BEFORE AN EXPERT PANEL
SOUTHLAND WIND FARM

UNDER the Fast-track Approvals Act 2024

IN THE MATTER OF an application by Contact Energy Limited for approvals for the Southland Wind Farm

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APPENDIX TO PART A OF APPLICATION DOCUMENTS

LEGAL ANALYSIS OF FAST-TRACK APPROVALS ACT 2024 FRAMEWORK AND APPLICATION BY CONTACT ENERGY LIMITED

18 August 2025

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1. INTRODUCTION AND BACKGROUND TO THE PROJECT

Purpose and structure of this document

1.1 Contact Energy Limited (**Contact**) is lodging a substantive application, under section 42 of the Fast-Track Approvals Act 2025 (**FTAA**), for various approvals[1] to construct, operate, and maintain a wind farm in Slopedown, Southland (the **Project**).

1.2 The FTAA is intended to provide a more efficient and certain consenting pathway for projects with significant regional or national benefits, and establishes a framework within which Contact's application for approvals is to be considered. To assist the Expert Panel (**Panel**), this document presents a summary of that framework and evaluates Contact's application against the key legal tests.

1.3 The Project is a 'referred project', meaning Contact applied to use the fast-track approvals process for the Project and that application was granted by the Minister for Infrastructure.[2] In doing so, the Minister was satisfied that:

(a) the Project would have significant regional or national benefits; and

(b) referring the Project to the fast-track approvals process:

(i) would facilitate the Project, including by enabling it to be processed in a more timely and cost-effective way than under normal processes; and

(ii) is unlikely to materially affect the efficient operation of the fast-track approvals process.[3]

1.4 The structure of this document is as follows:

(a) this **Section 1** introduces the Project and its context, including to acknowledge that the Project was previously considered under the COVID-19 Recovery (Fast-track Consenting) Act 2020 (**Covid Fast-track Act**);

(b) **Section 2** summarises the legal framework under the FTAA;

[1] Contact is applying for all necessary approvals to authorise the Project, which include resource consents that would otherwise be applied for under the Resource Management Act 1991 (**RMA**); concessions that would otherwise be applied for under the Conservation Act 1987 (**Conservation Act**); wildlife approvals that would otherwise be applied for under the Wildlife Act 1953 (**Wildlife Act**); an archaeological authority that would otherwise be applied for under the Heritage New Zealand Pouhere Taonga Act 2014 (**HNZPT Act**); and approvals that would otherwise be applied for under the Freshwater Fisheries Regulations 1983 (**Fisheries Regulations**).
[2] Sections 21 and 22 of the FTAA.
[3] These are the criteria for accepting a referral application under s 22(1) of the FTAA.

(c) **Section 3** applies the framework to the Project, including by reference to the Project's environmental effects and, in respect of the resource consents sought, the relevant planning instruments;

(d) **Section 4** addresses the Panel's power to set conditions; and

(e) **Section 5** contains a brief conclusion.

1.5 Detailed information on the Project and how it has been evaluated within the consenting framework is provided in the suite of application documents prepared by expert planners at Mitchell Daysh Ltd, drawing on technical advice provided by a large team of other experts. This legal analysis complements and is intended to be read alongside the application and its supporting materials.

Principal submission

1.6 The reasons for the Panel to grant the consents sought for the Project are numerous and compelling. Chief among those is the fact that access to secure, sufficient and reliable renewable electricity is of critical importance to the social, economic, and cultural wellbeing of people in Southland and throughout New Zealand.

1.7 The Project will deliver those national and regional benefits at a very large scale – it is expected to generate approximately 1,200 gigawatt hours of renewable electricity each year (depending on the wind turbine chosen for the Project), sufficient to meet the energy needs of up to 150,000 households[4] – in an environmentally responsible manner.

1.8 There is also a pressing need to decarbonise New Zealand's economy, to support global efforts to address the existential threats posed by human-induced climate change.

1.9 This will be particularly challenging given that electricity demand is expected to rise significantly in the coming decades. The Project represents a major opportunity to help the Government meet New Zealand's commitment to meeting this demand primarily with renewable electricity. That is, the Project will help New Zealand meet:

(a) the emissions reduction target of reducing our greenhouse gas emissions (except biogenic methane) to net zero by 2050;[5] and

[4] To put this figure into context, as at the 2018 census there were 38,931 households (ie occupied dwellings) in Southland.
[5] Section 5Q of the Climate Change Response Act 2002.

(b) the targets for the energy system set out in the Government's second Emissions Reduction Plan, delivering 'Electrify New Zealand' is based on a goal of doubling renewable energy generation by 2050.

1.10 The Project is strongly supported by the National Policy Statement for Renewable Electricity Generation 2011 (**NPS-REG**) and numerous other RMA and other statutory documents, including the Southland Regional Policy Statement and relevant district plans, and the Emissions Reduction Plan, all of which place considerable emphasis on the need to increase electricity generation from renewable sources in order to reduce emissions.

1.11 Further, the Project has been carefully designed to ensure that it:

(a) will result in a number of other direct positive effects, including economic benefits and employment opportunities;

(b) will comprehensively address all adverse effects through construction management techniques and bespoke conditions requiring adverse effects to be avoided, remedied, and mitigated (and offset and compensated for, in respect of residual ecological effects);

(c) will deliver many enduring benefits to local communities and the environment, primarily through wide-ranging cultural mitigation initiatives, a generous Community Benefit Fund, and comprehensive measures to address ecological effects (described in more detail below);

(d) is consistent with the relevant planning documents; and

(e) promotes the outcomes envisaged by Part 2 of the RMA.

1.12 For these reasons, the Project would strongly merit approval under the RMA and other relevant legislative regimes.

1.13 Under the FTAA, there is no reasonable basis on which the Panel could decline Contact's application; it will strongly promote the purpose of the FTAA (to *"facilitate the delivery of infrastructure (…) projects with significant regional or national benefits"*) to grant the application on appropriate conditions – that is, on conditions that are proportionate to the adverse effects of the Project and that will not unreasonably compromise Contact's ability to deliver the Project.

Contact Energy Limited

1.14 Contact is the second largest electricity generator/retailer in New Zealand, with a flexible and largely renewable portfolio of electricity generation assets.

1.15 Contact commenced operations in early 1996 when it acquired a portfolio of electricity generation assets from the state-owned electricity generator (Electricity Corporation of New Zealand). Contact operates 11 generating stations across the country and has recently acquired Manawa Energy and its large renewables portfolio. Contact generally produces 80-85% of its electricity from renewable hydro and geothermal resources, although is on track for this figure to reach 95% by 2027.

1.16 Contact is committed to helping the New Zealand Government meet its climate change goals by developing and operating renewable electricity infrastructure, and is making good progress through a multi-billion dollar investment in clean energy. The Project is one of Contact's key initiatives to meet this commitment.

The Project

1.17 Part A, Section 5 of the application documents describes the Project in detail. In summary, the Project comprises a large wind farm of up to 55 turbines, electrical reticulation infrastructure, a substation, meteorological masts, an operations and maintenance building, access roads, and other facilities associated with constructing and operating the Project. The Project also includes an overhead transmission line and switching station (also known as a Grid Injection Point or **GIP**) to connect the wind farm to the Transpower National Grid.

1.18 The area where the wind turbines are proposed to be located (the **Wind Farm Site**) is in the Southland District, which is within the Southland Region. The proposed transmission line crosses into the Gore District (also in the Southland Region). The wider site comprising the Wind Farm Site, the transmission infrastructure and other Project activities is referred to as the **Project Site**.

1.19 An indicative layout of these components is illustrated in **Figure Project Description 2** in Part G of the application documents.

1.20 The Project incorporates numerous other elements that, while not directly needed to generate renewable electricity, will provide significant benefits for local communities and the environment more generally and are now properly considered as integral aspects of this proposal.

1.21 These elements have been developed by Contact working together with Project partners (ie mana whenua) and stakeholders (such as the Department of Conservation (**DoC**)), and in response to comments made by

participants in the previous consenting process relating to the Project (under the Covid Fast-track Act). They include:

(a) wide-ranging **cultural initiatives** by which Contact acknowledges the mana and will support the exercise of kaitiakitanga by Kā Papatipu Rūnaka ki Murihiku, including:

(i) processes and protocols, including a joint relationship group (Ngā Pou Whai Hua) and programme of works (Tuia Te Mana ō Pawakataka), to ensure that the implementation of the Project is culturally safe and mana-enhancing;

(ii) the establishment of a pūtea/fund for addressing residual cultural effects of the Project and to support the wellbeing of members of Kā Papatipu Rūnaka;

(iii) the provision of power to four local marae and support in them becoming energy self-sufficient;

(iv) educational scholarships; and

(v) potential employment opportunities;

(b) a proposed **Community Benefit Fund** to support local social or environmental initiatives, which could amass as much as $4,225,000 over the first 35 years of the Project;[6] and

(c) a comprehensive suite of **measures to offset and compensate for the Project's adverse ecological effects**, which will lead to a material overall enhancement in biodiversity values. That is, **biodiversity will be better off if the Project proceeds than if it does not** (even putting to one side the important role of renewable electricity in combatting climate change, which poses major threats to biodiversity). These measures include:

(i) funding intensive predator control over an extensive 10,000ha area in the Beresford Range in the Catlins Forest Park, which will provide significant benefits to a known local population of long-tailed bats and to many other indigenous fauna and flora species (including Mohua / yellowhead), for the life of the Project;

[6] The actual total values paid through the Fund will depend on the final installed capacity of the Project, as implemented, as well as the Project's duration. The relevant condition provides for an initial contribution of $200,000 plus minimum annual contributions of $70,000, plus $250 per MW above 200 MW of installed capacity, throughout the construction and operation of the Project.

(ii) regular large-scale aerial control of introduced mammalian pests across indigenous vegetation and habitats over an approximate 1,400ha area on Jedburgh Station, for the life of the Project;

(iii) frequent ground-based trapping along all wind farm roads within the 1,400ha pest control area on Jedburgh Station, targeting mustelids, rats, and feral cats, for the life of the Project, to address potential effects associated with fragmentation of habitats;

(iv) further targeted deer and pig control on the Jedburgh Plateau,[7] for the life of the Project;

(v) construction of an ungulate exclusion fence around a large (approximately 245ha) block of indigenous vegetation, characterised by mānuka forest and scrub, and smaller areas of shrubland and fen and bog wetlands, referred to as the Jedburgh Station Ecological Enhancement Area, with the area to be covenanted in perpetuity and feral deer and pigs eradicated, stock excluded, and enrichment planting undertaken;[8]

(vi) permanent physical protection of 18ha of fen wetland and 1.5ha of bog wetland from browsing and pugging within the Jedburgh Station Ecological Enhancement Area;

(vii) assisted regeneration and enrichment planting of existing tracks that are no longer required within the Jedburgh Station Ecological Enhancement Area, amounting to restoration of an additional 8.7ha area;

(viii) restoration (through revegetation, exclusion of stock, and pest control) and legal protection of wetlands currently dominated by exotic grasses on land owned by Contact at Davidson Road, approximately 6km north of the Wind Farm Site;

(ix) another ungulate exclusion fence around an approximately 8ha area of degraded copper tussock vegetation at Matariki Forest (again with a covenant to be put in place, animal pest control and enhancement planting);

(x) targeted intensive ground-based predator control for the life of the Project across a 55ha area on the Jedburgh Plateau (primarily to

[7] An approximately 530ha area within the 1,400ha pest control area on Jedburgh Station.
[8] This area is also within the 1,400ha pest control area on Jedburgh Station.

benefit the local populations of mātātā/South Island fernbird, pīhoihoi/NZ pipit, lizards and invertebrates and offset potential residual effects on other indigenous birds), known as the Plateau Fauna Enhancement Area; and

(xi) other specific enhancement measures focused on herpetofauna and terrestrial invertebrates.

1.22 The spatial extent of these measures is shown on figures in Part G of the application documents titled **Figure Terrestrial Ecology 9a-c**.

1.23 Collectively these measures represent a conservation / biodiversity enhancement programme that will be very significant for Southland. Below we discuss conditions under the FTAA, including the requirement in section 83 that conditions be no more onerous than necessary. In short, though, the biodiversity measures – which were developed and honed with mana whenua and DoC in a different statutory context, and retained by Contact in this FTAA application – go well beyond those needed to mitigate adverse effects and fall to be weighed strongly by the Panel among the regionally and nationally significant benefits of the Project.

The existing environment

1.24 Part B, Section 2 of the application documents describes the existing environment for the Project in detail. This section does not repeat those details but highlights key features.

1.25 The Project is to be constructed on Slopedown Hill in eastern Southland, around 12km east of Wyndham. The Wind Farm Site covers approximately 58km^2 of privately owned land, including part of two sheep and beef farms (Jedburgh Station and Glencoe Station) and Venlaw plantation forest owned by Matariki Forests. The proposed transmission line and associated infrastructure extends across farmland and forestry to the north-east of the Wind Farm Site.

1.26 The Project Site is an excellent location for a wind farm, including because it is not a pristine environment earmarked for protection in the relevant planning documents. Key aspects of the existing environment of which the Panel should be aware include the following:

(a) The Wind Farm Site is elevated and exposed to a rich wind resource, in reasonable proximity to the National Grid.

(b) The Wind Farm Site is approximately half pastoral farmland and half plantation forestry. The land around the Project Site is a mixture of pastoral farmland, plantation forestry and indigenous vegetation. As such, the Project Site is obviously modified for productive use and is subject to ongoing environmental change – particularly through future harvesting of the plantation forest owned by Matariki Forests.[9]

(c) The Project Site spans the Waipahi and Tahakopa Ecological Districts and is characterised by a mosaic of indigenous and exotic forest, shrublands, wetlands and grasslands. The areas of particular ecological sensitivity are focused within a 530ha portion of the Jedburgh Station (referred to as the 'Jedburgh Plateau'), which accordingly has been a strong focus for Contact in terms of minimising adverse effects and proposing careful management and enhancement measures. More generally, terrestrial ecology values are carefully addressed through the effects management hierarchy, as described below.

(d) The Wind Farm Site is a large cuesta landform, of a scale that can comfortably accommodate large wind turbines without being dominated or fundamentally altered by them. The cuesta has a steep, bush-clad scarp to the south-east with higher landscape values than the rest of the Wind Farm Site and, as described below, the Project has sought to mitigate adverse effects by setting turbines back from the most prominent points in that feature.

