Clare Sykes Commissioner (Panel Chair) Independent Planning Commission of NSW	Duncan Marshall AM Commissioner Independent Planning Commission of NSW	Juliet Grant Commissioner Independent Planning Commission of NSW	12 February 2024

Dear Commissioners

Letter to IPC - Written submission

The purpose of this submission is to support an application for development consent under the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) for the proposed Hills of Gold Windfarm (SSD 9679) (**Project**), currently before the Independent Planning Commission (**IPC**) for final determination.

1 Executive summary

The Department of Planning, Housing and Industry (**DPHI or the Department**) (formerly the Department of Planning and Environment) has recommended that the Project should be approved in its Assessment Report dated 12 December 2023, but has recommended an overall reduction of the Project by 17 wind turbines to 47 wind turbines.

As outlined in the meeting held on 12 January 2024 between representatives of Hills of Gold Windfarm Pty Ltd (**Proponent** or **we**) and the IPC, we are seeking reinstatement of 15 of the 17 wind turbines (being turbines 53-63, 9-11 and 28).

We are seeking the reinstatement of these turbines on the basis that DPHI's recommendation:

(a) renders the overall Project as commercially unviable and, as a result, jeopardises the realisation of the overwhelming environmental, economic and social benefits it would otherwise deliver (outlined in section 2 below).

(b) is based on a fundamentally flawed and incorrect approach to assessing and weighing visual impacts which:

- is technically flawed, overly conservative and overstates visual amenity impacts;
- fails to follow the correct approach to weighing visual impacts of wind farms set out by the now Chief Justice of the NSW Land and Environment Court in *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd [2007] NSWLEC 59* (**Taralga**) (this is most notably the case in respect of DPHI's approach to balancing visual impacts at DAD 01 against the public interest);
- sets a dangerous industry precedent for wind developments in NSW by enabling objector landowners to retrospectively lodge development applications or obtain complying development certificates, as an opportunistic mechanism to block projects; and

(c) is not correct to the extent that it proposes the removal of turbine 28 on biodiversity grounds. Our assessment shows that retention of this turbine has acceptable biodiversity impacts.

We also seek:

- implementation of our proposed draft condition in respect of retiring biodiversity credit liabilities, as opposed to DPHI's recommended condition, on the basis that it will generate better biodiversity outcomes; and
- to have draft recommended conditions A7 and A10(d) amended so that the 130-metre buffer from Ben Halls Gap Nature Reserve is reduced to 50 metres to align with the outcomes of the assessment within the Proponent's Biodiversity Development Assessment Report (**BDAR**). These matters are addressed in section 6 below.

This submission is supported by the following expert reports:

- Visual Assessment Report prepared by Moir Landscape Architecture Pty Ltd dated 12 February 2024 (**Moir Report**); and
- Biodiversity Report prepared by Biosis dated 12 February 2024 (**Biosis Report**).

In addition to the matters set out in this submission, a number of additional matters were raised by the Commissioners, the public and other stakeholders throughout the IPC decision-making process (including at the 12 January 2024 Proponent meeting and the public meeting).

We have compiled those questions, together with references to the applicable responses, at **Schedule 1.**

2 Benefits of Project as proposed by the Proponent

It is legally open and appropriate on the merits for the IPC to reinstate those 15 winds turbines, and if it does so, the Project will deliver:

(a) **a necessary source of renewable energy for the State:** the Project will supply renewable energy capacity of 372 MW – enough renewable energy to power up to 163,000 average homes.

(b) **new electricity generation within a critical timeframe:** if approved, the Project is expected to be operational within 4 years, contributing to NSW's urgent need to deliver secure electricity supply by 2030 and achieve its climate targets.

(c) **the potential for downward pressure on electricity prices**: the Project will provide access to more reliable energy with downstream social benefits and has the potential to reduce electricity costs for NSW households and businesses as coal-fired power stations retire.

(d) **a reduction in emissions**: the Project will contribute to the delivery of the State's climate targets by reducing CO_2 emissions by approximately 628,000 tonnes per annum.

(e) **economic benefits to local and regional communities:** the Project will deliver more than 287 jobs and $833 million in new private investment into regional NSW energy infrastructure, including $227.2 million in benefits to the local economy.

Following DPHI's recommendation and not reinstating those 15 wind turbines would render the Project commercially unviable, which would amount to a constructive refusal of the Project (this is explained further at section 3 below).

This would not only deprive the State of extensive public interest benefits set out above, but it would also set a dangerous industry precedent for other proposed wind farm developments in NSW. This must also be considered in the context of the important role the Project would play in the State's energy transition. In particular:

- there is a critical need to deliver major renewable energy projects in NSW, especially in order to achieve the State's targets in relation to greenhouse gas emissions, regional energy infrastructure investment and energy security; and
- coal-fired power stations are closing faster than expected (Liddell closed in April 2023 and Eraring and Bayswater are expected to close in 2025 and 2030-2033, respectively). This rapid rate of withdrawal of conventional fossil fuel powered generators presents technical, price and reliability risks to the energy market and consumers.[1]

To drive the State's transition from conventional fossil fuel powered generators to renewable energy generation, various State and regional policies, strategies and legislation have been implemented. We have summarised those various instruments, and how they align with the Project, in **Schedule 2** below.

3 Project viability

During the course of the public meeting, the Commissioners raised questions in relation to the impact the removal of the 17 wind turbines would have on the overall viability of the Project. Since then, we have analysed the commercial viability of the Project through refined assumptions and forecasts.

That analysis has demonstrated that DPHI's recommendations render the overall Project commercially unviable.

The Project has undergone a series of amendments and refinements since the Scoping Report was submitted during 2018 as a 97-turbine wind farm. This is evidenced in the significantly reduced EIS submission in 2022 of 64 better sited and lower impact turbines.

It is important to note that the series of refinements that occurred between 2018 and 2022 were not in the interest of improving the economic viability of the Project, but to improve, where reasonable and feasible, any biodiversity and/or visual impact outcomes.

