

**BEFORE AN INDEPENDENT HEARING COMMISSIONER FOR WAITOMO
DISTRICT COUNCIL**

IN THE MATTER of the Resource Management Act 1991 (the **RMA**)

AND

IN THE MATTER of an application by Taumatotara Wind Farm Limited to change conditions of a land use consent for the Taumatotara Wind Farm

**Legal Submissions on behalf of
the Director-General of Conservation *Tumuaki Ahurei*
Dated: 12 November 2023**

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MAY IT PLEASE THE COMMISSIONER

INTRODUCTION

1. These submissions are made on behalf of the Director-General of Conservation *Tumaki Ahurei* in respect of the application by Taumatotara Wind Farm Limited (**Applicant**) to vary the conditions of its unimplemented windfarm resource consent¹ to:
 - a. Reduce the number of turbines from 22 to 8;
 - b. Increase the maximum diameter of the rotor area from 111.5 m to 163 m; and
 - c. Increase the tip height of the turbines from 121.5 m to 180.5 m.
2. The Director General opposed the application² on the basis that the Applicant had provided insufficient information and that the proposal does not adequately identify and address the potential adverse effects on indigenous biodiversity, in particular those effects on long-tailed bats (*Chalinolobus tuberculatus*). Long-tailed bats are classified as “nationally critical” which is the highest threat category before extinction.
3. The proposal is for renewable energy generation (REG). The Director-General acknowledges the importance of the development of REG, and the need to reduce carbon emissions under the Climate Change Response Act 2002 and National Emissions Reduction Plan 2022. The climate change crisis will exacerbate existing pressures on biodiversity. Accordingly, the Director-General supports projects to mitigate emissions when appropriate. The Director-General accepts that REG is a positive aspect of the proposal.
4. The Director-General supports the agreement reached between Ngaati Mahuta ki te Hauaauru and the applicant. The Director-General notes that the assessment report provided by Ngaati Mahuta ki te Hauaauru specifically states that the agreement has been reached on the basis that Ngaati Mahuta ki te Hauaauru relies on the Commissioner to ensure that the conditions imposed ensure less than minor ecological effects.³

¹ Resource consent RM050019

² Submission of the Director General of Conservation, dated 1 May 2023

³ Ngaati Mahuta Ki Te Hauaauru Effects Assessment Report Application to Vary Resource Consent RM050019 by Taumatotara dated October 2023 at pages 1 and 8.

5. However, the Director-General is concerned about the potential for significant adverse effects on indigenous biodiversity that may be caused by the application – specifically adverse effects on long-tailed bats, including but not limited to habitat impacts and direct death and/or injury caused by turbine construction and operation.
6. In the Director-General’s submission, there is inadequate ecological data to allow an assessment of the ecological effects of the proposal on long-tailed bats, either of the existing consent (as varied in 2011) or of the proposed variation. As such, it is impossible for the necessary assessment under section 127 of the Resource Management Act 1991 (RMA) to be undertaken. Moreover, while the overall number of turbines are being reduced, in light of the significant increase in size of the remaining turbines, the ecological evidence presented on behalf of the Director-General is that the application may still result in harm to bats with *‘the potential to cause more damage to bats⁴*.
7. In the Director-General’s submission, the application should be declined under section 104(6) of the RMA or adjourned in order to give time for adequate information to be obtained pursuant to s 41C(3) or s 41C(4) of the RMA.
8. In the event that the Commissioner disagrees and the consent is granted, the Director-General considers that the conditions currently proposed by the Applicant (in response to the conditions proposed in the section 42A report) are wholly insufficient to avoid, remedy and mitigate the effects of the proposal on long-tailed bats. In light of the significant information gaps that exist, conditions would need to be stringent and comprehensive with robust requirements for pre and post construction monitoring and adaptive management.

Evidence

9. The Director-General will call the following witnesses:
 - a. Moira Pryde, Technical Advisor (Ecology), Department of Conservation;

⁴ Evidence of Moira Pryde, paragraph 129.

