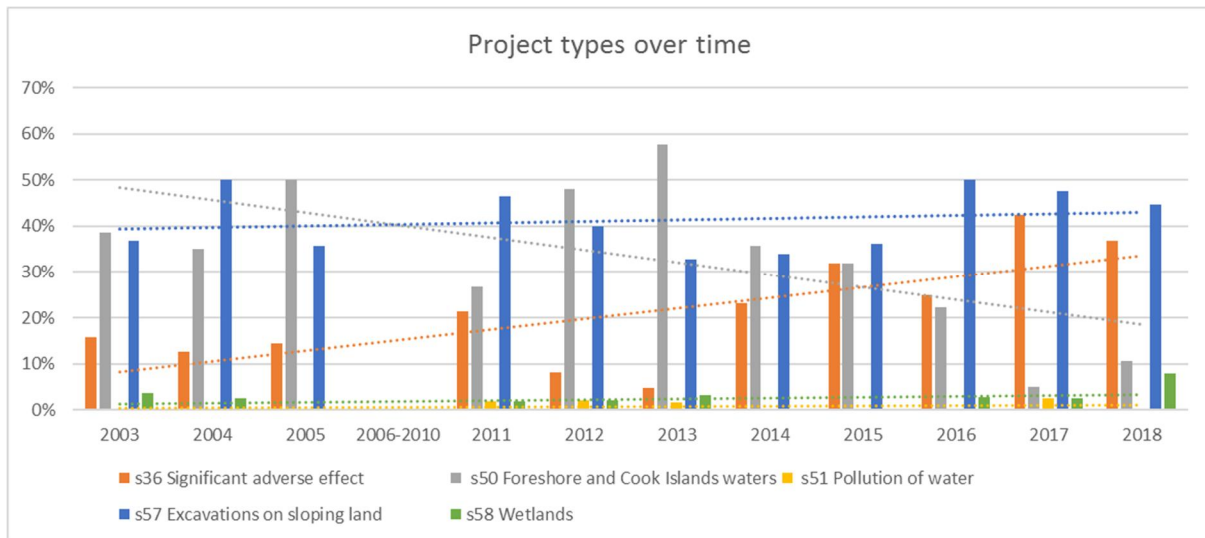


Figure 2.2: Graph showing project types recorded in the Project Logbook from 2003 (when the Environment Act came into effect) to 2005, and from 2011 to 2018. Records from 2006-2010 were not viewed. The bars show percentages of each project type, and the dotted lines show the trend for each project type, where these were noted.

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### 3 Stakeholder interviews

Discussions in relation to the gap analysis were held over two site visits to Rarotonga during the weeks of 8 April 2019 and 20 May 2019. Full details of these discussions is set out in Appendix F. The following sections summarise the discussions with each stakeholder.

We note that from our discussions with stakeholders, most of the key issues for the permitting process appear to be associated with the Environment Act, although there is opportunity to streamline the three-step process between NES, MoH and ICI.

#### 3.1 Infrastructure Cook Islands

ICI are the project owner and T+TI have been in close liaison with them throughout the wider project.

ICI have had significant input into the new Infrastructure Act 2019, which has recently been passed. As noted above, to some extent this fills a gap by providing a requirement for project proponents to consider provision of necessary infrastructure.

One of the biggest issues with the current permitting process from an ICI Building Control perspective is that it is not a centralised process. Permits are completed in as a linear process (rather than being able to run the NES and ICI process in parallel). In addition, the 1990 version of the Building Code still applies as the revised Building Code has not yet gone through the legislative process.

#### 3.2 National Environment Service

T+TI met with members of the NES team during the inception visit in the week of 8 April 2019, and followed up in the weeks of 20 May 2019 and 27 May 2019.

The Advisory and Compliance Team confirmed that they apply the Draft Regulations in the absence of other guidance, including the tiered process (EIA/Technical Report) and forms and fees set out by the Regulations. The decision on whether a project requires an EIA or a technical report is made by the NES Compliance and Advisory team, and the applicant is then advised and sent Terms of Reference with the reporting requirements. Decision are based on the requirements set out in the Regulation.

A gap identified by NES is that cultural heritage matters can only be addressed through the EIA process if the site is listed with the Cook Islands Cultural and Historic Places Trust under the Cultural and Historic Places Act 1994-95. This is up to the landowner and means that a significant site has recently not been captured in the EIA process.

Monitoring and compliance was a key issue identified by the NES. In general, NES staff commented that the Environment Act doesn't have enough 'teeth' in terms of compliance. Particular issues include:

- When activities are found to breach the Environment Act, the current process is for Environment Officers to verbally tell the person undertaking the works to stop works, and then to return to the office in order to get formal confirmation in writing, which is signed off by the Director. The understanding is that this is what is provided for under the Act.
- Under the Environment Act, enforcement actions may be escalated to the Courts under certain circumstances. However, we understand that these are rarely used, and that prosecutions have not been undertaken for several years. NES no longer have an in-house legal advisor to take these prosecutions.

- NES's understanding of the Environment Act is that it does not allow them to take enforcement action against contractors.
- In addition, resourcing can be an issue. For example, NES tries to monitor active construction sites on a daily basis, but due to staff numbers sometimes relies on the applicant's engineers to monitor the site, who may not be there at the critical times.

There can be overlap with other Ministries, particularly MoH. Environment Officers also respond to complaints as required. These are either followed up or passed on to another Ministry if the complaint falls outside of their jurisdiction e.g. for complaints about septic tanks, the Ministry of Health is informed.

### 3.3 Cook Islands Tourism Corporation (CITC)

CITC were visited as part of the inception visit in the week of 8 April 2019. The discussion largely focussed on the Muri stormwater project which T+TI is also currently undertaking however, CITC noted that cumulative impacts, for example development of hillsides, are an issue, noting there is no land zoning. These issues are not confined to Rarotonga; Aitutaki is also experiencing issues particularly with water and waste management. Safeguarding the lagoons is very important from a tourism perspective.

Overall, there is a strong need to comply with regulations but there are concerns around cost and resources / trained technical skills.

### 3.4 Te Ipukarea Society

Te Ipukarea Society is a non-government organisation with a focus on biodiversity, eco-sustainable development, waste management and youth development. The Society often reviews and submits on EIAs which are notified by NES. The Society noted that a process for independent peer review is lacking, and there is a lack of engineering experts (particularly coastal process engineers). Consideration of alternatives is not always robust. Compliance and monitoring is also an issue.

### 3.5 Cook Islands Natural Heritage Trust

This was a general discussion about the permitting process, including the proposal, alternatives and mitigation, along with the decision making process. Decision makers on the EIA process are predominantly MPs.