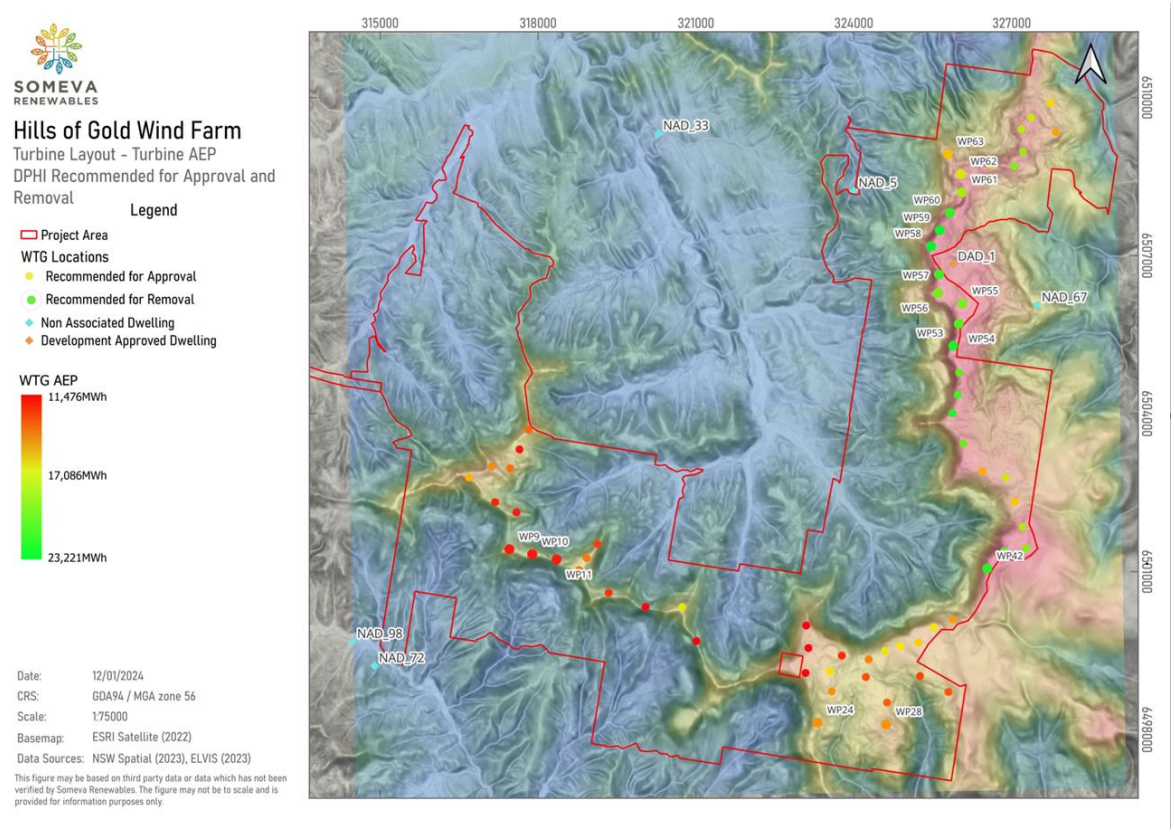
Scale is critical for wind farm projects due to the high cost of fixed price infrastructure required; most notably, the connection assets that ensure the electrons reach the public network for consumption. In addition, there is a higher cost associated with building infrastructure in difficult terrain. Complex terrain is a common trait amongst wind farm projects across the industry, with projects sited in order to take advantage of the strong, investable wind resource commonly found on ridgelines and escarpments. So again, scale is important.

Another key point for consideration is that not all turbines are made equal. Within the Project footprint, the performance of turbines varies due a range of factors. Accordingly, the removal of a particular turbine in one part of the site can have greater relative economic impact than the removal of one in another part of the site. This is what drives the significant economic impact that would result from the recommended removal of turbines 53 – 63. These would be the **highest performing turbines on the site**, with each anticipated to yield 22% more energy per annum than the remaining turbines, on average.

The productiveness of turbines 53–63 is apparent in the image extracted below. The wind resource grid in that image has higher wind speeds represented in areas shaded red across the Project area, while areas shaded in blue represent lower wind speeds. The wind resource grid has been produced using analysis from DNV, a company with decades of expertise in wind energy assessments and monitoring campaigns. Specifically, DNV utilises 10-years of onsite wind monitoring data and correlates the onsite data to long-term averages collected at proximate weather stations and satellite data.

[1] AEMO, *2022 Integrated System Plan for the National Electricity Market*, June 2022, pp. 48-49.

The '*WTG AEP*' scale on the left-hand side demonstrates that turbines 53–63 are high energy producing turbines that are critical for Project viability and are situated in high wind speed locations.



Since DPHI's recommendation for the Project in December 2023, we have worked with suppliers, our energy management team and our finance team to update assumptions and determine the impact that the removal of the 17 turbines would have on project viability. The reduction in turbines has led to a 10.6% increase in the Levelised Cost of Energy (**LCOE**),[2] This is a material increase to the cost for which it could generate electricity, and a price the market will not carry. Every organisation has their own return expectations; however, this pushes the returns below AEMO's industry recognised marginal return benchmark of 7%, meaning other industry participants would also not be able to deliver this Project.

By contrast, as a 62-turbine wind farm, the Project is an investable project that would contribute 372 MW towards the energy transition. As a 47-turbine wind farm, the Project would be rendered unviable, signalling a dangerous industry precedent, and would make zero contribution towards the much-needed energy transition. As such, upholding DPHI's 47 turbine recommendation would result in a constructive refusal of the Project.

The IPC would appreciate that detailed information regarding these matters is highly commercially sensitive and confidential. We are unable to provide further information in writing on these matters but would be happy to meet with the IPC to discuss further if that would assist.

4 DPHI's flawed approach to weighting visual impacts

DPHI's assessment approach to visual impacts is fundamentally flawed from both a technical and a legal perspective. This submission will establish that:

[2] This increase in the LCOE is 1.6% higher than what was signalled to the IPC at the 12 January Proponent meeting due to refined modelling and assumptions.

(a) DPHI's visual assessment is technically flawed and overstates visual amenity impacts (see Moir Report). In particular, the visual assessment presents no clear methodology for the conclusions reached, is overall inconsistent, and adopts overly conservative language in describing purported visual impacts;

(b) even if (contrary to our primary submission) the IPC forms a view that the technical assessment relied on by DPHI is in fact accurate, DPHI has not applied the correct test to appropriately balance potential visual impacts against broader and more compelling merit and public interest considerations in accordance with existing case law (see section 5 below). This is most notably the case in respect of DPHI's approach to balancing visual impacts at DAD 01 against the merit and public interest considerations supporting the retention of turbines 53–63; and

(c) even if (again, contrary to our submissions) the IPC considers that DPHI has applied the correct balancing test to weight impacts, the IPC has a clear legal power to impose a voluntary land acquisition condition rather than to adopt the Draconian measure suggested by DPHI of deleting turbines from the Project (see section 5 below).