(e) There are no outstanding natural features (**ONF**) or landscapes identified in the Southland District Plan within or near to the Wind Farm Site or wider Project Site. Part-way through the consenting process under the Covid Fast-track Act, a previously confidential District-wide landscape report from 2019 came to light which identifies part of the Wind Farm Site as a potential candidate for ONF status. The landscape experts advising Contact disagree with that identification, and consider that only the scarp feature may be worthy of further consideration through a statutory planning process (and consider that the Project sits appropriately in the landscape in any event). Counsel understand from Southland District Council that it does not intend to progress a plan change on these matters in the near future.

[9] Only a very small proportion of the Wind Farm Site (about 2.4%, around 140ha of 5,800ha) is directly affected by the earthworks necessary for the turbine pads and access roads.

(f) The area around the Wind Farm Site is sparsely populated, with a low density of dwellings and no dwellings within 2km of the proposed wind turbines. This sets it apart from a number of other wind farms in New Zealand, which tend to have greater adverse visual and noise effects on surrounding communities.

(g) The Kaiwera Downs Wind Farm is located to the north of the Project. The distance between the closest wind turbines in the two wind farms will be approximately 4km.

(h) Although some archaeological sites have been identified in the Project Site, the overall archaeological value of the site is low.

(i) The Wind Farm Site is located predominantly in the Mimihau Stream catchment, with small portions located in the Mokoreta River and Kaiwera Stream catchments.

1.27 In addition, there are streams and natural inland wetlands across the Wind Farm Site (for the latter, collectively amounting to approximately 133ha in area). The concerted efforts of the Project's designers to avoid these sensitive locations have largely been successful – over 98% avoidance has been achieved for natural inland wetlands – but the Project will inevitably intersect with a small number of them. For wetlands, effects will be tightly controlled through a strict effects 'cap' (of 2.5ha), and more broadly effects on wetlands and streams have been addressed in accordance with the effects management hierarchy and the requirements of the National Policy Statement for Freshwater Management 2020 (**NPS-FM**), as explained in the application documents.

Referral application

1.28 The Project is a 'referred project'. Contact's referral application was accepted by the Minister for Infrastructure on 4 August 2025. The referral application was not for a 'staged project' in respect of section 21(1)(a) of the FTAA. In accepting the referral application, the Minister was satisfied that:

(a) the Project is an infrastructure proposal with significant regional or national benefits as it:

(i) involves the development of a new wind farm;

(ii) will deliver new nationally significant infrastructure by providing new renewable electricity generation sufficient to power up to 150,000 homes;

(iii) will deliver significant economic benefits by providing up to $280 million to the economy and creating 160-240 direct full-time equivalent jobs;

(iv) will support climate change mitigation through the reduction of greenhouse gas emissions by the creating of new renewable electricity generation; and

(v) will support recovery from events caused by natural hazards by improving resilience in the national electricity supply;

(b) referring the Project:

(i) would facilitate the Project and enable it to be processed in a more timely and cost-effective manner than understand process, by utilising a process which does not involve public notification and limits rights of appeal to matters of law; and

(ii) is unlikely to materially affect the efficient operation of the fast-track approvals process because the applicant is well-advanced towards preparation of a substantive application and an expert consenting panel was already able to consider an application for substantially the same proposal under a previous fast-track regime.

Previous application for the Project

1.29 As noted above, Contact previously sought RMA approvals for the Project through an application under the Covid Fast-track Act. Contact lodged its application in late 2023, and on 18 March 2025 the panel declined consents.

1.30 For the Panel newly constituted under the FTAA, the task is obviously to determine the new application for the Project afresh, applying the new law (including the different decision-making criteria under the FTAA, discussed further below). In that context, the previous panel's decision is likely to be of limited relevance in this new process.

1.31 However, counsel anticipate that the new Panel may nonetheless be interested in understanding Contact's position on and response to that earlier decision, so that is summarised below. A number of the technical experts advising Contact (such as in respect of ecology and landscape matters) have also commented on the previous panel's findings in their assessments. If the

Panel requires any further, more detailed explanations of these matters, those can readily be provided.

1.32 Contact has responded constructively to the earlier decision by carefully scrutinising each aspect of the Project's design and carrying out further work to address the key points of concern highlighted by the previous panel, as set out in Part A, Section 3 of the application documents. Additional design refinements have been proposed, to reduce further the flexibility inherent in the approvals now sought by Contact. That work has provided even greater certainty as to the likely effects of the Project and how adverse effects will be managed.

1.33 Fundamentally, however, Contact is still proposing to construct and operate a wind farm of up to 55 turbines in the same receiving environment as previously. In refusing consent for a similar proposal, the previous panel's decision was, put simply, wrong in many respects.

1.34 On the merits, the panel's decision was at odds with the vast weight of expert evidence before it, including the views of most of the experts appointed by the panel itself to advise it on Contact's application, and at odds with the positions taken on the Project by a number of well-informed participants such as Kā Papatipu Rūnaka ki Murihiku and DoC. In making its own factual findings on Contact's applications, this Panel should not give weight to the factual findings of the previous panel, including its findings that:

(a) there was insufficient ecological baseline information to grant consent (noting that the extensive survey efforts of Contact's experts have been further supplemented in the meantime in any event);

(b) effects on wetlands and the wider 'Jedburgh Plateau' would have been significant and could not appropriately be offset or compensated; and

(c) adverse effects on natural landscapes and features, natural character and visual amenity would have been significant and could not be adequately mitigated.

1.35 The panel's decision was also legally wrong in a number of clear and material ways. As such, Contact appealed the decision to the High Court on numerous grounds.[10]

[10] That said, as this substantive application is now being made under the FTAA, Contact is required by section 94 of the FTAA to withdraw the appeal within five working days of the EPA assessing this application as complete.

1.36 Contact's notice of appeal is attached in full in the **Appendix** to this document. By way of illustration, some clear legal errors made by the previous panel were as follows:

(a) The unanimous evidence of the expert planners participating in the process (including the panel's appointee) was that the Project passed the 'objectives and policies' gateway in section 104D(1)(b) of the RMA. The panel rejected that unanimous evidence and found that the Project did not pass the gateway. In doing so, the panel focused on certain 'avoid' policies and downplayed the many strongly enabling policies (and misinterpreted and misapplied both types of policy) rather than carrying out the required 'fair appraisal' of all relevant plan provisions, read as a whole.[11] For the present application under the FTAA, section 104D is not applicable in any event; nonetheless, this was a clear error in the previous decision (and led to that panel concluding that consent could not be granted under the Covid Fast-track Act).

(b) On landscape matters, the Southland District Plan has clear policy direction that distinguishes between ONFs identified in the Plan, within which the direction is that inappropriate land use and development is *"avoided"*,[12] and natural features that have not been identified (through a plan change) as an ONF, within which the direction is less stringent (applying an 'avoid, remedy, or mitigate' approach).[13] As noted above, there is no ONF relevant to the Project Site, although a District-wide landscape report from 2019 – which has not been acted on by the Council or tested through a public process – identifies part of the Wind Farm Site as a potential candidate for ONF status. Again contrary to the unanimous advice of the expert planners, the panel wrongly applied the 'avoid' policy as if an ONF had already been identified in the Plan.

(c) In the usual way, a number of plan provisions direct that certain adverse effects of proposals be *"avoided, remedied, or mitigated"*. The orthodox RMA interpretation of the word *"mitigated"*, in that context, is *"reduced"*, or *"made less severe"*. The previous panel applied those policies as if they required adverse effects to be reduced to zero, which is clearly incorrect.

[11] See the Supreme Court's decision in *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26, [2024] 1 NZLR 241.
[12] Policy NFL-P1.
[13] Policy NFL-P3.

(d) The panel also misapplied the 'functional need' test as effectively requiring Contact to demonstrate that the Project was in the only possible location for a wind farm (as opposed to in what the panel described as *"other high points with similar wind conditions"* elsewhere) and therefore ignored High Court authority requiring practical constraints to be considered.[14]

1.37 The other errors are set out in detail in the **Appendix**.

1.38 Again, this Panel must make its own findings of fact, based on the information before it, and apply those in the context of the different decision-making criteria under the FTAA. Most materially, as described further below, the FTAA has a different statutory purpose than the Covid Fast-track Act and requires a different weighting of relevant matters (giving the greatest weight to the purpose of the FTAA). Moreover, the section 104D RMA gateway tests, which the previous panel applied to refuse consent, do not apply under the FTAA.

2. LEGAL FRAMEWORK – FAST-TRACK APPROVALS ACT 2024

Introduction

2.1 Key aspects of the FTAA are summarised in sections 2 to 4 of this document.

2.2 Again, the purpose of the FTAA is to facilitate the delivery of infrastructure and development projects with significant regional or national benefits. As the Panel will be aware, it must interpret the FTAA from its text, read in light of its purpose and its context (which is set out in section 3).[15]

2.3 Notably, the FTAA consolidates multiple statutory approval processes that are typically required for large or complex projects, into a 'one-stop-shop' arrangement. That is, the FTAA establishes an alternative consenting / approvals regime to that under a range of *"specified Acts"*.[16] Where a substantive application for approvals for the Project is made under section 42, the process and requirements for obtaining approvals under the FTAA applies instead of the equivalent processes under the relevant Acts.

2.4 As applicable to this Project, the approvals sought by Contact include:[17]

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[14] *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2022] NZHC 629, at [48] and [58] – [59].
[15] Legislation Act 2019, s 10(1).
[16] FTAA, 4(1), means the Conservation Act 1987 (**Conservation Act**) (including the Freshwater Fisheries Regulations 1983); the Crown Minerals Act 1991 (**CMA**); the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (**EEZ Act**); the Heritage New Zealand Pouhere Taonga Act 2014 (**HNZPTA**); the National Parks Act 1980; the Reserves Act 1977 (**Reserves Act**); the Resource Management Act 1991 (**RMA**); and the Wildlife Act 1953 (**Wildlife Act**).
[17] FTAA, s 42(4)(a) to (n).

(a) all the resource consents necessary under the RMA to construct, operate, and maintain the Project;

(b) concessions under the Conservation Act, namely in respect of:

(i) culvert and airspace easements associated with the Mimihau Stream (subject to Part 4A (Marginal Strips) of the Conservation Act); and

(ii) an airspace easement where the transmission line may cross over a Public Conservation Area, administered by DoC (Waiarikiki Stream, Mimihau);

(c) approvals under the Wildlife Act, for any activities relating to the disturbance of lizards and Helms' stag beetles;

(d) an archaeological authority under the HNZPTA, covering the entire Project Site, to modify archaeological sites (following appropriate protocols) if any are discovered during earthworks activities; and

(e) an approval under the Freshwater Fisheries Regulations 1983, to construct three culverts that will permanently block the passage of exotic fish.

2.5 Contact is lodging with the Environmental Protection Authority (**EPA**) an application for all approvals required for the Project under section 42 of the FTAA, and the Panel will have since been established to process the application and make decisions on each approval sought.

2.6 The substantive decision-making provisions in the FTAA apply in the same way to both 'listed' or 'referred' projects.

Purpose of 'facilitating delivery'

2.7 As noted above, the purpose of the FTAA is to ***"facilitate the delivery** of infrastructure and development projects with significant regional or national benefits"* (emphasis added).[18] Facilitating the delivery of such projects means the same thing as to 'helping make them happen'.

2.8 This purpose section was intentionally strengthened through the Parliamentary process; in its first reading, the purpose clause in the Fast-track Approvals Bill was *"to provide a fast-track decision-making process that facilitates the delivery of infrastructure and development projects with significant regional or national benefits."* The change in language from

[18] FTAA, s 3 (purpose).

'providing a process' to simply 'facilitating the delivery' represents significant strengthening of the purpose. This was intentional, as explained in the Select Committee report.[19]

2.9 The purpose of 'facilitating delivery' of beneficial projects is not to say the process under the FTAA does not apply rigour to assessing a substantive application, or that an application cannot be declined. However, there is a strong starting presumption of 'facilitating delivery'; the foundational premise of the FTAA is that the delivery of infrastructure with significant regional or national benefits should be facilitated. This presumption is reflected in a number of ways throughout the scheme of the FTAA. That is:

(a) A panel must give the greatest weight to the purpose of the FTAA in its decision-making, ahead of all other considerations.[20] This deliberate aspect of the FTAA clearly intends to make decision-making more favourable to beneficial proposals than would otherwise be the case under usual (non-FTAA) processes.

(b) A panel only has discretion[21] to decline an application where *"adverse impacts"* are *"sufficiently significant to be out of proportion to the project's regional or national benefits"* (even after considering conditions).[22] There is therefore a clear tolerance for adverse impacts, provided they are not out of proportion to the regional and national benefits (and even if they are, a panel has a residual discretion to grant approvals).

(c) The 'proportionality' consideration means that the more significant the regional and national benefits of a proposal, the more significant the adverse impacts would need to be before the proposal could be declined. It was introduced to the FTAA late in the legislative process (at the Committee of the Whole House stage), in order to *"clarify the high bar for declining an approval"*.[23]

(d) That the bar is *"high"* is further underscored by Parliament's choice of language in the test. A panel's discretion to decline approvals does not arise if a project's adverse effects are merely 'significant', or 'greater

[19] Fast-track Approvals Bill, as reported from the Environment Committee, 18 October 2024, at page 3.
[20] FTAA, cl 17(1)(a) (resource consent), 20(3)(a)(i) (change or cancellation of a resource consent condition), 24(1)(a)(i) (notice of requirement) of schedule 5; cl 7(1)(a)(i) (concession), 29(1)(a)(i) (land exchange) and 45(1)(a) (conservation covenant) of schedule 6; cl 5(a) (wildlife approval) of schedule 7; cl 4(1)(a) (archaeological authority) of schedule 8; cl 5(a) (freshwater fisheries activity approval) of schedule 9; cl 6(1)(a) (marine consent) of schedule 10; cl 7(1)(a)(i) and cl 8(1)(a)(i) (access arrangements), and cl 19(1)(a) (mining permit) of schedule 11.
[21] There are also limited mandatory circumstances in which an application must be declined set out in section 85(1).
[22] Section 85(3).
[23] Amendment Paper No 238 (released 10 December 2024) – New Zealand Legislation.

than' its benefits. Rather, adverse effects must be *"sufficiently significant to be out of proportion to"* the regional and national benefits in order for the discretion to decline to be available; this requires a panel to apply a strong presumption in favour of enabling a beneficial project (and thereby realising its benefits).

(e) Moreover, before the discretion to decline an approval is available to a panel, it must first have taken into account the full extent of its powers to impose conditions (and any conditions that may be offered by an applicant).[24]

(f) The FTAA also requires a panel, if proposing to decline approvals, to provide the applicant with a copy of its draft decision and invite the applicant to propose conditions on, or modifications to, any of the approvals sought (or withdraw the part of the substantive application).