Cumulative impacts of filling in wetlands are a key environmental issue for Rarotonga. There are social and cultural aspects to this, which is an important consideration, for example, the general perception is that a wetland is either for planting taro or it is a place that can be filled in. Incentives developed to keep wetlands was suggested.

### 3.6 Ministry of Health

The MoH noted that broadly, Rarotonga has changed over time with observed impacts including coastal erosion, bigger dwellings and taro plantations decreasing, with associated changes in land use and drainage.

In terms of the permitting process, the MoH approves the sanitation component of development. Effects of existing development is an issue.

For new development, the MoH has a good process, which includes consideration of tank location, soakage rates / soil types, setbacks, appropriate treatment, access for pump outs etc. MoH's role in ongoing monitoring mainly involves response to complaints however, MoH also monitor construction of sewage systems and provide a compliance certificate.

### 3.7 Office of the Public Service Commissioner (PSC)

This discussion focussed on the provisions of the Infrastructure Act 2019 (which at that time was in the consultation phase) and potential synergies with this gap analysis with a broader Environment Act review.

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## 4 Issues and recommendations

Based on the findings of the literature review and the stakeholder interviews, we have identified key gaps that require further analysis, and which lead into the identification of recommendations.

The key gaps in the permitting process are:

Gap / issue	Overview
Lack of strategic land use planning	The lack of strategic land use planning means that it is difficult for the permitting process to respond to and address complex and cumulative impacts.
Management of environmental impacts under the Environment Act	The current Environment Act does not effectively manage environmental issues. It seems unlikely that environmental impacts of land development are being captured in a holistic or integrated manner.
Procedural review	Procedural matters, such as the lack of any supporting Regulations mean that the Environment Act has not been effectively or fully implemented. Improvements to the existing Draft Regulations have been recommended.
Public participation	Improving effective participation of the community in environmental management and sustainable development through the permitting process. This could include appeal processes.
Capacity and capability	Implementation of the Environment Act is a considerable challenge due to capacity and capability constraints, particularly for NES.

Key issues are discussed in Sections 4.1 to 4.5 below, with recommendations following the discussion of each issue.

In addition, while the following are not 'gaps' as such, examination of the following matters would assist in improving the overall permitting process:

- Governance: Improvement of the governance process under the Environment Act.
- Scope and process clarifications: Clarification of NES's jurisdiction in relation to some matters under the current legislation would be helpful e.g. protection of cultural heritage matters and enforcement processes.
- Duplication of effort: Review of administrative procedures to support the permitting process, including review of internal NES processes and interaction between the regulatory authorities.
- Compliance strategy: Review of compliance toolkit to assist in enforcing the current provisions.

These are further discussed in Section 4.6.

### 4.1 Lack of strategic land use planning

In general, there is little or no strategic land use planning in the Cook Islands. This is largely due to the land tenure system where land is held within families for the benefit of future generations of that family.

Assessing complex impacts of proposals via the permitting process makes it challenging to achieve sustainable development as:<sup>10</sup>

<sup>10</sup> Paraphrased from New Zealand Productivity Commission (Te Kōmihana Whai Hua o Aotearoa), *Better urban planning*, February 2017, p40

- 1 Applications for land development are made on an individual and site-specific basis. There is no holistic framework that the permitting authorities can use as a 'yardstick' for assessing external impacts of development on individuals and common resources (e.g. water, soil) and cumulative impacts e.g. there is no zoning to assess whether commercial or residential developments are appropriate in certain locations.
- 2 A lack of strategic guidance makes it difficult for the community as a whole to anticipate and allow for change and growth over time, and to agree on the how to provide for local public goods e.g. ecosystem services associated with wetlands, park areas or beach access.
- 3 It also makes it difficult for infrastructure providers to anticipate and respond to potential future changes e.g. increases in impervious areas and associated stormwater within developing catchments.

A strategic land use planning framework assists the permitting process, and would help to articulate the way in which the purpose of the Environment Act can be achieved.

The inclusion of Strategic Environmental Assessments into Environment Act legislation could assist in providing this framework. Strategic Environmental Assessments are developed at a higher level to EIAs, and can be used in three main ways:<sup>11</sup>

- *To prepare a strategic development or resource use plan for a defined land and/or ocean area*
- *To examine the potential environmental impacts that may arise from, or impact upon, the implementation of government policies, plans and programmes*
- *To assess different classes or types of development projects, so as to produce general environmental management policies or design guidelines for the development classes/types.*

These could be targeted at particular catchments or types of impacts e.g. erosion and sediment control or stormwater runoff, and would provide an improved context and framework for decision making on individual projects which may be small to moderate in scale, but still contribute to cumulative impacts on the environment. Alternatively, these could be focussed on specific areas of concern as set out in Part 8 of the Environmental Act e.g. works in the foreshore and Cook Island waters, excavations on sloping land or protection of wetlands.

There are also a number of existing policy and legislative tools within the broader Cook Islands context which could be used to provide some strategic guidance, including:

- marine spatial planning is intended under the Marae Moana Act 2017.
- national strategies, policies and legislation to guide environment-related activities is being improved over time with a number of broad policies have been developed for the Cook Islands e.g. Te Kaveinga Nui: National Sustainable Development Plan 2016-2020, the Solid Waste Management Policy, the Sanitation (Wastewater Management) Policy and the Integrated Water Resource Management Policy.
- the passing of the Infrastructure Act 2019 will go some way to providing for efficient investment in infrastructure, particularly in relation to reducing uncertainty and improving coordination by various parties.

Acknowledgement or alignment of these could provide a statutory basis for taking these into account where relevant to an EIA process.

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<sup>11</sup> SPREP, 2016, p9

#### 4.1.1 Recommendations

We recommend that the Environment Act be reviewed and updated to:

- Provide for Strategic Environmental Assessments
- Align with other legislation e.g. Marae Moana Act 2017 and Infrastructure Act 2019
- Require that national level policies such as the Te Kaveinga Nui: National Sustainable Development Plan 2016-2020, Solid Waste Management Policy, Sanitation (Wastewater Management) Policy and Integrated Water Resource Management Policy are taken into account when preparing EIA reports.