5 The correct approach to balancing visual impacts against the public interest

5.1 *Taralga*

In considering whether to grant development consent, including to a State significant development (**SSD**) proposal, the consent authority is required to consider the likely impacts of the development on the natural and built environment, and social and economic impacts in the locality.[3]

The correct approach to assessing the visual impacts of a proposed development, particularly those of wind farms, is set out by Preston CJ of the Land and Environment Court of NSW in Taralga and comprises:[4]

- first, a preliminary threshold question whether or not a first breach in the present general landscape should be permitted – a visual breach will be unacceptable if the landscape in question is, on a dispassionate assessment, so 'iconic' that a visual breach would be 'antithetic to the landscape'[5]; and
- second, once such a breach is permitted, it is then relevant to turn to whether or not the extent of it should be limited as a general question, and also, to turn to the question of the impacts on individual properties. At [128] of *Taralga,* His Honour stated (emphasis added):

> *"Having concluded that **one turbine breaching the landscape would be acceptable**, it is therefore appropriate to turn to the **question of whether or not the totality of that which is proposed is acceptable or whether it should be modified in some fashion**."*

Chief Justice Preston then applied this approach to determine whether the visual impacts of the Taralga Wind Farm on the village of Taralga, which was located just over 3 km from the wind farm site, justified the deletion of some or all turbines.

Chief Justice Preston stated at [139] that (emphasis added):

> *"[a]s I am satisfied that the presence of at least some turbines in the Taralga village landscape is acceptable, **following a path of modification leading to constructive refusal is inappropriate**. I have so concluded because to grant a consent, knowing that*

[3] *Environmental Planning and Assessment Act 1979* (NSW) s 4.15(1)(b).

[4] The Hon Justice Brian J Preston and Tristan Orgill, 'Adapting to a Sustainable Energy Future: The Role of Planning and Environmental Law' (Conference Paper, Australasian Conference of Planning and Environmental Courts and Tribunals, 13 October 2016) 35 – 37.

[5] *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* [2007] NSWLEC 59 at [126]-[127].

> *it was an **effective futility**, would clearly be contrary to… the broad public interest in the establishment of viable renewable energy sources".*

Adopting this test, Preston CJ concluded that: "… *the overall public benefits [of renewable energy generation] outweigh any private disbenefits to the Taralga community and specific landowners*" at [352].

His Honour's decision in *Taralga* makes clear that:

- the public interest in the establishment of viable renewable energy sources must be balanced with any private disbenefits, including visual impacts, to the local community or specific landowners;[6]
- there is a significant public interest, in general terms, in the adoption of alternative, more environmentally friendly, energy generation sources;[7]
- it is "an effective futility" contrary to the board public interest in the establishment of viable renewable energy sources to grant consent to a project modified to such an extent (to reduce visual impacts) that the project is constructively refused;[8]
- where modifications to a project to reduce visual impacts would cause a project to become economically unviable, the choice lies between granting consent to the whole project as proposed or no project at all;[9] and
- the imposition of a condition for a proponent to voluntarily acquire a property with an existing dwelling impacted to a significantly greater degree than any other properties in the vicinity of a proposed wind farm is satisfactory compared to harming the commercial viability of the project by removing turbines.[10]

In this case, the above principles make it clear that the IPC has a decision to either approve 62 wind turbines, or alternatively, approve 47 wind turbines and give effect to a constructive refusal of the Project. The above principles demonstrate that the adverse visual impacts of a few wind turbines on receptors must not be overstated and/or deferred to at the expense of a wind energy project and its overwhelming public benefit in driving the transition to environmentally sustainable sources of renewable energy generation.

5.2 A proper application of *Taralga* requires approval of the Project with 62 turbines

For the reasons outlined in the table below, we submit that the IPC should approve the Project (with 62 turbines as proposed) because:

- first, it is clear that a breach in the present general landscape should be permitted on the basis that it is not so iconic that a visual breach would be antithetic to the landscape, but rather, the landscape has already been highly modified to primarily facilitate (amongst other things) grazing and forestry uses;
- second, the provision of the Project proposed by the Proponent in its totality is plainly consistent with the broad public interest in establishing and transitioning to viable renewable energy sources;
- the turbines proposed to be deleted by DPHI are the Project's most productive turbines (see image in section 3 above) and their deletion would render the Project unviable. As it was put by Preston CJ: *"I can state, as a generality, that the removal of the rows that are located where the local wind mapping shows*

[6] *Taralga* (n 5) [139], [353].

[7] Ibid [146].

[8] Ibid [139].

[9] Ibid [145].

[10] Ibid [251]-[253].

that there is the greatest wind strength would also have the greatest impact on the viability of the proposal";[11] and

- adoption of DPHI's recommendation to approve a modified version of the Project would be an "effective futility" and it would be contrary to this public interest to delete these turbines due to disbenefits to a small number of private receptors (some of which we submit are disingenuous).

The IPC may consider it appropriate to impose a condition of consent for the Proponent to voluntarily acquire any property with an existing dwelling impacted to a significantly greater degree than any other properties in the vicinity of the Project rather than harm the commercial viability of the Project by removing turbines.

Our more detailed responses to the visual amenity issues raised by DPHI in its Assessment Report are set out in the table below.

DPHI recommendation	Proponent response
1 Removal of turbines 53–63 based on visual (and noise) impacts to DAD 01	**The existing case law does not support the manner in which DPHI has balanced visual impacts on the approved (but not yet constructed) dwelling at DAD 01 against other considerations, such as the public interest in the generation of renewable energy generation in NSW.** The IPC should take the following matters into account: • **First,** DPHI has erroneously asserted that the previous landowner sought approval for the dwelling *before* the SEARs were issued.[12] In fact, consultation with the previous landowner commenced in December 2017 when a formal offer was made to host turbines on their property. The previous landowner was also aware of wind monitoring campaigns on the land at DAD 01 for an extensive period of time that spanned well-before the SEARs for the Project were issued. This factual chronology establishes that the previous landowner at DAD 01 had knowledge of the Project prior to seeking approval for the dwelling. All matters considered, it appears that the previous landowner intentionally sought to obtain approval to build a dwelling in an opportunistic location with a view to spoil the Project. • **Second**, the approval which is relied upon for the purposes of DAD 01 is a CDC issued by a private certifier on 11 November 2020. The CDC is legally flawed, subject to review and ought to be given very little (if any) weight for the following reasons: ○ the development does not meet the requirements of cl 3D.3(3) of State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (**Codes SEPP**), in that the lot does not have lawful direct frontage access or a right of carriageway to a public road or a road vested in or maintained by local council. Rather, the lot has access to an unformed Crown road that is not maintained. We note that a development application was previously rejected by the local council on the ground that (amongst other things) *"the application has not provided documentary evidence that the subject site has the legal right to access the site over Lot 210 DP 819485 and the adjoining reserve."*

[11] *Taralga* (n 5) [137].

