

**BEFORE THE ENVIRONMENT COURT  
AT AUCKLAND**

**I TE KOTIMATUA O AOTEAROA  
TĀMAKI MAKĀURAU ROHE**

**ENV-2019-**

**IN THE MATTER** of an appeal under clause 14(1) of the First Schedule to the  
Resource Management Act 1991

**AND**

**IN THE MATTER** of the Proposed Regional Plan for Northland

**BETWEEN** **NORTHPOWER LIMITED**

**APPELLANT**

**AND** **NORTHLAND REGIONAL COUNCIL**

**RESPONDENT**

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**NOTICE OF APPEAL BY NORTHPOWER LIMITED**

**DATED 17 JUNE 2019**

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**To:** The Registrar  
Environment Court  
**Auckland**

### **Introduction**

1. Northpower Limited (**Northpower**) appeals against parts of a decision of Northland Regional Council (**Council**) on the Proposed Regional Plan for Northland (**Proposed Plan**).
2. Northpower made a submission and a number of further submissions on the Proposed Plan.
3. Northpower is not a trade competitor for the purposes of section 308D of the Resource Management Act 1991 (**RMA**).
4. Northpower received notice of the Council's decision on the Proposed Plan (**Decision**) on 4 May 2019.

### **Background**

5. Northpower owns the electricity distribution and ultra-fast broadband networks in Whangarei and Kaipara, both of which are critical infrastructure.
6. Northpower is 100% consumer-owned. Northpower is the majority owner of Northpower Fibre Limited (which is also partly owned by Crown Infrastructure Partners Limited and the Crown).
7. Northpower's networks at a glance include:
  - (a) approximately 3,700 kilometres of high voltage lines and cables;
  - (b) approximately 54,306 power poles; and
  - (c) more than 60,000 customers connected to the network.
8. Northpower is a requiring authority for the supply of line function services and the operation of a network for the purposes of telecommunication in accordance with sections 166 and 167 RMA.

9. Northpower's key assets include facilities required for communication, network electricity lines and associated infrastructure and the Wairua Hydro Electric Power Station. This includes fibre-based networks for telecommunications.
10. Northpower's networks traverse water, soil, air and the coastal marine area and exist both overhead and underground. Those networks are a physical resource for the purposes of the RMA and are identified in Appendix 3 of the Regional Policy Statement of Northland (**RPS**) as regionally significant infrastructure (being both "key facilities required for communication (including telecommunication and broadband)" and electricity distribution assets). The Wairua Hydro Electric Power Station is also specifically identified by the RPS as regionally significant infrastructure.

### **Scope of the appeal**

11. The parts of the Decision that Northpower is appealing are those parts relating to:
  - (a) Rule C.1.8 – Coastal works general conditions;
  - (b) Rule C.5.1.13 – Water takes below a minimum flow or water level;
  - (c) Rule C.5.1.14 – Water takes that will exceed an allocation limit;
  - (d) Policy D.2.6 – Minor adverse effects arising from the establishment and operation of regionally significant infrastructure;
  - (e) Policy D.2.8 – Appropriateness of regionally significant infrastructure proposals; and
  - (f) Policy D.2.16 - Managing adverse effects on indigenous biodiversity.
12. Those parts of the Decision are set out in **Schedule 3** to this Notice of Appeal.

### Reasons for the appeal

13. Without derogating from the generality of the matters set out in paragraph 14 below:

#### ***Rule C.1.8 – Coastal works general conditions***

- (a) Sections 23 to 23C of the Electricity Act 1992 (**Electricity Act**) empower Northpower to enter land to undertake works without notice if that is:
- (i) necessary in circumstances of probable danger to life or property; or
  - (ii) immediately necessary to maintain the continuity or safety of the supply and distribution of electricity.
- (b) Similarly, sections 125 – 126 and 1552D -1552E of the Telecommunications Act 2001 (**Telecommunications Act**) provide rights of entry to land in relation to lines (including fibre optic cables) and fibre-to-the-premises networks without notice if entry is:
- (i) necessary in circumstances of probable danger to life or property; or
  - (ii) immediately necessary to maintain the continuity or safety of the supply of telecommunications.
- (c) Northpower needs to be able to undertake such activities efficiently and effectively in order to comply with its statutory obligations (including those under the Health and Safety at Work Act 2015).
- (d) Undertaking works in the common marine and coastal area in such circumstances may mean that it is not reasonably practicable to comply with the general conditions for coastal works set out in Rule C.1.8(1) to (24) of the Proposed Plan as currently worded (which relate to structures and disturbance, mangrove removal and pruning, lighting and noise).