(g) Any conditions imposed by a panel must be no more onerous than necessary to address the relevant matter.[25] The clear intent of this provision is to prevent the imposition of conditions that are overly burdensome and may delay or prevent the delivery of a proposal.

(h) The general processing and decision-making timeframes set out in the FTAA are shorter than under the equivalent non-FTAA process. The time efficiency built into the process is geared toward enabling faster delivery of the relevant proposals, which means that the benefits of such proposals are accrued earlier.

Information requirements

2.10 The information requirements for a substantive application for approvals are set out in section 43 and in various provisions in schedules 5 to 11, as relevant to each approval type that can be sought under the FTAA.[26] In particular, a substantive application must (relevantly):

(a) explain how the project is consistent with the purpose of the FTAA;[27]

(b) demonstrate that the project does not involve any *'ineligible activities*' (within the meaning in section 5(1) of the FTAA);[28]

[24] Section 85(3)(b).
[25] Section 83.
[26] FTAA, sch 5, cl 5 to 8 (resource consent); sch 5, cl 11 (certificate of compliance); sch 5, cl 12 (designation); sch 6, cl 3 (concession); sch 6, cl 23 (land exchange); sch 6, cl 42 (conservation covenant); sch 7, cl 2 (Wildlife Act approval); sch 8, cl 2 (archaeological authority); sch 10, cl 2 and 4 (marine consent); sch 11, cl 3 (access arrangement).
[27] FTAA, s 43(1)(b)(i).
[28] FTAA, s 43(1)(c).

(c) comply with any requirements in schedules 5 to 11 that apply to the approvals sought;[29] and

(d) for a listed project, information that would have been required to be included in a referral application under section 13(4).[30]

2.11 Schedules 5 to 11 of the FTAA include additional information requirements for each approval sought.[31] For example, the specific form, manner and content requirements for consent applications under schedule 5 of the FTAA are set out in clauses 5 to 7, and 12 (respectively). Those clauses include additional information requirements than those specified in the RMA, including the requirement to provide information about any Treaty settlements that apply in a project area.[32] For some other approvals, the information requirements in the FTAA are likewise more prescriptive than the usual processes under the relevant Acts.[33]

2.12 Information required for a substantive application for approvals under section 43 must be specified in sufficient detail to satisfy the purpose for which it is required,[34] and the Panel may request further information from a number of specified parties any time before making a decision on any approvals sought under section 81 of the FTAA.[35]

2.13 For completeness, and in order to satisfy section 43 and the relevant schedules of the FTAA, each of Contact's application documents includes a section that outlines how the information requirements are met and where the information is located.

Relevant considerations for the approvals sought

2.14 In respect of this substantive application, the process for obtaining approvals under the FTAA applies, rather than the usual processes for obtaining approvals under the relevant Acts.[36]

2.15 The FTAA identifies a range of matters which the Panel must consider in determining whether to grant or decline the approvals sought in a substantive application for a referred project such as this. The Panel must apply the

[29] FTAA, s 43(1)(e)(i) and (ii).
[30] FTAA s 43(2), with reference to s 13(4).
[31] FTAA, sch 5, cl 5 to 11 (resource consent) and 12 (notice of requirement); sch 6, cl 2 and 3 (concessions), 23, 24, 27 (land exchanges) and 42 (conservation covenants); sch 7, cl 2 (wildlife approval); sch 8, cl 2 (archaeological authority); sch 9, cl 3 (complex freshwater fisheries activity approval); sch 10, cl 2 (marine consent); sch 11, cl 2 and 3 (access arrangement), cl 15 and 16 (mining permit).
[32] FTAA, sch 5, cl 5(1)(i) and 12(1)(e).
[33] See for example, s 53 of the Wildlife Act.
[34] FTAA, s 44.
[35] FTAA, s 67(1)(a). Specified parties are the applicant, a relevant local authority, a relevant administering agency or any person invited to provide comments under sections 35 (referral application) or 53 (substantive application).
[36] FTAA, s 40(a).

relevant criteria to each approval sought and decide whether to grant or decline that approval (and whether to impose conditions). The criteria that the Panel must consider will depend on the types of approvals being sought, and it must make separate decisions for each approval, subject to the relevant criteria.

Panel decisions on approvals sought in substantive application

2.16 Section 81 and the relevant schedules to the FTAA are relevant to the Panel's decision-making in respect of approvals sought in a substantive application. In particular, section 81(2) sets out the matters relevant to the Panel when considering the application. For the purpose of making a decision for each approval sought, the Panel:[37]

(a) must consider the application and any advice, report, comment, or other information received by it throughout the fast-track approvals process[38] and within the applicable timeframe[39];

(b) must apply the applicable clauses that set out the criteria for decision-making in schedules 5 to 11[40] (including in relation to the weight to be given to the purpose of the FTAA when making a decision on an approval);

(c) must comply with section 82, if applicable;

(d) must comply with section 83 in setting conditions;

(e) may impose conditions under section 84; and

(f) may decline the approval only in accordance with section 85.

2.17 Section 82 applies if a Treaty settlement, the Marine and Coastal Area (Takutai Moana) Act 2011 or the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 is relevant to an approval. If a Treaty settlement or those Acts provide for the consideration of a document (such as a statutory document amended as a result of a Treaty settlement), the Panel must give it the same or equivalent effect through its decision-making as it would under the relevant specified Act.

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[37] FTAA, s 81(2).
[38] Information received by a panel under sections 51-53, 55, 58, 67-70, 72 or 90.
[39] FTAA, 81(6).
[40] FTAA, s 81(2)(b) and (3). The applicable clauses are: for a resource consent, cl 17 to 22 of schedule 5; for a change or cancellation of a resource consent for aquaculture, cl 20 to 22 of schedule 5; for any other change or cancellation of a resource consent, cl 23 of schedule 5; for a certificate of compliance, cl 27 of schedule 5; for a designation, cl 24 and 25 of schedule 5; for a concession, cl 7 to 9 of schedule 6; for a land exchange, cl 29 to 33 of schedule 6; for a conservation covenant, cl 45 and 46 of schedule 6; for a wildlife approval, cl 5 and 6 of schedule 7; for an archaeological authority, cl 4 and 5 of schedule 8; for a complex freshwater fisheries activity approval, cl 5 and 6 of schedule 9; for a marine consent, cl 6 and 7 of schedule 10; for an access arrangement, cl 7,9 and 10, or 8, 9 and 10 of schedule 11; for a mining permit, cl 19 to 21 of schedule 11.

2.18 Further, the Panel must consider section 7 of the FTAA in its decision-making by acting in a manner that is consistent with the obligations in existing Treaty settlements and recognised customary rights. Section 82(3) requires the Panel to consider whether granting an approval would comply with that section, and it may set conditions to recognise or protect a relevant Treaty settlement and any obligations arising under the above Acts.[41] For completeness, nothing in section 81, 82 or 85 limits section 7.[42]

2.19 Section 83 requires that any conditions imposed by the Panel under the FTAA must be no more onerous than necessary to address the relevant matter.

2.20 Finally, a decision document must accompany a Panel's decisions, that sets out (among other things) the reasons for its decisions, and a statement of the principal issues that were in contention.[43]

Weight given to the purpose of the FTAA in decision-making

2.21 The weight that the Panel must give to the purpose of the FTAA is set out in in schedules 5 to 11, as relevant to the type of approval. Section 81(4) requires the Panel, when taking the purpose of the FTAA into account under the applicable clauses in the schedules, to consider the extent of the Project's regional or national benefits.[44]

2.22 The applicable clauses in schedules 5 to 11 expressly require the Panel to give the greatest weight to the purpose of the FTAA in its decision-making, ahead of all other considerations.[45] This includes those that would apply in respect of those approvals under the relevant Acts. As noted above, the clear intent of this statutory framing is to make decision-making more favourable to beneficial proposals than would otherwise be the case under usual non-FTAA processes. That is, while other considerations must be given due consideration on their own terms, a panel must always give the purpose the greatest weight when it stands back and undertakes its overall balancing.

[41] FTAA, s 84.
[42] FTAA, s 81(7).
[43] FTAA, s 87.
[44] For a staged project, the regional or national benefits of the whole project must be considered under section 81(5), having regard to the likelihood that any later stages of the project will be completed.
[45] FTAA, cl 17(1)(a) (resource consent), 20(3)(a)(i) (change or cancellation of a resource consent condition), 24(1)(a)(i) (notice of requirement) of schedule 5; cl 7(1)(a)(i) (concession), 29(1)(a)(i) (land exchange) and 45(1)(a) (conservation covenant) of schedule 6; cl 5(a) (wildlife approval) of schedule 7; cl 4(1)(a) (archaeological authority) of schedule 8; cl 5(a) (freshwater fisheries activity approval) of schedule 9; cl 6(1)(a) (marine consent) of schedule 10; cl 7(1)(a)(i) and cl 8(1)(a)(i) (access arrangements), and cl 19(1)(a) (mining permit) of schedule 11.

2.23 In considering a similar direction to apply a hierarchy to considerations under section 34 of the Housing Accords and Special Housing Areas Act 2013,[46] the Court of Appeal in *Enterprise Miramar Peninsula Inc v Wellington City Council*[47] found that a decision-maker must undertake an individual assessment of the listed matters before standing back and conducting an overall balancing in accordance with the prescribed hierarchy.

2.24 For example, for resource consent approvals, after taking into account each of the matters individually, the Panel must conduct an overall balancing exercise giving the greatest weight to the purpose of the FTAA, and lesser weight to:[48]

(a) the provisions of Parts 2,[49] 6, and 8 to 10 of the RMA that direct decision-making on an application for a resource consent (but excluding section 104D); and

(b) the relevant provisions of any other legislation that directs decision-making under the RMA.

2.25 A similar structure applies to the criteria for assessing applications for (as relevant) concessions, wildlife approvals, archaeological authorities, and Freshwater Fisheries Regulations approvals. [50]

Grounds for declining an approval

2.26 The FTAA prescribes limited grounds by which the Panel can decline to grant an approval. [51] Those matters are set out in section 85. That section sets out when a panel *must* decline an approval, and where an approval *may* be declined (if the adverse effects of that activity are considered to be out of proportion to the regional or national benefits of the proposal).

2.27 Under section 85(1), the Panel must decline an approval if one or more of the following matters apply:

(a) the approval is for an ineligible activity;

(b) the Panel considers that granting an approval would breach section 7 of the FTAA; and

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[46] The direction to decision-makers under that section was to *"have regard to [listed] matters, giving weight to them (greater to lesser) in the order listed"*, with the purpose of that Act listed first.
[47] [2018] NZCA 541 at [52] - [53]
[48] FTAA, sch 5, cl 17.
[49] We note that references to Part 2 of the RMA in cl 17 and 24 excludes section 8 which requires persons exercising functions and powers under the RMA to take into account the principles of the Treaty of Waitangi.
[50] FTAA, sch 5, cl 24(1)(a) (notice of requirement) and cl 20(3)(a) (aquaculture decision); sch 6, cl 7(a) (concessions), cl 29(1)(a) (land exchange) and cl 45(1) (conservation covenant); sch 7, cl 5 (wildlife approvals); sch 8, cl 4(1) (archaeological authorities); sch 9, cl 5 (complex freshwater fisheries activity approval); sch 10, cl 6(1) (marine consent); and sch 11, cl 7(1) and 8(1) (access arrangements) and 19(1) (mining permit).
[51] FTAA, s 81(2)(f).

(c) the approval does not meet the relevant criteria under the schedules.[52]

2.28 The only ground on which the Panel has discretion to decline an approval is if, in complying with section 81(2), it forms the view that:[53]

(a) there are one or more *"adverse impacts"*[54] in relation to the approval sought; and

(b) those adverse impacts are sufficiently significant to be out of proportion to the proposal's regional or national benefits under section 81(4), even after taking into account:

(i) any conditions that the Panel may set in relation to those adverse impacts; and

(ii) any conditions or modifications that the applicant may agree to or propose to avoid, remedy, mitigate, offset, or compensate for those adverse impacts.

2.29 Significantly, the above threshold cannot be met solely on the basis that an adverse impact is inconsistent with or contrary to a provision of a specified Act, or any other document that a panel must take into account or otherwise consider in complying with section 81(2).[55] For example, if a relevant document directed that a particular adverse effect must be avoided, an application could not be declined on the basis of such a direction. Rather, in order for such a proposal to be lawfully declined the adverse impacts (which might include the effect directed by a relevant document to be avoided) must be sufficiently significant to be out of proportion to the Project's regional or national benefits.

2.30 Again, as noted above, this 'proportionality' consideration means that:

(a) the more significant the benefits of a proposal, the more significant the adverse impacts would need to be before the proposal could be declined; and

(b) adverse effects that merely outweigh or are greater than the regional or national benefits do not trigger the discretion to decline; adverse effects must be *"sufficiently significant to be out of proportion to"* those benefits.

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[52] FTAA, sch 5, cl 23 (change or cancellation of conditions) and cl 27 (certificate of compliance); sch 6, cl 7(3) (concession) and cl 29(2) or (3) (land exchange); sch 11, cl 7(2) or 8(2) (access arrangements) and cl 20 (mining permit).
[53] FTAA, s 85(3).
[54] FTAA, s 85(5). This term is broadly defined as meaning any matter *"considered by the panel in complying with section 81(2) that weighs against granting the approval"*.
[55] FTAA, s 85(4).

2.31 Counsel wish to stress, however, that Contact need not rely on the more favourable scheme of the FTAA (including its greater tolerance for adverse impacts) in order to obtain the requisite approvals. The proposal is one which Contact considers should obtain the requisite approvals under conventional processes. Nevertheless, the different directions under the FTAA must be borne in mind and given effect by the Panel.

3. APPLICATION OF THE FRAMEWORK TO THE PROJECT

Introduction

3.1 Part A of the application documents details the approvals sought by Contact for the Project under the FTAA. As noted above, in broad terms they are resource consents, concessions under the Conservation Act, approvals under the Wildlife Act, archaeological authorities, and an approval under the Freshwater Fisheries Regulations 1983.

3.2 Below we first address the following general matters that go to the Panel's evaluation for all types of approval:

(a) the Project's significant regional and national benefits, which go to the heart of the purpose of the FTAA (and which in turn must be given most weight by the Panel); and

(b) why the Project's adverse effects, which will be carefully managed through numerous proposed conditions, cannot be said to be sufficiently significant to be out of proportion to the Project's regional and national benefits (even after taking into account conditions).