#### 4.2 Management of environmental impacts under the Environment Act

There are a number of issues associated with management of environmental impacts at the EIA level. Particular issues identified through the gap analysis include:

- The existing legislation applies only to 'significant environmental impacts', which are not defined. Small to medium sized projects are not covered by the Environment Act, although these may still affect the environment.
- Cumulative impacts e.g. filling in of wetlands and effects of existing development were identified as a key issue by several stakeholders. The lack of strategic planning framework, against which individual applications can be assessed, exacerbates this issue.
- The effectiveness of the Environment Act in protecting the existing specific areas of concern is unclear, and the way these may require updating to deal with emerging issues. This is partly due to the way that applications are recorded. However, there appears to be ongoing issues about development in areas of concern which have been expressed by stakeholders (particularly in relation to wetlands and foreshore areas), noting the permitting authority may not unreasonably refuse to grant a consent for excavations on sloping land or works within wetlands under sections 57 and 58.
- SPREP (2004) identified that traditional ecological knowledge is being lost. Although decisions under the Environment Account must take into account "relevant traditional resource management practices and standards on island", stakeholders expressed concerns about changes in traditional land use e.g. through the movement of residential activity from the hillsides to the dune and wetland areas and the decrease in taro plantations. Cultural heritage was also identified as a concern. These matters are not particularly prominent in the existing legislation.
- There is no requirement for consideration for provision of necessary infrastructure associated with the under the Act (this is remedied to a certain extent by the new Infrastructure Act 2019).
- In addition, tests for robust consideration of alternatives for a proposed project are not clear.
- In general, Environment Officers feel that the Environment Act does not have enough 'teeth' in terms of compliance. Fines are not large enough to deter offenders. There is also a lack of clarity about enforcement against persons who do not own the site where offending takes place, e.g. contractors.

Updating the Environment Act and providing for supporting regulations as part of legislative review is clearly required in order to manage spillover impacts of individuals and businesses on others and on the natural environment.

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Table 4.1: Case study: EIA guidance documents

We have reviewed a number of guidance documents relating to EIAs and environmental safeguard frameworks for definitions of 'significant impact'.<sup>12</sup> Our view is that the definition of significant impact and supporting EIA assessment tools set out by SPREP in *Strengthening Environmental Impact Assessment: Guidelines for Pacific Island Countries and Territories*<sup>13</sup> are clear and applicable in a Cook Islands context. This is also consistent with the latest World Bank Environmental and Social Framework,<sup>14</sup> which provides a risk-based approach to the EIA process.

The SPREP definition is:<sup>15</sup>

*A 'significant impact' is defined as an impact that is important, notable, or of consequence for natural/biophysical, social or economic aspects of the environment. When determining if a project is likely to have a significant impact, the following factors should be considered:*

*The sensitivity, value, and quality of the environment which is to be impacted; and*

*The intensity, duration, magnitude, geographic location and extent of the impacts.*

SPREP further state that, where there are many potential impacts, where management of impacts is likely to be difficult or uncertain, or where there are unknown or uncertain impacts, the proponent should be asked to undertake a full EIA.<sup>16</sup> This is consistent with the requirement under s36 of the EA to provide an EIA where an activity which causes or is likely to cause significant environmental impacts.

SPREP have also provided a number of EIA tools including a screening checklist, Terms of Reference template, EIA report review template and an example approach of risk assessment for EIA reports (attached in Appendix G).

We consider that, with some modifications (e.g. inclusion of specific areas of concern under the EA), these could be implemented in a Cook Islands context. This could provide for an updated basis for NES to assess whether impacts of the proposal are significant. It could also be used to encourage better environmental management, as it would require proponents to step through the environmental impacts of their assessment in a more thorough manner.

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<sup>12</sup> See for example, Asian Development Bank website, <https://www.adb.org/site/safeguards/safeguard-categories>, accessed 20 May 2019; Environmental Institute of Australia and New Zealand, *Ecological Impact Assessment (EIA): EIANZ guidelines for use in New Zealand terrestrial and freshwater ecosystems*, 2<sup>nd</sup> edition, May 2018; New Zealand Aid Programme, *Environmental and Social Impacts: Operational Policy*, August 2012, along with the definition contained in the draft Regulations; World Bank, *World Bank Environmental and Social Framework*, 2016.

<sup>13</sup> SPREP, 2016

<sup>14</sup> World Bank, *World Bank Environmental and Social Framework*, 2016

<sup>15</sup> *Ibid.*, p36

<sup>16</sup> *Ibid.*, p36

#### 4.2.1 Recommendations

Legislative review of the Environment Act should include:

- Improve the definition of 'significant environmental impact', which could be based on the SPREP definition in the case study in Table 4.1.
- Inclusion of a stepped approach to EIA assessment as set out in Table 4.2 below (we note this could also be included in updated Regulations which are addressed in Section 4.3 below).
- Inclusion of specific requirements to assess cumulative impacts (and other long-term impacts e.g. climate change) in the EIA process.
- Review the identified specific areas of concern to check these are still relevant and capturing the priority environmental issues for the Cook Islands.<sup>17</sup>
- Support retention of cultural heritage and traditional ecological knowledge if appropriate e.g. further use of ra'ui could be encouraged where communities support additional protection of certain areas of value, noting that while ra'ui is a traditional method of conservation and preservation of any or all resources whether on land, sea or air.
- Review of the statutory tests, for example, whether it is still appropriate to include the provision stating that the permitting authority may not unreasonably refuse to grant a consent for works within wetlands, given this appears to be a priority issue for the Cook Islands.
- Alignment with the Infrastructure Act 2019, including requirements for the provision of necessary infrastructure associated with development.
- Consider improving the requirements for assessment of alternatives to ensure robust assessments.
- Legislative review should include updates to the enforcement provisions to give the Environment Officers more enforcement options under the Environment Act, including increasing fines and providing greater clarity around responsibilities. Re-structuring the Environment Act would assist in this regard, as the structure is currently confusing with NES responsibilities located in several Parts.

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<sup>17</sup> We understand NES has drafted a State of the Environment Report 2018 and that there may be relevant information in this document.



### 4.3 Procedural review

Any legislative review ultimately needs to involve the drafting of supporting Regulations as well in order to effectively implement the legislation. Recommendations below are based on the comments on the existing process under the Draft Regulations set out in Section 2.6 above.

Key issues identified include:

- Fees charged under the Draft Regulations do not reflect the actual cost of the time taken to process applications by NES Environment Officers.
- The current 'assessment toolbox' for management of environmental impacts may not necessarily provide Environment Officers with the information required to assess the relatively impacts of a proposal, particularly in relation to cumulative or complex/technical impacts.
- Specialist input is important and should be able to be sought (i.e. NES should be able to retain specialists and recover costs for this from the applicant)
- There is no appeal process although applicants can apply again (as many times as they wish) if their application is declined, which is a concern to the NES. We note that in other jurisdictions, for example, in New Zealand, technically applicants can also apply multiple times for the same unsuccessful development. However, in New Zealand, the cost of this would cause applicants to pause for thought before proceeding down this track.
- We note the appeal process is also an issue in relation to the Building Code. Under the current Building Act, an Appeal Board is required, however it has never been initiated due to lack of funding (Beca, 2017).
- Land disputes are sometimes played out through the EIA submissions process. Requiring proof of ownership/occupation rights with applications would minimise this risk (we have also commented further on this in Section 0 below).
- There is risk of political interference in the permitting process due to the make-up of the IEAs.
- A graduated system of compliance and enforcement including an appropriate toolbox of enforcement measures is important. This should provide the means to deter by fines, warning letters, abatement notices and prosecutions (noting that guidance material, education programmes, online forms etc. are also relevant tools, and this is further discussed in Section 4.6 below). The ability to undertake compliance on contractors as well as applicants/other persons should be clear.