- b. Elizabeth Williams, Resource Management Act Planner, department of Conservation.

Submissions

10. The following submissions are made to assist the Commissioner in the determination of the variation application.

Is there adequate information to assess effects? If not, the application should be declined pursuant to s 104(6) or adjourned in order to give time for adequate information to be obtained pursuant to s 41C(3) or s 41C(4).

11. Section 104(6) of the RMA states:

A consent authority may decline an application for a resource consent on the grounds that it has inadequate information to determine the application.

12. The scheme of Part 6 (Resource Consents) of the RMA is relevant to the question as to how s 104(6) should be applied. For example:

- a. Section 88(2)(b) requires an application to *“include the information relating to the activity, including an assessment of the activity’s effects on the environment, that is required by Schedule 4.”*
- b. Clause 1 of Schedule 4 requires that the information *“be specified in sufficient detail to satisfy the purpose for which is its required.”*
- c. Clause 6(1)(b) of Schedule 4 requires the assessment of the activity’s effects on the environment to include *“an assessment of the actual or potential effect on the environment of the activity.”*
- d. Clause 7(1)(c) of Schedule 4 requires the assessment of the activity’s effects on the environment to address *“any effect on ecosystems, including effects on plants or animals and any physical disturbance of habitats in the vicinity.”*
- e. Under ss 88(3) and (3A) a consent authority may determine an application to be incomplete if it does not include the information required by Schedule 4 and return it to the applicant.
- f. Section 92 gives a consent authority the power to request further information from the applicant or to commission a report.

- g. Sections 92A and 92B give the applicant the right to refuse a request for further information or to refuse to agree to the commissioning of a report.
13. The above provisions demonstrate a clear intent in the RMA for the consent authority to be adequately informed before making a decision. The power to decline a consent under s 104(6) is a discretionary power that should be exercised reasonably and proportionately. It:
- imposes a type of legal burden on an Appellant to supply adequate information, although it may in certain circumstances be able to sidestep that if it can satisfy a consent authority that an adaptive management or similar condition is appropriate (i.e. the Sustain Our Sounds v New Zealand King Salmon Company Ltd' criteria are met- we discuss these later).⁵*
14. This method of applying section 104(6) is generally consistent with Principle 15 of the *Rio Declaration* which states:⁶
- In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.*
15. The lack of express reference in the RMA to the “precautionary approach” may simply be because the precautionary approach was still being developed when the RMA was enacted in 1991. The Director-General submits that the scheme of the RMA as a whole is clearly designed to be protective and pre-emptive.
16. In some contexts the precautionary intent of the RMA is given express acknowledgement through the planning instruments. For example, the NZCPS and the NPSIB. While there is a carve out of the NPSIB for REG, still relevant to this proceeding is objective IM03 of the Waikato Regional Policy Statement which states:

⁵ *RJ Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81 upheld on appeal in *RJ Davidson Family Trust v Marlborough District Council* [2017] NZHC 52.

⁶ Principle 15 of the Rio Declaration on Environment and Development UNESCO, 1992.

adopts a precautionary approach, including the use of adaptive management, where appropriate, towards any proposed activity whose effects may be significant or irreversible but are as yet uncertain, unknown or little understood”

17. Section 104(7) states:

In making an assessment on the adequacy of the information, the consent authority must have regard to whether any request made of the applicant for further information or reports resulted in further information or any report being available.

18. Requests were made of the applicant to provide additional information. On 7 September 2020, the Waitomo District Council sent a further information request to the applicant. Question 19 of that request stated:⁷

*The original ecology assessment reported that long-tailed bats were present in the wider area (Aorangi Scenic Reserve). That assessment identified that bats may be present in the forest on the cliffs adjacent to the wind farm site and foraging at night within the vicinity of the turbines. Long-tailed bats are classified by DOC as having the highest threat ranking – Nationally Critical. It is therefore expected that for any wind farm site for which there is the potential for bats to be present, survey work will be undertaken to confirm their presence or absence on the site, particularly at the turbine locations (as per the AUSWEA guidelines). **As such, further information is required regarding long-tailed bats on the Taumatotara wind farm site, including their distribution and relative abundance at each turbine site, as well as movements across the site in relation to their key habitat requirements (foraging, commuting and proximity to roost sites, including maternity roost sites). This information is fundamental to be able to determine if the proposal will in fact effect this Nationally Critical species. [emphasis added]***

⁷ Further Information Request from Waitomo District Council dated 7 September 2020.

