

# Practice and Guidance note

## Chapter E26 Infrastructure and the AUP(OP)

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# 1 Introduction

Network utility infrastructure is fundamental to well-functioning places and communities, in both urban and rural areas. Such infrastructure is diverse, but includes infrastructure associated with ‘three waters’ services (water, wastewater, stormwater), electricity, gas, petroleum, telecommunications and transport.

‘Infrastructure’ is formally defined in the [Resource Management Act 1991](#). The AUP(OP) uses the RMA definition of infrastructure, and adds some additional items to the [RMA definition](#).

In recognition of the criticality of network utility infrastructure, the AUP(OP) has a specific chapter dedicated to it – [E26 – Infrastructure](#). The chapter provides an enabling framework for infrastructure to support the growth that the AUP(OP) promotes.

While an enabling framework is provided, reasonable environmental ‘checks and balances’ are set out to ensure adverse effects on the environment are avoided, remedied or mitigated. The chapter does this by defining the activity status of network utility activities in a manner that is proportionate to the likely adverse effects generated by the activities and the characteristics of the environmental setting.

Within the AUP(OP) [Chapter E26](#) is unique in its structure and approach. Because infrastructure is fundamental to growth throughout the region, and because the chapter incorporates a number of overlay and Auckland-wide provisions, [Chapter E26](#) is inherently complex.

Infrastructure projects also have some unique characteristics that resource consent planners need to be aware of and understand.

In light of these matters, this Practice and Guidance Note (PGN):

- sets out the overall approach of [Chapter E26](#) and some of its key elements
- unpacks some of the chapter’s complexities and how infrastructure considerations in the chapter are balanced with other important considerations
- provides guidance around the unique characteristics of resource consent applications that are required for infrastructure projects under [Chapter E26](#).

## 2 Key Intent of E26 – Infrastructure

While [Chapter E26](#) is titled ‘Infrastructure’, and the preamble refers to ‘infrastructure’ in a generic manner, the main focus of the chapter is on network utilities (including road network activities, see [definition](#)) and electricity generation. In addition to larger scale network utility infrastructure within the public realm, the chapter also addresses private infrastructure – for example pipes and lines on private property.

A key focus of Chapter E26 is to provide an enabling consenting framework for the construction and maintenance of this infrastructure.

This enabling framework is framed through objectives and policies that promote the strategic importance of network utility infrastructure.

Notably, all but one of the nine objectives set out in E26.2.1 relate to recognition of the strategic importance and value of network infrastructure and are enabling. While one objective (Objective 9) states: *The adverse effects of infrastructure are avoided, remedied or mitigated.*

This approach is intentional and sets the scene in the chapter for enabling policies and through generally permissive activity standards. Table E26.2.3.1 sets out a wide range of network utility infrastructure activities in various zones and roads, and many of these activities are permitted activities.

However, where activities have the potential to generate adverse effects on the environment, they may be classified as controlled, restricted discretionary or discretionary activities. For example, overhead electricity lines greater than 110kV, are listed as discretionary activities in all zones (except in the Heavy Industry Zone) and roads.

Following Table E26.2.3.1 are permitted activity standards that apply to the activities listed in that table. These standards are designed to provide environmental safeguards to balance the permissive nature of the activity rules.

In addition to Table E26.2.3.1, the activity status of land use and development for road network activities is specified in Table E26.2.3.2. The rules in this table apply to the local public road network operated by Auckland Transport and any private road (provided the private road is in private ownership, provides public access and is connected to the public road network).

The chapter then proceeds, from Section E26.3, to address a wide range of resource management matters that fundamentally interact with other chapters of the AUP (OP).

### 3 Relationship between Chapter E26 – Infrastructure and other chapters in the AUP (OP), where they apply

Rule C1.6(1) in [Chapter C](#) of the AUP(OP) states that the overall activity status of a proposal will be determined on the basis of all rules which apply to the proposal, including any rule which creates a relevant exception to other rules.

Rule C1.8 of the AUP(OP) states that, when considering an application for resource consent for an activity that is classed as a restricted discretionary, discretionary or non-complying activity, the Council will consider all relevant overlay, zone, Auckland-wide and precinct objectives and policies that apply to the activity or to the site or sites where that activity will occur.