#### 4.3.1 Recommendations

Legislation should provide for recourse for applicants if their application is declined e.g. an appeal process. This should be consistent with the current Building Act process for ease of understanding but should include a funding mechanism.

Retention of the Director's ability to delegate powers any Deputy Director or other officer of the Service under the Environment Act (and relevant Regulations).

The governance structure of the IEAs should be reviewed to create a more independent decision making process.

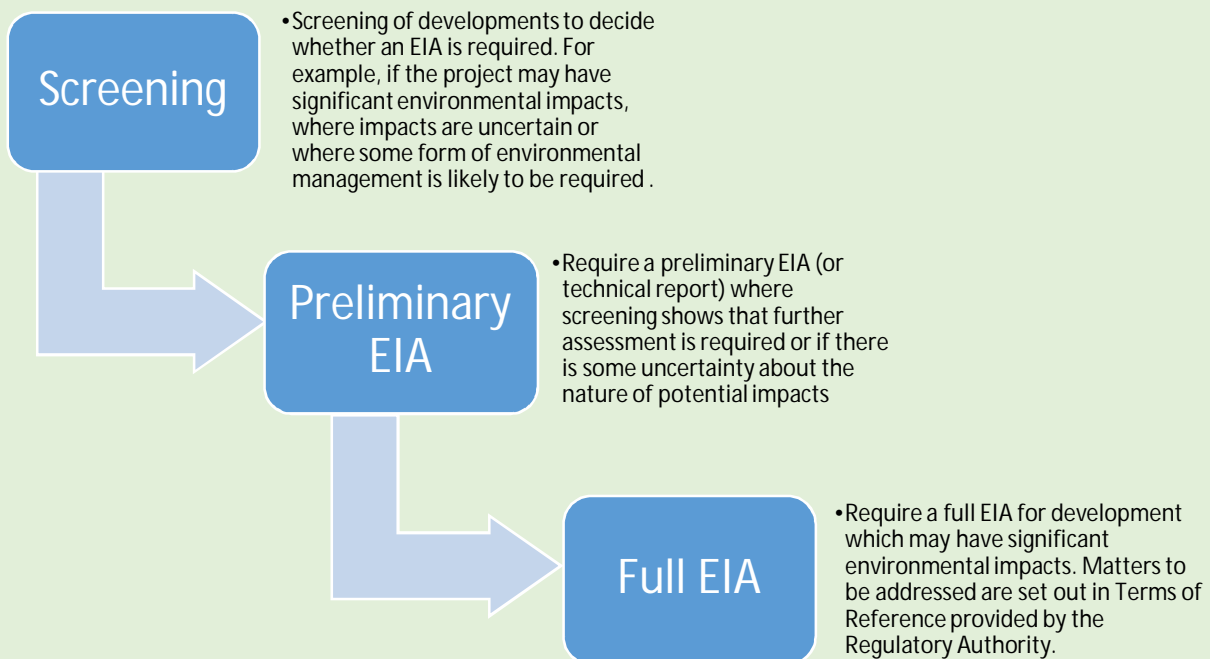
Regulations should:

- Provide for appropriate fees, including the ability to charge applicants for independent review of EIAs by technical specialists. These would ideally be able to be changed over time to reflect inflation or changes in application processes.

- Provide for robust supporting assessment tools, which would also ideally be changed over time to reflected updated practises. These could be based on the SPREP tools attached in Appendix G with modifications for the Cook Islands context e.g. inclusion of specific areas of concern.
- Provide for specialist / technical input to support NES as well as applicants.
- Detail procedural matters such as:
  - Requiring proof of ownership/occupation rights with applications
  - The ability to request additional information from applicants in the case of deficiencies (and potentially the ability to return applications if the Terms of Reference are not adequately addressed).
- Compliance tools including fines, warning letters, abatement notices.

Table 4.2: Stepped approach to EIA assessment

A stepped approach to EIA assessment is reasonably common. It includes:



The Samoa Planning and Urban Management Act 2004 and the Tuvalu Environment Protection (Environmental Impact Assessment) Regulations 2014 both provide stepped EIA processes.

We note that both of these Acts/Regulations exempt certain development with minimal environmental impact from requiring an EIA e.g. those listed in a sustainable management plan or regulations (or potentially, Strategic Environmental Assessments if these are adopted). This would potentially lessen bureaucratic requirements for applicants.

However, any such exemption would need to be carefully considered e.g. we note that Tuvalu exempts all residential development. Given the cumulative impacts of residential development in the Cook Islands, wholesale removal of residential development from environmental regulations is not recommended.

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## 4.4 Public participation

There is no requirement for the NES or the proponent of the development to incorporate feedback or address any issues raised during public notification. That is important for meaningful input and a robust, transparent and accountable EIA process.

We have reviewed environmental legislation in the Pacific e.g. the Samoan Planning and Urban Management Act 2004 includes clauses for public notification and notification of affected parties (for example, neighbours that may be affected by the impacts of the proposal). This legislation then goes on to include 'all submission received, including objections' as one of the matters that the regulatory authority must consider when making a determination on a development application (Section 44). This type of system would give submitters some assurance that their comments are being taken into account.

Another example is the New Zealand system, which allows for submitters as well as applicants to appeal decisions. We note that this would require a funding and resourcing mechanism, and present this as an option only at this stage.

Further to Section 4.3 above, we also note that land disputes are played out through submissions on the EIA process. Along with requiring proof of ownership/occupation rights, this matter could also be dealt with in a similar manner to the provisions limiting trade competitors from submitting on applications under New Zealand's Resource Management Act 1991 (RMA). The RMA states that trade competitors may only make a submission only if directly affected by an effect of the activity to which the application relates, that—

- (a) adversely affects the environment; and
- (b) does not relate to trade competition or the effects of trade competition.

### 4.4.1 Recommendations

- Retain public notification requirements for EIAs, and requiring the permitting authority to take submissions into account, including reasons for their response.
- Clear separation of the land ownership process from the permitting process, by limiting submissions on applications to environmental impacts, and submissions which do not relate to land disputes.