19. The applicant's ecologist Mr Chapman responded to question 19 by way of a memorandum dated 9 December 2020. In the memorandum, Mr Chapman said:⁸

I do not recommend embarking on a bat research programme as has been suggested. Sites like this with large expanses of pasture and few if any bats, such research would be unlikely to succeed in generating any information that would be useful in assessing the application to vary the existing consent.

20. The right of an applicant under ss 92A and 92B to refuse or ignore requests under s 92 is particularly relevant to the power in s 104(6).⁹ An applicant can exercise the right "not to adduce further evidence, if it chooses, but runs the risk of having its application declined, if the information is inadequate."¹⁰
21. Mr Chapman provided a further memorandum on 10 April 2021 which recorded that a decision had been made following a meeting held on 11 February 2021 that bat and bird surveys would be carried out on-site to obtain the information requested.¹¹
22. The survey work that was subsequently undertaken by the applicant confirmed that long-tailed bats are present at the site. However, best practice baseline monitoring has not been followed. Accordingly, there is still inadequate baseline information on how the bats are using the project site. This makes it very difficult to assess the effects on the bats of the variation proposal.¹² The applicant's approach to the baseline monitoring is disappointing. The further information request was sent on 7 September 2020 (just over three years ago). There has been plenty of time for the applicant to complete the various stages of the baseline monitoring to identify how the bats are using the project site.
23. In making an assessment of the adequacy of the information, the Director-General submits that the Commissioner should consider the following matters:

- a. The presence of long-tailed bats at the site has been confirmed.¹³

⁸ Memorandum dated 9 December 2020 from Simon Chapman in response to section 92 request.

⁹ *RJ Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81 at para [31].

¹⁰ *RJ Davidson Family Trust v Marlborough District Council* [2017] NZHC 52 at para [103].

¹¹ Further memorandum dated 10 April 2021 from Simon Chapman.

¹² Evidence of Moira Pryde, paragraph 116 and 67 to 71.

¹³ Evidence of Moira Pryde, paragraph 96 and Ecology Report 10 Aug 21 (Figures 1 and table in section 5.3.1)

- b. The environment at the site is consistent with bat habitat in that it would provide roosting and foraging opportunities.¹⁴
- c. The long-tailed bat is now assigned to the category most at risk of extinction threatened “Nationally Critical”.¹⁵
- d. Our understanding of potential effects of wind farms on bats has increased, with the identification of both direct collisions and barotrauma being identified as causes of deaths.¹⁶
- e. Maintaining the function and the structural connection of actual and potential roosts and commuting flyways is important for the survival of bats. Turbines have the potential to sever these connections.¹⁷
- f. Significant activity has been detected from the one survey that has been undertaken which indicates that more survey work needs to be done to fill the information gaps on how the bats are using the site (for example: to identify roost locations and flight paths within the home range).¹⁸
- g. There is not enough baseline information and the adverse effects on bats may become irreversible if the new significantly larger turbines are placed in the wrong location (for example: if a turbine is placed in a flight path directly between a roost tree and a foraging area). Therefore, adaptive management may not be suitable because the *Sustain Our Sounds v New Zealand King Salmon Company Ltd*’ criteria has not been met. The *Sustain Our Sounds* criteria requires the decision-maker to be satisfied that:¹⁹
 - (i) there will be good baseline information about the receiving environment;
 - (ii) the conditions provide for signeffective monitoring of adverse effects using appropriate indicators;
 - (iii) thresholds are set to trigger remedial action before the effects become overly damaging; and

¹⁴ Evidence of Moira Pryde, paragraph 101.

