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Sue Simons
Panel Chair – Waerenga Solar Farm Expert Consenting Panel
C/EPA
by email

Attention: Gen Hewett

Waerenga Solar Farm – Fast-Track Application – Legal Advice

1. I refer to your instructions regarding legal matters arising from the Fast-Track Consenting Panel's (**Panel**) consideration of the Waerenga Solar Farm Proposal (**Proposal**) consent application (**Application**) under the COVID-19 Recovery (Fast-track Consenting) Act 2020 (**FTA**).

2. The Panel seeks advice regarding the application of the National Policy Statement for Highly Productive Land 2022 (**NPS-HPL**). Specifically, the Panel seeks a review of the Applicant's interpretation of the effect of the NPS-HPL on the Proposal and whether the Application falls within the ambit of the exception in cl 3.9(2)(j)(i) of the NPS-HPL.

Executive Summary

3. In my opinion:

   (a) What is proposed is development associated with the expansion of specified infrastructure. The absence of the word "construction" is of no consequence. Thus, the Proposal falls within the cl 3.9(2)(j)(i) exclusion.

(b) Notwithstanding that conclusion, I consider in the alternative the Applicant's interpretation of the NPS-HPL is supportable as:

(i) The Applicant's interpretation of the NPS-HPL and conclusion that the Application falls within the ambit of cl 3.9(2)(j)(i) "when read as whole" is consistent with established interpretation principles.

(ii) The Applicant's interpretation of the NPS-HPL is consistent with the policy direction of the NPS-HPL and aligns with the proposed changes to cl 3.9(2)(j)(i) which specifically include the "construction" of specified infrastructure as an exception.

(iii) I agree the Panel is required as a matter of law to "have regard to" all relevant national policy statements. Consideration of the NPS-HPL cannot be undertaken in a vacuum. The Panel must undertake a "fair appraisal" of each relevant instrument.

(iv) It is open to the Panel to have recourse to Part 2 of the Resource Management Act 1991 (**RMA**) when considering any inconsistency between the NPS-HPL and other national policy statements.

Context – The Proposal

4. The Application was lodged under the FTA on 7 July 2023 and seeks an overall discretionary resource consent for the construction and operation of a solar farm located on a 385ha site in Waerenga, North Waikato (**Site**).[1]

5. The Proposal and Site are described in sections 2.0 and 3.0 of the AEE. I do not repeat those details here.

6. Suffice to say, the Proposal seeks to construct and operate a solar farm comprising approximately 304,000 solar panels, associated infrastructure, an energy storage system and a National Grid substation, the purpose of which is to generate and convey electricity into the National Grid. The Site will continue to be used for agricultural purposes (sheep farming) as the proposed layout of the solar panels allows that rural use to occur.[2]

[1] The Site is made up of several parcels of land held in 18 separate titles.
[2] AEE, section 3.7.1.1.

7. The construction phase is expected to have a duration of approximately 15 – 18 months with an anticipated total operation period of 40 years.[3] The Proposal's activities will be decommissioned at the end of operational life and the land remediated and returned to pasture.[4]

The Issue

8. The Site is located on soils classified as LUC Classes 2, 3, and 4. As stated in the AEE,[5] 90.9% of the Site is classified as "highly productive land" by reference to the NPS-HPL. Thus, the Proposal includes activities that will be located on highly productive land and is therefore subject to the NPS-HPL.

9. Clause 3.9(1) of the NPS-HPL requires territorial authorities to avoid the inappropriate use of highly productive land that is not "land-based primary production".[6] A limited list of non-land based primary production activities that are not inappropriate are identified in cl 3.9(2).[7]

10. Clause 3.9(2)(j)(i) provides:

> (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:
>
> (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:

11. Because aspects of the Proposal are not for land-based primary production, the core issue arising is whether the Proposal falls within the cl 3.9(2)(j)(i) exclusion, thereby providing a consenting pathway.

[3] AEE, section 3.1.
[4] AEE, section 3.8.
[5] Section 6.5.1.3.1.
[6] Under the NPS-HPL, "land-based primary production" means production, from agricultural, pastoral, horticultural, or forestry activities, that is reliant on the soil resource of the land.
[7] Subject to also complying with the measures in subclause (3).