3.3 We then note additional decision-making criteria relevant to each type of approval.

Significant regional and national benefits

3.4 There can be no argument or doubt that the Project's benefits, including in terms of supplying electricity from a renewable source and decarbonisation, are very significant at both a regional and a national level. With a potential installed capacity of approximately 350MW (and up to around 380MW), the Project will be the largest wind farm in New Zealand by far; Harapaki Wind Farm in the Hawkes Bay is the largest wind farm currently operating, at 176MW.[56]

[56] Genesis Energy's Castle Hill Wind Farm, not yet commissioned, is the largest consented wind farm so far, at 300MW.

3.5 The Project's benefits in this regard are detailed in the application documents, as are other measures such as the very generous ecological offset and enhancement package, the Community Benefit Fund (the scale of which is unprecedented for projects of this type in New Zealand, as far as counsel can ascertain), and the suite of important cultural measures.

3.6 The Minister's referral decision also points to other significant regional and national benefits of the Project, namely that it:

(a) *"involves the development of a new wind farm"*; the Minister's decision thus indicates that **any** new wind farm must be considered to be significantly beneficial, at least for the relevant region (and potentially nationally);

(b) *"will deliver new nationally significant infrastructure by providing new renewable electricity generation sufficient to power up to 150,000 homes"*; the Minister's decision thus acknowledges the vast amount of renewable electricity to be created by the Project and clearly frames it as being significant to New Zealand as a whole;

(c) *"will deliver significant economic benefits by providing up to $280 million to the economy and creating 160-240 direct full-time equivalent jobs"*;

(d) *"will support climate change mitigation through the reduction of greenhouse gas emissions by the creating of new renewable electricity generation"*; and

(e) *"will support recovery from events caused by natural hazards by improving resilience in the national electricity supply"*.

3.7 The FTAA's very purpose is to facilitate the delivery of infrastructure proposals such as this, and that purpose must be given the greatest weight in the Panel's decision on all the approvals sought.

No adverse effects of significance

3.8 Considered against the Project's very large benefits for New Zealand and Southland, and taking into account the comprehensive suite of consent conditions proposed by Contact, the Project's adverse effects are not significant (and are certainly not so significant as to be out of proportion to those benefits).

3.9 The Project is situated in an environment and area that is highly valued by mana whenua, but Ngāi Tahu / Kā Papatipu Rūnaka have confirmed that

adverse cultural effects have been appropriately addressed. The Panel can take considerable comfort in this advice, including because it goes to the heart of related issues such as the Project's adverse landscape and ecological effects – in short, those matters have been addressed to the satisfaction of mana whenua.

3.10 On ecology, the Panel should also take comfort in DoC's broad support for the Project and the proposed ecological offset and enhancement package. Contrary to the view of the last panel and one of its advisors, the Jedburgh Plateau – while containing some high-value ecological features – is not so unique as to be irreplaceable. Effects on natural wetlands and fauna are all readily manageable. More broadly, net biodiversity gains will be achieved.

3.11 In terms of landscape effects, the Project is very well located on a large feature that will comfortably accommodate the turbines proposed (which will ultimately be decommissioned and removed at the end of the Project's life, thus reversing adverse effects). People's houses are well separated from the Project, and visual/landscaping mitigation will be offered to a number of dwellings where views will be altered.

3.12 The absence of any significant adverse effects, let alone any that are out of proportion to the Project's very large benefits, means that the Panel has no legal basis on which to refuse any of the approvals sought by Contact.

Resource consents – additional criteria

3.13 Contact is seeking resource consents under the FTAA that would otherwise have been applied for under the RMA.

3.14 As noted above, the Project is a fundamentally sound one, in that it has very significant benefits (and is urgently needed), is well located, and has manageable adverse effects. Unsurprisingly, therefore, the Project is strongly supported by the relevant national, regional, and local planning instruments and promotes the outcomes envisaged by Part 2 of the RMA.

3.15 As well as directing the Panel to recognise the benefits of renewable electricity, those instruments reflect that the Project is proposed to be built in a rural environment where economic activity is promoted, and where the adverse effects of activities cannot always be internalised.

3.16 Those adverse effects – to the extent they cannot be avoided – will be comprehensively addressed through proposed conditions and generous and carefully developed offset/compensation measures, including a number of enhancements now proposed in response to comments. The residual

potential effect of wind turbines being visible from nearby properties and around the district is not a valid reason for the Panel to refuse consent.

3.17 In terms of Part 2:

(a) The Project will deliver a nationally significant source of renewable electricity, which will contribute to the social, economic, and cultural well-being of people and communities and provide for their health and safety, both by providing essential electricity and by contributing to New Zealand's decarbonisation goals.

(b) The Project has been developed in an environmentally responsible manner and has comprehensively addressed its potential adverse effects. For this reason, the Project will sustain the potential of resources for future generations; safeguard the life-supporting capacity of the environment; and avoid, remedy or mitigate any potential adverse effects. By increasing New Zealand's supply of renewable electricity, it will assist to reduce emissions and thereby assist to protect the environment from the damaging effects of climate change.

(c) The Project has also responded appropriately to the specific directions in section 6, 7, and 8 of the RMA, as explained in more detail in the application documents.

3.18 Therefore, the Panel can have a high degree of confidence that the Project is consistent with Part 2 and achieves the sustainable management purpose and principles of the RMA.

Conservation Act approval – additional criteria

3.19 Contact is seeking relatively minor concessions to enable the Project, that would otherwise be sought under the Conservation Act, namely:

(a) An easement for a right of way for the construction of a culvert stream crossing to replace an existing ford over the Mimihau Stream North Branch (subject to Part 4A (Marginal Strips) of the Conservation Act). The culvert will enable construction and potentially ongoing maintenance access.

(b) An airspace easement for a high voltage (220kV) transmission line to pass over this same marginal strip, in a different, but nearby, location to the proposed culvert.

(c) An airspace easement for a right to convey electricity to permit the transmission line crossing over part of the Waiarikiki Stream, Mimihau Conservation Area (should this be required).

3.20 The details of the concessions sought and proposed activities are set out in the Conservation Act approvals application, which is Part C of the overall application documents.

3.21 In light of the significant and long-term nature of the Project, Contact is seeking a 60-year term for these easements. Part C sets out the justification for that term (which is more than the 'default' 30-year maximum term under section 17Z(3) of the Conservation Act).

3.22 As with all other approvals sought in the overall application, the Panel must take into account, and give the greatest weight to, the purpose of the FTAA when assessing the concession applications.

3.23 Clause 7 of Schedule 6 to the FTAA sets out a detailed list of other matters that must also be taken into account, including most fundamentally Part 3B of the Conservation Act.

3.24 A number of the other matters listed in clause 7 are not relevant here,[57] including because the concessions sought would normally be sought under the Conservation Act (not the Wildlife Act or the National Parks Act 1980). There are specific listed circumstances where the concessions must not be granted,[58] but those are not relevant here.

3.25 Part C includes the necessary analysis against all the criteria that are relevant to the Expert Panel's decision on the concessions. In particular, Part C addresses:

(a) the nature of the existing environment and the proposed activities;

(b) the consideration of alternative options;

(c) an assessment of the environmental impacts and proposed management measures;

(d) details of consultation undertaken; and

(e) an assessment of the relevant objectives and policies of the Southland Murihiku Conservation Management Strategy.

[57] Specifically, 7(1)(a)(iii), (iv), (v), (vii) - because there are no relevant documents that have been co-authored, authored or approved by a Treaty settlement entity - (viii), and (ix).
[58] Clause 7(3) of Schedule 6.

3.26 The analysis demonstrates that all potential adverse effects of the proposed activities are anticipated to be appropriately managed. None of the matters that the Expert Panel must take into account under clause 7 of Schedule 6 weigh against the concessions being granted.

Wildlife Act approval – additional criteria

3.27 Under the FTAA, a wildlife approval means a 'lawful authority' for an act or omission that would otherwise be an offence under any various sections of the Wildlife Act, including section 63(1).[59] 'Lawful authority' is not defined in the FTAA or the Wildlife Act.[60] A wildlife approval under the FTAA has the same effect as if granted under the Wildlife Act.[61]

3.28 In considering an application for a wildlife approval (including conditions), the Panel must take into account:[62]

(a) the purpose of the FTAA (as above, this must be given the greatest weight);

(b) the purpose of the Wildlife Act and the effects of the Project on Helms' stag beetles and lizards[63] (the relevant protected wildlife); and

(c) information and requirements relating to that wildlife (including the New Zealand Threat Classification System or any relevant international conservation agreement).

3.29 The Wildlife Act does not contain a standalone purpose section. The long title states:

> *An Act to consolidate and amend the law relating to the protection and control of wild animals and birds, the regulation of game shooting seasons, and the constitution and powers of acclimatisation societies.*

3.30 The Court of Appeal and Supreme Court have confirmed that the Wildlife Act has a protective purpose (although protection of wildlife is not the sole purpose of the Act).[64] What types of activity fall within the 'protective purpose' of the Act will be fact and circumstance dependent.[65] Protection is a part of the Wildlife Act's overarching purpose of regulating human

[59] Schedule 7 clause 1.
[60] The Court of Appeal in *PauaMAC5 Inc v Director-General of Conservation* [2018] NZCA 348, [2019] 2 NZLR 1 at [21] referred to the lawful authorities the Director-General can grant under sections 53 and 54. Section 71, which would also provide lawful authority; is explicitly disapplied by clause 8 of Schedule 7 of the FTAA.
[61] Section 96 FTAA.
[62] FTAA, schedule 7, cl 5.
[63] Specifically, Tussock skink and Tautuku gecko (presence confirmed) and green skink and herbfield skink (presence unlikely, but possible).
[64] *PauaMAC5 Inc v Director-General of Conservation* [2018] NZCA 348, [2019] 2 NZLR 1 at [42]–[43], [47], [52] and [58]; and *Shark Experience Ltd v PauaMAC5 Inc* [2019] NZSC 111, [2019] 1 NZLR 791 at [44] and [66].
[65] *PauaMAC5 Inc v Director-General of Conservation* [2018] NZCA 348, [2019] 2 NZLR 1 at [52]–[53].

interactions with wildlife. That protective purpose is not absolute; it requires consistency with protection at a species level, not solely at an individual animal level.

3.31 Recent legislative amendments have clarified that a section 53 Wildlife Act authority may, in certain circumstances, be granted for killing of wildlife that is incidental to carrying out an otherwise lawful activity. Those circumstances are where the overall effect of the authority would be consistent with the protection of populations of wildlife and individual wildlife. The focus is on protecting individual wildlife and the viability of populations of wildlife as far as practicable.[66]

3.32 The protected wildlife species that are to be covered by the wildlife approval sought in this application are tussock skink (At Risk – Declining), Tautuku gecko (At Risk – Declining), green skink (Threatened – Nationally Critical), herbfield skink (At Risk – Declining) and Helms' stag beetles. None of these species are subject to international conservation agreements.

3.33 Contact is proposing to translocate native fauna (Helms' stag beetles, tussock skink and Tautuku gecko, and if found, green skink and herbfield skink) from identified areas of habitat that will be affected by vegetation / habitat clearance required for the construction of the Project and relocate them to areas outside the Project footprint.

3.34 Salvage and relocation will be undertaken carefully, in accordance with the methods recommended by Wildlands and specified in the Lizard Management Plan (**LMP**) and Terrestrial Invertebrate Management Plan (**TIMP**). These measures will mitigate the potential effects of Project construction activities on those species – both at an individual level, and at a species (or population) level.

3.35 Habitat values at the translocation areas will be significantly improved, through habitat restoration and enhancement measures, fencing and predator control (as summarised in Section 4 of this application document).

3.36 These measures are all required by the conditions proposed to attach to the resource consents, and to the wildlife approval. Of note, the LMP and TIMP attach to both the resource consent and wildlife approval conditions. While the other ecology management plans are intended to be subject to a post-consenting certification process, Contact is asking the Panel to approve the

[66] Sections 53A-53C, Wildlife Act 1953.

LMP and TIMP in final form in its decision on the application, so that they can in turn attach in final form to the wildlife authority.

3.37 Given these proposed measures, and noting that native lizards and invertebrates are currently subject to predation and degraded habitat values at the Project Site, the required translocation of fauna is consistent with the purpose of the Wildlife Act.

Archaeological authorities – additional criteria

3.38 Contact is seeking a 'site-wide' archaeological authority for the Project (refer to Part E of the overall application document). The authority is being sought on a precautionary basis: only two archaeological sites have been identified across the Project Site, and neither are expected to be directly affected by the Project works. However, one of the two sites is in close proximity to the works, and it is also possible that earthworks elsewhere on the Project Site will modify or destroy unrecorded archaeological sites or material.

3.39 In considering the application, the Panel must take into account:[67]

(a) The purpose of the FTAA. As above, this must be given the greatest weight.

(b) The matters set out in section 59(1)(a) of the HNZPTA. In that respect:

(i) the historical and cultural heritage values of the archaeological sites within the Project Site are described in Part E and in the supporting expert archaeological assessment;

(ii) the application is consistent with the purpose and principles of the HNZPTA, as the authority will ensure the correct handling and management of any archaeological sites discovered during the proposed works, while enabling the development of the Project;

(iii) Contact has consulted with the persons who may be directly affected by the proposed archaeological authority, including the landowners, TAMI and HNZPT;

(iv) there is no statutory acknowledgement that relates to any archaeological site within the Project Site; and

(v) the Project will respect the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi

FTAA, schedule 8, cl 4.

tūpuna, wāhi tapu, and other taonga of relevance to the Project Site, as summarised in Part A and in Part C of the application documents.

(c) The matters set out in section 47(1)(a)(ii) and (5) of the HNZPTA). In that respect:

(i) the effects on archaeological sites / values will be no more than minor;

(ii) the significance of the two known archaeological sites at the Project Site has been carefully assessed, and the expectation is that neither will be directly affected by the Project works; and

(iii) the only HNZPT 'statement of general policy' that is potentially relevant is *"The Administration of the Archaeological Provisions"* (2015). There is nothing in that document that weighs against the granting of the application.

3.40 Of particular note is that mana whenua, all relevant landowners, and HNZPT are comfortable with Contact's application for a general, site-wide authority for the Project.

Freshwater fisheries approvals – additional criteria

3.41 Contact is seeking approval, as provided for in section 42(4)(j) of the FTAA, for approvals *"that would otherwise be applied for under regulation 42 or 43 of the Freshwater Fisheries Regulations 1983 in respect of a complex freshwater fisheries activity"*.

3.42 The relevant 'complex freshwater fisheries activity' that Contact is seeking approval for is *"a culvert or ford that permanently blocks fish passage"*.[68]

3.43 Proposed resource consent conditions CM14 and CM15 require the permanent culverts that will be constructed for the Project to have fish passage provided and maintained, with the design of the culverts to be consistent with the New Zealand Fish Passage Guidelines.

