

MEMORANDUM

Date: 27 February 2023
To: Let Capital Number 3 Limited Partnership
From: Wynn Williams

WAIUKU WIND FARM – SPECIFIED INFRASTRUCTURE, THE NATIONAL ENVIRONMENTAL STANDARDS FOR FRESHWATER AND THE NATIONAL POLICY STATEMENT FOR HIGHLY PRODUCTIVE LAND

1. You have asked for our advice on:
 - (a) whether the proposed Waiuku Wind Farm and associated works (**Project**) is “specified infrastructure” for the purposes of the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (**NES-F**); and
 - (b) how clause 3.9 of the National Policy Statement for Highly Productive Land (**NPS-HPL**) applies to the Project.
2. These questions are important because the Project:
 - (a) involves activities regulated by the NES-F that may occur within natural inland wetlands, or within 10m of natural inland wetlands – the activity status of those parts of the Project is dependent on whether the Project is “specified infrastructure”;
 - (b) includes an area of class 3 soils, which are treated as highly productive land under the NPS-HPL. Clause 3.9 of the NPS-HPL requires councils to avoid the inappropriate use or development of highly productive land, subject to certain exceptions. The assessment of the Project in relation to national policy statements is a relevant consideration when the Minister for the Environment decides whether or not to refer a project under the COVID-19 Recovery (Fast-track Consenting) Act 2020 (**FTCA**).

Executive Summary

3. In our opinion:
 - (a) The Project is “specified infrastructure” for the purpose of the NES-F, as it is both a lifeline utility and regionally significant infrastructure.
 - (b) The exception in clause 3.9(2)(j)(i) of the NPS-HPL applies to the Project, as the Project is use or development associated with the operation of specified infrastructure, and which has a functional or operational need to be on the highly productive land.
 - (c) Regardless of the exceptions, we nonetheless consider that the Project is not inconsistent with the NPS-HPL.
4. Our detailed advice follows.

Specified infrastructure and the NES-F

5. The NES-F definition of “specified infrastructure” refers to the National Policy Statement for Freshwater Management (**NPS-FM**), which provides:

specified infrastructure means any of the following:

- a) infrastructure that delivers a service operated by a lifeline utility (as defined in the Civil Defence Emergency Management Act 2002)
 - b) regionally significant infrastructure identified as such in a regional policy statement or regional plan
 - c) any public flood control, flood protection, or drainage works carried out:
 - i. by or on behalf of a local authority, including works carried out for the purposes set out in section 133 of the Soil Conservation and Rivers Control Act 1941; or
 - ii. for the purpose of drainage by drainage districts under the Land Drainage Act 1908
6. Criterion (c) clearly does not apply to the Project. The question is whether either (a) or (b) are met.

Criterion (a) – infrastructure that delivers a service operated by a lifeline utility

7. A lifeline utility under the Civil Defence Emergency Management Act 2002 is defined as either a specified entity listed in the Act, or a business that carries on business described in Part B of Schedule 1.¹ LET is not a specified entity. The businesses described in Part B of Schedule 1 include:

- 2 An entity that generates electricity for distribution through a network or distributes electricity through a network.

8. On its face, Part B of Schedule 1 appears to apply only to businesses that are already carrying on the relevant activities (in this case, the generation of electricity for distribution through a network). That is, it arguably does not apply to new infrastructure that will generate electricity once built.
9. This definition is understandable, given the context of the Civil Defence Emergency Management Act 2002 (which empowers certain entities to respond to emergencies). However, in our opinion, the definition of “lifeline utility” in the NES-F and NPS-FM should be read in the context of those documents – both are future-looking and contemplate the establishment of new activities. In our opinion, rather than focusing on whether LET currently generates electricity for distribution, the question is: if the Project is approved, would LET be an entity that generates electricity for distribution through a network? On that basis LET would be a lifeline utility and the Project would be specified infrastructure.
10. We have not been able to find any case law directly on this issue. However, a similar approach was adopted for another fast track project – the Otawere Water Storage Reservoir in Northland. The applicant (Te Taitokerau Water Trust) had consent for another water storage reservoir, but was not supplying or distributing water. The Expert Consenting Panel received legal opinions from Anderson Lloyd, Thomson

¹ Civil Defence Emergency Management Act 2002, s 4.

Wilson and Derek Nolan KC. It concluded that the proposal was “specified infrastructure” under the lifeline utility limb because:

- (a) The scheme was infrastructure.
- (b) Te Taitokerau Water Trust was an entity.
- (c) If the scheme was consented, the Trust would distribute water.

