

15 July 2022

**To:** Richard Clarke and Tiwana Tibble, Te Rimu Trust

**Copy:** Hayley Jones, Tonkin & Taylor

**From:** David Randal, Thad Ryan, and Chelsea Easter

**Te Araroa proposed barge facility – advice on 'specified infrastructure' and 'functional need'**

Tēnā kōrua Richard, Tiwana,

1. Thank you for your instructions in relation to the Te Araroa proposed barge facility (**project**).
2. Following discussions with Tonkin & Taylor, we have been asked to advise on the application of the 'specified infrastructure'<sup>1</sup> and/or 'functional need'<sup>2</sup> requirements of clause 3.22(1)(b) of the National Policy Statement for Freshwater Management 2020 (**NPS-FM**) and regulation 45(2) of the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (**NES-F**).
3. Our advice, in summary, is as follows:
  - (a) In light of Tonkin & Taylor's planning analysis, we consider there is a strong argument that the project is 'regionally significant infrastructure' and therefore falls within the definition of 'specified infrastructure' in the NPS-FM; and
  - (b) Tonkin & Taylor have identified a series of factors which support a conclusion that the project has a 'functional need' to be established in its proposed location. Further support for that conclusion is provided by the High Court's decision in *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* (**Poutama**), attached.<sup>3</sup>

**Regionally significant infrastructure / specified infrastructure**

4. We have reviewed the planning analysis on the 'regionally significant infrastructure' / 'specified infrastructure' requirement from Tonkin & Taylor in relation to the project, as well as the legal advice provided by Derek Nolan QC to the Expert Consenting Panel for the Thames Kōpū Marine Precinct project.<sup>4</sup>
5. Regulation 45(2) of the NES-F provides that earthworks land disturbance within, or within a 10 m setback from, a natural wetland is a discretionary activity if it is for the purpose of constructing specified infrastructure. That regulation then defines 'specified infrastructure' to include (relevantly) "*regionally significant infrastructure as identified as such in a regional policy statement or regional plan*".

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<sup>1</sup> As defined in clause 3.21 of the NPS-FM and noted as a requirement in clause 3.22(b)(ii) and (iii). Of relevance for this project appears to be (b) "*Regionally significant infrastructure identified as such in a regional policy statement or regional plan*."

<sup>2</sup> As defined in clause 3.21 of the NPS-FM and noted as a requirement in clause 3.22(b)(iii).

<sup>3</sup> *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2022] NZHC 629.

<sup>4</sup> Legal advice: Kōpū Marine Precinct – specified infrastructure (31 January 2022); available at: [Microsoft Word - Draft opinion on Option 2 and specified infrastructure - final.docx \(epa.govt.nz\)](#)

6. Clause 3.21 of the NPS-FM also provides for a definition of 'specified infrastructure' which again includes (relevantly) "*regionally significant infrastructure as identified as such in a regional policy statement or regional plan*".
7. As such, both the NPS-FM and NES-F anticipate that regional planning documents will specifically identify 'regionally significant infrastructure' to guide the application of the relevant NPS-FM and NES-FM provisions.
8. However, the Tairāwhiti Resource Management Plan (**TRMP**), which includes both regional policy statement and regional plan provisions for Tairāwhiti / Gisborne, predates the NPS-FM and the NES-F. It has not yet been updated specifically to identify 'regionally significant infrastructure', as anticipated by the NPS-FM and NES-F.
9. With that in mind, we agree that a purposive approach is appropriate to identify if the project is 'regionally significant infrastructure' for the purposes of:
  - (a) regulation 45(2) of the NES-F; and
  - (b) the definition of 'specified infrastructure' in clause 3.21 of the NPS-FM (which includes 'regionally significant infrastructure').
10. Tonkin & Taylor have identified that there is strong support for finding the project amounts to 'regionally significant infrastructure' (and would be identified as such if the TRMP had a list), in:
  - (a) the TRMP (including the regional policy statement objectives and policies); and
  - (b) Te Tairāwhiti Regional Land Transport Plan.
11. We agree that those provisions, and the application of a purposive approach to the relevant NES-F and NPS-FM provisions, support the conclusion that the project amounts to 'regionally significant infrastructure'.