3.44 However, proposed condition CM15(2) specifies that fish passage will not be provided for at three specific culverts (referred to as NSC1, NSC3, and NSC6). That reflects the advice of Contact's consultant freshwater ecologists, and of DoC, that trout should be prevented from passing through those specific culverts in order to protect native freshwater fish (Gollum

[68] Per the definition of 'complex freshwater fisheries activity' in section 4 of the FTAA.

galaxias) upstream of NSC1 and NSC3, and Clutha flathead galaxias upstream of NSC6).

3.45 For completeness, and noting that strictly speaking constructing the culverts without providing for fish passage is a 'complex freshwater fisheries activity', Contact is seeking approval in respect of those three specific culverts (refer to Part F of the overall application).

3.46 Part F describes the relevant existing environment, focussing specifically on the location of the three relevant culverts. Existing water quality and freshwater ecology values are addressed, along with the design of the proposed culverts, and the views of DoC and TAMI.

3.47 In considering the application, the Panel must take into account:[69]

(a) the purpose of the FTAA (which must be given the greatest weight);

(b) the alignment of the proposed activity with best practice and the New Zealand Fish Passage Guidelines;

(c) how the proposed activity will manage risks to freshwater values or habitat, including prevention of access to or spread of invasive species

(d) the availability and quality of the habitat upstream and downstream of the proposed activity;

(e) the presence of threatened, data-deficient, or at-risk species under the New Zealand Threat Classification System in the vicinity of the proposed activity; and

(f) the advantages and disadvantages of providing fish passage upstream or downstream of the proposed activity.

3.48 These considerations are addressed in Part F of the application. Put simply, it is preferable in ecological terms for the three relevant culverts to prevent rather than provide for fish passage.

4. CONDITIONS

4.1 When considering the application, the Panel must decide whether to grant any approvals and set any conditions to be imposed on those approvals.[70]

4.2 The Panel has a broad scope to impose conditions, subject to the following requirements in the FTAA:

FTAA, schedule 9, cl 5.
[70] FTAA, s 81(1).

(a) the Panel may impose conditions that an applicant has proposed with its application;[71]

(b) the Panel may set conditions relating to the effect of the grant of any approvals on Treaty settlements and recognised customary rights;[72]

(c) relevant Ministers[73] may comment on a draft decision of the Panel and any draft conditions proposed;[74] and

(d) as referenced above, any conditions on approvals must be no more onerous than necessary to address the purpose for which they are set.[75]

4.3 Schedules 5 to 11 of the FTAA set out specific considerations relevant to each approval sought,[76] and in some instances require the Panel to set conditions in accordance with the legislation to which that approval relates. For example, the Panel may set conditions under Parts 6, 9 and 10 of the RMA (for resource consents)[77] and under section 17X of the Conservation Act (for concessions)[78].

4.4 To expand on that point, the Panel has broad powers to impose conditions for resource consents under Part 6 of the RMA and these are relevant to its powers to set conditions under the FTAA. The following principles, with which the Panel will be familiar, are relevant. Valid conditions must:

(a) be for a resource management purpose and not for any ulterior purpose;

(b) fairly and reasonably relate to the proposal which is the subject of consent or designation (noting that section 108AA of the RMA requires a condition to be *"directly connected"* to an adverse effect of the activity on the environment and/or an applicable planning rule or environmental standard);

(c) not be so unreasonable that no reasonable decision-maker could have imposed them; and

[71] For example, FTAA, sch 5, cl 12(1)(k) (resource consent).
[72] FTAA, s 84.
[73] The Minister for Māori Crown Relations: Te Arawhiti and the Minister for Māori Development.
[74] FTAA, s 72.
[75] FTAA, s 83.
[76] FTAA, sch 5, cl 18 (resource consent), cl 19 (freshwater fisheries activity), cl 25 (designation); sch 6, cl 8 (concession), cl 32 (land exchange), cl 46 (conservation covenant); sch 7, cl 6 (wildlife approval); sch 8, cl 5; sch 9, cl 6 (freshwater fisheries activity approval); sch 10, cl 7 (marine consents); and sch 11, cl 9 (access arrangements) and cl 21 (mining permits).
[77] FTAA, schedule 5, cl 18.
[78] FTAA, schedule 6, cl 8.

(d) not involve an unlawful delegation of the decision-maker's duties.[79]

4.5 Another key administrative law principle is that a condition cannot negate, frustrate, or nullify the grant of consent. This means that the Panel cannot grant consent subject to a condition that cannot be complied with.[80]

4.6 For other approvals, the Panel may apply bespoke conditions clauses (ie not contained in the enabling legislation) for certain types of approvals. For example, for Wildlife Act approvals, the Panel may set conditions that it considers necessary to manage the effects of the activity on protected wildlife.[81]

4.7 In terms of process, before granting an approval under section 81, the Panel must direct the EPA to seek comments on its draft conditions from the applicant, persons that provided comments on the application (and any report for a land exchange) and parties with statutory responsibility to enforce or monitor compliance with the relevant conditions.[82]

4.8 Again, if a panel is minded to decline an approval, it must provide the applicant with an opportunity to propose conditions on, or modifications to, any of the approvals sought, or withdraw any parts of the application that sought those approvals.[83]

4.9 Contact has prepared extensive proposed conditions, which have been provided with the application.

4.10 The condition set for the resource consents is by far the most detailed. Contact has engaged extensively with mana whenua, DoC, the Councils, and others in respect of the proposed consent conditions, which have been well honed through the previous fast-track process.

4.11 The proposed consent conditions were developed under the Covid Fast-track Act, which did not include the FTAA-specific requirement that conditions must be no more onerous than necessary to address the purpose for which they are set. There is a good case to be made that the consent conditions should be reassessed, and made less onerous, in light of that statutory limitation.

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[79] *Newbury District Council v Secretary of State for the Environment* [1980] 1 All ER 731 (HL) at [739], endorsed in the context of the RMA in *Housing NZ Ltd v Waitakere City Council* [2001] NZRMA 202 (CA) at [18].
[80] See generally *Lyttelton Port Company Limited v Canterbury Regional Council* EnvC Christchurch C8/2001, 26 January 2001 at [11], W*estfield (New Zealand) Limited v Hamilton City Council* (2004) 10 ELRNZ 254 (HC) at [53]–[55], and *Director-General of Conservation v Marlborough District Council* [2004] 3 NZLR 127 (HC) at [22]–[23].
[81] FTAA, schedule 7, cl 6(1).
[82] FTAA, s 70(1).
[83] FTAA, s 69(2)(b). Any draft conditions relating to Treaty settlements may be commented on by relevant Ministers under section 72.

4.12 However, Contact does not propose to resile from where the conditions landed during the previous fast-track process. The proposed consent conditions provide a comprehensive set of controls and will ensure the Project achieves the best possible environmental outcomes. The panel would need to have a very compelling basis to impose conditions that are more stringent or detailed than those proposed by Contact.

4.13 Conditions are also proposed for each of the other authorisations sought for the Project. In each case, Contact has started with 'standard form' conditions of the sort that the relevant administering agency would normally impose, and has adapted those as appropriate.

4.14 The Panel will need to consider the conditions proposed by Contact, and any comments made on the conditions by the administering agencies and others involved in the process. Ultimately, the Panel – rather than the administering agency – must determine what conditions to impose.

5. CONCLUSION

5.1 New Zealand urgently needs this Project and the large amount of renewable electricity it will produce. Its proposed location is well suited for a large-scale wind farm. As with all wind farms, some adverse effects are unavoidable, but in this case they will be comprehensively addressed through a wide array of management measures that will (among other positive outcomes) lead to a net biodiversity gain.

5.2 Unsurprisingly, therefore, the Project satisfies all the relevant tests under the FTAA – which is tailor-made to facilitate the delivery of highly beneficial, nationally significant infrastructure like this – as well as the other relevant legislation.

5.3 The Panel can therefore be satisfied that the approvals sought by Contact can be granted on the conditions it has proposed.

DATED 18 August 2025

……
D G Randal / T J Ryan
Counsel for Contact Energy Limited

APPENDIX – NOTICE OF APPEAL

[Overleaf]

DUPLICATE

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2025-485- 202

Under the	**COVID-19 RECOVERY (FAST-TRACK CONSENTING) ACT 2020**
In the matter of	an appeal under clause 44 of Schedule 6 to the Act
Between	**CONTACT ENERGY LIMITED**
	Appellant
And	**AN EXPERT CONSENTING PANEL APPOINTED UNDER THE ACT**
	Respondent

NOTICE OF APPEAL

28 March 2025

Received by Email
Date: 28/3/25

BUDDLE FINDLAY
Barristers and Solicitors
Wellington

Solicitor Acting: **David Randal / Thaddeus Ryan**
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TO: The Registrar of the High Court at Wellington

AND TO: The Respondent

1. Contact Energy Limited (**Contact / Appellant**) gives notice that it appeals to the High Court against the decision of the Expert Consenting Panel (**Panel**), decided and issued on 18 March 2025 (**Decision**)[1] under the COVID-19 Recovery (Fast-track Consenting) Act 2020 (**Act**), to decline the application for resource consents for the Southland Wind Farm Project (**Project**).

DECISION APPEALED AND ERRORS OF LAW

2. The Appellant appeals against the whole of the Decision on the grounds that the Decision is wrong in law. The Appellant appeals particularly in relation to the following issues / errors of law:

   Issue 1: Incorrect application of section 104D(1)(b) of the Resource Management Act 1991 (**RMA**) ('gateway' test for non-complying activities);

   Issue 2: Errors of interpretation in statutory evaluation, in terms of the relevant policy and planning provisions;

   Issue 3: Incorrect interpretation and application of the 'functional need' test in the National Policy Statement for Freshwater Management 2020 (**NPS-FM**), Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (**NES-F**) and Proposed Southland Water and Land Plan;

   Issue 4: Incorrect interpretation and application of the 'functional or operational need' test in the National Policy Statement for Highly Productive Land 2022 (**NPS-HPL**) and Southland Regional Policy Statement;

   Issue 5: Findings on ecology, landscape, natural character, and visual effects that were unreasonable and failed to take into account relevant matters;

   Issue 6: Incorrect findings as to lawfulness of certain conditions of consent proposed by Contact; and

[1] The Decision is available at: Southland-Wind-Farm-Decision_FINAL-1.pdf

Issue 7: Unjust and unfair process and failure to adhere to natural justice principles.

ISSUE 1: INCORRECT APPLICATION OF SECTION 104D(1)(B) OF THE RMA ('GATEWAY' TEST FOR NON-COMPLYING ACTIVITIES)

Errors of law

3. In concluding at [825] that the Project does not pass either 'gateway' test in section 104D of the RMA and that therefore consent cannot be granted, the Panel erred in law in its application of the 'objectives and policies gateway' in section 104D(1)(b). In particular, the Panel erred in law by:

   (a) failing to take a 'fair appraisal' approach to assessing the objectives and policies of the regional and district plans, in evaluating whether the Project was for activities that will be contrary to those objectives and policies;

   (b) isolating and de-contextualising individual provisions in a manner that does not fairly reflect the broad intent of the plans;

   (c) ignoring relevant national policy statements in undertaking its assessment under section 104D(1)(b); and

   (d) reaching its conclusion unreasonably, contrary to the unanimous views of the expert planners participating in the process.

Questions of law to be resolved

4. The appeal raises the following questions of law:

   Did the Panel correctly apply section 104D(1)(b) of the RMA in the Decision?

   Was the Panel's conclusion that the Project failed to pass the section 104D(1)(b) gateway reasonably available on the information before it?

Grounds of appeal

5. The grounds of appeal in relation to these questions of law are:

(a) The Panel was required under the Act to apply the section 104D RMA gateway test.[2]

(b) The Project passes the 'objectives and policies gateway' (section 104D(1)(b)), because it would not be contrary to the objectives and policies of the relevant regional and district plans.

(c) The key judicial decision explaining how a decision-maker on a resource consent application must apply section 104D(1)(b) is the Supreme Court's decision in *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* (***East / West Link***).[3]

(d) In determining (incorrectly) that the Project could not pass through the relevant gateway, the Panel erred in its application of section 104D(1)(b). The Panel failed to acknowledge the Supreme Court's *East / West Link* decision as the leading authority on the application of section 104D(1)(b) and failed to apply section 104D(1)(b) in the way described by the Court in that case.

(e) The Panel referred at [734] to the requirement to undertake a *'fair appraisal'* of the relevant objectives and policies, read as a whole. However, the Panel failed to carry out a fair appraisal, which requires a detailed analysis to be undertaken of the various relevant plan provisions and, to the extent necessary, a reconciliation of any provisions that may appear to be in conflict, in order to understand the overall intention of the planning instruments with respect to the appropriateness of the proposed activity in its proposed location and context.

(f) The Panel made findings on the consistency of the Project with individual objectives and policies (some of which were themselves in error, see Issues 2 and 3 below), and findings on the overall consistency of the Project with each of the regional and district instruments it considered. However, in concluding at [824] that the Project was contrary to the objectives and policies of the relevant plans and failed the section 104D(1)(b) gateway test, the Panel did not reconcile its findings that the Project was inconsistent with various

[2] Clause 32(1) of Schedule 6 of the Act applies section 104D of the RMA to the Decision. The applications for consent for the Project were assessed as a non-complying activity, therefore section 104D of the RMA applied.
[3] *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26, [2024] 1 NZLR 241.

provisions / planning instruments on the one hand, with its findings that the Project was consistent with various provisions / planning instruments on the other hand.[4] That exercise is necessary in order to comply with section 104D(1)(b).

(g) The Panel's evaluation under section 104D(1)(b) (at [731] to [826]) entirely ignores relevant national policy statements. The section 104D(1)(b) analysis must be carried out with an eye to those documents.[5]

(h) As part of its process, the Panel:

(i) appointed an expert advisor on planning matters, Ms Chloe Trenouth;

(ii) directed Ms Trenouth to prepare an assessment of whether the Project passed the section 104D(1)(b) gateway, issued in November 2024, in which she concluded that it did;[6]

(iii) directed Ms Trenouth to update her assessment of whether the Project passed the section 104D(1)(b) gateway, in light of new available information; the updated assessment was issued on 23 January 2025, and in it Ms Trenouth again concluded that the Project passed the gateway;[7] and

(iv) directed expert planning conferencing to take place, which occurred on 4 February 2025 and involved Ms Trenouth and planners advising Contact, the Department of Conservation (**DOC**), and Gore District Council; the planners expressed a unanimous opinion that the Project passed the section 104D(1)(b) gateway.[8]

(i) There was therefore no expert planning opinion evidence on which the Panel could reasonably have found that the Project failed to pass the section 104D(1)(b) gateway.