11. The Otawere decision and legal submissions are available on the EPA’s website.²

Criterion (b) – regionally significant infrastructure

12. The Waikato RPS defines regionally significant infrastructure as:

Regionally significant infrastructure

Includes:

...

- (f) infrastructure for the generation and/or conveyance of electricity that is fed into the national grid or a network (as defined in the Electricity Industry Act 2010);

...

- (h) lifeline utilities, as defined in the Civil Defence and Emergency Management Act 2002, and their associated essential infrastructure and services;

13. In our opinion, the Project is demonstrably infrastructure for the generation of electricity, which will be fed into a network.

14. If there was any argument about this, the Waikato RPS definition of regionally significant infrastructure is inclusive, meaning infrastructure not listed can be included based on its character – for example, size and significance of the project and the construction spend and employment it will bring. This was confirmed in the decision on the Kopu Marine Precinct fast track project.

15. In our opinion, the size and scale of the Project is highly likely to reach the threshold of being regionally significant.

Application of clause 3.9 of the NPS-HPL

16. Clause 3.9 of the NPS-HPL protects highly productive land from inappropriate use and development. It provides:

- (b) Territorial authorities must avoid the inappropriate use or development of highly productive land that is not land-based primary production.

17. Clauses 3.9(2) and (3) contain exceptions to clause 3.9(1), recognising that not all use and development of highly productive land is inappropriate:

- (2) A use or development of highly productive land is inappropriate except where at least one of the following applies to the use or development, and the measures in subclause (3) are applied:
 - (a) it provides for supporting activities on the land:

² <https://www.epa.govt.nz/fast-track-consenting/referred-projects/otawere-water-storage-reservoir/>

...

- (j) it is associated with one of the following, and there is a functional or operational need for the use or development to be on the highly productive land:
 - (i) the maintenance, operation, upgrade, or expansion of specified infrastructure:
 - (ii) the maintenance, operation, upgrade, or expansion of defence facilities operated by the New Zealand Defence Force to meet its obligations under the Defence Act 1990:
 - (iii) mineral extraction that provides significant national public benefit that could not otherwise be achieved using resources within New Zealand:
 - (iv) aggregate extraction that provides significant national or regional public benefit that could not otherwise be achieved using resources within New Zealand.
- (3) Territorial authorities must take measures to ensure that any use or development on highly productive land:
 - (a) minimises or mitigates any actual loss or potential cumulative loss of the availability and productive capacity of highly productive land in their district; and
 - (b) avoids if possible, or otherwise mitigates, any actual or potential reverse sensitivity effects on land-based primary production activities from the use or development.

18. The Project is not land-based primary production, so the question is whether the Project falls within an exception in clauses 3.9(2) and (3). Our advice focusses on the application of clause 3.9(2)(j)(i) because the Project is specified infrastructure.³

Interpreting the NPS-HPL

- 19. Section 10 of the Legislation Act 2019 provides that the meaning of legislation must be ascertained from its text and in the light of its purpose and context. Legislation includes secondary legislation such as the NPS-HPL. While s 10 requires interpretation to be informed by context, it does not allow it to be distorted by context.
- 20. On its face, clause 3.9(2) of the NPS-HPL provides a test with multiple elements:

<u>Element</u>	<u>Reference</u>	<u>Description</u>
	<i>Chapeau:</i>	A use or development of highly productive land is inappropriate except where at least one of the following applies to the use or development:

³ The definition of specified infrastructure in the NPS-HPL includes infrastructure recognised as regionally or nationally significant in a National Policy Statement, New Zealand Coastal Policy Statement, regional policy statement or regional plan. For the same reasons as given above in relation to the NES-F, we consider that the Project is specified infrastructure in terms of the NPS-HPL.

Element 1	<i>Paragraph (j):</i>	It [referring to the use or development in question, as described in the chapeau] is associated with ...
	<i>Sub-paragraph (j)(i)</i>	... the maintenance, operation, upgrade, or expansion of specified infrastructure
Element 2	<i>Paragraph (j)</i>	there is a functional or operational need for the use or development to be on the highly productive land