#### **Functional need**

12. Clause 3.22 of the NPS-FM sets out a policy requirement that the loss of extent of natural inland wetlands be avoided. That is subject to listed exceptions, including the pathway for 'specified infrastructure' in clause 3.22(b).<sup>5</sup>
13. As set out above, clause 3.21 of the NPS-FM defines specified infrastructure to include "*regionally significant infrastructure identified as such in a regional policy statement or regional plan*". As set out above, we consider there is a strong argument that the project qualifies as 'regionally significant infrastructure' and 'specified infrastructure'.
14. The pathway for the construction of specified infrastructure under clause 3.22(b) of the NPSFM requires that:
  - (i) ...
  - (ii) *the specified infrastructure will provide significant national or regional benefits; and*

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<sup>5</sup> Clause 3.22 sets out a similar policy position in respect of rivers.

- (iii) *there is a functional need for the specified infrastructure in that location; and*
- (iv) *the effects of the activity are managed through applying the effects management hierarchy provisions.*

15. Tonkin & Taylor address the significant benefits and effects management requirements in their analysis.
16. The 'functional need' requirement has recently been considered carefully by the Courts in relation to two Waka Kotahi NZ Transport Agency projects – Te Ara o Te Ata: Mt Messenger bypass project and Te Ahu a Turanga: Manawātū Taranua Highway. In both cases the Courts found that there was a functional need for the project to occur in the identified location which had been "*identified after consideration of options in the route designation process.*"<sup>6</sup>
17. In particular, the High Court recently considered an appeal from the Environment Court's decision on the Te Ara o Te Ata project.<sup>7</sup> In relation to the 'functional need' requirement in the NPS-FM, the Court held that:
  - (a) it is not necessary to demonstrate that there are no possible alternative locations in order to fulfil the functional need requirement – practicalities can and should be considered;<sup>8</sup>
  - (b) there is a fact- and context-specific consideration to be undertaken when considering the functional need requirement;<sup>9</sup> and
  - (c) the extent to which alternative options have been considered is important.<sup>10</sup>
18. The High Court emphasised that it is important not to read the 'functional need' requirement so narrowly as to defeat the purpose of the 'specified infrastructure' pathway / exemption. The mere fact that there is some other possible alternative location for the activity does not mean the functional need requirement is not met:

*"...the existence of any conceivable alternative would make the specified infrastructure exception in cl 3.22(1)(b) otiose. Such redundancy could not have been intended."*<sup>11</sup>

19. We have reviewed the planning analysis from Tonkin & Taylor in support of there being a functional need for the project in its proposed location, in light of the High Court's findings in that case. We agree that the factors identified by Tonkin & Taylor, including the limited suitable locations for geomorphological, logistical and cultural reasons, weigh in favour of the project meeting the functional need requirement. We note that (unlike Waka Kotahi NZ Transport Agency), the trustees of Te Rimu Trust do not have requiring authority status under the RMA, and cannot pursue compulsory acquisition via the Public Works Act 1981. That puts a significant limit on the extent to

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<sup>6</sup> *Director-General of Conservation v Taranaki Regional Council* [2021] NZEnvC 27, (2021) 22 ELRNZ 557 at [41]; *Waka Kotahi NZ Transport Agency v Manawātū-Whanganui Regional Council* [2020] NZEnvC 192 at [314].

<sup>7</sup> *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2022] NZHC 629.

<sup>8</sup> At [51] and [57].

<sup>9</sup> At [58].

<sup>10</sup> At [41(c)] and [58].

<sup>11</sup> At [57].

which the trustees can pursue options on land that they do not have property rights to, and is a matter that should probably be considered in the 'functional need' analysis.

20. For the purposes of the eventual application for resource consents under the COVID-19 Recovery (Fast-Track Consenting) Act 2020, the Expert Hearing Panel will expect a fulsome explanation of the process followed in considering alternative locations for the project, and the constraints associated with that task.

Nāku noa, nā



**David Randal**  
Partner

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