

**IN THE ENVIRONMENT COURT
AT AUCKLAND**

**I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKĀURAU**

Decision [2023] NZEnvC 050

IN THE MATTER OF appeals under Clause 14 of Schedule 1 of
the Resource Management Act 1991

BETWEEN

ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW
ZEALAND INCORPORATED

(ENV-2019-AKL-000127)

NORTHPOWER LIMITED

(ENV-201-AKL-000123)

TRANSPower NEW ZEALAND
LIMITED

(ENV-2019-AKL-000107)

Appellants

AND

NORTHLAND REGIONAL
COUNCIL

Respondent

Court: Environment Judge J A Smith sitting alone under s 279 of the Act

Date of Order: 23 March 2023

Date of Issue: 23 March 2023

CONSENT DETERMINATION



A: Under section 279(1)(b) of the Resource Management Act 1991, the Environment Court, by consent, orders that:

- (1) the Proposed Regional Plan for Northland be amended as set out in Annexure A to this determination;
- (2) this determination resolves Policy D.2.9. No appeal points remain outstanding in Topic 10 – Infrastructure and energy.

B: Under section 285 of the Resource Management Act 1991, there is no order as to costs.

REASONS

Introduction

[1] This determination relates to appeals against Northland Regional Council's decision on the Proposed Regional Plan for Northland, in respect of appeals against provisions relating to Topic 10 – Infrastructure and energy.

[2] The appeals were lodged by:

- (a) Royal Forest and Bird Protection Society of New Zealand Incorporated (**Forest and Bird**);
- (b) Northpower Limited; and
- (c) Transpower New Zealand Limited.

[3] The appeals related to Policy D.2.9 Appropriateness of regionally significant infrastructure proposals.¹

[4] By Consent Order dated 9 March 2021, Transpower New Zealand's appeal point on Policy D.2.9 was resolved.

¹ Previously D.2.8.

[5] The following persons have given notice of their intention to become parties to Forest and Bird and/or Northpower Limited's appeals under section 274 of the Act:

- (a) Transpower New Zealand Limited;
- (b) Waka Kotahi;
- (c) Northpower Limited;
- (d) Patuharakeke Te Iwi Trust Board;
- (e) Minister of Conservation;
- (f) Northport Limited;
- (g) Top Energy Limited;
- (h) Channel Infrastructure NZ Limited; and
- (i) Federated Farmers of New Zealand Incorporated.

[6] CEP Services Matauwhi Limited is a section 274 party only on Transpower New Zealand Limited's appeal on Topic 10. In any event, CEP Services Matauwhi Limited has confirmed it has no issues with the agreed amendments to Policy D.2.9.

Agreement reached

[7] The parties participated in Court-assisted mediation on the appeals in September 2019 as well as subsequent informal discussions. The parties have reached agreement on Policy D.2.9.

[8] Policy D.2.9 requires decision-makers to have regard and give appropriate weight to a number of matters when considering the appropriateness of regionally significant infrastructure proposals in circumstances where adverse effects are greater than envisaged in Policies D.2.7 and D.2.8.²

² Previously D.2.6 and D.2.7.

- [9] Policies D.2.7, D.2.8 and D.2.9 are intended to work together:
- (a) *Policy D.2.7 Minor adverse effects arising from the establishment and operation of regionally significant infrastructure* provides that the establishment and operation (including consenting) of regionally significant infrastructure should be enabled by allowing minor adverse effects, provided that certain conditions are met;
 - (b) *Policy D.2.8 Maintenance, repair and upgrading of regionally significant infrastructure* provides that the maintenance and upgrading of established regionally significant infrastructure wherever it is located should be enabled by allowing adverse effects in certain circumstances;
 - (c) The intent of Policy D.2.9 is to identify non-exclusive relevant considerations for more substantial regionally infrastructure proposals.
- [10] Policy D.2.9 was appealed by:
- (a) Forest and Bird, who sought that the policy be deleted. The rationale for Forest and Bird's appeal is that the policy is unclear and contrary to case law and the New Zealand Coastal Policy Statement 2010 (**NZCPS**);
 - (b) Northpower Limited, who sought that the policy be amended so that regard and appropriate weight is given to any proposed compensation. The rationale for Northpower's appeal is that under s 104(1)(b) RMA, consent authorities have an obligation to consider any proposed measures to compensate for adverse effects; and
 - (c) Transpower New Zealand Limited, who sought that a new policy be inserted or that Policy D.2.9 be amended to give effect to the National Policy Statement on Electricity Transmission 2008, which provides a comprehensive management regime for the National Grid. As noted above, Transpower's appeal was resolved by Consent Order dated 9 March 2021.

- [11] Following mediation and subsequent discussions, the parties agreed to:
- (a) Make amendments to the heading and chapeau of the Policy D.2.9, to explicitly exclude National Grid infrastructure from the policy. New Policy D.2.10 Operation, maintenance, upgrading and development of the National Grid (which was approved by Consent Order dated 9 March 2021) applied specifically to National Grid Infrastructure;
 - (b) Amend the chapeau of the policy to remove the reference to “in circumstances where adverse effects are greater than envisaged in Policies D.2.7 and D.2.8”. The parties consider that it is not longer necessary to have that degree of direction in the chapeau as to how the policy relates to other policies in the Proposed Plan. The parties consider that the plan interpretation statement approved by the Court in the Topic 1 Consent Order dated 23 September 2022³ provides sufficient guidance on how potentially competing objectives and policies in the Proposed Plan applies, removing the need for a chapeau that addresses the same issue.