¹⁵ Evidence of Moira Pryde, paragraph 38.

¹⁶ Evidence of Moira Pryde, paragraph 56

¹⁷ Evidence of Moira Pryde, paragraph 107.

¹⁸ Evidence of Moira Pryde, paragraph 118.

¹⁹ *Sustain Our Sounds Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 40.

(iv) effects that might arise can be remedied before they become irreversible.

24. Habitat that supports a critically threatened species is significant and a precautionary approach should be taken to baseline monitoring in order to reduce uncertainty as much as possible.
25. Further, it is important to properly scrutinise this proposal, as there is a risk it will set a precedent.
26. In the absence of good baseline monitoring, the Director-General submits that the evidence of Ms Pryde and Dr Bull should be preferred. While the overall number of turbines are being reduced, in light of the significant increase in size of the remaining turbines,²⁰ the ecological evidence presented on behalf of the Director-General is that the application may still result in harm to bats with *'the potential to cause more damage to bats'*²¹ - i.e. adverse effects on bats that are greater than the adverse effects on bats associated with the 2011 consent.
27. It is not possible for the applicant to state that the potential effects of the variation proposal will be positive. There is no evidential basis to support this. The adverse effects of the original application on bats were never assessed. Further, the 2011 variation failed to compare any differences as the original adverse effects were never assessed.
28. The rotor sweep area of each remaining turbine will increase by 114% and the remaining turbines in the north have significant bat activity from one survey.²² The applicant's ecologist has placed significant weight on the reduction in the number of wind turbines and the fact that the combined rotor sweep area across all wind turbines will decrease (by 14%).²³ However the applicant's ecologist has failed to consider the potential effects arising out of the significantly larger size of each individual remaining turbine.
29. The Director-General therefore submits that the application should be declined pursuant to s 104(6) or adjourned in order to give time for adequate information to be obtained pursuant to s 41C(3) or s 41C(4).

²⁰ Appendix One of Glen Starr's evidence shows visually the increase in size.

²¹ Evidence of Moira Pryde, paragraph 129.

²² Evidence of Moira Pryde, paragraph 32.

²³ EIC S Chapman, paragraphs 7.1 - 7.5

If the Commissioner decides that there is adequate information, the following matters are of particular relevance to the s 104 test

30. As the Commissioner is already aware, the applicant has applied for a change to consent conditions pursuant to s 127 of the RMA. Sections 88 to 121 of the RMA therefore apply as if the application were an application for a discretionary activity.

Section 104(1)(a) any actual and potential effects on the environment of allowing the activity

The relevant environment

31. Ms Pryde has assessed the site as meeting the significance criteria in the Waikato Regional Policy Statement (WRPS).²⁴ The applicant has said that the turbines and the area that they cover cannot be habitat in accordance with the definitions in either the Waikato RPS or the NPSIB.²⁵ We disagree. The turbines haven't been built yet and the data that has been obtained does not support a conclusion that the bats are only there fleetingly.
32. The site is especially significant when the wider context of the rate of decline of long-tailed bats and the location of the project site in relation to the Grand Canyon Cave and the Whareorino Conservation area is considered.²⁶
33. Ms Pryde has noted in her evidence that recent bat research has highlighted the importance of fragmented habitat such as pasture and isolated trees for commuting and foraging.²⁷

Actual and potential effects

34. Dr Bull and Ms Pryde agree that bat populations can be impacted by wind farms.²⁸ Bats are vulnerable to death or injury from wind turbines due to collisions with the towers and blades and barotrauma from moving blades.²⁹ Long-tailed bats are particularly vulnerable because they feed and commute in open and forest edge habitats.³⁰ Ms Pryde has identified in her evidence that the rotor sweep area of each remaining turbine will increase by 114%

²⁴ Evidence of Moira Pryde, paragraphs 101 to 103.