Although [Chapter E26](#) is the specific chapter dedicated to infrastructure, a proposal may trigger rules in other chapters of the AUP(OP), which need to be applied. It may also be necessary to refer to objectives and policies in other chapters, as discussed below.

#### 3.1 Applying Chapter E26 provisions

Table E26.1.1.1 sets out the structure of Chapter E26. The paragraph before the table explains that a number of Auckland-wide provisions have been included in activity tables in the chapter. As can be seen in the middle column of the table (extract below), from Section E26.3 onwards the chapter advances through sections that address different topic areas. The left-hand column then sets out the corresponding overlay or Auckland-wide provisions reference.

For example, and as seen in the extract of the table, E26.3 relates to Vegetation Management in relation to network utilities and electricity generation. Scanning across the row of the table to the left-hand column shows that the relevant overlay or Auckland-wide provisions are [Chapter D9 Significant Ecological Areas Overlay](#) and [Chapter E15 Vegetation management and biodiversity](#). This is then reinforced in Section E26.3, where rather than outlining objectives and policies within the chapter, reference is made back to other chapters for objectives and policies.

**Table E26.1.1.1 Structure**

<b>Overlay or Auckland-wide provisions</b>	<b>E26 sub-section reference</b>	<b>Page number</b>
Network utilities and electricity generation – All zones and roads	<a href="#">E26.2 Network utilities and electricity generation – All zones and roads</a>	3
<a href="#">D9 Significant Ecological Areas Overlay</a>  <a href="#">E15 Vegetation management and biodiversity</a>	<a href="#">E26.3 Network utilities and electricity generation – Vegetation management</a>	32
<a href="#">D13 Notable Trees Overlay</a>  <a href="#">E16 Trees in open space zones</a>  <a href="#">E17 Trees in roads</a>	<a href="#">E26.4 Network utilities and electricity generation – Trees in roads and open space zones and the Notable Trees Overlay</a>	43
<a href="#">E11 Land disturbance – Regional</a>  <a href="#">E12 Land disturbance – District</a>	<a href="#">E26.5 Network utilities and electricity generation – Earthworks all zones and roads</a>  <a href="#">E26.6 Network utilities and electricity generation – Earthworks overlays except</a>	52  62

Figure 1 Extract of Table E26.1.1.1

In summary, with regard to consideration of objectives and policies in relation to resource consent applications triggered by rules only in Chapter E26:

- If consent is required for a network utility or electricity generation activity ONLY under Activity table E26.2.3 - Network utilities and electricity generation - all zones and roads (rules A1- A66) or under Activity table E26.2.3 road network activities (rules A67- A70) , then ONLY the relevant objectives and policies under E26.2.1 and E26.2.2 need to be considered. This is because all the relevant objectives and policies are already included in Chapter E26.
- If consent is required under any other Activity table (rules A71- A201) in Chapter E26, then the relevant objectives and policies under E26.2.1 and E26.2.2 need to be considered, PLUS relevant objectives and policies in other chapters referenced in that section of chapter E26 - if identified in the preamble of that section.

### 3.1.1 Examples

The following hypothetical scenarios illustrates how the provisions in E26 inter-relate (or do not inter-relate) with other chapters of the AUP(OP).

## Scenario 1 - Example where only provisions in Chapter E26 apply

Watercare is proposing to build a pump station on one of its sites on a reserve with an Open Space zoning. The building will be 6 metres high, therefore exceeding the height limit of 2.5m under standard E26.2.5.2(3)(a). Activity (A51A) under E26.2.3.1 provides that wastewater pump stations that do not comply with standard E26.2.5.2 (3)(a) are a restricted discretionary activity. For the purpose of this scenario it is assumed that there are no other reasons for resource consent.