## 4.5 Capacity and capability

Capacity and capability is particularly an issue in relation to:

- Lack of specialist assistance for independent review of EIAs (noting that NES cannot currently charge for external specialist input as the Draft Regulations are not in force)
- Enforcement of Environment Act provisions and permits issued under this Act. For example, NES tries to monitor active construction sites on a daily basis, but also relies on the applicant's engineers to monitor the site, who may not be there at the critical times.
- There appear to be some gaps in the collective knowledge e.g. erosion and sediment control measures implemented on the Cook Islands (often cutoff drains only) are not adequate to contain impacts within the property being developed.
- Records and monitoring of collective impacts of permits issued under the Environment Act for example, applications under the Environment Act were previously recorded in an electronic Microsoft Access database, however this was corrupted during a move to a different mapping system several years ago and was not able to be retrieved. NES is re-building this over time, with GIS locations mapped via phone app. However, resourcing capacity is constraining the speed of this process.

This is not a quick fix. Some suggestions for improvement in the near term are:

- Seek input from specialists within the Cook Islands Government Departments where relevant (and if they are available, noting resourcing constraints). For example, environmental specialists within NES could assist with applications within their area of expertise, marine ecologists within the Ministry of Marine Resources could assist in reviewing applications for works within the foreshore e.g. sand mining, or the Ministry of Health could assist in reviewing likely impacts of discharges from wastewater treatment systems on the environment (as well as on public health). This could be formalised in Memorandums of Understanding between Ministries.
- An update of the NES Compliance, Enforcement, Monitoring Division Working Manual to reflect current processes would assist in articulating institutional knowledge and to clearly articulate NES duties under the Environment Act.
- A capability review to identify missing technical expertise or full time equivalents, along with strategy to build this expertise / resourcing up over time
- Funding of training for common environmental management issues e.g. erosion and sediment control, coastal erosion management, wetland ecology
- Strategic approach within the Ministries to provide a consistent GIS based database for integrated physical planning. There could be synergies with work undertaken by the NES Island Futures Division linking to mapping of significant areas (e.g. ra'ui or large wetlands).
- Seeking assistance with discrete tasks which are outside of the core focus of Environmental Officers e.g. re-building the Project Permit database.

#### 4.5.1 Recommendations

It is recommended that:

- The NES undertake a capability review and a strategy to fill gaps over time.
- Identifying a strategic and integrated approach to seeking assistance where possible e.g. specialist input and integrated databases.
- Identification of priority training courses to seek funding for

#### 4.6 Other improvements to the existing process

In our review of the permitting process, we have identified a number of issues which are not necessarily 'gaps', but where improvements could be made to the existing process. There are:

##### 4.6.1 Governance

Recommendations to the IEAs and associated decisions do not contain a lot of detail. A summary of key details of the application provided with the recommendation would provide the decision maker with more assistance and context.

##### 4.6.2 Scope and process clarifications

Clarification of the scope of the existing Environment Act legislation would be useful. In particular, the extent to which the NES can consider cultural heritage and social matters in the EIA process where there are significant impacts on these issues, would be pertinent. In addition, clarification of enforcement procedures e.g. who can issue stop works notices, and the ability to undertaken enforcement action on contractors. It appears that, while the draft Regulations state that the Director may issue orders (Section 49), the main Act states an Environment Officer may require works to cease (Section 27(2)).

In addition, updates to templates/internal procedures could assist with:

- Making sure statutory tests are considered in recommendations or decisions, and therefore it is not clear how these are assessed. For example, under s50(2)(b), the permitting authority may not grant any consent in respect of the foreshore unless they are of the opinion that the activity consented to would result in the preservation, restoration, or enhancement of the natural configuration and features of the foreshore or the natural flow of water. This is a high test but it is not clear how this is being applied.
- Permit conditions which clearly articulate the environmental impacts that need to be managed, and by whom so that these are more easily enforceable and the applicant's responsibilities are clear. For example, requirements for erosion and sediment control on sloping sites should be clearly set out.
- Environmental management techniques to better align with current practise e.g. soil erosion management techniques using sediment control fences to retain sediment within the property being development.

In addition, we note that given that the ESD Form currently in use is attached to the draft Regulations which do not have legal effect, it would appear that this could be updated to an amended version without amending the main legislation. This could provide an immediate improvement to the process (although we recommend this approach is subject to legal review).

#### 4.6.3 Duplication of effort

The following steps could be undertaken to make the permitting process clearer, easier to navigate for applicants and more efficient for the permitting authorities:

- Development of a central database accessible by the NES, MoH and ICI, where electronic copies of applications could be uploaded and shared, rather than requiring multiple submissions of the same documents.
- Development of Memorandums of Understanding between permitting authorities to reduce duplication and exploit synergies between departments where possible. For example, as noted above, NES could benefit from receiving specialist inputs from specialists within the Cook Islands Government Departments where relevant (and if they are available), including Ministry of Health who have the skills to assist in reviewing likely impacts of discharges from wastewater treatment systems on the environment (as well as on public health).

#### 4.6.4 Compliance strategy

Compliance strategies likely to be set out in regulations include fines, warning letter and abatement notices ('stop works notices'). These are part of a wider compliance toolkit, which includes making compliance easier for stakeholders (e.g. through online information and 'one-stop-shops'), and assisting them with compliance (e.g. through guidance material and education).

This wider toolkit, along with the associated cost of enforcement, is set out in in Table 5.1 below. This table shows that making it easy to comply is, in the long-term, a lower cost strategy than using the full force of the law through prosecutions.

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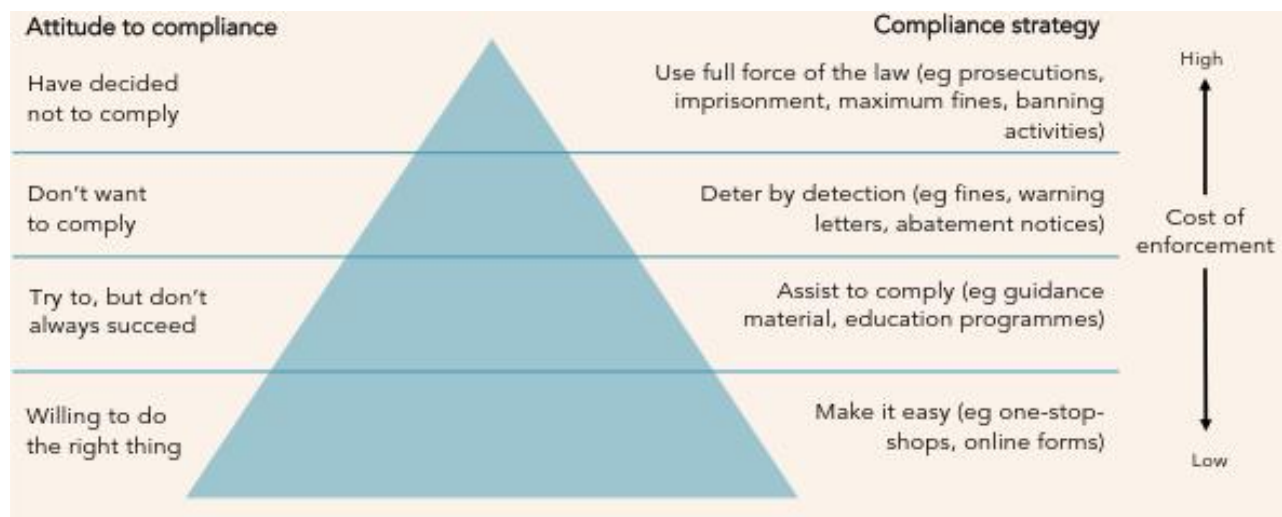