- (e) For example, while Northpower would seek to act as responsibly as practicable, it may not be reasonably practicable to:
- (i) avoid imposing restrictions on public access that last for longer than seven days or provide an alternative access route or controlled access (Rule C.1.8(4));
  - (ii) cause no disturbance or damage to saltmarsh, seagrass meadow or natural wetland (Rules C.1.8(8) and C.1.8(16));
  - (iii) remedy or restore any visible damage of the foreshore or seabed in certain specified areas within 48 hours, and in other areas within seven days (Rules C.1.8(9) and (11)); and/or
  - (iv) not cause permanent scouring or erosion of banks (Rule C.1.8(12)).
- (f) There are some exceptions in Rule C.1.8 for “emergency remedial work ... if a structure is damaged by a natural hazard event” (Rule C.1.8(5)) and “noise generated by emergency works arising from the need to protect life or limb or prevent loss or serious damage to property, or minimise or prevent environmental damage” (Rule C.1.8(24)(b)). However, those exceptions do not cover either:
- (i) all the situations in which activities may be required in the circumstances contemplated under the Electricity and Telecommunications Acts (e.g. if as a result of vandalism the continuity of electricity supply was at risk); or
  - (ii) all the aspects of the coastal works general conditions that Northpower may not be able to comply with.
- (g) In appropriate circumstances, Northpower will be able to undertake works under the emergency powers in section 330 RMA. However:
- (i) there may be situations where works undertaken in the circumstances contemplated under the Electricity and

Telecommunications Acts do not fall within the ambit of the emergency powers in section 330 RMA; and

- (ii) if works undertaken in such circumstances caused any more than a *de minimis* ongoing change to the foreshore or seabed, river banks, public access, saltmarsh, seagrass meadow or natural wetlands, there would be an argument that Northpower would need to obtain a retrospective resource consent for those works (due to the breach of Rule C.1.8) under section 330A(2) RMA.
- (h) That would not be consistent with either:
- (i) the efficient use of physical resources (section 7(b) RMA); or
  - (ii) the principle, in section 18A(1) RMA, that efficient and cost-effective processes which are proportionate to the functions or powers being performed or exercised should be used.

***Rule C.5.1.13 – Water takes below a minimum flow or water level and***

***Rule C.5.1.14 – Water takes that will exceed an allocation limit***

- (i) The Hearing Panel considering the Proposed Plan recommended that “the allocation limits for rivers and aquifers should explicitly not apply to non-consumptive takes as they do not impact on water quantity” (paragraph [126] of the Hearing Panel’s report).
- (j) However, as currently worded, Rules C.5.1.13 and C.5.1.14 do not make it clear that they do not apply to non-consumptive takes.

***Policy D.2.6 – Minor adverse effects arising from the establishment and operation of regionally significant infrastructure and Policy D.2.8 – Appropriateness of regionally significant infrastructure proposals***

- (k) Under changes made to section 104 RMA by the Resource Legislation Amendment Act 2017, when considering an application for resource consent, a consent authority must consider any measure proposed or agreed to by the applicant for ensuring positive effects on the

environment “to offset *or compensate for*” [emphasis added] any adverse effects on the environment of allowing the activity (section 104(1)(ab) RMA).

- (l) The addition of the requirement to consider “any adverse effects that would be compensated for” was specifically recommended by the Select Committee which considered that legislation (*Resource Legislation Amendment Bill as reported from the Local Government and Environment Committee, page 24*).
- (m) However, as currently worded:
  - (i) Policy D.2.6 only refers to consent authorities considering whether “other adverse effects” arising from proposed activities “are avoided, remedied, mitigated or offset”; and
  - (ii) Policy D.2.8 only requires consent authorities to consider the extent to which the adverse effects of regionally significant infrastructure “can be practicably reduced, inclusive of any positive effects and environmental offsets proposed”.