In this scenario, resource consent is only triggered by this one standard in Chapter E26. The application would be assessed against the following matters over which discretion is restricted under E26.2.7.1(1) (together with relevant assessment criteria in E26.2.7.1(1)):

- (a) functional and operational needs of, and benefits derived from, the infrastructure;*
- (b) visual effects;*
- (c) where located within a road, the operation and function of road network activities and effects on the amenity values of the streetscape;*
- (d) noise and vibration effects;*
- (e) odour effects;*
- (f) shadow flicker effects; and*
- (g) implications in terms of future planned urban development.*

In addition, objectives and policies within Chapter E26 that are relevant to any of these matters over which discretion is restricted should also be considered in the assessment. For example, the following objectives under E26.2.1 would be relevant to the first matter outlined above (E26.2.7.1(1)(a)):

- (1) The benefits of infrastructure are recognised.*
- (2) The value of investment in infrastructure is recognised.*
- (3) Safe, efficient and secure infrastructure is enabled, to service the needs of existing and authorised proposed subdivision, use and development.*
- (4) Development, operation, maintenance, repair, replacement, renewal, upgrading and removal of infrastructure is enabled.*

While the following objective would be relevant to the second matter above relating to visual effects (E26.2.7.1(1)(b)):

- (9) The adverse effects of infrastructure are avoided, remedied or mitigated.*

## Scenario 2 – Provisions in Chapter E26 and another chapter apply

A network utility operator is undertaking a project involving tree removal in a Significant Ecological Area (SEA). It is assumed that the construction of the physical infrastructure itself is a permitted activity under E26.2. However, given it is occurring in the SEA, in light of Rule C1.6(1), E26.3 needs to be reviewed to confirm whether resource consent approval is required for the tree removal that is required to construct the infrastructure.

The project will require the removal of five trees greater than 6m in height, in the SEA.

E26.3.1 and E26.3.2 state that the objectives and policies for vegetation management are located in:

- [D9 Significant Ecological Areas Overlay](#)
- [D10 Outstanding Natural Features Overlay and Outstanding Natural Landscapes Overlay](#)
- [D11 Outstanding Natural Character and High Natural Character Overlay and](#)
- [E15 Vegetation management and biodiversity.](#)

Activity (A77) in Table E26.3.3.1 states that vegetation alteration or removal that does not comply with Standards E26.3.5.1 to E26.3.5.4 is a restricted discretionary activity.

E26.3.5.2(1) states that vegetation removal must not include trees greater than 6m in height. Therefore, the removal of the five trees would require a restricted discretionary activity resource consent.

In terms of assessment, the consent planner would need to consider:

- The matters of discretion in Chapter E26, under E26.3.7.1(1), and assessment criteria under E26.3.7.2(1)
- The relevant objectives and policies of the Significant Ecological Areas Overlay D9.2 and D9.3. That is, objectives and policies that relate to the matters of discretion under E26.3.7.1(1).
- The objectives and policies in E26.2.

It is important to note that the activity does not also require consent under the Chapter E15 rules. This is made clear in the precis text for E15.4 Activity Table where it is specifically stated that for use and development of infrastructure the rules in E26 Infrastructure apply.



### Scenario 3 - Provisions in Chapter E26 and another chapter apply

The road controlling authority is reconfiguring and widening an existing road. Most of the road works are taking place within the existing road corridor, however some of the road widening will extend over adjoining council reserve land which has an Open Space Zoning. The reserve land has no overlay protection under the AUP(OP).

In this scenario, the activity rules under E26.2.3.2 - must be considered. The activity falls under Activity (A67) under E26.2.3.2 - '*Construction, operation, use, maintenance and repair of road network activities*' – which is a permitted activity.

The activity involves 10,000m<sup>2</sup> of earthworks within the road corridor, and 2,000m<sup>2</sup> within the reserve land adjoining the road corridor. These earthworks activities must be considered against Table E26.5.3.1 Activity table - Earthworks all zones and roads.

As the earthworks are over a surface area greater than 2500m<sup>2</sup> where they occur within the road corridor, consent as a restricted discretionary activity is required (A97). In addition, where the earthworks are occurring over the reserve land (Open Space zoning), consent is not required as the surface area of the earthworks is less than 2500m<sup>2</sup> (A95). Table E26.5.3.1 indicates these are district plan rules.

The earthworks will also need to comply with the standards set out in E26.5.5.2 that relate to district plan earthworks.