²⁵ Legal Submissions on behalf of Taumatotara Wind Farm Limited at paragraph 9.14 and 9.15.

²⁶ Evidence of Moira Pryde, paragraphs 100 and 103.

²⁷ Evidence of Moira Pryde, paragraph 104.

²⁸ Section 42A Report and evidence of Moira Pryde.

²⁹ Evidence of Moira Pryde, paragraph 56.

³⁰ Evidence of Moira Pryde, paragraph 56.

and the remaining turbines in the north have significant bat activity from one survey.³¹ As already noted, the applicant's ecologist has placed significant weight on the reduction in the number of wind turbines and the fact that the combined rotor sweep area across all wind turbines will decrease (by 14%).³² However, the applicant's ecologist has failed to consider the potential impacts arising out of the significantly larger size of each individual remaining turbine.

35. It is not possible for the applicant to state that the potential effects of the variation proposal will be positive. There is no evidential basis to support this proposition. The adverse effects of the original application on bats were never assessed. Further, the 2011 variation failed to compare any differences as the original adverse effects were never assessed.
36. The Director-General invites the Commissioner to accept the expert opinion evidence of Dr Bull and Ms Pryde and find that there is a real possibility that the significantly larger size of each individual remaining turbine is likely to create adverse effects on bats that are greater than the adverse effects on bats associated with the 2011 consent. Section 3(f) of the RMA provides that the term effect includes "*any potential effect of low probability which has a high potential impact.*"
37. If the Commissioner accepts this expert opinion on potential adverse effects on long-tailed bats, then it will be necessary to carefully consider whether these effects are acceptable or able to be appropriately avoided, remedied, mitigated (or offset or compensated) through conditions.
38. The Director-General's planner (Ms Williams) has provided comments on the proposed conditions in Appendix 1 to her evidence.³³ However, these comments are subject to the fundamental concern that there is inadequate baseline information. Inadequate baseline information results in a situation whereby the identification of potential and adverse effects and the determination of measures to avoid, remedy, mitigate (or offset or compensate) those adverse effects are left to future yet to be developed management plans. This approach goes against the following guidance on

³¹ Evidence of Moira Pryde, paragraph 32.

³² EIC S Chapman, paragraphs 7.1 - 7.5

³³ Evidence of Elizabeth Williams, Appendix 1.

consent conditions in clause 10.4 of the Environment Court Practice Note 2023:

- viii. *Performance standards must be set out in the conditions and not be left to be determined later.*
- ix. *Conditions must not purport to delegate arbitral or judicial functions to officers of or consultants to a consent authority.*

Section 104(1)(ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects

39. The variation proposal does not offer any offsetting. The Director-General submits that the proposed compensation does not adequately compensate for the likely loss of long-tailed bats.

Section 104(1)(b) any relevant provisions of the planning framework

40. The Director-General has submitted planning evidence from Ms Williams on the planning framework. In *King Salmon*, the Supreme Court provided guidance to the effect that the decision-maker should: identify the relevant provisions; pay careful attention to the way in which they are expressed and apply the provisions according to their terms (noting that those expressed in more directive terms will carry greater weight than those expressed in less directive terms). While there may be instances where particular provisions “pull in different directions” it is likely that conflict between particular provisions will dissolve if close attention is paid to the way in which the provisions are expressed.³⁴
41. The applicant’s planning evidence is that the carve out in cl 1.3(3) of the National Policy Statement for Indigenous Biodiversity means that the NPSIB “does not apply to the T4, or for that matter to any renewable electricity generation project”³⁵ and that in turn that means that “the indigenous biodiversity provisions of the Operative District Plan and the Proposed District Plan are also not relevant in considerations as these plans must “give effect” to the NPSIB.”³⁶

³⁴ *Environmental Defence Society Inc v New Zealand King Salmon Co* [2014] NZSC 38 at [129] and [130].

³⁵ Planning evidence of Craig Shearer, paragraph 10.35.

³⁶ Planning evidence of Craig Shearer, paragraph 10.37.