Figure 4.1: Braithwaite Compliance Triangle, from NZ Productivity Commission, *Towards Better Local Regulation 2013*

The following steps could assist stakeholders in complying with current legislation:

- Updating the NES Compliance, Enforcement, Monitoring Division Working Manual to reflect current processes. This would assist in articulating institutional knowledge and NES duties under the Environment Act.
- Development of Guidelines for the Permitting Process along with Erosion and Sediment Control (underway as part of the wider T+TI engagement).
- As is already the case, a Cook Island Maori version or user guides of important documents. This would be highly useful for the new Building Code, noting it is much more complex than the existing code.
- In addition, building on synergies between departments and improving conditions and environmental management techniques (as set out above) would also improve the ease of compliance with the various pieces of legislation.

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## 5 Summary of recommendations and conclusions

Our review and analysis has concluded that there are a number of gaps within the permitting process in the Cook Islands. In particular:

- The lack of strategic land use planning means that it is difficult for the permitting process to respond to and address complex and cumulative impacts.
- The current Environment Act does not effectively manage environmental issues. It seems unlikely that environmental impacts of land development are being captured in a holistic or integrated manner.
- Procedural matters, such as the lack of any supporting Regulations which means that the Environment Act has not been effectively or fully implemented. Improvements to the existing Draft Regulations have been recommended.
- Improving effective participation of the community in environmental management and sustainable development through the permitting process. This could include appeal processes.
- Implementation of the Environment Act is a considerable challenge due to capacity and capability constraints, particularly for NES.

In addition, we have identified a number of issues which are not necessarily 'gaps', but where improvements could be made to the existing process.

Many of these gaps or issues should be addressed through legislative change however, a number can be addressed through procedural review. The recommendations, along with implementation mechanisms, are set out below.

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Table 5.1: Recommendations in relation to permits required by the Environment Act 2003

Key gap / issue	Recommendation	Implementation mechanism
Lack of strategic land use planning	Provide for Strategic Environmental Assessments	Legislative review
	Alignment and acknowledgement within the Environment Act of other legislation e.g. Marae Moana Act 2017 and Infrastructure Act 2019	
	Require that national level policies such as the Te Kaveinga Nui: National Sustainable Development Plan 2016-2020, Solid Waste Management Policy, Sanitation (Wastewater Management) Policy and Integrated Water Resource Management Policy are taken into account when preparing EIA reports.	
Management of environmental impacts under the Environment Act	Improve the definition of 'significant environmental impact'	Legislative review
	Inclusion of a stepped approach to EIA assessment	
	Inclusion of specific requirements to assess cumulative impacts (and other long-term impacts e.g. climate change) in the EIA process.	
	Review the identified specific areas of concern to check these are still relevant and capturing the priority environmental issues for the Cook Islands.	
	Support retention of cultural heritage and traditional ecological knowledge if appropriate e.g. further use of ra'ui could be encouraged	
	Review of the statutory tests, for example, whether it is still appropriate to include the provision stating that the permitting authority may not unreasonably refuse to grant a consent for works within wetlands, given this appears to be a priority issue for the Cook Islands.	
	Alignment with the Infrastructure Act 2019, including requirements for the provision of necessary infrastructure associated with development.	
	Consider improving the requirements for assessment of alternatives to ensure robust assessments	
	Legislative review should include updates to the enforcement provisions to give the Environment Officers more enforcement options under the Environment Act, including increasing fines and providing greater clarity around responsibilities. Re-structuring the Environment Act would assist in this regard, as the structure is currently confusing with NES responsibilities located in several Parts.	

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Key gap / issue	Recommendation	Implementation mechanism
Procedural review	Legislation should provide for recourse for applicants if their application is declined e.g. an appeal process. This should be consistent with the current Building Act process for ease of understanding but should include a funding mechanism.	Legislative review
	Retention of the Director's ability to delegate powers any Deputy Director or other officer of the Service under the Environment Act (and relevant Regulations).	No action required – retention of current powers in existing Environment Act
	The governance structure of the IEAs should be reviewed to create a more independent decision making process.	Legislative review
	Regulations should: <ul style="list-style-type: none"> <li>• Provide for appropriate fees, including the ability to charge applicants for independent review of EIAs by technical specialists. These would ideally be able to be changed over time to reflect inflation or changes in application processes.</li> <li>• Provide for robust supporting assessment tools, which would also ideally be changed over time to reflected updated practises.</li> <li>• Provide for specialist / technical input to support NES as well as applicants.</li> <li>• Detail procedural matters such as: <ul style="list-style-type: none"> <li>- Requiring proof of ownership/occupation rights with applications</li> <li>- The ability to request additional information from applicants in the case of deficiencies (and potentially the ability to return applications if the Terms of Reference are not adequately addressed).</li> <li>- Compliance tools including fines, warning letters, abatement notices.</li> </ul> </li> </ul>	Drafting of regulations once Environment Act is revised
Public participation	Retain public notification requirements for EIAs, and requiring the permitting authority to take submissions into account, including reasons for their response.	Legislative review
	Clear separation of the land ownership process from the permitting process, by limiting submissions on applications to environmental impacts, and submissions which do not relate to land disputes.	Legislative review
Capacity and capability	The NES undertake a capability review and a strategy to fill gaps over time.	Capability assessment
	Identifying a strategic and integrated approach to seeking assistance where possible e.g. specialist input and integrated databases	Internal review – potentially a cross-department working group to identify improvements.