The AEE

12. The AEE engages with various National Policy Statements at 6.5.1 and with the NPS – HPL at 6.5.1.3.

13. At 6.5.1.3.2.1.1 the AEE states:

> - Section 1.6 of the RPS defines "regionally significant infrastructure" as including (d) the national electricity grid, as defined by the Electricity Industry Act 2010, and (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).
>
> Accordingly, the Project comprises "specified infrastructure" as defined in the NPS-HPL.

14. The AEE goes on in the balance of that subsection to explain why the Applicant says the new activities which are proposed are enabled by the NPS – HPL. The relevant provisions of the NPS-HPL are addressed.

15. In short, I agree the proposition set out is supportable (albeit in my view little if any weight attaches to the Minister's decision to refer the Proposal to the Fast-track Act process by reference to the specific requirements of the NPS – HPL) when coupled with further comments made in the Applicant's response to the Panel's second request for further information on 4 October 2023 (**RFI 2**). The Applicant relies upon an interpretation which reads the NPS-HPL 'as a whole'.

The Panel's Question

16. Relevantly, in RFI 2 the Panel stated:[8]

> The Discussion documents published by MFE proposing to amend the NPS-HPL calls into question the analysis undertaken by the Applicant that it meets the criteria under Clause 3.9 of the NPS – HPL. We would welcome your comments. If doubts do exist in that regard, please explain how the application for a 40 year project can be reconciled with the limit of 30 years on long term constraints in Clause 3.10 of the NPS – HPL.

17. My understanding of the 'Discussion documents' (**Consultation Documents**) published by Ministry for the Environment's (**MfE**) is that they are motivated by a concern that the relevant provision at issue here lacks some clarity given the absence of specific reference to "construction". As noted above, the AEE already explains the basis on which the Applicant says there is a pathway through the NPS – HPL. The Applicant's response by way of Legal

[8] RFI 2, Appendix 1 para 4.

Memorandum dated 18 October 2023 (**Legal Memo**) slightly alters and enlarges upon the position they took in the AEE.

18. The Applicant's Memo:

(a) Addresses the impact of the MfE Consultation Documents[9] on the Panel's consideration of the Proposal;

(b) Responds to the Panel's question regarding cl 3.10 of the NPS-HPL;

(c) Addresses the approach to decision-making in relation to the NPS-HPL; and

(d) Addresses the legal position regarding the relevance of the consultation documents on the Panel's consideration of the Application.

19. For ease of reference, my analysis below adopts the Applicant's headings.

The Applicant's Position and Analysis

20. The Applicant's position is that the Application falls within the ambit of the NPS-HPL's specified infrastructure exception.

21. Paragraph 9 of the Legal Memo sums up the position as:

> Therefore, while the Project may not fall within the strictly applied wording of the implementation clause 3.9(2)(j)(i) of the NPS-HPL ("maintenance, operation, upgrade, or expansion"), in light of the policy intent of clause 3.9(2)(j)(i), the AEE concludes that the Project is within the intended scope of the specified infrastructure exception.

22. I am unclear why the Applicant suggests that the Proposal "may not fall within the strictly applied wording of the implementation clause". In my view that is an unnecessary concession because it assumes that the word "construction" is required and that what is proposed does not come within the term "expansion". I think the addition of "construction" would be helpful perhaps, but it is not needed. In my opinion development associated with expansion must include construction, and what is proposed here is expansion. I explain this view under the "Alternative Interpretation" heading later in this advice.

[9] Ministry for the Environment Managing the use and development of highly productive land: Potential amendments to the NPS-HPL – Discussion document (ME 1802, September 2023) ("Discussion Document") and Interim Regulatory Impact Statement: Potential amendments to the National Policy Statement for Highly Productive Land (Ministry for the Environment and Ministry for Primary Industries, 5 September 2023) ("Interim RIS").

The consultation documents do not have any impact on the assessment of the project against the NPS-HPL

23. The Applicant addresses the Consultation Documents in paragraphs 3 – 11 of the Legal Memo.

24. I say at commencement that I agree with the Applicant's later conclusion the Consultation Documents are not documents the Panel must have regard to under Schedule 6, cl 31(1) of the FTA. The Consultation Documents are not listed in cl 31(1) as a matter the Panel must have regard to, nor do those documents have any statutory weight.