[12] Department of Planning and Environment, *Hills of Gold Wind Farm State Significant Development Assessment Report (SSD 9679)* (December 2023) [107].

DPHI recommendation	Proponent response

- the development does not meet the requirements of clause 3D.6(2)(b) of the Codes SEPP, in that the relevant area contains bushfire prone land, and as mentioned above, does not have access to a public road or a road vested in or maintained by local council.
- the development unlikely meets the requirements of clause 1.19(1)(b) of the Codes SEPP, in that the accessway to the existing dwelling is densely vegetated and is bushfire prone land.
- local council previously rejected (on 24 September 2019) a development application lodged for a residence in that location also on grounds of access. We consider that a development application in this particular location submitted from this point onwards would again likely be rejected by council as the lack of legal access has not been, and cannot be, addressed.

- **Third**, as a result of the legal errors identified above, and in particular, the lack of legal access, there are practical issues that would impact on the buildability of a dwelling on the site. No road access is provided for in the CDC, and a further development application for a road would most likely be rejected by local council. It would be possible for any person to apply to the Land and Environment Court to restrain a breach under s 9.46 (1) of the EP&A Act. In these circumstances, no reasonable person in the shoes of the decision maker would require the removal of turbines due to an impact on this location.
- **Fourth**, notwithstanding the validity issues identified above, the CDC has not been acted on and there is no current indication that it ever will be. Requiring the removal of 11 turbines due to an impact to a dwelling that does not physically exist at the date of the decision (and has low prospect of proceeding) is not an appropriate weighting of impacts. No case law proposition supports this. Generally, impacts to the environment ought to be assessed at the time of the determination of the application, and very little, if any weight should be attributed to a CDC which has not been commenced in a more than minimal way (see, e.g., *Tuite v Wingecarribee Shire Council (No 2)* [2008] NSWLEC 321; *Tuite v Wingecarribee Shire Council* [2008] NSWLEC 1315 (Tuite)). The reasoning in Tuite should be applied to the assessment of this Project given that, as it stands today, DAD 01 has the 'benefit' of a legally flawed CDC, not yet acted on, that has been opportunistically located over a part of the land with no legal access.
- **Fifth,** even if the impacts on DAD 01 are considered to be significant, that does not justify the Draconian proposal to remove 11 turbines when considered against the public interest in renewable energy generation. The Court has previously had to engage with exactly the same balancing of the public benefit in renewable energy generation against private disbenefits to individual landowners, including for existing dwelling entitlements. As set out above, in Taralga, Preston J (as he was then) determined the "*overall public benefits [in renewable energy generation] outweigh any private disbenefits to the Taralga community and specific landowners"* (see [352]).
- **Sixth,** the Department stating that 11 turbines would not jeopardise the energy transition in NSW is factually incorrect and sets a dangerous industry precedent for other proposed wind farm

DPHI recommendation	Proponent response
	developments in NSW. These 11 turbines have been strategically located to leverage an abundant amount of wind energy, and if constructed, would comprise the most productive turbines across the development. The removal of these turbines would potentially render the Project as entirely uncommercial based on current assumptions. For wind farm developments, it is "necessary to go where the wind is"[13] and these 11 turbines: ○ average approximately 22% higher energy output than the other turbines comprising the Project (and provide power for 38,000 average homes per annum); ○ are strategically situated on flat areas of mostly exotic pasture; ○ increase feasible generation volume in the context of the Project as a whole; ○ present no impact to historical or Aboriginal Cultural Heritage; and ○ contribute to 2 neighbours annual benefit sharing payment.
2 Voluntary acquisition condition in relation to DAD 01 is "unwarranted"	**The Department's justification for a voluntary acquisition condition being "unwarranted" is unsatisfactory.** Even if the IPC were to form a view that DPHI has correctly balanced the visual impacts on DAD 01 against the broader public interest in renewable energy generation, it has the option to impose a voluntary acquisition condition as a last resort. In particular, the IPC as delegate has a clear power to impose an acquisition condition and it would be appropriate to do so in order to mitigate any unacceptable impacts on DAD 01. This has been done in the past, for example in cases where the visual impact from wind turbines are severe and usual mitigation strategies are otherwise not available. Relevantly, the IPC is not required to give effect to the recommendations made by DPHI.[14] For example, in Taralga, Preston J saw fit to impose a voluntary acquisition condition in relation to a property (on which there was an existing dwelling, not a dwelling entitlement) that was most severely impacted by the visual amenity of the subject wind farm (see [252]-[253]). In this context, the visual impact said to be problematic to DAD 01 relates not to an existing dwelling, but rather a potential future dwelling that in all circumstances may never even exist. If the IPC is satisfied that there are significant impacts that cannot be reasonably mitigated at DAD 01, it should then follow the approach taken by Preston J in Taralga, as opposed to DPHI's recommendation.

[13] *Taralga* (n 5) [81].

[14] *Warkworth Mining Limited v Bulga Milbrodale Progress Associated Inc* [2014] NSWCA 105.

DPHI recommendation	Proponent response
3 Removal of turbines 9–11 based on visual impacts to NAD 72 and NAD 98	The removal of turbines 9–11 will not have a material effect on the extent of visual impact on NAD72 and NAD98.[15] See, e.g., paragraphs 94–96 of the Moir Report.

6 Biodiversity impacts

The impacts to biodiversity as a result of the Project have been avoided and mitigated as much as practicable through the design phase refinements and comprehensive biodiversity assessment. Further mitigation measures proposed to be adopted to minimise any residual biodiversity impacts during the construction and operational phases of the Project include the provision of biodiversity offsets, management measures and adaptive management measures.