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[4] Including its findings that the Project was consistent with or not contrary to the Regional Water Plan for Southland (at [818]), the Regional Air Plan (at [820]), the operative Gore District Plan (at [822]) and the proposed Gore District Plan (at [823]).
[5] *East / West Link* at [92].
[6] Page 11: https://www.epa.govt.nz/assets/Uploads/Documents/Fast-track-consenting/Southland-Wind-Farm/Reports/Southland-Wind-Farm_s104D-Assessment-November.pdf.
[7] https://www.epa.govt.nz/assets/Uploads/Documents/Fast-track-consenting/Southland-Wind-Farm/Reports/Southland-Wind-Farm_s104D-Assessment-January-2025.pdf.
[8] Paragraph 64; https://www.epa.govt.nz/assets/Uploads/Documents/Fast-track-consenting/Southland-Wind-Farm/Expert-conferencing/Southland-Wind-Farm-JWS-Planning-4.2.25.pdf

(j) The Panel's errors of law in respect of the section 104D(1)(b) were exacerbated by the errors of law it made in interpreting and applying individual objectives and policies in the planning instruments (refer to Issues 2, 3 and 4). If the Panel had correctly interpreted the individual objectives and policies, that would have in turn influenced its overall *'fair appraisal'* of the provisions (had it carried out that *'fair appraisal'*, which it did not).

(k) The errors of law are material to the Decision, because if the Panel had applied section 104D(1)(b) of the RMA correctly, it would have determined that the application could pass through that gateway, which in turn would have informed its overall consideration of the Project under clause 31 of Schedule 6 to the Act.

ISSUE 2: ERRORS IN STATUTORY EVALUATION (IN TERMS OF THE RELEVANT POLICY AND PLANNING PROVISIONS)

Errors of law

6. The Panel made numerous errors of law in considering and applying the relevant national environmental standards, national policy statements, and regional and district planning instruments under clause 31(1)(c) of schedule 6 to the Act. Those errors include:

(a) The Panel erred in concluding that Southland District Plan (**SDP**) Objective NFL-O1 and Policy NFL-P1 apply to the Project, rather than Policy NFL-P3;

(b) The Panel erred when finding the Project to be inconsistent with objectives and policies that require or provide for environmental effects to be *"avoided, remedied, or mitigated"* on the basis that the relevant effects are not reduced to nil through avoidance, remediation or mitigation measures; and

(c) The Panel erred when finding the Project to be inconsistent with or contrary to provisions that specify considerations or requirements for a decision-maker, and do not set 'bottom line' requirements for applications to meet.

Questions of law to be resolved

7. The appeal raises the following questions of law:

Do SDP Objective NFL-O1 and Policy NFL-P1 apply to the Project, or does SDP Policy NFL-P3 apply?

Do the relevant policies that require or provide for environmental effects to be *"avoided, remedied, or mitigated"* require the relevant effects to be reduced through avoidance, remediation or mitigation measures to nil?

Did the Panel err in law when finding the Project to be inconsistent with or contrary to provisions that specify considerations or requirements for a decision-maker, and do not set 'bottom line' requirements for applications to meet?

Grounds of appeal

8. The grounds of appeal in relation to these questions of law are:

SDP Objective NFL-O1, Policy NFL-P1 and Policy NFL-P3

(a) In respect of landscape values, the key relevant SDP provisions are:

> **Objective NFL-O1** Outstanding Natural Features (**ONF**) and Landscapes are protected from inappropriate subdivision, land use and development.
>
> **Policy NFL-P1** Avoid inappropriate subdivision, land use and development within areas identified as Outstanding Natural Features and Landscapes.
>
> **Policy NFL-P3** Avoid, remedy or mitigate adverse effects of subdivision, land use and development on the District's natural features and landscapes that have not been assessed by Council for landscape values.

(b) There is no relevant ONF identified in the SDP.

(c) The Panel erred in finding at [757] and [758] that Objective NFL-O1 and Policy NFL-P1 apply to the Project, and that the Project is contrary to those provisions.

(d) Instead, Policy NFL-P3 applies because the natural features / landscapes of the Project site have not been assessed by the Southland District Council for landscape values. The Panel erred at [757] in finding that Policy NFL-P3 is not relevant.

(e) The Panel relied on the Southland / Murihiku Regional Landscape Study 2019 (**Study**) as amounting to an assessment of the Project site by Southland District Council for landscape values. That reliance was wrong in law: the Study does not amount to an assessment by Southland District Council of the landscape values of the site, because:

(i) The 'explanation' to Policy NFL-P3 states that a range of natural features of landscapes have not been assessed to determine their natural values, and that *"As landscape assessments of these areas are undertaken Council, through the plan change process, may identify and protect additional Outstanding Natural Features and Landscapes and Visual Amenity Landscapes"*. No such plan change process has occurred in respect of landscape features relevant to the Project site.

(ii) That Study itself includes specific disclaimers stating that it is not local government policy, that it is incomplete because it does not include cultural advice on values or matters of importance to Ngāi Tahu ki Murihiku, and that it has not been tested by the general public through a public consultation process.

(f) The correct legal position is that Southland District Council has not assessed the Project site for landscape values, and therefore Policy NFL-P3 applies to the Project, and Objective NFL-O1 and Policy NFL-P1 do not apply.

(g) The Panel has therefore erred in finding that Policy NFL-P1, with a more stringent 'avoid inappropriate subdivision, land use and development' standard, applies to the Project, rather than Policy NFL-P3, which has a lesser requirement for effects to be *"avoided, remedied, or mitigated"*. In doing so, the Panel has disregarded the position taken by all the expert planners[9] and relied on an untested 2019 desktop and region-wide landscape study to equate to *"identification"* by Council of part of the Project site as an ONF.

(h) This error of law is material to the Decision, because the Panel's findings that Objective NFL-O1 and Policy NFL-P1 apply, and subsequently an assessment that inappropriate land use / development

[9] Joint statement of planning experts, 4 February 2025, from paragraph 39: https://www.epa.govt.nz/assets/Uploads/Documents/Fast-track-consenting/Southland-Wind-Farm/Expert-conferencing/Southland-Wind-Farm-JWS-Planning-4.2.25.pdf

would not be avoided in accordance with Policy NFL-P1, were central to the Panel's section 104D(1)(b) analysis and to its overall Decision on the application.

Provisions requiring / providing for effects to be *"avoided, remedied, or mitigated"*

(i) A number of the objectives and policies considered by the Panel require or provide for effects to be *"avoided, remedied or mitigated"*. The Panel has erred in law by interpreting those policies as requiring the relevant effects to be reduced through avoidance, remediation or mitigation measures to nil, and has found the Project to be inconsistent with those policies where it considered that has not occurred. Provisions where the Panel has taken this incorrect approach are:

(i) Ecology Objective ECO-O1 and Policies ECO-P2 and ECO-P3 in the SDP: the Panel erred in law by finding at [751] that those provisions do not provide for residual effects to be addressed through offset or compensation measures. That finding – essentially that all effects must be avoided, remedied or mitigated to nil, and if that does not occur an application will automatically be contrary to those provisions – is wrong in law.

(ii) Energy and minerals Objective EM-O1 and Policy EM-P1 of the SDP: the Panel erred in law by finding at [764] that the Project is contrary to those provisions because not *all* effects can be avoided, remedied or mitigated. The Panel's finding in respect of these provisions erroneously disregards Policy EM-P8, which directly provides for residual effects of renewable electricity generation to be offset or compensated for.

(iii) Infrastructure Objective INF-O1 and Policy INF-P1 of the SDP and regionally and nationally significant infrastructure Policy 26A (and Objective 9B) in the Proposed Southland Water and Land Plan: the Panel erred in law by finding at [764] and at [779] – [780] that the Project is contrary to those provisions because not *all* effects can be avoided, remedied or mitigated. The Panel also erred in law by ignoring that those provisions are enabling provisions, and are explicitly to "*recognise and provide for*" infrastructure development when making those findings.

(iv) General rural zone Objective GRUZ-O1 and GRUZ-O2 and Policies GRUZ-P2, GRUZ-P4 and GRUZ-P8 of the SDP: the Panel erred in law by finding at [764] that the Project is by definition contrary to those provisions because not *all* effects can be avoided, remedied or mitigated.

(j) In respect of the ecology provisions in particular, further measures were proposed to offset and / or compensate for the remaining effects, to the point where the end result of the Project would be an overall gain in ecological values – including an overall increase in the area of wetlands in the Southland Region. The Panel erred in disregarding those measures when applying the ecology provisions.

(k) The Panel has applied these provisions, which provide for / require effects to be *"avoided, remedied or mitigated"*, as if they simply require all effects to be *"avoided"*. That is wrong in law: to mitigate means *"make less severe"*, meaning applications that *reduce* as opposed to *eliminate* effects can be consistent with avoid / remedy / mitigate provisions.

(l) The errors of law in respect of these provisions are material to the Decision. If the Panel had correctly applied the avoid / remedy / mitigate provisions, it would have found the Project to be consistent with those provisions, because in all cases measures had been applied or were proposed to substantially reduce the relevant effects.

<u>Provisions that specify considerations for a decision-maker</u>

(m) A number of the objectives and policies addressed in the Decision specify considerations for a decision-maker, but do not set requirements for applicants to meet. The Panel erred in law by applying those provisions as if they do set requirements for applicants or proposals, and finding the Project to be inconsistent with those provisions. The provisions in respect of which the Panel has taken this incorrect approach include:

(i) Ecology Policy ECO-P9 in the SDP: this policy requires decision-makers and / or the relevant council to *"Encourage biodiversity initiatives that promote the retention, maintenance and enhancement of indigenous biodiversity"*.

The Panel has erred in law by finding at [754] and [755] that the Project is contrary to this policy. That finding appears to be based on the Panel's conclusion that the offset and compensation measures proposed by the Appellant are not adequate to address all the residual effects of the Project on ecology values.

However, as a matter of law the Project cannot be 'contrary to' the policy, because the policy requirement is on the Panel to encourage biodiversity initiatives.

(ii) Energy and Minerals Policy EM-P4 in the SDP: this policy requires decision-makers to *"Recognise that development of energy and mineral resources and the generation of electricity can have a functional, technical or operational requirement to be sited at a particular location"*.

The Panel erred in law by finding at [766] that the Project is 'partially consistent' with this policy, because the Panel considered there is no functional need for the Project to be at this particular location, while accepting there may be technical or operational requirements to be at this location. However, as a matter of law the Project cannot be partially consistent with (or partially inconsistent with) the policy, because the policy requirement is on the Panel to recognise the particular needs of electricity generation. The policy is an enabling one.

Alternatively, if EM-P4 is a policy for the Project to meet, then the Panel erred in its 'partially consistent' finding. The policy clearly refers to activities having a functional, technical, **or** operational need to be sited at a particular location. If there is a technical or operational need (as the Panel accepted there may be), then the Project is consistent with the policy.[10]

(iii) Energy and Minerals Policy EM-P8 in the SDP: this policy requires decision-makers to *"Provide for offsetting measures or environmental compensation where any residual environmental effects of renewable electricity generation cannot be avoided, remedied or mitigated."*

[10] Additionally, the Panel erred in its consideration of what amounts to a 'functional need' – refer to Issue 3.

The Panel erred in law by finding at [766] that the Project is 'partially consistent' with this policy, based on its findings that the offset and compensation proposed by the Appellant were not appropriate to address effects on the Jedburgh plateau. However, as a matter of law the Project cannot be partially consistent with (or partially inconsistent with) the policy, because the policy requirement is on the Panel to provide for offsetting and compensation as an alternative / additional way to address adverse effects. The policy is an enabling one.

The Panel made no attempt to reconcile the enabling nature of this policy, which lends support to offsetting and compensation being endorsed as appropriate, with its earlier findings taking issue with the nature of the offsetting and compensation proposed by the Appellant in the context of other policy and planning instruments.

(iv) Policy C2 of the National Policy Statement on Renewable Electricity Generation 2011 (**NPS-REG**): this policy requires that *"When considering any residual environmental effects of renewable electricity generation activities that cannot be avoided, remedied or mitigated, decision-makers shall have regard to offsetting measures or environmental compensation including measures or compensation which benefit the local environment and community affected"*.

The Panel erred in law by finding at [882] that the Project is not consistent with this policy, because of the Panel's view that the offsetting and compensation measures proposed by the Appellant will not adequately offset and compensate for the residual effects of the Project. However, as a matter of law the Project cannot be inconsistent with the policy, because the policy requirement is on the Panel to have regard to the offsetting and compensation measures proposed by the Appellant. The policy is an enabling one.

(n) The Panel erred in law by applying these policies as if they set requirements for the Project to meet, and determining that the Project was contrary to or inconsistent with the policies on that basis.

(o) The errors of law in respect of these policies are material, because if the Panel had correctly applied the policies, it would not have found the Project to be contrary to or inconsistent with them. That would in turn have influenced the Panel's assessment of the Project against the section 104D(1)(b) RMA gateway test, and under clause 31 of Schedule 6 to the Act.

ISSUE 3: INCORRECT APPLICATION OF THE 'FUNCTIONAL NEED' TEST IN THE NATIONAL POLICY STATEMENT FOR FRESHWATER MANAGEMENT 2020, RESOURCE MANAGEMENT (NATIONAL ENVIRONMENTAL STANDARDS FOR FRESHWATER) REGULATIONS 2020 AND PROPOSED SOUTHLAND WATER AND LAND PLAN

Error of law

9. The Panel misinterpreted and incorrectly applied the 'functional need' test that applies to specified infrastructure developments that will result in the loss of extent or values of rivers or natural inland wetlands under the NPS-FM and Proposed Southland Water and Land Plan.

Questions of law to be resolved

10. The appeal raises the following questions of law:

Did the Panel correctly apply the 'functional need' test in respect of effects on rivers and natural inland wetlands in the Decision?

As a result of its approach to the 'functional need' test, did the Panel err in finding that the Project was inconsistent with the NPS-FM?

As a result of its approach to the 'functional need' test, did the Panel err in finding that consents for the Project could not be granted under the NES-F?

Grounds of appeal

11. The grounds of appeal in relation to these questions of law are:

(a) The NPS-FM provides that the loss of the extent and values of rivers (clause 3.24) and natural inland wetlands (clause 3.22) should be avoided, subject to an exemption available for 'specified infrastructure' (such as the Project) where it can be demonstrated that there is a "*functional need for the specified infrastructure in that location*". Functional need is defined in clause 3.21 of the NPS-FM to mean "*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".

