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 Taumatatotara Wind Farm Limited to change conditions of a land use consent for the Taumatatotara Wind Farm

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Supplementary Legal Submissions on behalf of the Director-General of Conservation *Tumuaki Ahurei* – Points raised by the Commissioner at hearing
Dated:

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MAY IT PLEASE THE COMMISSIONER

INTRODUCTION

1. These supplementary legal submissions address the points identified by the Commissioner during the hearing held on 13 – 14 November 2023. The Commissioner directed the Department to provide further legal submissions on these points.

2. Those points are:

   (i) Significant habitat assessment – relevance of existing unimplemented consent and case law on 'existing environment';

   (ii) Department's position on whether the application should be considered on the basis of section 127 or section 88 of the RMA; and

   (iii) Department's involvement in original application**.**

3. These supplementary legal submissions will also address the Department's position on the latest version of the draft conditions.

Significant habitat assessment - relevance of existing unimplemented consent and case law on 'existing environment'

Background – evidence and legal submission to date

4. The expert evidence provided by Moira Pryde on behalf of the Department is that the site triggers the significance criteria in the Waikato Regional Policy Statement (RPS)[1] and accordingly is 'significant habitat'.[2] The Department's planning expert, Elizabeth Williams, refers to Ms Pryde's conclusion at paragraph 23 of her evidence. Ms Williams notes that there is no definition of 'habitat' in the Resource Management Act (RMA). Ms Williams refers to the definition of 'habitat' in the NPSIB as relevant to the interpretation of the term. That definition provides:

> *"… an area where an organism or ecological community lives or occurs naturally for some or all of its life cycle including as part of seasonal feeding patterns but does not include built structures or an area or environment where an organism is present only fleetingly"*[3]

[1] Appendix 5, Table 28
[2] EIC Moira Pryde, paragraph 102.
[3] National Policy Statement for Indigenous Biodiversity July 2023, 1.6 Interpretation **Habitat**.

5. Ms Williams concludes at paragraph 25:

> *Given the long-tailed bats conservation status, that its habitat includes foraging and socialising habitat, and due to the presence of long tailed bats at the application site triggering the significance criteria in the Waikato Regional Policy Statement, it is my opinion that Part 2, Section 6(c) of the Act is a relevant consideration to the assessment of the proposed variation.*

6. In their legal submissions, the Applicant disagreed with the conclusion that the site constituted 'significant habitat'. The legal submissions provide:

> *9.13 Ms Williams overlooks that the chapeau of Appendix 5 of the Waikato RPS provides "Areas of significant biodiversity shall not include areas that have been created and subsequently maintained for or in connection with artificial structures".*
>
> *9.14 The NPSIB definition of "habitat" is consistent and provides that:*
>
> > *"habitat means the area or environment where an organism or ecological community lives or occurs naturally for some or all of its life cycle or as part of its seasonal feeding or breeding pattern; <u>but does not include built structures or an area or environment where an organism is present only fleetingly</u>." (emphasis added)*
>
> *9.15 It is clear that the turbines and the area that those cover, which form part of the existing environment, cannot be habitat in accordance with the definitions in either the Waikato RPS or the NPSIB.*

7. Ms Williams provided supplementary evidence in response to the Applicant's legal submissions on this point. Her supplementary evidence provides:

> *Assessment of the existing environment and consideration of Appendix 5 of the Waikato Regional Policy Statement*
>
> *20. The applicant's legal submission raised a point in paragraph 9.13 regarding the Waikato Regional Policy Statement Appendix 5 exemption and the existing environment. It was noted that Appendix 5 states that areas of significant indigenous biodiversity shall not include areas that have been created and maintained in connection with artificial structures. This is a provision in the Waikato Regional Policy Statement which is intended to assist plan users on how to assess whether habitats of indigenous fauna would meet the significance criteria. The plan provision does not mention whether the 'consented environment' is a relevant consideration in this only that the site should not include areas that have been created or maintained.*
>
> *21. I acknowledge that the 'environment' upon which effects are assessed for the purpose of section 104(1)(a) includes the existing and reasonably foreseeable future environment. This includes the environment as it might be modified by implementing the original 2011 resource consent i.e the 22 turbines.*

> *22. However, for the purposes of identifying whether an area is significant, the ecological evidence submitted has examined the site as it is described presently containing patches of forests and open pasture where there have not been any artificial structures such as wind turbines created or maintained. The bat surveys undertaken by the applicant have also been undertaken prior to any artificial structures being created or maintained. These surveys have been used to inform the assessment of whether the site is significant.*
>
> *23. Based on the above, I do not agree with the applicant that the chapeau in Appendix 5 means that the site cannot be assessed as habitat in accordance with the Waikato RPS.*

8. Finally, this issue was addressed in the Department's legal submissions (as amended prior to hearing):

> *The relevant environment*
>
> *31. Ms Pryde has assessed the site as meeting the significance criteria in the Waikato Regional Policy Statement (WRPS). 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. 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.*

Department's further legal submissions

9. The Commissioner has requested submissions on the relevance of case law relating to the 'existing environment' for the purposes of assessing whether the site constitutes significant habitat. We understand this question refers to the line of established case law regarding the extent to which the term 'environment' in the context of section 104(1)(a) encompasses the future state of the environment.