The Proponent:

(a) seeks reinstatement of turbine 28 on the basis that retention of this turbine has acceptable biodiversity impacts;

(b) seeks implementation of its proposed draft condition in respect of retiring biodiversity credit liabilities, as opposed to DPHI's corresponding recommended condition, on the basis that it will generate better biodiversity outcomes; and

(c) seeks to have draft conditions A7 and A10(d) amended so that the 130-metre buffer from Ben Halls Gap Nature Reserve is reduced to 50 metres to align with the outcomes of the assessment within the Proponent's BDAR; and

(d) is prepared to accept DPHI's recommendation to remove turbines 24 and 42 on the basis of its assessment of biodiversity impacts.

Our more detailed response to the issues raised by DPHI in its Assessment Report is set out in the table below.

DPHI recommendation	Proponent response
1 Removal of turbine 28 based on impacts to biodiversity values	**Net positive gain from reinstating turbine 28** The impacts to native vegetation from turbine 28 can be entirely offset by securing biodiversity offset credits at its proposed Biodiversity Stewardship Site adjacent to the proposed location of the wind turbine, and if required, via additional measures under the Biodiversity Offsets Scheme. In particular, the measures proposed by the Proponent to offset native vegetation impacts would ensure a net positive gain for native biodiversity (see sections 6 and 8 of the Biosis Report).
2 No ongoing layout optimisation	**The Proposed Condition that we are seeking the IPC to impose**

[15] David Moir, *Hills of Gold Wind Farm DPHI Recommendations Relating to Visual Impact* (Visual Assessment Report, 12 February 2024), [94]-[96].

post-approval and pre-construction

DPHI recommended the following condition in relation to biodiversity offsets:

> *B24. Prior to carrying out any development that could directly or indirectly impact the biodiversity values requiring offset, the Applicant must retire biodiversity credits of a number and class specified in Table 5-1 and 5-2 of Appendix 5, unless the Planning Secretary agrees otherwise.*

The Proponent seeks an alternative condition that would allow the Proponent to re-baseline biodiversity credit offset liabilities following detailed design and before construction. For context, we are proposing the draft condition set out in Annexure 6 (**Proposed Condition**).

The *Biodiversity Conservation Act 2016* (NSW) **(Biodiversity Conservation Act**) and the regime it creates does not prevent a proponent of SSD from re-baselining biodiversity credit offset liabilities following detailed design and before construction.

The relevant requirement for SSD under the Biodiversity Conservation Act is contained in section 7.14(4), which states that a condition to retire biodiversity credits must be complied with before any development is carried out that would impact on biodiversity values.

The design intent of the proposed condition is to allow updated baseline mapping following detailed design and prior to construction (therefore, before any development is carried out).

Such an approach aligns with section 7.14(4) of the Biodiversity Conservation Act and is otherwise consistent with general market practice (see, e.g., conditions of consent for Uungula Wind Farm granted on 7 May 2021).

Question raised by the IPC

During the Proponent meeting on 15 January 2024, the IPC queried whether the Proposed Condition is consistent with the objectives of the EP&A Act in terms of being sufficiently final and certain.

In short, our answer to this question is: **Yes**, for the reasons set out below.

The breadth of the IPC's power under the statutory framework

From the outset, the IPC's jurisdiction to approve or disapprove SSD applications derives from s 4.5 of the EP&A Act. As a 'consent authority', the IPC is to determine SSD applications by:

- granting consent, either unconditionally or subject to conditions; or
- refusing consent,

(see s 4.16 of the EP&A Act).

The power to grant consent subject to conditions is wide.[16] Under the EP&A Act, a condition of consent may be imposed if, for example, it relates to any matter referred to in s 4.15(1) that is of relevance to the development the subject of the consent.[17] When a condition is imposed that falls outside what the statute permits, the purported

[16] *Ulan Coal Mines Ltd v Minister for Planning and Moolarben Coal Mines Pty Limited* [2008] NSWLEC 185 (***Ulan***), [75].

[17] Relevantly, this includes the likely impacts of the subject development, including environmental impacts on the natural environment: *Environmental Planning and Assessment Act 1979* (NSW) s 4.15(b).

approval will be no approval at all (unless the condition is severable).[18]

The imposition of the Proposed Condition would be 'within power' under the statutory framework

Nothing in the EP&A Act, nor the Biodiversity Conservation Act, expressly or impliedly prohibits the IPC as consent authority from imposing the Proposed Condition.

Rather, the Proposed Condition can be seen to be conducive to the objects of the EP&A Act (as well as the *Biodiversity Conservation Act*). In particular, it would facilitate 'ecologically sustainable development' (**ESD**);[19] which, under the EP&A Act, adopts the same meaning that is prescribed to it under s 6(2) of the *Protection of the Environment Administration Act 1991* (NSW) (**POEA Act**). Key principles of ESD under the POEA Act, and by extension the EP&A Act, are (inter alia):

- that the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making about environmental planning and assessment;[20] and
- environmental goals, having been established, should be pursued in the most cost-effective way, by establishing incentive structures, including market mechanisms, that enable those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems.[21]

Consistent with the principle of subsidiarity,[22] the Proposed Condition would facilitate ESD by affording the Proponent latitude to re-baseline its biodiversity offset credit liabilities, reduce Project impacts, and generate better environmental outcomes. The Proposed Condition will not permit the Proponent to cause additional impacts to biodiversity values. Instead, it would simply allow the Proponent to operate within, but not exceeding, the impact limits specified in the Proponent's revised BDAR.

A condition will not be invalid because it lacks certainty or finality

There is no common law principle that an exercise of statutory power must be certain or final in order to be valid.[23] A consent will only fail for a lack of certainty where it leaves open the possibility of a significantly different development.[24] In circumstances where impacts will not exceed specified parameters, there is no such uncertainty, and even if there was, it does not leave open any possibility of a significantly different development.

An adaptive condition that retains practical flexibility is not a novel concept. In the case of SSD, which is often complex and multi-

[18] *Barrington – Gloucester – Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure* [2012] NSWLEC 197 (***Gloucester***), [77].

[19] *Environmental Planning and Assessment Act 1979* (NSW) s 1.3(b).

[20] *Protection of the Environment Administration Act 1991* (NSW) s 6(2)(c).

[21] Ibid s 6(2)(d)(ii).

[22] See, e.g., *Jeffman Pty Ltd v Environment Protection Authority of NSW* [2011] NSWLEC 38, [99].

[23] *King Gee Clothing Co Pty Ltd v Commonwealth* (1945) 71 CLR 184 at 194–195; cited in *Ul*an at [49] and *Gloucester* at [75].