42. We disagree. The NPS-IB carve out does not direct that REG is preferred over the protection of indigenous biodiversity, and it does not require current plan provisions protecting significant natural areas to be ignored. The wording of cl 1.3(3) does not support the position put forward by the applicant. This issue came up in a recent application for a solar array at Tekapo. In the Council Decision, the Hearing Commissioners said:³⁷

We agree with Dr Warnock that the NPS-IB 'carve out' for renewable energy generation does not direct the Panel to prefer renewable energy generation over the protection of indigenous biodiversity; or for the current planning provisions for the protection of significant indigenous flora and fauna to be ignored.

43. The planning provisions for the protection of significant indigenous biodiversity in the Waikato Regional Policy Statement and the Waitomo District Plan as discussed in the evidence of Ms Williams are still relevant and must be considered along with the need to recognise and provide for the benefits of REG. Addressing both matters is required to meet the objective of sustainable management in the RMA.³⁸
44. In *Weston Lea Limited & The Director-General of Conservation v Hamilton City Council*, the Environment Court held that there is a need to avoid adverse effects on “significant habitats of indigenous fauna” whether we take an approach to protection “under s 6(c), under the Regional Policy Statements and Plans or under Chapter 20 of the District Plan”.³⁹
45. The requirement to protect section 6(c) values still apply to REG development. The carve out in cl 1.3(3) of the NPSIB says “Nothing in this National Policy Statement” it does not say “Nothing in the RMA”.
46. ECO-P2 in the Waikato Regional Policy Statement states:

Significant indigenous vegetation and the significant habitats of indigenous fauna shall be protected by ensuring the characteristics that contribute to its significance are not adversely affected to the extent that the significance of the vegetation or habitat is reduced.

³⁷ Decision of the Canterbury Regional Council and Mackenzie District Council re an application for a solar array at Tekapo at paragraph 199.

³⁸ Evidence of Ms Williams, paragraph 38.

³⁹ *Weston Lea Limited & The Director-General of Conservation v Hamilton City Council* [2020] NZEnvC 189 at para 22.

47. The applicant has not assessed the activity's effects on the environment to address "*any effect on ecosystems, including effects on plants or animals and any physical disturbance of habitats in the vicinity*" as required by clause 7(1)(c) of Schedule 4 of the RMA. The evidence of Ms Pryde confirms that the site meets the significance criteria in the Waikato Regional Policy Statement and ECO-P2 requires that significant habitat be protected by ensuring that the characteristics that contribute to its significance are not adversely affected to the extent that the significance of the habitat is reduced.
48. Habitat that supports a critically threatened species is significant and a precautionary approach should be taken to baseline monitoring in order to reduce uncertainty as much as possible. As already noted, maintaining the function and the structural connection of actual and potential roosts and commuting flyways is important for the survival of the threatened nationally critical long-tailed bats.⁴⁰

Section 104(1)(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

Setting a precedent

49. The precedent effect can be considered under s 104(1)(c).⁴¹ The Director-General is concerned that this application will set a precedent for wind farm applicants to proceed on the basis of inadequate baseline information. Given that maintaining the function and the structural connection of actual and potential roosts and commuting flyways is important for the survival of bats. And that turbines have the potential to sever these connections.⁴² A precedent effect has the potential to accelerate the rate of decline of the threatened nationally critical long-tailed bat.

Section 108 - conditions

50. The Director-General's planning witness (Ms Williams) has provided comments on the proposed conditions in Appendix 1 of her evidence. These comments are subject to the Director-General's primary position that there is inadequate baseline information and that the application should be declined or put on hold to give the applicant time to obtain adequate baseline information. If the Commissioner is minded to grant the application on the

⁴⁰ Evidence of Moira Pryde, paragraph 107.

⁴¹ *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA).

⁴² Evidence of Moira Pryde, paragraph 107.

basis of the inadequate baseline information, then the Director-General would like the opportunity to provide comment on any updated conditions.

A handwritten signature in blue ink, appearing to be 'MH'.

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