(b) These requirements have been imported into the Proposed Southland Water and Land Plan (Policy 28A in relation to rivers and Policy 33A in relation to natural inland wetlands).

(c) The NES-F provides that resource consents for activities related to specified infrastructure within or in close proximity to natural inland wetlands may only be granted if the *"functional need"* test is met.

(d) The Panel erred in finding that the Project does not meet the functional need test in respect of natural inland wetlands (at [795]) and streams (at [811]), and that it could not grant the discretionary activity resource consents under the NES-F (at [904]), because:

(i) While the Panel correctly identified the leading case on the functional need test,[11] it ignored the High Court's reasoning in that case that the test does not require the proposed location for the infrastructure to be the only possible location, because applying the test in that way would render the exception 'redundant' or 'otiose'. Instead, "*practicalities*" that constrain potential locations need to be considered.[12]

(ii) The Panel then applied the functional need test with no reference to or acknowledgment of constraints and practicalities. The Panel stated simply that it *"is not satisfied [Contact] has met the "high bar" of "can only" in relation to the functional need for the Project to be in this particular location (or environment). There are other high points with similar wind conditions and other well suited locations in this area, as is evidenced by the nearby Kaiwera Downs windfarm and the Regional Energy Strategy"*.[13]

(iii) In making that finding, the Panel erred in assessing the Project on the basis that Contact is required to prove that there are no conceivable alternatives for the location of the Project. Nor has the Panel given any consideration to whether any of the 'other

[11] *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2022] NZHC 629 (**Mt Messenger decision**).
[12] Mt Messenger decision at [48] and [58] – [59].
[13] Panel Decision at [795].

well suited locations' for the Project would entirely avoid any loss of stream or natural inland wetland extent / values.

(e) That error of law is material, because if the Panel had correctly considered the relevant constraints and practicalities when applying the functional need test, it would have found that the Project met the test.

(f) If the Panel had then appropriately considered the evidence to assess whether the effects of the Project had been managed by applying the effects management hierarchy, it would have found that they had been (refer to Issue 5 below). The Panel would then have concluded that the Project was consistent with the NPS-FM and Proposed Southland Water and Land Regional Plan in respect of stream and natural inland wetland loss. That would in turn have influenced the Panel's assessment of the Project against the section 104D(1)(b) RMA gateway test, and under clause 31 of Schedule 6 to the Act. The Panel would also have concluded that it was able to grant the discretionary activity consents sought under the NES-F.

ISSUE 4: INCORRECT APPLICATION OF THE FUNCTIONAL OR OPERATIONAL NEED TEST IN THE NATIONAL POLICY STATEMENT FOR HIGHLY PRODUCTIVE LAND AND SOUTHLAND REGIONAL POLICY STATEMENT

Error of law

12. The Panel misinterpreted and incorrectly applied the 'functional or operational need' test that applies to the development of highly productive land for specified infrastructure under the NPS-HPL.

Questions of law to be resolved

13. The appeal raises the following questions of law:

Did the Panel correctly apply the 'functional or operational need' test in the NPS-HPL in respect of the development of highly productive land in the Decision?

If the Panel incorrectly applied the 'functional and operational need' test in the NPS-HPL, did that result in the Panel incorrectly concluding that the Project is inconsistent with Policy RURAL.4 of the Southland Regional Policy Statement?

Grounds of appeal

14. The grounds of appeal in relation to these questions of law are:

(a) The NPS-HPL provides that the inappropriate use or development of highly productive land that is not land-based primary production must be avoided, but that the development of specified infrastructure (such as the Project) may not be inappropriate if there is a functional or operational need for the development to be on the highly productive land (clause 3.9(2)(j)).

(b) The Appellant explained to the Panel that the Project will result in the permanent loss of approximately 4 hectares of highly productive land (all of which is 'Class 3', as opposed to higher quality 'Class 1' or 'Class 2' land).[14]

(c) The Panel erred in finding at [899] that the Project is inconsistent with clause 3.9(2)(j) of the NPS-HPL, and is therefore inconsistent with the NPS-HPL, because:

(i) The Panel has at [897] imported its incorrect application of the functional need test under the NPS-FM to its NPS-HPL analysis.

(ii) The Panel at [898] has failed to address whether the Project has an operational need to be on the highly productive land. This a different test to the functional need test.

(iii) Earlier in its Decision, at [765] when addressing SDP Policy EM-P4, the Panel acknowledged the distinction between functional need and operational need, when it stated that while it was not satisfied that *"there was a functional need for the Project to be at this particular location"*, it *"accepts there may be technical or operational requirements to be at this location"*.

(iv) Had the Panel applied the 'functional or operational need' requirement correctly, it would have found that the Project met that requirement. If so, the Panel would have found that the Project is consistent with the NPS-HPL.

[14] Contact's response to Section 104D Assessment by Ms Trenouth at page 8: https://www.epa.govt.nz/assets/Uploads/Documents/Fast-track-consenting/Southland-Wind-Farm/Comments-on-draft-conditions/Applicant_Response-to-Section-104D-assessment.pdf

(d) Policy RURAL.4 of the Southland Regional Policy Statement is to *"Avoid the irreversible loss of high value soils from productive use, through inappropriate subdivision, use and development"*. The Panel found at [913] that the Project is inconsistent with that policy because it is inconsistent with the NPS-HPL. In making that finding, the Panel erred in law: its finding that the Panel was inconsistent with the NPS-HPL was based on its incorrect application of the 'functional or operational need' requirement. Had the Panel applied that requirement correctly, it would have found the Project to be consistent with the NPS-HPL, and in turn would have found the Project to be consistent with Southland Regional Policy Statement RURAL.4.

(e) These errors of law are material, because they resulted in the Panel finding that the Project is inconsistent with the NPS-HPL. If the Panel had correctly applied the relevant test, it would have concluded that the Project was consistent with the NPS-HPL and with Southland Regional Policy Statement RURAL.4. That would in turn have influenced the Panel's assessment of the Project against the section 104D(1)(b) RMA gateway test, and under clause 31 of Schedule 6 to the Act.

ISSUE 4: FINDINGS ON ECOLOGY AND LANDSCAPE EFFECTS THAT WERE UNREASONABLE AND FAILED TO TAKE INTO ACCOUNT RELEVANT MATTERS

Errors of law

15. The Panel erred in law:

(a) by making findings in relation to ecology and landscape effects which, on the evidence before it, it could not reasonably have made; and

(b) in doing so, by failing to take into account a number of relevant matters.

Questions of law

16. The appeal raises the following questions of law:

Did the Panel err in making findings in reliance on opinions expressed by:

(a) Mr Mike Harding in relation to the Project's effects on ecological values; and

(b) Ms Anne Steven in relation to the Project's effects on landscape values and visual amenity?

Did the Panel fail to take into account relevant matters in relation to the Project's ecological effects or landscape and visual effects?

Grounds of appeal

17. The grounds of appeal in relation to these questions of law are:

Ecology

(a) The Panel appointed experts to peer review ecological information relevant to the application, including Mr Harding (in respect of ecology generally), Dr Graham Ussher (in respect of the proposed measures to offset or compensate for the Project's residual adverse ecological effects), and Dr Hannah Mueller (in respect of avifauna).

(b) Mr Harding did not undertake a primary assessment of the Project's ecological effects.

(c) In his peer review capacity Mr Harding briefly visited the Project site. The overall Wind Farm Site (being the total area of the landholdings where the wind turbines and associated wind farm infrastructure would be located) covers approximately 5,800ha. The wind farm footprint would cover approximately 164ha[15] (2.8%) of this 5,800ha area. Ecological offset and compensation measures are proposed to be carried out across an area of over 11,400ha (both onsite and offsite).

(d) During his one visit to the site, Mr Harding spent approximately 6-7 hours assessing the site and surrounding area, most of which was spent in a helicopter. Less than 1.5hrs was spent physically walking on the Jedburgh Plateau – which is approximately 550ha in area located at the southern end of the Wind Farm Site. It is this plateau area where the Panel's concerns about ecology related matters were focussed.

(e) In this 1.5hr period, Mr Harding walked a distance of approximately 1320m, of which approximately 435m was within the actual wind farm footprint. If Mr Harding assessed a 6m wide corridor (3m either side of his centreline) this represents a total assessment of approximately

[15] Noting that disposal sites, which will be rehabilitated post-construction, are in addition to this area.

7900m^2 (0.8ha) of which approximately 2600m^2 (0.26ha) was within the wind farm footprint.

(f) There is approximately 30ha of wind farm footprint on the 550ha Jedburgh Plateau. As such, Mr Harding assessed less than 0.15% of the total Jedburgh Plateau area and less than 1% of the wind farm footprint on the Jedburgh Plateau. Mr Harding did not undertake any assessments following any recognised formal methodology, such as to survey the species present or plot vegetation.

(g) The Panel had before it information on ecological values and the Project's ecological effects, as relevant to Mr Harding's review, from numerous other sources, including:

(i) detailed primary assessments undertaken by experts in the areas of terrestrial and wetland ecology including offsetting and compensation (Nick Goldwater, Dr Kelvin Lloyd, Justyna Giejsztowt), freshwater ecology (Dr Ruth Goldsmith and Dr Greg Ryder), avifauna (Dr Della Bennet), lizards (Samantha King), invertebrates (Vikki Smith), bats (Dr Ian Davidson Watts and Gerry Kessels), wetland soil and hydrology (Jon Williamson) and hydrology generally (Lennie Palmer of Riley Consultants), informed by extensive field surveys (amounting to over 1,000 hours of field work);

(ii) tangata whenua, who confirmed on 27 November 2024 (through their representatives Papatipu Rūnaka ki Murihiku and Te Rūnanga o Ngāi Tahu) that *"the [Project's] cultural and te taiao [ecological / environmental] effects relevant to them have been appropriately avoided, remedied, mitigated, offset and compensated"*;[16]

(iii) a peer review of the assessment of vegetation / habitat effects on the Jedburgh plateau carried out by Roger MacGibbon of Tonkin and Taylor;

(iv) other peer reviews carried out by experts appointed by the Panel, including those of Dr Ussher and Dr Mueller; and

[16] https://www.epa.govt.nz/assets/Uploads/Documents/Fast-track-consenting/Southland-Wind-Farm/Comments-on-draft-conditions/Applicant_Memo-from-applicant-and-iwi-regarding-agreement.pdf

(v) experts and officers representing DOC, including Dr Rhys Burns (in respect of general ecology), Dr Colin O'Donnell (in respect of bats), Lynn Adams (in respect of lizards) and Herb Familton (in respect of planning and conditions).[17]

(h) All of those other experts / officers / sources expressed opinions, generally based on detailed studies and a significantly greater understanding of the Project and the receiving environment than carried out by Mr Harding, that the Project's effects on the environment:

(i) have been robustly assessed; and

(ii) will be acceptable.

(i) The Panel nonetheless made a number of key findings, in reliance on Mr Harding's opinion evidence, which were material to its Decision to decline consent. Those findings included those made at [202], [204], [208], [209], [264], [268], [273], [274], and [453] of the Decision.

(j) It was unreasonable for the Panel to rely on Mr Harding's opinions to refuse consent on ecological grounds, for the reasons summarised above.

(k) In relying on Mr Harding's opinions to refuse consent on ecological grounds, the Panel failed to take into account the information, advice, and opinions from the sources referred to at paragraph 17(g) above.

(l) In respect of the vegetation mapping, in relying on Mr Harding's opinions as to its inadequacy the Panel noted the fact that vegetation mapping of the site carried out in 2008 (for another developer) was not made available, for commercial confidentiality reasons. The Panel Decision records that the Panel *"has therefore been unable to confirm the location, extent or survey effort of the vegetation field surveys relied on in the Wildlands assessment"*.[18] However, Contact and its advisors made it clear to Mr Harding and to the Panel that the 2008 mapping was not ultimately relied on; and that for the application *"the entire site*

[17] As set out in DOC's letter to the Panel providing comments on proposed conditions of consent: Department-of-Conservation_Comments-on-Draft-Conditions.pdf – the letter records that "*All technical experts are now satisfied that their concerns have been addressed in the latest set of conditions*".
[18] Panel Decision at [201].

was mapped anew through desktop and ground truthing".[19] The Panel failed to take into account this explanation in its Decision.

(m) Each error of law is material to the Decision as the Panel refused consent on the grounds of (*inter alia*) effects on significant indigenous vegetation, lizards, invertebrates, and ecological offsets/compensation, in reliance on Mr Harding's opinions.[20]

Landscape and visual effects

(n) The Panel appointed Ms Anne Steven as a landscape / visual peer reviewer, to review an expert assessment of the Project prepared by Mr Brad Coombs of Isthmus Group.

(o) Ms Steven did not undertake a primary assessment of the Project's landscape / visual effects, but instead provided a peer review report dated August 2024[21] and additional comments dated 3 September 2024.[22]

(p) In her August 2024 peer review report, Ms Steven:

(i) noted that *"the Southland [Regional Policy Statement] requires culturally significant landscapes to be recognised and managed as locally distinctive and valued [landscapes]"*;

(ii) noted and relied upon information regarding Māori cultural values in aspects of the landscape local to the Project; and

(iii) criticised Mr Coombs' primary assessment as lacking *"a conclusion, with reasoning, on whether parts of the Site are within [an Outstanding Natural Feature (**ONF**) / Outstanding Natural Landscape] and/or 'locally distinctive and valued' (including acknowledging significant cultural landscape for tangata whenua as informed by the [Cultural Impact Assessment (**CIA**)]) or Significant Landscape in response to landscape assessments that have been completed"*.

[19] Wildlands' Response to Ecology Peer Review Prepared by Mike Harding, 10 September 2024, at page 3: Appendix-D-memorandum-prepared-by-Wildlands-in-response-to-ecology-peer-review.pdf
[20] See for example paragraph [7] of the Decision.
[21] https://www.epa.govt.nz/assets/Uploads/Documents/Fast-track-consenting/Southland-Wind-Farm/Reports/Anne-Steven-Report.pdf.
[22] Available at: Reports and advice | EPA.