Key gap / issue	Recommendation	Implementation mechanism
	Identification of priority training courses to seek funding for	Internal identification and progression
Other improvements to the existing process: Scope and process clarifications	A summary of key details of the application provided with the recommendation to provide the decision maker with more assistance and context.	Review of EIA templates.
	Clarification of the scope of the existing Environment Act legislation. In particular, the extent to which the NES can consider cultural heritage matters in the EIA process, and the ability to issue stop works notices on the site without returning to the office, and the ability to undertake enforcement action on contractors.	Legal review of current existing Environment Act.
	Updates to templates/internal procedures to: <ul style="list-style-type: none"> <li>• Ensure consideration of statutory tests are included in recommendations or decisions.</li> <li>• Include permit conditions which clearly articulate the environmental impacts that need to be managed, and by whom so that these are more easily enforceable and the applicant's responsibilities are clear.</li> <li>• Review environmental management techniques to better align with current practise e.g. soil erosion management techniques using sediment control fences to retain sediment within the property being development.</li> </ul>	Review of EIA templates, condition sets and environmental management techniques. Identify training where required.
	Consider updating ESD Form currently in use to better align with current EIA practises e.g. World Bank risk-based approach.	Review of ESD Form.
Other improvements to the existing process: Duplication of effort	Development of a central database accessible by the NES, MoH and ICI, where electronic copies of applications could be uploaded and shared, rather than requiring multiple submissions of the same documents.	Internal review – potentially a cross-department working group to identify improvements. Identification of funding required.
	Development of Memorandums of Understanding between permitting authorities to reduce duplication and exploit synergies between departments where possible.	Internal review – potentially a cross-department working group to identify improvements. Identification of resourcing required.
Other improvements to the existing process: Compliance strategy	Update the NES Compliance, Enforcement, Monitoring Division Working Manual to reflect current processes.	Review of Compliance Working Manual by NES.
	Development of Guidelines for the Permitting Process along with Erosion and Sediment Control Guidelines	Underway as part of the wider T+TI engagement

Key gap / issue	Recommendation	Implementation mechanism
	A Cook Island Maori version or user guides of important documents.	Review of documents to identify any particular gaps. The new Building Code should be considered in this review.
	Building on synergies between departments and improving conditions and environmental management techniques would improve the ease of compliance with the various pieces of legislation	Internal review – potentially a cross-department working group to identify improvements. Identification of funding required.

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## 6 Applicability

This report has been prepared for the exclusive use of our client Infrastructure Cook Islands, with respect to the particular brief given to us and it may not be relied upon in other contexts or for any other purpose, or by any person other than our client, without our prior written agreement.

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## Appendix A: Environment Act 2003

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Appendix B: Environment (Permits and Consents)  
Regulations 2011

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## Appendix C: Sewage and sanitation forms

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## Appendix D: Building permit (ICI) forms

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Appendix E: Existing permitting flowcharts  
(Environment Act)

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## Appendix F: Stakeholder feedback

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Table D.1: Stakeholder feedback during the weeks of 8 April 2019 and 20 May 2019

Stakeholder	Key matters of discussion
<p>Infrastructure Cook Islands</p> <ul style="list-style-type: none"> <li>• Felix Matapuku (Acting Secretary)</li> <li>• Jaime Short (ICI, Director, Water and Sanitary (WATSAN))</li> <li>• Teresa Manarangi-Trott</li> <li>• Gareth Clayton</li> <li>• Paul Maoate</li> <li>• Louis Teiti – Builder Controller</li> </ul>	<ul style="list-style-type: none"> <li>• The NES is currently undertaking a review of the Environment Act, with input from a Policy &amp; Legal Advisor (Annika Lane) based in the Office of the Public Service Commissioner (PSC). Important to be consistent and aware of this process.</li> <li>• ICI are also going through a process of legislative review – new Building Code / Infrastructure Bill currently going through Parliament. This may affect the permitting process.</li> <li>• Discussion of the Building Code with Louis – 1990 version still applies as the new Building Code is still proceeding through the legislative process. The new version updates cyclone loading requirements – this may apply to both existing as well as new development. Potential financial implications for this.</li> <li>• Provided copy of process that ICI goes through for the Building Code process – an engineering / building check only. Standard notification periods for all development along with pre-arranged pre-start meetings required for bigger developments. Building Certification provided once sign off is given.</li> <li>• The biggest issue is that it isn't a centralised process – run as linear process (rather than being able to run the NES and ICI process in parallel). ICI's mandate under the Building Code excludes large infrastructure e.g. roads and drainage.</li> </ul>
<p>National Environment Service</p> <ul style="list-style-type: none"> <li>• Louisa Karika (Deputy Director, previously National R2R Programme Director)</li> <li>• Vavia Tangatataia (Manager Advisory &amp; Compliance Division)</li> <li>• Phillip Strickland (Senior Compliance Officer)</li> <li>• Benjamin Maxwell (Compliance Officer)</li> </ul>	<ul style="list-style-type: none"> <li>• Vavia and Phillip work in the Advisory and Compliance Team for NES. They have five staff (including one new person).</li> <li>• The NES apply the draft Environment (Permits and Consents) Regulations in the absence of other guidance, including the tiered process (EIA/Technical Report) and forms and fees set out by the Regulations. This includes: <ul style="list-style-type: none"> <li>- Building permits are required for constructing a building of any kind. All applicants for developments are required to complete an initial assessment, including an Environmental Significance Declaration (ESD) Form (Schedule 2 of the Regulations attached in Appendix B),</li> <li>- A tiered environmental assessment process, which sets out circumstances where EIAs or technical (focus) reports are required. If the NES do not identify any environmental concerns, a building permit is issued.</li> <li>- The ability for NES to request additional information from applicants.</li> <li>- A roster of accredited engineers or environmental specialists.</li> </ul> </li> </ul>

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- The decision on whether a project requires an EIA or a technical report is made by the NES Compliance and Advisory team, and the applicant is then advised and sent Terms of Reference with the reporting requirements. Decision are based on the requirements set out in the Regulation.
- NES maintain a roster of accredited environmental specialists and engineers, however these are used by the applicant rather than the NES.
- Projects which require authorisation under s36 or Part 8 of the EA are recorded in a hard copy Projects Logbook. These projects were previously recorded in an electronic Microsoft Access database which included locations, however this was corrupted during a move to a different mapping system several years ago. NES is re-building this over time, with GIS locations mapped via phone app.
- The logbook records the applicant and the section of the Act under which the project is authorised. Projects in areas of interest may be recorded under s36 if they have significant environmental impacts e.g. wetland reclamation.
- IEAs are the permitting authority and make the overall decision on whether to grant or decline an application. If the application is declined, the applicant may reapply as many times as they like.
- Permits are issued subject to conditions, which generally include:
  - Notification of works to NES prior to works commencing
  - NES will monitor the site
  - Engineering supervision of works by the applicant's engineer, who also certifies that the activities have been complied with
  - Works must be undertaken as set out in the site plan and report provided to NES
  - Site specific conditions e.g. that no red/brown soil (i.e. topsoil/organic matter) is to be used on the foreshore.
- NES's understanding is that cultural heritage matters can only be addressed through the EIA process if the site is listed with the Cook Islands Cultural and Historic Places Trust under the Cultural and Historic Places Act 1994-95. This is up to the landowner and means that a significant site has recently not been captured in the EIA process.
- Monitoring and compliance is an issue. NES tries to monitor active construction sites on a daily basis, but also relies on the applicant's engineers to monitor the site, who may not be there at the critical times. There are issues across the board, including contractors to private and public sector clients.
- In general, the Environment Act doesn't have enough teeth in terms of compliance. NES used to have an in-house legal advisor but no longer.