**Policy D.2.16 – Managing adverse effects on indigenous biodiversity**

- (n) Policy D.2.16 of the Proposed Plan largely follows the wording of Policy 4.4.1 RPS. However, it lacks:
  - (i) the recognition (included in Policy 4.4.1(4)(a) RPS) that a minor or transitory effect may not be an adverse effect on biodiversity; and
  - (ii) the specific recognition (included in Policy 4.4.1(5) RPS) that sometimes adverse effects on biodiversity cannot be reasonably avoided, remedied or mitigated in which case offsetting or compensation may be appropriate.

- (o) These omissions:
    - (i) may create a barrier to obtaining consent for activities required for the use, maintenance, repair and development of regionally significant infrastructure; and
    - (ii) are contrary to the requirement, in section 67(3)(c) RMA, that a regional plan must give effect to a regional policy statement.
14. Addressing the issues set out in paragraph 13 above in the manner set out in the relief sought by Northpower would:
- (a) be consistent with achieving the purpose of the RMA, including:
    - (i) promoting sustainable management of natural and physical resources;
    - (ii) enabling people and communities of Northland to provide for their social and economic wellbeing and, importantly, their health and safety;
  - (b) be consistent with the principles of the RMA, including enabling the efficient use and development of natural and physical resources;
  - (c) assist the Council with its functions under the RMA, particularly to:
    - (i) achieve integrated management of the effects of the use, development and protection of land and resources;
    - (ii) control effects of the use, development and protection of land;
    - (iii) use timely, efficient, consistent, and cost-effective processes that are proportionate to the functions or powers being performed or exercised;
  - (d) be consistent with the objectives and policies of the RPS, by (for example):
    - (i) recognising and promoting the benefits of Northpower's assets as regionally significant infrastructure (a physical resource),



which, through its use of natural and physical resources, can significantly enhance Northland's economic, cultural, environmental and social wellbeing and having particular regard for those benefits (RPS Objective 3.7 and Policies 5.3.1, 5.3.2);

- (ii) ensuring that Northland's energy and telecommunication supplies are secure and reliable, and electricity generation that benefits the region is supported, particularly when it uses renewable sources (RPS Objective 3.9);
- (e) provide for the provision, operation, maintenance and repair of critical pieces of regional infrastructure with strategic importance for the wellbeing of Northland and the functioning of its economy; and
- (f) be consistent with good resource management practice.

### **Relief sought**

15. Northpower seeks the following decisions:

- (a) exclusion from the general conditions on coastal works (in Rule C.1.8) of activities undertaken in relation to electricity and telecommunications networks which are:
  - (i) necessary in circumstances of probable danger to life or property; or
  - (ii) immediately necessary to maintain the continuity or safety of the supply or distribution of electricity or the supply of telecommunications;
- (b) clarification that non-consumptive takes are excluded from Rules C.5.13 and C.5.14;
- (c) amendment of Policies D.2.6 and D.2.8 to include recognition of consent authorities' obligation, under section 104(1)(ab) RMA, to consider any proposed measures to compensate for adverse effects;

- (d) amendment of Policy D.2.16 to recognise that:
    - (i) a minor or transitory effect may not be an adverse effect; and
    - (ii) sometimes adverse effects on biodiversity cannot be reasonably avoided, remedied or mitigated in which case offsetting or compensation may be appropriate;
  - (e) such additional alternative, consequential or ancillary relief as is necessary to address the issues raised in this notice of appeal; and
  - (f) costs.
16. The specific changes to the Proposed Plan provisions Northpower is proposing are set out in **Schedule 1** to this Notice of Appeal.

#### **Documents attached to this notice**

17. Northpower attaches the following documents to this notice:
- (a) at **Schedule 1** – the specific changes to the Proposed Plan provisions proposed by Northpower;
  - (b) at **Schedule 2** – a copy of Northpower’s submission and its main further submissions document (which includes all further submission points relevant to this appeal), with a copy of the submissions opposed or supported by the relevant parts of its further submissions;
  - (c) at **Schedule 3** – a copy of the relevant parts of the Decision; and
  - (d) at **Schedule 4** – a list of names and addresses of persons to be served with a copy of this notice of appeal.
18. The parties set out in Schedule 4 will be served with a copy of this notice of appeal and a copy of Schedule 1 to this notice. Copies of the documents referred to in paragraphs 17(b) to (d) may be obtained, on request, from MinterEllisonRuddWatts at the address for service specified below.