(q) Ms Steven participated in expert conferencing on 16 and 17 September 2024 and signed a joint witness statement in which she recorded that:[23]

> *"Ms Steven has advised that she has not been engaged to undertake a primary assessment of the proposal and is therefore not in a position to conference determinatively on matters of landscape character and values, or on visibility/visual effect and landscape effects assessment, or Outstanding Natural Feature (**ONF**) status."*

(r) Despite that, on 4 December 2024 Ms Steven issued a further 'review' document[24] in which she:

(i) expressed definitive opinions on each of those matters – *"landscape character and values, or on visibility/visual effect and landscape effects assessment, or Outstanding Natural Feature (**ONF**) status"* – in:

(1) recommending that 29 of the 55 proposed wind turbines be deleted from the Project; and

(2) expressing the opinion that 86 properties, many of which are around 10km from the Project, would be adversely affected by the Project to the extent that mitigation planting / landscaping should be offered;

(ii) recorded that:

> *"The ASLA review overall has significant limitations due to the very short time frame available to complete the review (essentially 2.5 days) and the sheer volume of information to be reviewed"*; and
>
> in respect of visual effects, *"It is stressed that this is a quickfire review and the findings are only indicative"*;

(iii) suggests that Mr Coombs' assessment understates the Project's adverse effects on cultural values in the landscape, including noting (for example) that:

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[23] https://www.epa.govt.nz/assets/Uploads/Documents/Fast-track-consenting/Southland-Wind-Farm/Expert-conferencing/Landscape-Expert-Conferencing-JWS.pdf.
[24] https://www.epa.govt.nz/assets/Uploads/Documents/Fast-track-consenting/Southland-Wind-Farm/Expert-Reviews-of-Draft-Comments/Anne-Steven-Landscape-review-of-comments-on-draft-conditions.pdf.

"Iwi and local community members have made it clear that Pawakataka (which is scarp plus dipslope) and the Mokoreta escarpment is of significance to them indicating Associative Values are higher than the Moderate degree the [Isthmus assessment] assigns"; and

"The values are somewhat diluted in their presentation with lack of specificity about the importance of Pawakataka to iwi and of the escarpment/skyline to the local community."

(s) In expressing the opinions in her 4 December 2024 report, Ms Steven:

(i) did not acknowledge the earlier confirmation by tangata whenua that *"the [Project's] cultural and te taiao [ecological / environmental] effects relevant to them have been appropriately avoided, remedied, mitigated, offset and compensated"*;[25] and

(ii) relied on Mr Harding's opinions on ecological matters, rather than those of various other expert ecologists, without explaining the basis of such reliance.

(t) Contact criticised Ms Steven for (among other things) failing to factor the views of tangata whenua into her opinions on the Project.[26] The Panel invited Ms Steven to respond, which she did in a document dated 18 December 2024.[27] She responded:

"Effects on Cultural Values

ASLA's [Ms Steven's] views were informed by the Cultural Impact Assessment provided to the EPA by Te Ao Marama and by Te Tangi [a] Tauira. Whether the effects on cultural values have been addressed or not to the satisfaction of mana whenua does not diminish or negate the existence of the effect(s). This is a weighting matter reserved for the decision-maker, and is outside the scope of the landscape effects assessment."

(u) Ms Steven thus confirmed that the opinions expressed in her 4 December 2024 document relied on the original CIA and were not

[25] https://www.epa.govt.nz/assets/Uploads/Documents/Fast-track-consenting/Southland-Wind-Farm/Comments-on-draft-conditions/Applicant_Memo-from-applicant-and-iwi-regarding-agreement.pdf
[26] https://www.epa.govt.nz/assets/Uploads/Documents/Fast-track-consenting/Southland-Wind-Farm/Correspondence-to-panel/Contact-Energy-Limited-response-to-minute-11-11-December-2024.pdf.
[27] https://www.epa.govt.nz/assets/Uploads/Documents/Fast-track-consenting/Southland-Wind-Farm/Reports/Anne-Stevens-additional-response-19-December-2024.pdf.

informed by the subsequent information provided by mana whenua (on whose behalf the CIA was prepared and submitted) regarding the acceptability of the Project's effects on cultural values in the landscape.

(v) The Panel made a number of key findings, in reliance on Ms Steven's opinion evidence, which were material to its Decision to decline consent. Those findings included that:

(i) there is an *"identified"* ONF relevant to the Project (although the Panel did not identify its extent) – in this respect, the Panel also erroneously relied on the untested and caveated Southland / Murihiku Regional Landscape Study 2019 (refer to Issue 2);[28]

(ii) the Project would have *"a significant adverse effect on natural character as a landscape attribute; significant adverse effects on the visual amenity of some private residents; and the adverse effects on the landscape of Pawakataka [which] cannot be adequately mitigated or remedied by consent conditions"*;[29] and

(iii) the Project will not *"protect"* relevant natural features and landscape values and attributes (as the Panel incorrectly held was required; see Issue 2 above).[30]

(w) It was unreasonable for the Panel to rely on Ms Steven's opinions (and the 2019 Study) to refuse consent on landscape, natural character, and visual grounds, for the reasons summarised above.

(x) In relying on Ms Steven's opinions (and the 2019 Study) to refuse consent on landscape grounds, the Panel failed to take into account relevant matters including:

(i) the significant limitations expressed by Ms Steven as to the scope of her peer review, her ability to express determinative views on key issues, and her 4 December 2024 report;

(ii) the detailed assessment of the Project's landscape, visual, and natural character effects undertaken by Mr Coombs;

[28] Paragraphs [622] and [624].
[29] Paragraphs [640] and [644].
[30] Paragraph [647].

(iii) the updated views of mana whenua regarding the Project's effects on te taiao, including the local landscape;

(iv) the ecological information, advice, and opinions from the sources referred to at paragraph 17(g) above.

(y) Each error of law is material to the Decision as the Panel refused consent on the grounds of (*inter alia*) effects on natural landscape and features, natural character, and visual amenity, in reliance on Ms Steven's opinions and the 2019 Study.[31]

ISSUE 6: INCORRECT FINDINGS AS TO LAWFULNESS OF CONDITIONS PROPOSED BY CONTACT

Error of law

18. The Panel erred in finding that that the conditions of consent proposed by Contact to manage any future, unforeseen effects on migratory birds, and in respect of pest control at the Davidson Road East wetland restoration site, were unlawful.

Questions of law

19. The appeal raises the following questions of law:

Did the Panel correctly determine that conditions of consent EC29(g), EC30(c) and EC37E, proposed by Contact to manage any future, unforeseen effects on migratory birds, were unlawful?

Did the Panel correctly determine that condition EC54(d), proposed by Contact in respect of pest control at the Davidson Road East wetland restoration site, was unlawful?

Grounds of appeal

20. The grounds of appeal in relation to these questions of law are:

(a) Contact proposed conditions of consent consent EC29(g), EC30(c) and EC37E to manage any future, unforeseen effects of the Project (in terms of 'turbine strike') on migratory birds. The peer reviewer appointed by the Panel to advise on effects on avifauna / birds (Dr Hannah Mueller) confirmed to the Panel that those conditions resolved

[31] See for example paragraph [7] of the Decision.

her previously expressed concerns in respect of effects on migratory birds. DOC and its expert ecologists also confirmed to the Panel that the conditions addressed their concerns.

(b) However, the Panel concluded at [856] that those conditions involved the unlawful delegation of the Panel's decision-making powers, relying on the legal advice it had obtained from Mr Dean van Mierlo. That conclusion was erroneous, because:

(i) In imposing the conditions, the Panel would have appropriately been making the key substantive decisions in respect of effects of migratory birds, as required to avoid unlawfully delegating its decision-making power. Namely, the Panel would have appropriately recognised that:

(1) any unforeseen effects on migratory birds or other indigenous birds can, if identified through monitoring, be appropriately addressed via additional compensation; and

(2) the precise details of that additional compensation can appropriately be devised by experts, in light of the monitoring results, and with the oversight of DOC, Ngāi Tahu and Southland District Council.

(ii) Similar condition schemes have correctly been found to be lawful, and imposed by the Environment Court, in a number of cases addressing applications for resource consent for wind farms.[32] Those conditions required pre- and post-construction monitoring of the effects of wind farms on avifauna, and for effects management measures to be devised in light of those results. The Environment Court has provided for independent and experienced experts to exercise their judgment to ensure any effects are addressed appropriately. There was no basis for the Panel determining that the conditions proposed by the Appellant were unlawful in light of those Environment Court decisions.

(iii) The Panel made no specific reference to the additional / updated condition requirements proposed by Contact in response to Mr van Mierlo's advice, including in particular providing for an Expert

[32] Including for example *Meridian Energy Ltd v Hurunui District Council* [2013] NZEnvC 261 and *Mainpower NZ Ltd v Hurunui District Council* [2011] NZEnvC 384.

Avifauna Panel to be established to provide advice in respect of post-construction monitoring and testing of effects management.[33] The Panel failed to address whether those additions would resolve any concerns in respect of unlawful delegation of decision-making power.

(c) The error of law in determining that these proposed conditions were unlawful is material, because it led to the Panel's conclusion that effects on avifauna would not be appropriately addressed (at [347] and [349]), and (at [7]) were a principal reason for refusing consent.

(d) Contact proposed condition EC54(d) in respect of ground-based predator control at the Davidson Road East wetland restoration site. As originally proposed, the condition required that pest control *"if a Suitably Qualified and Experienced Person considers it is necessary to protect plantings and restoration of this site"*. Mr van Mierlo expressed the view that this wording potentially involved the unlawful delegation of the Panel's decision-making power.

(e) In response to Mr van Mierlo, the Appellant explained that it did not consider the condition to be an unlawful delegation, but in any event proposed to make the edit suggested by Mr van Mierlo to address the potential unlawful delegation, being to delete the words cited above (so that ground based pest control is an absolute requirement).[34] The Panel erred in determining at [857] that proposed condition EC54(d) was unlawful, including because it did not acknowledge or address Contact's proposed update to the condition in light of Mr van Mierlo's advice.

(f) All the expert planners who participated in conferencing agreed that the final version of conditions proposed by the Appellant "*address the legal concerns of uncertainty and avoid any unlawful delegation of decision making.*"[35] The Panel erred by failing to acknowledge or address that unanimous expert view.

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[33] As provided with Contact's memorandum of counsel dated 30 January 2025, and summarised at [90] of that memorandum.
[34] Memorandum of counsel for Contact dated 30 January 2025 at [90]: https://www.epa.govt.nz/assets/Uploads/Documents/Fast-track-consenting/Southland-Wind-Farm/Applicant-response-to-comments/Memorandum-of-counsel-for-Contact-responding-to-minutes-14-and-16-and-seeking-resumption-of-processing70419493.1.pdf
[35] Southland-Wind-Farm-JWS-Planning-4.2.25.pdf

(g) This error of law is material, because it relates to the Panel's determination that the suite of offset and compensation measures to address effects on natural inland wetlands were not adequate / appropriate.

ISSUE 7: UNJUST AND UNFAIR PROCESS

Error of law

21. The Panel erred in adopting a process that was unjust and unfair to Contact and did not adhere to the principles of natural justice.

Question of law

22. The appeal raises the following question of law:

Did the Panel adopt a fair process that accorded with the principles of natural justice?

Grounds of appeal

23. The grounds of appeal in relation to this question of law are:

(a) In convening as a Panel, processing Contact's application for resource consents, and making its Decision, the Panel was required to act in accordance with:

(i) the Act, including the procedural principles in section 10 and the requirement in clause 10 of Schedule 5 to adopt a procedure that best promotes the just (and timely) determination of an application; and

(ii) the principles of natural justice.

(b) The Panel significantly and fundamentally departed from those requirements, including in the following ways:

(i) In refusing consent, the Panel found that additional ecological survey data was required before consent could be granted, accepting the opinions of Mr Harding in this regard.[36] In light of Mr Harding's criticisms, by memorandum of counsel dated 11 October 2024 Contact offered to provide further survey data and proposed a constructive process for that to be considered by

[36] See for example paragraphs [204] and [268].

commenters and the Panel. Two weeks passed before the Panel refused Contact's offer; in its Minute 8 dated 25 October 2024, the Panel stated that *"There simply isn't enough time available for all (or even some) of [the proposed] steps."* Contact's proposal did allow sufficient time, however, for Contact to supply further survey data and allow for comment and expert conferencing on it, prior to 18 March 2025 (when the Decision was ultimately issued).

(ii) The Panel's Minute 11 indicated bias and predetermination on the part of the Panel. Minute 11:

(1) noted *"what appear to be insurmountable difficulties [with Contact's application] in several key areas"*, without explaining the basis for that statement or why the detailed information and explanations previously provided by Contact and its expert advisors were not accepted;

(2) summarised comments received from some of the persons invited to comment on Contact's application, in which the Panel gave credence to unsubstantiated allegations of adverse effects on them, including in respect of improper resource management considerations such as alleged effects on property values;

(3) unfairly criticised a community fund proposed by Contact, which could have provided in excess of $2 million in funding for community initiatives, as being *"nowhere near substantial"*; and

(4) indicated that it had made assumptions about the expected profit of the Project, on which it had no information.

(iii) The Panel failed to provide sufficient timeframes to respond to material that required expert input; for example, the Panel gave Contact:

(1) zero working days to respond to Minute 14, which was issued on 20 December 2024 and directed a response by midday on 10 January 2025;[37]

(2) four working days to respond to Minute 11 (discussed above) dated 5 December 2024, which required expert responses; and

(3) two working days to respond to Minute 12 (dated 11 December 2024), which was accompanied by further documents authored by Mr Harding and Ms Steven and also required expert responses.

(c) The Panel failed to convene a hearing but then made a number of core findings in the Decision on the basis of an absence of evidence that could have been adduced from available expert witnesses through a hearing process.

RELIEF

24. The Appellant seeks the following relief:

(a) that its appeal be allowed;

(b) a declaration that the Respondent erred in law as set out in this notice of appeal;

(c) that the Decision is quashed;

(d) that:

(i) the Application is granted; or

(ii) a new, differently constituted Expert Consenting Panel is directed to reconsider Contact's application in light of the High Court's findings on the matters set out above; and

[37] https://www.epa.govt.nz/assets/Uploads/Documents/Fast-track-consenting/Southland-Wind-Farm/Minutes/Minute-14-v2.pdf.

(e) an order as to costs.

DATED this 28th day of March 2025

D Randal / T Ryan
Counsel for the Appellant

This notice of appeal is filed by **David Geoffrey Randal**, solicitor for the Appellant, of the firm Buddle Findlay. The Appellant's address for service is at the offices of Buddle Findlay, Level 17, Aon Centre, 1 Willis Street, Wellington 6011. Documents for service on the Appellant may be left at that address or may be:

1. posted to the solicitor at PO Box 2694, Wellington 6140; or
2. left for the solicitor at a document exchange for direction DX SP20201, Wellington; or
3. emailed to david.randal@buddlefindlay.com and thaddeus.ryan@buddlefindlay.com