25. In addition, in my view consultation documents have a similar (or arguably lesser) status to guidance documents. In that respect:

    (a) The Environment Court has been reluctant to take non-statutory guidance documents into account when interpreting national direction.[10]

    (b) I note that the Environment Court recently provided commentary on the use of the MfE Guidance for interpreting the provisions of the NPS-HPL, stating that "[t]he MfE Guide does not have any formal statutory force for interpretive purposes."[11]

    (c) While guidance documents can be useful, they cannot be used as a replacement for the plain wording of secondary legislation.

    (d) Whatever its standing, where a guidance document is considered, it is fundamental that it must be applied in context.

26. In this case, the observations above equally apply to the Consultation Documents (which do not purport to express a firm view on the issue in any event – they refer to the omission of a clear 'consenting pathway', but do not suggest there is no pathway).

27. Notwithstanding the above and returning to the Applicant's Legal Memo, it identifies that the Consultation Documents are a response to a concern raised by stakeholders that the NPS-HPL does not provide adequate policy support for the construction of <u>new</u> specified infrastructure.

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[10] See for example *Federated Farmers of New Zealand v Northland Regional Council* [2022] NZEnvC 16 at [17]-[29] and *Greater Wellington Regional Council v Adams* [2022] NZEnvC 25 at [136]. Both cases related to the Ministry for the Environment *Defining 'natural wetlands' and 'natural inland wetlands': Guidance to support the interpretation of the National Policy Statement for Freshwater Management 2020 and the Resource Management (National Environmental Standards for Freshwater)* Regulations 2020 (September 2021).

[11] *Wakatipu Equities Ltd v QLDC* [2023] NZEnvC 188 at [9].

28. The concern is that the exception in cl 3.9(2)(j)(i) only refers to "the maintenance, operation, upgrade, or expansion" of specified infrastructure, and there is no express provision for use or development associated with the "construction" of specified infrastructure.

29. I agree with the Applicant that:

(a) The Consultation Documents confirm that the NPS-HPL was intended to provide explicit policy support for new specified infrastructure on highly productive land;

(b) The Consultation Documents advance as their preferred option the amendment of the NPS-HPL by inserting the word "construction" into cl 3.9(2)(j)(i);

(c) The Consultation Documents make various references to the absence of a clear 'consenting pathway' for the construction of new specified infrastructure on highly productive land; and

(d) Decision-makers must "have regard to" the NPS-HPL together with other national direction in determining whether consents should be granted under schedule 6, cl 31(1) of the FTA.

30. The Applicant's interpretation of cl 3.9(2)(j)(i) is set out in paragraphs 7 – 11 of the Legal Memo. The position adopted is supportable and could be relied upon, albeit in certain respects I say the answer is more straight forward (refer my advice below).

31. I note the Applicant's approach that the NPS-HPL should be read "as a whole". I understand the Applicant's approach to be a reference to the established principles of interpretation in the context of the RMA and planning instruments, and specifically that while it is appropriate to seek the plain meaning of a rule from the words themselves, it is not appropriate to undertake that exercise in a vacuum, regard must be had to the immediate context and, where any obscurity or ambiguity arises, it may be necessary to refer to the other sections of the plan and the objectives and policies of the plan itself. [12]

[12] See for example, *Budden v Auckland Council* [2017] NZEnvC 209 at [36] – [38]. Numerous other decisions could be referenced which adopt the position as expressed in *Powell v Dunedin City Council* [2005] NZRMA 174 (CA).

32. The High Court recently cited *Powell* with approval in *Southern Cross Healthcare Ltd v Eden Epsom Residential Protection Society Inc*[13] stating that "[t]he provisions of a planning document must be interpreted in the context of the document as a whole".[14]

33. By reference to the principles above:

(a) I accept that a plain reading of cl 3.9(2)(j)(i) is that "construction" is not expressly identified.

(b) However, that exercise should not be undertaken in a vacuum. In this context, a strict interpretation of the provision to exclude construction activities would not be consistent with the NPS-HPL when read as a whole. For example:

(i) The term "development" in cl 3.9(2)(j) on a plain meaning would include construction.

(ii) Use or development of highly productive land is not inappropriate where it is "associated with" the maintenance, operation, upgrade, or expansion of specified infrastructure. I agree with the Applicant that the term "associated with" captures a range of activities including development and construction of infrastructure. It is almost certain that development in association with the upgrade or expansion of existing specified infrastructure will require construction. Construction is therefore implied as appropriate in those circumstances.

(iii) Specified infrastructure is recognised as nationally important.