[24] *Kindimindi Investments Pty Ltd v Lane Cove Council* [2006] NSWCA 23, [28].

staged, adaptive conditions may even be "appropriate and inevitable".[25] For example:

- In *Ulan,* the applicant challenged the validity of a condition which allowed flexibility in the carrying out of mining operations on grounds of uncertainty. Chief Justice Preston rejected the challenge and held that the failure of the condition to specify permissible parameters for adjustment of the scale of mining operations did not cause the condition to be outside the class of conditions permitted by statute;[26] and
- In *Gloucester,* the validity of groundwater and wastewater conditions were challenged on similar grounds of uncertainty. In particular, the applicant contended that the failure to identify water quality standards with respect to the re-use and disposal of water (amongst other things) was uncertain and could alter the development in a fundamental way. Justice Pepper rejected the challenge (as well as each challenge against the other subject conditions) and stated that: "*[t]he fact that the conditions leave it open for [the proponent] to determine which of the range of water use options it will ultimately adopt does not give rise to a significantly different development…".*[27]

We have also seen such flexibility incorporated into wind farm development consents in NSW.[28]

Accordingly, the wide power of the IPC (as a consent authority) to impose conditions on an approval ought not to be read down by requiring the Proponent to meet a specified outcome or objective.[29] If the IPC decides to adopt the Proposed Condition, it will encourage the Proponent to reduce its biodiversity offset credit liabilities by minimising and avoiding Project impacts within, but not exceeding, specified parameters.

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3 Reduction in 130m buffer from Ben Halls Gap Nature Reserve

The Proponent's amended condition we are seeking the IPC to impose

DPHI has recommended the following condition in relation to the buffer from Ben Halls Gap Nature Reserve:

> *A7. No wind turbine blade tip may be located within 130 metres from the surveyed boundary of Ben Halls Gap Nature Reserve.*

The same requirement is mirrored at condition A10(d) as follows:

> *the revised location of the blade tip of a wind turbine is at least 130 metres away from the surveyed boundary of Ben Halls Gap Nature Reserve.*

The basis for this proposed condition from DPHI is unclear and appears to be a drafting error. Please refer to section 9 of the Biosis Report for further evidence in relation to this.

There are 6 turbines (turbines 38-40, 43-45 noting that turbine 42 is accepted for removal) that do not meet the buffer as currently

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[25] *Ulan* (n 16) [80].

[26] Ibid [76].

[27] *Gloucester* (n 18)*,* [144].

[28] See, e.g., *Development Consent granted to the Uungula Wind Farm project (SSD 6687) by the Minister for Planning and Public Spaces pursuant to s 4.28 of the EP&A Act* (7 May 2021).

[29] *Ulan* (n 16) [75].

		drafted, which does not align with our previous discussions with and RFI responses to DPHI. The Proponent requests these conditions be amended so that the 130-metre buffer from Ben Halls Gap Nature Reserve is reduced to 50 metres consistent with the outcomes of the assessment in the BDAR and as further discussed at section 9 of the Biosis Report. The proposed amended conditions are set out in Annexure 6.
4	**Removal of Turbines 24 and 42**	**The Proponent is prepared to accept DPHI's recommendation on the basis of its assessment.** In particular, DPHI has recommended: • the removal of turbine 24 due to visual impacts on the dwelling located at NAD 69 and biodiversity impacts; and • the removal of turbine 42 due to impact zone overlap into Ben Halls Gap Nature Reserve. The Proponent is prepared to accept this on the basis of: • the assessment and the lower-than-average benefit these turbines provide due to lower wind speeds and energy yield; • higher biodiversity impacts than other turbines on average (T24 is the higher impact to Snow Gum (1.9ha vs 1.5ha); • opportunity to increase wildlife corridor between WTG 43 and 40 by an additional 400m to 1.5km; and • challenges to site turbine 42 further away from Ben Halls Gap Nature Reserve due to terrain.

7 Community enhancement

DPHI's recommended conditions A22 and A23 would require the Applicant to enter into a VPA with the Upper Shire Council and Tamworth Regional Council on the terms summarised in Appendix 3. The general terms of the VPA at Appendix 3 include contributions payable to each Council as follows:

- 0.5% of CIV for community projects within 20 km of the project site (Local Enhancement Fund); and
- 1.0% of CIV for use in the broader region (Regional Enhancement Fund), where CIV equates to the proportion of the total number of approved turbines located in the relevant Council LGA.

Condition A24 provides that if the Applicant and the Tamworth Regional Council do not enter into a VPA or other agreement then the Applicant must make a section 7.12 contribution of $6,376,562 (for 64 turbines) recalculated pro-rata for the number of approved turbines. The amount is to be directed to infrastructure, services and community projects in towns, villages and rural areas within the Tamworth LGA including Nundle and Hanging Rock.

We had previously represented to the community that we would seek a Community Enhancement Fund In lieu of Voluntary Planning Agreements (**VPAs**). The fund was to be administered in accordance with the Community Enhancement Fund Charter (Appendix C.4 to the Project EIS) including broad representation across geographic areas close to the project, democratic systems to elect representatives for the committee and transparency in selection process use of funds.

While the Proponent's preference was to move away from a VPA condition, we are particularly concerned about condition A24, which as presently drafted, does not include

a governance arrangement that would ensure benefits are distributed directly to the local community. This was an issue raised by a number of members of the public at the public meeting.

We would like the IPC to consider how the monetary contribution to be paid in accordance with condition A24 would be applied by the Tamworth Regional Council to ensure that benefits flow to the local community. One option might be for the IPC to consider nominating a certain percentage of the contribution that is required to be applied to local community benefits.

8 Conclusion

We ask that the IPC:

- consider the additional visual and biodiversity assessment information contained in this submission and the further reports annexed to this submission; and
- then weigh the visual and biodiversity impact concerns raised in DPHI's Assessment Report against the broader public good of renewable energy generation to determine whether "on balance, the broader public good must prevail" as required by the Taralga decision.

Having done this, we submit that the only appropriate decision which the IPC could reach is to approve the Project and reinstate 15 of the 17 wind turbines recommended for deletion by DPHI.

We have previously provided DPHI with a markup of our proposed changes to its recommended conditions of consent (majority of which were not adopted). If it would assist the IPC, we would be happy to provide a further mark up of our consolidated proposed changes.

Please contact us if you would like any further information.