For context, the plan interpretation statement provides:

Application of objectives and policies:

1. Regard must be had to all the relevant objectives and policies in the Plan when considering an application for a resource consent.
2. Where policies in this plan are in conflict, the more directive policies shall prevail.
3. Regard must be had to any relevant provisions of the Regional Policy Statement and National Policy Statements, and where appropriate Part 2 of the RMA, when considering an application for a resource consent.

The effect of the plan interpretation statement is that a plan user would need to consider Policies D.2.7, D.2.8 and D.2.9 and determine which

³ *Transpower New Zealand Limited & others v Northland Regional Council* [2022] NZEnvC 174.

applies, but then also look to other relevant objectives and policies in the Proposed Plan, including those that seek to achieve environmental outcomes such as *Policy D.2.17 Managing adverse effects on natural character, outstanding natural landscapes and outstanding natural features* and *Policy D.2.18 Managing adverse effects on indigenous biodiversity*. If the policies are in conflict, the more directive policy will prevail.

(c) Make the following amendments to clause (7):

7) the extent to which the adverse effects of the activity can be practicably ~~reduced~~ managed, inclusive of any positive effects and environmental offsets or compensation proposed, and

The parties consider that the amendments are appropriate as they reflect consent authorities' obligations under s 104(1)(ab) RMA to consider any proposed measures to compensate for adverse effects.

Consideration

[12] The Court has now read and considered the consent memorandum of the parties dated 10 March 2023.

[13] The Court is making this order under section 279(1) of the Act, such order being by consent, rather than representing a decision or determination on the merits pursuant to section 297. The Court understands for present purposes that:

- (a) all parties to the proceedings have executed the memorandum requesting this order;
- (b) all parties are satisfied that all matters proposed for the Court's endorsement fall within the Court's jurisdiction, and conform to the relevant requirements and objectives of the Act including, in particular, Part 2.

[14] In terms of an assessment under s 32AA RMA, the parties advised that the proposed changes were discussed at length between the parties through an iterative

process. The parties consider that the proposed changes are the most appropriate way to achieve the objectives of the Proposed Plan as well as give effect to the relevant higher-order documents, including the Regional Policy Statement for Northland and the NZCPS. The changes are consistent with other amendments approved by the Court, including the interpretation statement referred to above.

[15] This Determination does not represent the outcome of a full hearing by the Court, but rather an agreement reached between parties represented by experienced counsel after lengthy discussions.

[16] The Consent Order dated 9 March 2021 approved amendments to the chapeau of Policy D.2.9. There are further amendments to the chapeau made by this determination. I agree that the plan interpretation statement provides appropriate guidance such that the removal of the reference to other policies in the chapeau is appropriate. This simplifies matters. The interpretation statement makes it clear that if policies are in conflict the more directive policy prevails.

[17] I agree that the amendments to clause (7) are appropriate as they reflect obligations under s 104(1)(ab) RMA to consider any proposed measures to compensate for adverse effects.

[18] I am satisfied that the agreement reached is one that represents the various interests of the parties. I conclude the parties have taken a considered approach, and the agreed amendments are the most appropriate way to achieve the purpose of the Act and the objectives in the Plan. Overall, I consider the sustainable management purpose and the other relevant requirements of the Act are broadly met.

Order

[19] Therefore, the Court orders, by consent that the Proposed Regional Plan for Northland be amended as set out in **Annexure A** to this Determination.

[20] This determination resolves Policy D.2.9. No appeal points remain outstanding in Topic 10 – Infrastructure and energy.

[21] There is no order as to costs.



J A Smith

Environment Judge



ANNEXURE A: AMENDMENTS TO THE PROPOSED PLAN

D.2.9 Appropriateness of regionally significant infrastructure proposals (except the National Grid)

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, (except the National Grid)~~, have regard and give appropriate weight to:

- 1) the benefits of the activity in terms of D.2.5, and
- 2) whether the activity must be recognised and provided for by a national policy statement, and
- 3) any demonstrated functional need for the activity, and
- 4) the extent to which any adverse environmental effects have been avoided, remedied or mitigated by route, site or method selection, and
- 5) any operational, technical or location constraints that limit the design and location of the activity, including any alternatives that have been considered which have proven to be impractical, or have greater adverse effects, and
- 6) whether the activity is for regionally significant infrastructure which is included in Schedule 1 of the Civil Defence Emergency Management Act as a lifeline utility and meets the reasonably foreseeable needs of Northland, and
- 7) the extent to which the adverse effects of the activity can be practicably ~~reduced~~ managed, inclusive of any positive effects and environmental offsets ~~or compensation~~ proposed, and
- 8) whether an adaptive management regime (including modification to the consented activity) can be used to manage any uncertainty around the occurrence of residual adverse effects, and
- 9) whether the activity helps to achieve consolidated development and the efficient use of land and resources, including within the coastal marine area.