(iv) Application of a strict interpretation would create inconsistencies with the other relevant national policy statements such as the NPS-REG and the NPS-ET. Those instruments require decision-makers to recognise and provide for the effective operation, maintenance, upgrading and development of the electricity transmission network[15] and recognise and provide for national significance of renewable electricity generation activities.[16]

[13] [2023] NZHC 948.
[14] At [107].
[15] NPS-ET, Policy 2.
[16] NPS-REG, Policy A.

(v) The Applicant considers that a "fair appraisal" of all relevant provisions does not result in an "obvious" resolution to potential conflict. The Applicant therefore considers it open to the Panel to consider Part 2 of the RMA. I agree that the Panel could have recourse to Part 2 if they found difficulty in reconciling relevant provisions.

(vi) The Applicant is correct that cl 3.9(2)(j)(i) is not a rule and should not be applied as one.

(vii) The Applicant's assessment of consistency with the NPS-HPL objectives and policies is supportable.

Response to question regarding cl 3.10

34. I agree with the Applicant's response in paragraph 13 of the Legal Memo.

35. Clause 3.10 provides territorial authorities discretion to "only allow highly productive land to be subdivided, used, or developed for activities not otherwise enabled under clauses 3.7, 3.8, or 3.9". As noted by the Applicant, the purpose of cl 3.10 is to provide an exception for the use and development of highly productive land that has constraints such that land-based primary production is not economically viable for at least 30 years.

36. If the Panel accepts the Proposal falls within the ambit of cl 3.9(2)(j)(i) then there is no need to consider cl 3.10.

37. Given my view above, I make no comment on the appropriateness of the duration of consent sought.

The appropriate approach to decision making – "have regard to" the NPS-HPL and other relevant national policy statements

38. The Applicant advises the Panel that to "have regard to" means to undertake a "fair appraisal" of the relevant provisions as set out in *R J Davidson Family Trust v Marlborough District Council*.[17] I agree.

[17] [2013] NZCA 316, (2018) 20 ELRNZ 367 at [71-75].

39. The Applicant addresses the other relevant national policy statements at paragraph 17 of the Legal Memo. I consider that assessment supportable.

The Consultation Documents are not relevant matters to be considered under Schedule 6, cl 31(1)

40. I have already commented on this issue above. I agree with the Applicant's conclusion the Consultation Documents are not documents the Panel must have regard to under Schedule 6, cl 31(1) of the FTA. The Consultation Documents are not listed in cl 31(1) as a matter the Panel must have regard to, nor do those documents have any statutory weight.

41. I agree with the Applicant's conclusion that the Consultation Documents are not an "other matter" that is "relevant and reasonably necessary" for the Panel to determine the Application for the reasons addressed at paragraphs 27.1 – 27.3. I also agree with the view that consultation documents are less relevant to interpretation than guidance documents (which are of themselves limited in that regard).

42. While useful to the extent that they demonstrate support for the Applicant's interpretation, the Consultation Documents cannot be considered relevant matters to be considered under Schedule 6, cl 31(1).

Alternative Interpretation

43. An alternative interpretation is also available. I focus on the ambit of the opportunity offered by "expansion of significant infrastructure".

44. "Specified infrastructure" is defined as a 'class' in the NPS-HPL rather than through schedules of individual components. With reference to the definition, relevant are:

    (a) infrastructure that delivers a service operated by a lifeline utility[18].

    (b) infrastructure that is recognised as regionally or nationally significant in a National Policy Statement, New Zealand Coastal Policy Statement, regional policy statement or regional plan.

45. Enlarging on the specified infrastructure definition, "infrastructure that delivers a service operated by a lifeline utility" is a widely cast description which by reference to electricity

[18] Lifeline utility defined in Civil Defence Emergency Act 2002.

generation and conveyance does not identify individual components of that system. Facilities, lines and support structures are treated as a class. The relevant part of the "infrastructure" definition in the RMA is:

> (d) facilities for the generation of electricity, lines used or intended to be used to convey electricity, and support structures for lines used or intended to be used to convey electricity, excluding facilities, lines, and support structures if a person—
>
> (i) uses them in connection with the generation of electricity for the person's use; and
>
> (ii) does not use them to generate any electricity for supply to any other person:

46. Turning to the second part of the NPS-HPL definition of "specified infrastructure" engages two NPS and the Waikato Regional Policy Statement.