Yours sincerely

DocuSigned by:
Thierry Kalfon
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Thierry Kalfon

Managing Director Australia & South East Asia

ENGIE

Schedule 1

Key questions and answers

1 Transport

(a) **Are OSOM vehicles proposed to use Morrisons Gap Road to access the site? If so, what is the likely frequency?**

See the response at Annexure 1.

(b) **What works would be required to ensure Morrisons Gap Road can accommodate OSOM vehicles? Would road widening and vegetation clearing be required? Would this all be entirely within the road reserves?**

See the response at Annexure 1.

(c) **If vegetation clearing is required, was this considered in the BDAR?**

See the response at Annexure 1.

(d) **Why is road sealing only proposed after the turbines are constructed?**

See the response at Annexure 1.

2 Emergency Access

(a) **Questions have been raised about the proposed emergency access via the Head of Peel Road. How and when is this proposed to be used?**

See the response at Annexure 1.

3 Visual Impact

(a) **A number of community members have expressed concerns around a lack of visual assessment at some nearby properties. Is there any intention to complete further visual impact assessments for nearby properties that weren't considered in the VIA? If not, why?**

See the response at paragraphs 100–105 of the Moir Report.

(b) **What visual amenity assessments have been completed in relation to the transverse track?**

See the response at paragraph 107–109 of the Moir Report.

4 Hydrological studies

(a) **There have been concerns relating to project water use – where is water proposed to be sourced from for construction and ongoing operations?**

See the response at Annexure 2.

(b) **What water quality monitoring will be conducted and where?**

See the response at Annexure 2.

5 Consent

(a) **Are there landholder agreements in place for all of the access routes?**

See the response at Annexure 3.

(b) **What stage is the transport study at for Crawney Road?**

See the response at Annexure 1.

6 Process

(a) **A number of community members have raised concerns about the extent of community consultation completed by the applicant – what is your response to this?**

See the response at Annexure 4.

7 Turbine removal

(a) **We have heard a lot of submissions asking for additional removal of turbines from the Project – what would this mean for the project?**

See the response at Annexure 5.

8 Biodiversity

(a) **There were concerns about the currency of data used in the biodiversity studies – do you have comments about this?**

See the response at section 3 of the Biosis Report.

(b) **Where was the data soured from in relation to bird and bat strike?**

See the response at section 3 of the Biosis Report.

(c) **Can you outline the proposed monitoring, adaptive management and curtailment strategy for bird and bat strike?**

See the response at section 5 of the Biosis Report.

9 Emergency Access

(a) **Questions have been raised about the proposed emergency access via the Head of Peel Road. How and when is this proposed to be used?**

See the response at Annexure 1.

10 Decommissioning

(a) **When is the decommissioning plan proposed to be developed?**

See the response at Annexure 7.

(b) **How does the Applicant propose to ensure that sufficient funds are available to remediate the site?**

See the response at Annexure 7.

11 Geotechnical and Site Constructability

(a) **Provide some further clarity in relation to site suitability from a geotechnical perspective, including an outline of investigations undertaken to date. Please clarify whether such investigations include the western access track.**

See the response at Annexure 8.

12 Hazards Assessment

(a) **Please confirm the assessment of the northern turbines within the preliminary hazards assessment.**

See the response at Annexure 9.

13 Bushfire

(a) **Several submissions during the public meeting raised concerns regarding the interaction between wind farms and aerial fire-fighting activities during a bushfire. How is this being addressed?**

See the response at Annexure 10.

14 Land clearing

(a) **Several submitters raised concerns around land clearing within the Project footprint. Please clarify the Project's position with respect to any land clearing that has occurred within the Project area to date.**

See the response at Annexure 11.

15 Aviation lighting

(a) **Please clarify whether aviation lighting will be required for the Project based on the assessments undertaken to date.**

See the response at Annexure 12.

16 Community Enhancement

(a) **Submissions were made at the public meeting about how the community enhancement funding is distributed. Is there a way of managing that to enable community input?**

See the response at Annexure 13.

Schedule 2

Project's alignment with policies, strategies and legislation

Policy/Strategy/Legislation	Objective	Project (62 turbines) justification / alignment with policy context
State Context		
NSW Transmission Infrastructure Strategy 2018	The NSW Transmission Infrastructure Strategy 2019 identifies priority transmission projects to support up to 17,700 MW of new electricity generation and cheap energy supply that could be accelerated to meet energy needs prior to the retirement of NSW's existing coal-fired power stations. The strategy aims to boost interstate interconnection, such as upgrading to the Queensland-NSW Interconnector; increase NSW's energy capacity by prioritising REZs, including in New England; and improve conditions for investment. [30]	The Project aligns with the strategy. The Project: • would supply new renewable energy capacity of 372 MW – enough to power up to 163,000 average homes; • would connect to the existing 330kV Transgrid Liddell to Tamworth networks, which dissects the New England REZ; and • has the ability to take advantage of the Queensland to NSW interconnector.
Energy Security Target under the NSW Electricity Strategy 2019	In 2019, the then State Government committed to an Energy Security Target under the NSW Electricity Strategy 2019 to plan for a reliable, affordable and sustainable electricity future (discussed in the table below). In the NSW Electricity Strategy 2019, it was recognised that: [31]	The Project aligns with the strategy and supports the Energy Security Target because it would provide renewable energy generation and storage capacity to lower the costs of power in comparison to wholesale prices and would take advantage of

[30] NSW Department of Planning and Environment, *NSW Transmission Infrastructure Strategy: Supporting a modern energy system* (November 2018), 6, 8.

[31] NSW Department of Planning, Industry and Environment, *NSW Electricity Strategy*, 11.