**Dated** this 17<sup>th</sup> day of June 2019



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R M Devine and C J Sinnott for  
and on behalf of **NORTHPOWER  
LIMITED**

**Address for service of Northpower Limited:**

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**Advice to recipients of a copy of this notice of appeal:**

19. How to become party to proceedings:
- (a) You may be a party to the appeal if you made a submission or a further submission on the matter of this appeal.
  - (b) To become a party to the appeal, you must,—
    - (i) within 15 working days after the period for lodging a notice of appeal ends, lodge a notice of your wish to be a party to the proceedings (in form 33) with the Environment Court and serve copies of your notice on the relevant local authority and the appellant; and

- (ii) within 20 working days after the period for lodging a notice of appeal ends, serve copies of your notice on all other parties.
  - (c) Your right to be a party to the proceedings in the court may be limited by the trade competition provisions in section 274(1) and Part 11A RMA.
  - (d) You may apply to the Environment Court under section 281 RMA for a waiver of the above timing or service requirements (see form 38).
20. How to obtain copies of documents relating to appeal:
- (a) The copy of this notice served on you does not attach Schedules 2 to 4. These documents may be obtained, on request, from the appellant.
21. Advice:
- (a) If you have any questions about this notice, contact the Environment Court in Auckland.

**Schedule 1: Specific changes to the Proposed Plan provisions proposed by Northpower**

Provision in decisions version	Relief sought
<p><b>Rule C.1.8 Coastal works general conditions</b></p>	<p>Add the following exemption to the general conditions in Rule C.1.8:</p> <p><i><u>Except that these general conditions do not apply to activities carried out by, or on behalf of, an owner or operator of an electricity or telecommunications network that are necessary in circumstances of probable danger to life or property or immediately necessary to maintain the continuity or safety of the supply and distribution of electricity or the supply of telecommunications.</u></i></p>
<p><b>Rule C.5.1.13</b></p> <p>Water take below a minimum flow or water level - non-complying activity</p>	<p>Add the following advice note to Rule C.5.1.13:</p> <p><i><u>For the avoidance of doubt, this rule does not apply to non-consumptive takes.</u></i></p>
<p><b>Rule C.5.1.14</b></p> <p>Water take that will exceed an allocation limit - non-complying activity</p>	<p>Add the following advice note to Rule C.5.1.14:</p> <p><i><u>For the avoidance of doubt, this rule does not apply to non-consumptive takes.</u></i></p>
<p><b>Policy D.2.6</b></p> <p>Minor adverse effects arising from the establishment and operation of regionally significant infrastructure</p>	<p>Amend Policy D.2.6 to read as follows:</p> <p><i>Enable the establishment and operation (including consenting) of regionally significant infrastructure by allowing any minor adverse effects providing:</i></p> <p>...</p> <p><i>3) other adverse effects arising from the regionally significant infrastructure are avoided, remedied, mitigated, or offset, or compensated for to the extent they are no more than minor.</i></p>

Provision in decisions version	Relief sought
<p><b>Policy D.2.8</b></p> <p>Appropriateness of regionally significant infrastructure proposals</p>	<p>Amend Policy D.2.8 to read as follows:</p> <p><i>When considering the appropriateness of a regionally significant infrastructure activity in circumstances where adverse effects are greater than envisaged in Policies D.2.6 and D.2.7, have regard and give appropriate weight to:</i></p> <p>...</p> <p><i>7) the extent to which the adverse effects of the activity can be practicably reduced, inclusive of any positive effects and environmental offsets <u>or compensation</u> proposed.</i></p>
<p><b>Policy D.2.16</b></p> <p>Managing adverse effects on indigenous biodiversity</p>	<p>Amend Policy D.2.16 to read as follows:</p> <p><i>Manage the adverse effects of activities on indigenous biodiversity by, <u>subject to (7) below:</u></i></p> <p>...</p> <p><i>(5a) <u>recognising that a minor or transitory effect may not be an adverse effect, and</u></i></p> <p>...</p> <p><i>(7) <u>recognising that in some circumstances, such as when providing for the functional needs of regionally significant infrastructure, adverse effects cannot be reasonably avoided, remedied or mitigated and it may be appropriate to consider the next steps in the mitigation hierarchy i.e. significant residual adverse effects on biodiversity values <u>being</u> offset or compensated <u>for:</u></u></i></p> <p><i>(a) in accordance with the Regional Policy Statement for Northland Policy 4.4.1; and</i></p> <p><i>(b) after consideration of the methods in (6) above, and</i></p>