In this scenario, assessment will be against the district restricted discretionary activities matters of discretion set out in E26.5.7.1, the district restricted discretionary activities assessment criteria in E26.5.7.2, the objectives in E26.2.1, the policies in E26.2.2 and against the relevant objectives and policies in Chapter E12 – Land Disturbance – District. Again, relevance of objectives and policies is confirmed where they relate to a matter to which discretion has been restricted under E26.5.7.1.

## 3.2 Applying rules / standards in other AUP(OP) chapters

In addition to the chapter inter-relationships outlined in Table E26.1.1.1, where rules trigger resource consent in Chapter E26, there will be a number of other situations where infrastructure works will trigger resource consent applications through rules in other chapters. For example, where the works are occurring on land subject to natural hazards.

In this case, the provisions in Chapter E36 Natural Hazards and Flooding are relevant. Again, consideration of infrastructure proposals on land subject to natural hazards is treated differently to other proposals. In particular, there are specific objectives and policies that apply to consideration of infrastructure proposals on land subject to natural hazards.

For example, Objective E36.2(4) states:

*(4) Where infrastructure has a functional or operational need to locate in a natural hazard area, the risk of adverse effects to other people, property, and the environment shall be assessed and significant adverse effects are sought first to be avoided or, if avoidance is not able to be totally achieved, the residual effects are otherwise mitigated to the extent practicable.*

As per provisions in Chapter E26, this objective is recognising that unlike some other forms of development, infrastructure will have, from time to time, an unavoidable functional or operational need to locate in a natural hazard area. Given the vital community-wide importance of infrastructure, this means that applications for infrastructure projects in natural hazard areas might be approved where they might not for other types of projects.

In the case of Chapter E36, the relevant rules for infrastructure activities on land subject to natural hazards are found in Table E36.4.1 Rules (A52) to (A56).

Other chapters which contain rules and standards potentially applicable to infrastructure projects that sit outside Chapter E26 include:

- Chapter E1 – Water quality and integrated management
- Chapter E2 – Water quantity, allocation and use
- Chapter E3 – Lakes, rivers, streams and wetland
- Chapter E4 – Other discharges of contaminants
- Chapter E5 – On-site and small-scale wastewater treatment and disposal
- Chapter E6 – Wastewater network management
- Chapter E7 – Taking, using, damming and diversion of water and drilling
- Chapter E8 – Stormwater – Discharge and Diversion

- Chapter E9 – Stormwater quality – High contaminant generating car parks and high use roads
- Chapter E10 – Stormwater management area – Flow 1 and Flow 2
- Chapter E25 – noise and vibration (note – there are some noise and vibration rules applicable to particular, defined activities contained in Chapter E26)
- Chapter E38 Subdivision – Urban
- Chapter E39 Subdivision – Rural

In all other chapters, the following situations apply:

- There is precis text before the relevant activity table specifying that consent is not required under that activity table for infrastructure projects (rather reference should be made to Chapter E26). As stated in Scenario 2 under Section 3.1.1.1 of this PGN, Chapter E15 is an example of a chapter that has this precis text. Other chapters with this precis text include Chapters E11, E12, E16, and E17.
- The chapter does not contain rules or standards at all (e.g. Chapter E18 – Natural Character of the Coastal Environment)
- The chapter does not contain rules or standards that potentially overlap with rules in Chapter E26. An example of this is Chapter E13 – Cleanfills, Managed Fills and Landfills, which only contains rules relating to discharges from these facilities.

## 4 Assessing the permissive intent of Chapter E26 with other AUP (OP) considerations

The hypothetical scenarios set out above introduce an issue that resource consent planners will need to reconcile from time to time – assessing an application in light of the more enabling provisions of E26, which recognises the importance of network utility infrastructure and any other relevant provisions of the AUP(OP), which may include policy direction about other important environmental considerations.

The starting point is that all relevant provisions of the AUP(OP) should be considered in an assessment under section 104(1)(b). Relevant case law has established what is required is a fair appraisal of the objectives and policies of a plan, read as a whole.

The Supreme Court decision in *Environmental Defence Society v New Zealand King Salmon*<sup>1</sup> also highlighted that a decision-maker must identify those objectives and policies that are relevant, paying careful attention to the way in which they are expressed. Policies expressed in more directive terms will carry greater weight than

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<sup>1</sup> [Environmental Defence Society v New Zealand King Salmon \[2014\] NZSC 38](#)

those expressed in less directive terms e.g. 'avoid' is a stronger direction than 'take account of'.