	<ul style="list-style-type: none"> <li>• When activities are found to breach the Environment Act, the current process is for Environment Officers to verbally tell the person undertaking the works to stop works, and then to return to the office in order to get formal confirmation in writing, which is signed off by the Director.</li> <li>• Under the Environment Act, enforcement actions may be escalated to the Courts under certain circumstances. However, we understand that these are rarely used, and that no prosecutions have been undertaken for several years.</li> <li>• NES's understanding of the Environment Act is that it does not allow them to take enforcement action against contractors, which creates issues.</li> <li>• NES have a complaints procedure. Environment Officers also respond to complaints as required, and either follow these up or pass them on to another Ministry if the complaint falls outside of their jurisdiction e.g. for complaints about septic tanks, the Ministry of Health is informed. Sometimes, complainants may be advised to speak to their MP.</li> </ul>
<p>Cook Islands Tourism Corporation (CITC)</p> <ul style="list-style-type: none"> <li>• Halatoa Fua (Chief Executive Officer)</li> </ul>	<ul style="list-style-type: none"> <li>• Rarotonga, Aitutaki and Atiu are the islands set up to receive tourists.</li> <li>• Since 2016, there has been an increase in air access to various locations, and this has led to a growth in tourist numbers. In 2009, 100,000 tourists visited the Cook Islands; in 2018, 170,000 tourists visited.</li> <li>• There hasn't been huge growth in the number of beds provided by hotels, and therefore the growth in tourism numbers appears to have been mainly absorbed by holiday homes, which are not registered with CITC. These tend to be booked directly online through platforms such as AirBnB and Booking.com, as wholesalers don't market them.</li> <li>• Overall, there is a strong need to comply with regulations but there are concerns around cost and resources / trained technical skills.</li> <li>• Could a government subsidy assist with this (like the subsidy applied to private household water storage?)</li> <li>• In terms of key tourism infrastructure, this includes roads (key point of access for the whole island), sanitation, water and waste management (biggest issue is plastics). Cumulative impacts are an issue – development of hillsides, noting there is no land zoning. Note these issues are not confined to Rarotonga; Aitutaki is also experiencing issues particularly with water and waste management. Safeguarding the lagoon is very important.</li> </ul>
<p>Te Ipukarea Society</p> <ul style="list-style-type: none"> <li>• Kelvin Passfield (Manager)</li> </ul>	<p>Te Ipukarea Society is a non-government organisation with a focus on biodiversity, eco-sustainable development, waste management and youth development. The Society often reviews and submits on EIAs which are notified by NES. Kelvin noted that there isn't currently a process for independent peer review, and there is a lack of engineering experts (particularly coastal process engineers). Consideration of alternatives is not always robust. Compliance and monitoring is also an issue.</p>

<p>Cook Islands Natural Heritage Trust</p> <ul style="list-style-type: none"> <li>Joseph Brider (Manager)</li> </ul>	<ul style="list-style-type: none"> <li>Discussed permitting process – Proposal, Alternatives and Mitigation, along with the decision makers on the EIA process (the Board, who are predominantly MPs).</li> <li>Wetlands – filling in is an issue. Social/cultural aspects important – general perception is that a wetland is either for planting taro or it is a place that can be filled in. Less taro patches = more houses. Could there be incentives developed to keep wetlands?</li> <li>Joseph suggested the project team could also touch base with the Ministry of Justice who deal with warrants, land declarations, driveways/accessways (key concern as these tend to channel water past existing wetlands).</li> </ul>
<p>Ministry of Health (MoH)</p> <ul style="list-style-type: none"> <li>Aumea Herman (Secretary – Apologies)</li> <li>Tereapii Uka (Director Community Health Services)</li> <li>Teokotai Nooapii (Sanitation Technical Advisor - Health Inspector)</li> <li>Tangata Vaeau (Sanitation Health Inspector)</li> <li>Claytoncy Taurarii (Health Protection Officer – Compliance)</li> </ul>	<p>The Director opened the meeting noting the changes that have happened on the island over the years – coastal erosion, bigger dwellings and taro plantations decreasing, with associated changes in land use and drainage.</p> <p>Drainage an issue – culverts are undersized for the current rains. Groundwater capacity / ponding on surface become an issue in the rains. Septic tanks can become inundated with stormwater. Prolonged ponding creates habitat for mosquitos which cause public health issues e.g. dengue fever. Lagoon water quality is also a public health issue (ciguatera fish poisoning).</p> <p>In terms of the permitting process, the MoH approves the sanitation component of development:</p> <ul style="list-style-type: none"> <li>Effects of existing development is an issue. For new development, the MoH has a good process, which includes consideration of tank location, soakage rates / soil types, setbacks, appropriate treatment, access for pump outs etc.</li> <li>Ongoing monitoring – mainly this involves response to complaints.</li> <li>MoH also monitor construction and provide a compliance certificate.</li> </ul> <p>Tai Nooapii provided a copy of an application and permit for a sewage system under the Public Health Act (24 May 2019).</p>
<p>Office of the Public Service Commissioner (PSC)</p> <ul style="list-style-type: none"> <li>Annika Lane (VSA Planning and Policy Advisor)</li> </ul>	<ul style="list-style-type: none"> <li>Annika outlined the Infrastructure Bill (noting that this was embargoed until at the Select Committee stage). This includes new requirements to get permission from infrastructure providers prior to undertaking works that affect infrastructure, and also requiring survey plans to be signed off by infrastructure providers before partition orders can be approved. This Bill needs to go through Select Committees/ public submissions.</li> <li>Annika is currently undertaking an initial review of the current Environment Act with NES. There are potential synergies with the gap analysis of the permitting process T+TI is undertaking for this project.</li> <li>Annika also suggested talking to the new Water Authority To Tatou Vai – will there be catchment committees in the associated Bill?</li> </ul>

## Appendix G: SPREP templates

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