Policy/Strategy/Legislation	Objective	Project (62 turbines) justification / alignment with policy context
	… [r]enewables are now the most economic form of new [electricity] generation… [and] that the replacement of existing equipment should result in lower carbo emissions from the electricity sector and cleaner air in NSW. The Electricity Strategy aims to: deliver the Central-West Orana REZ; additional capacity via interconnector projects; support the development of new electricity generators; encourage $8 billion of private investment in NSW's electricity system over the next decade, including $5.6 in regional NSW; and support 1,200 jobs, mostly in regional NSW.	existing transmission networks and committed interconnector upgrades. In addition, the Project would: • deliver $833 million in new private investment into regional NSW energy infrastructure, including $227.2 million in benefits to the local economy; • deliver more than 387 jobs; and • commit $11,189,059.80 in funding over 30 years in economic and community benefits, with $3,052,928.00 delivered at construction commencement.
Electricity Infrastructure Investment Act 2020 (NSW) (**EII Act)**	More recently, the Electricity Infrastructure Investment Act 2020 (NSW) (**EII Act**) was introduced in response to a large portion of the electricity infrastructure in NSW fast approaching the end of its technical life. At that time, the then State government recognised that: *Four of our coal-fired power stations that provide up to three-quarters of the State's energy supply each year are scheduled to close in the next 15 years. Those power stations must be replaced before they close to make sure we keep the lights on and avoid price spikes*. [32] The EII Act sets objectives to invest in and construct generation infrastructure that produces the same electricity as 8 GW in the New England REZ, 3 GW in the Central-West Orana REZ, and 1 GW of additional capacity elsewhere in NSW by the end of 2029.	The Project is consistent with the objectives (to secure affordable, reliable and clean energy) of the EII Act and NSW Electricity Infrastructure Roadmap because it would: • play an important role in increasing renewable energy generation in light of the imminent retirement of coal generators; • reduce the evolving risk of capacity shortfalls highlighted by allowing dispatchable resources to firm up support during peak loads; and • be located in a strong wind speed area adjacent to two REZs which have been declared and are

[32] New South Wales, *Parliamentary Debates,* Legislative Assembly, 10 November 2020 (Matt Kean, Minister for Energy and Environment).

Policy/Strategy/Legislation	Objective	Project (62 turbines) justification / alignment with policy context
	Consistent with these objectives, the EII Act gives effect to the NSW Electricity Infrastructure Roadmap.	supported by the infrastructure coordinated by EnergyCo in accordance with the EII Act.
NSW Electricity Infrastructure Roadmap	The NSW Electricity Infrastructure Roadmap is an integrated policy framework to secure an affordable, reliable and clean energy future for the State. The roadmap requires a minimum of 12 GW of renewable energy generation by 2030. Relevantly, the roadmap: *ensures that our new energy infrastructure supports and contributes to rather than takes away from our communities and it does this while reducing costs and moving towards a clean, more sustainable energy system… The private sector already sees the potential in New South Wales and has signalled it is ready to invest with 120 large-scale energy generation projects already in the pipeline, totalling $25 billion in potential investment. The roadmap will turbocharge that investment at a time when we need it the most.* Specifically, the roadmap seeks to attract $32 billion in private investment for regional energy infrastructure by 2030; support 6,300 construction jobs and 2,800 ongoing jobs, mostly in regional NSW; and reduce NSW electricity emissions by 90 million by 2030.	
Net Zero Plan Stage 1: 2020 – 2030,	This Plan sets the foundation for NSW's action on climate change and how the NSW Government will deliver on its objection to achieve net zero emissions by 2050. The plan also state's the Government's commitment to ensuring reliable and affordable electricity through the fast-tracked delivery of REZs, including the New England REZ. .[33]	The Project aligns with the emissions reduction targets in NSW by developing infrastructure that would: • reduce CO_2 emissions by 628,000 tonnes per annum;

[33] NSW Department of Planning, Industry and Environment, *Net Zero Plan Stage 1: 2020 – 2030,* 16.

Policy/Strategy/Legislation	Objective	Project (62 turbines) justification / alignment with policy context
		• allow reliable dispatchable resources to firm up support during peak loads; and • assist the electricity sector to transition from fossil fuels to low emissions sources.
New England REZ	The above legislative, policy and strategic objectives were further crystallised when, on 17 December 2021, the New England REZ was formally declared by the Minister for Energy.[34]	The Project aligns with the objectives of the New England REZ. Although the Project would be outside the New England REZ, the majority of renewable projects in NSW will be located outside of REZs. The Project would be in a region that is close to the declared New England REZ and requisite infrastructure to support the development of renewable energy generations, including existing transmission lines.
Climate Change (Net Zero Future) Act 2023 (NSW)	In December 2023, the impetus for NSW's energy transition was formalised with binding legislated: • targets to reduce GHG emissions by 50% by 2030, 70% by 2025, and to achieve net zero GHG emissions by 2050;[35] • guiding principles for action to address climate change;[36] and	As with the Net Zero Plan Stage 1, the Project aligns with NSW's legislated emissions targets and would support NSW's actions to address climate change by delivering new renewable energy generation.

[34] Energy Corporation of NSW, 'New England Renewable Energy Zone', *EnergyCo* (Webpage, October 2022) <New England Renewable Energy Zone | EnergyCo>.

[35] *Climate Change (Net Zero Future) Act 2023* (NSW) s 9.

[36] Ibid s 8.

Policy/Strategy/Legislation	Objective	Project (62 turbines) justification / alignment with policy context
	• the establishment of a Net Zero Commission to monitor and report on the State's progress to address climate change and alignment with the Paris Agreement.[37]	
Regional context		
New England North West Regional Plan 2041 Hunter Regional Plan 2041	The above State policies, plans, strategies and statutes are complimented by relevant local and regional plans for the period to 2041, including the applicable New England North West Regional Plan and nearby Hunter Regional Plan, and the priorities of Tamworth Regional Council, Upper Hunter Shire Council and Liverpool Plains Shire Council local government areas (**LGA**). The New England North West Regional Plan 2041 provides an objective to lead renewable energy technology, including wind, and investment to contribute to NSW's net zero emissions by 2050 target; and to support appropriately located wind renewable energy production opportunities, as well as battery storage facilities, across the Tamworth and Liverpool Plains LGA. [38] The Hunter Regional Plan 2041 indicates a priority to take advantage of opportunities associated with former mine and power station sites (such as the Liddell site), including transmission lines, to diversity industry and leverage employment opportunities arising from renewable energy investment.[39]	The Project aligns with each regional plan. The Project would support New England's objectives to lead NSW in renewable energy technology and emissions reduction in the Tamworth and Liverpool Plains LGA; and the Hunter's priority to invest in and transition to renewable energy, and diversity local economies and communities, while taking advantage of existing coal-related infrastructure, such the existing Liddell to Tamworth transmission line.

[37] *Climate Change (Net Zero Future) Act 2023* (NSW) Pt 3.

[38] NSW Department of Planning and Environment, *New England North West Regional Plan 2041* (September 2022) 43.

[39] NSW Department of Planning and Environment, *Hunter Regional Plan 2041* (December 2022) 120, 123, 127, 142.