Each application needs to be considered on its merits, paying attention to the language of the relevant objectives and policies. However, the strategic importance of network utility infrastructure, is recognised by the objectives and policies in Chapter E26, and by objectives and policies relating to infrastructure in other chapters of the AUP.

As an example, returning to the second hypothetical scenario above, relevant policies in Chapter D9 Significant Ecological Areas Overlay include Policies D9.3(1) and (8) which state:

*(1) Manage the effects of activities on the indigenous biodiversity values of areas identified as significant ecological areas by:*

...

*(b) avoiding other adverse effects as far as practicable, and where avoidance is not practicable, minimising adverse effects on the identified values;*

*(c) remedying adverse effects on the identified values where they cannot be avoided;*

*(d) mitigating adverse effects on the identified values where they cannot be avoided or remediated; ...*

*(8) Manage the adverse effects from the use, maintenance, upgrade and development of infrastructure in accordance with the policies above, recognising that it is not always practicable to locate and design infrastructure to avoid significant ecological areas.*

'Avoid' means do not allow or prevent the occurrence of. In isolation 'avoid' sends a clear signal that activities which result in the effects to be avoided will not be allowed. However, the use of the word 'avoid' must be considered in the context and framework in which it is used and does not necessarily always result in a blanket prohibition. Policy D9.3(1) directs the avoidance of adverse effects (outside the coastal environment) 'as far as practicable.'

Whether something is 'practicable' requires a value judgment in light of all the facts in a particular case. 'Practicable' has been interpreted in other statutory contexts to mean 'possible to be accomplished with known means or resources' and 'feasible.'

Policy D9.3(8) expressly recognises that it is not always 'practicable' to locate and design infrastructure to avoid significant ecological areas. Policies in Chapter E26 also identify that relevant matters for consideration may be whether infrastructure has a functional or operational need to be located in or traverse areas scheduled in the AUP(OP).

The wider public good aspect of network utility infrastructure and the recognition of this in the objectives and policies of E26 mean a network utility operator may be able to demonstrate that there are no other practicable alternative locations for infrastructure and that adverse effects have been avoided as far as practicable. Noting that a case by case assessment is always required, this could mean that an application for an infrastructure project in a Significant Ecological Area might be approved, whereas applications for other types of projects might be refused.

## **5 Contract tendering processes for infrastructure projects - what they mean for information provided with resource consent applications**

Network utility infrastructure projects often have construction and project management characteristics that are quite different to many housing or commercial development projects.

One of the key differences is that many network utility infrastructure projects will obtain resource consent approval before going to a tendering process with contractors. When considering tenders, network utility operators will weigh up sustainable practices, efficiency, innovation and costs, among other things, between proposals.

This means that network utility operators will often provide plans or information within resource consent applications that have an element of flexibility. This is because the contractors may ultimately undertake different construction management practices, which may only be finalised after the tendering process has concluded. This can relate to things such as construction management approaches, or erosion and sediment control measures.

A decision to notify a resource consent, and to grant a consent itself, must be reached on the basis of adequate and reliable information. The Council must have sufficient information in an application to understand and assess the adverse effects generated by an activity and how they are avoided, remedied or mitigated (as appropriate). However, it may also be appropriate to recognise the need for a degree of flexibility to be built into the application to allow for changes to project details.

For example, under the scenario described above in Section 3 the reason for consent is for the removal of five street trees to allow for works on the footpath. The issue would be whether the proposal avoids, remedies or mitigates the adverse effects of removing the trees. Rather than being overly concerned about the exact location or design of the tree pits or the ancillary application detail around design treatment of the footpath or road, key questions to ask could include:

- Are replacement trees proposed?

- Are they of the same or better quality than the existing trees?
- Are they native trees?

Furthermore, the network utility operators in Auckland who frequently undertake such works have separate engagement and consultation processes with mana whenua (provision of Cultural Values Assessment), local boards and the Auckland Design Office, to ensure the stakeholders' views are considered before the final designs are confirmed.

This can provide further safeguards when applying a more flexible approach with regards to infrastructure.