21. To meet the exception in clause 3.9(2)(j)(i) of the NPS-HPL, the Project must be:
- (a) a use or development;
 - (b) associated with the maintenance, operation, upgrade or expansion of specified infrastructure; and
 - (c) have a functional or operational need to be on highly productive land.
22. In our opinion, the reference to “use or development” contemplates that both existing activities (use) or new activities (development) can utilise the exception. Reference to “development” in particular, connotes change (for example, the construction of new buildings or structures).
23. While reference to being associated with “maintenance”, “upgrade” or “expansion” of specified infrastructure may suggest that the exception applies only to existing specified infrastructure, development associated with the “operation” of specified infrastructure can be interpreted to include new specified infrastructure.
24. In terms of a functional or operational need, those terms are defined by the National Planning Standards as:
- Functional need** means the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment
 - Operational need** means the need for a proposal or activity to traverse, locate or operate in a particular environment because of technical, logistical or operational characteristics or constraints
25. A wind farm must be located in a location suitable for wind power generation. Given the location of the wind resource, it is axiomatic that there is a functional or operational need for the Project to occur at the site.

Background material

26. Given the potential uncertainty regarding the exception in clause 3.9(2)(j)(i), we have reviewed the section 32 report for the NPS-HPL and the “Guide to Implementation” published by the Ministry for the Environment.
27. The section 32 report suggests that clause 3.9(2)(j) is intended to apply to existing specified infrastructure only:
- Specific activities that have a functional or operational need to locate on HPL –** clause 3.9(2)(j) lists a range of infrastructure, New Zealand Defence Force and mineral extraction activities that are locally constrained in terms of where they can

locate and may necessarily be located on HPL in certain circumstances (eg, where a road needs to be extended through HPL, or the mineral resource is located on HPL). Infrastructure, defence and mineral activities are also activities that can deliver significant economic and social benefits to people and communities. As such, clause 3.9(2)(j) makes allowance for such activities provided they can demonstrate that (in the case of mineral or aggregate extraction) they provide a significant national or regional public benefit and (in all cases) have a functional or operational need to be located on HPL. Note in the case of specified infrastructure and New Zealand Defence Force facilities, provision is made under this clause for maintenance, operation, upgrade, or expansion, but not construction of new infrastructure or facilities. This is because it is expected new specified infrastructure or New Zealand Defence Force facilities will use the designation process to establish and that this clause focuses on existing infrastructure or facilities that may not have been established using a designation.

(emphasis added)

28. In contrast, the Guide to Implementation suggests that new infrastructure is captured:

The intention of this clause [referring to clause 3.9(2)(j)] is to recognise situations where the use or development of specified infrastructure, defence facilities or mineral or aggregate extraction may occur on HPL. The key test is to demonstrate that the use and development has a 'functional need' and/or 'operational need' to be on HPL, which are terms that are defined in the National Planning Standards.

- **Specified infrastructure** – this test recognises that the functional and operational needs of specified infrastructure (as defined in Clause 1.3 of the NPS-HPL) means that they may need to be located on HPL – such as where a new road or transmission lines may need to traverse over an area of HPL. Further, in many cases, the presence of specified infrastructure on HPL does not preclude the balance of the HPL being used by land-based primary production. For example, land surrounding structures used for infrastructure can often be used for animal grazing or some forms of horticulture.

Conclusion on NPS-HPL

29. In our opinion, there is a good argument that the exception in clause 3.9(2)(j)(i) applies to the Project – it is demonstrably a development associated with the operation of specified infrastructure, which has a functional or operational need to be located on the site. However, there is some uncertainty with this interpretation.
30. Regardless of the exception, we nonetheless consider that the Project is not inconsistent with the NPS-HPL. Under the current layout, no turbines or buildings are located within highly productive land and, if the layout changes (consistent with the “envelope approach”), the design will still attempt to avoid compromising the class 3 soils. In our opinion:
- (a) Any development that occurs within the class 3 soils (access tracks, parts of structures etc) will be associated with the wind farm, which is specified infrastructure located outside of highly productive land.
 - (b) That development has a functional and operational need to locate on highly productive land, for the same reasons as given above.

- (c) The roads will be a minimal loss of productive capacity, as all areas other than the road surface can continue to be used for primary production without impediment.
- (d) The scope of the word “inappropriate” is heavily influenced by context and should be assessed by reference to what is sought to be protected.⁴ The class 3 soils on the Project site are a small, discrete area, separated from other large and geographically cohesive areas of highly productive land. It is unlikely that the area will be mapped as highly productive land when mapping is undertaken by Waikato Regional Council in accordance with the NPS-HPL.

31. Please contact us if you have any questions or would like to discuss this further.

Wynn Williams

⁴ *Environmental Defence Soc Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38; *Man O’ War Station Ltd v Auckland Council* [2015] NZHC 767.