47. The National Policy Statement for Renewable Electricity Generation 2011 (**NPS-REG**) recognises the national significance of renewable electricity generation and renewable electricity generation activities. It does not identify individual components of that renewable electricity generation system in a schedule – i.e. they are treated as a class. The relevant definitions are:

(a) *Renewable electricity generation* means generation of electricity from solar, wind, hydroelectricity, geothermal, biomass, tidal, wave, or ocean current energy sources.

(b) *Renewable electricity generation activities* means the construction, operation and maintenance of structures associated with renewable electricity generation. This includes small and community-scale distributed renewable generation activities and the system of electricity conveyance required to convey electricity to the distribution network and/or the national grid and electricity storage technologies associated with renewable electricity.

48. The National Policy Statement on Electricity Transmission (**NPS-ET**) recognises as nationally significant the need to operate, maintain, develop and upgrade the electricity transmission network. The relevant definition is:

(a) *Electricity transmission network, electricity transmission and transmission activities/assets/infrastructure/resources/system* all mean part of the national grid of transmission lines and cables (aerial, underground and undersea, including the high-voltage direct current link), stations and sub-stations and other works used to connect grid injection points and grid exit points to convey electricity throughout the North and South Islands of New Zealand.

49. Again, the defined terms do not identify individual components of the electricity transmission network system in a schedule – i.e. they are treated as a class.

50. Finally, the Waikato Regional Policy Statement (**RPS**) defines "regionally significant infrastructure" (relevantly) as the national electricity grid, as defined by the Electricity Industry Act 2010, a network (as defined in the Electricity Industry Act 2010); 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).

51. Once again, the definition is widely cast as a class, rather than specific components. At the risk of repetition, pulling the strands above together it is clear that the NPS-HPL definition of specified infrastructure as it applies to electricity infrastructure does not attempt to identify individual components in a granular way.

52. What is proposed in this application is new infrastructure for the generation and conveyance of electricity that is fed into the National Grid or a network i.e. it will come within the definition of "specified infrastructure".

53. The mere fact that construction is involved of new infrastructure is not determinative. That is because it seems certain that <u>any</u> "expansion" will be new infrastructure and involve construction - and expansion is provided for. The absence of construction being directly mentioned is of no consequence if the activity in question comes within the ambit of development associated with expansion.

54. On that basis, I say that the Proposal is development associated with expansion of specified infrastructure - it will add to the classes of electricity infrastructure captured by the definition. It does not matter that there is no existing solar farm on the site which is being expanded.

55. It appears that issues with respect to interpretation and the absence of the term "construction" arise in part from an effective assumption that to come within the confines of "expansion" as provided for in cl 3.9(2)(j)(i) of the NPS-HPL, only a specific existing identified piece of specified infrastructure could be expanded. I disagree.

56. My assessment is that the new infrastructure proposed in this matter will expand the current electrical generation and conveyance "specified infrastructure" which exists in New Zealand generally and within the Waikato specifically. Arguably it might also be characterised as an upgrade to that infrastructure (in the context of direction to improve the renewable

generation capacity of New Zealand's electricity infrastructure, progressing such a goal is potentially able to be described as an upgrade).

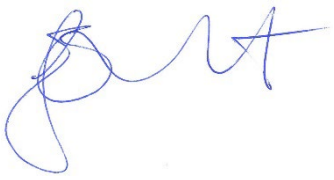
57. On a plain reading (and adopting a real-world approach), it is clear in my view that "development" "associated with" upgrade or expansion of specified infrastructure must encompass new physical construction to achieve those outcomes. While I accept that some form of upgrade might perhaps be accomplished through non-physical steps such as software improvements, it is not a tenable interpretation to limit the ambit of the provision only to non-physical works because they would have no implication for highly productive land. It is physical works (say works sitting on, displacing or disrupting use of highly productive land) which have implications for the protection of highly productive land, and specifically it logically is new physical works which are of concern because any historic lawful infrastructure impinging on highly productive land is already present and is not the focus of the provision in question.

58. Thus, in my opinion what is proposed is development associated with the expansion of specified infrastructure. The absence of the word "construction" is of no consequence. Therefore, the Proposal falls within the cl 3.9(2)(j)(i) exclusion.

Conclusion

59. In my opinion, the Proposal does fall within the ambit of the exception for specified infrastructure in cl 3.9(2)(j)(i) of the NPS-HPL.

Yours faithfully



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