10. The leading authority is the case of *Queenstown Lakes DC v Hawthorn Estate Ltd* (2006) 12 ELRNZ 299; [2006] NZRMA 424 (CA)**.** In that case, in which the primary effects under consideration were visual landscape effects, the Court of Appeal held:

> [84] In summary, we have not found, in any of the difficulties Mr Wylie has referred to, any reason to depart from the conclusion which we have reached by considering the meaning of the words used in s 104(1)(a) in their context. **In our view, the word "environment" embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a district plan. It also includes the environment as it might be modified by the**

> **implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented**. [Emphasis added].

11. It should also be noted that *Hawthorn* is not authority for the proposition that the environment as it exists at the relevant time ceases to be relevant for the purposes of the section 104(1)(a) assessment. Rather it defines the extent to which the future state may also be relevant and if so, what should be considered in that assessment of the future to avoid the exercise becoming too speculative.

12. In response to the Commissioner's question, the Department first submits that *Hawthorn* and subsequent case law has been developed and applies to the use of the term environment in so far as that term is used in section 104(1)(a). This is clearly articulated in *Hawthorn* at paragraph [84] quoted above. The cases do not establish a principle that is of general application to other assessments that may be required in any given case. So, in this case, the *Hawthorn* line of authorities does not mean that the fact the original (as modified) consent has been granted is relevant to the assessment of whether or not the site triggers the significance criteria in the relevant planning document, here the RPS. This would be to conflate two separate enquiries. Simply put, the Court in *Hawthorn* was not considering whether an area was an existing Significant Natural Area (SNA).

13. As noted above, for the purposes of the section 104(1)(a) assessment (as modified in this case by section 127), the relevant environment includes both the future *and* existing environment. Based on the evidence presented at hearing, the site as it exists triggers the significance criteria. The wind turbines, while consented, have not been built, and therefore currently have no effect on the factors that are present at the site currently that have led the Department's experts to conclude that the significance criteria is triggered. The survey results have confirmed the presence of threatened-nationally critical long-tailed bats at the site. It is also clear from the application documents and the evidence that the landscape features present at the site provide suitable habitat. Further monitoring to identify how the local population of long-tailed bats use the project site as part of their home range is the only way to take the significance assessment any further.

14. Secondly, the Department submits that the meaning that the Applicant seeks to put on the language both of the chapeau to Appendix 5 Table 28 of the RPS and the definition of "habitat" in the NPSIB in support of their argument that the *Hawthorn* future state approach applies to the significance assessment is incorrect.

15. The full chapeau to Table 28 in Appendix 5 provides:

> ***APP5 – Criteria for determining significance of indigenous biodiversity***
>
> *The following criteria are to be used to identify areas of significant indigenous biodiversity and their characteristics as they exist at the time the criteria are being applied. Criteria may be specific to a habitat type including water, land or airspace or be more inclusive to address connectivity, or movement of species across habitat types.*
>
> *To be identified as significant an area needs to meet one or more of the criteria identified in the table below.*
>
> ***Areas of significant indigenous biodiversity shall not include areas that have been created and subsequently maintained in connection with:***
>
> - ***Artificial structures*** *(unless they have been created specifically or primarily for the purpose of protecting or enhancing biodiversity); or*
> - *Beach nourishing and coastal planting (unless they have been created specifically or primarily for the purpose of protecting or enhancing biodiversity.*

16. The text in bold is the aspects of the chapeau relied on by the Applicant to support an interpretation of the chapeau that would exclude the 'areas' in which the turbines have been consented from 'areas' that may be considered significant.

17. The Department submits that the language used does not support an interpretation that would import a *Hawthorn* future state approach to the scope of the exclusion articulated in the chapeau. The words used are: *areas that have been 'created and subsequently maintained'*. The plain meaning of these words clearly implies physical or real-world actions that have already been taken. There is no ambiguity. The concept of the 'future state' of the environment as articulated in *Hawthorn* is a legal construct. It is not possible to 'create and subsequently maintain' a legal construct. Such an

interpretation would place too much of a strain on the language. Much clearer wording would have been required if this had been the intent. The Department also notes the wording at the start of the chapeau which states: *The following criteria are to be used to identify areas of significant indigenous biodiversity and their characteristics as they exist at the time the criteria are being applied* [emphasis added]. This clearly indicates that the assessment applies to the existing state.

18. If there was ambiguity on the scope of the exclusion in the chapeau, it would be appropriate to look to the relevant higher order document – here the NPSIB. The Applicant submits that the definition of 'habitat' in the NPSIB is consistent with its preferred interpretation of the chapeau. As noted above, the Applicant points to the fact that the definition of habitat excludes 'built structures'. Again, the Department disagrees that there is anything in the definition of habitat that would import a future state approach to the scope of the exclusion. The word used is 'built structures'. Built here is used as an adjective. It therefore relates to what exists currently, not a future legal construct.

19. A proper understanding of the NPS IB also supports the Department's argument that areas are assessed as SNAs on the basis of their current physical state not some future possible state. For example Clause 3.8 continually references the present reality in assessing SNAs (see e.g., (2(c)) "*wherever practicable, the values and extent of natural areas are verified by physical inspection*" and (3) referring to "*a physical inspection of the area*"). Further, and importantly, Clause 3.8(2)(f) states "*the boundaries of areas of significant indigenous vegetation or significant habitat of indigenous fauna are determined without regard to artificial margins (such as property boundaries...*" Accordingly, there is a clear policy direction in the NPS IB to assess SNAs on the basis of the existing physical environment not in accordance with some possible future state based on legal constructs.

20. The Department also notes that the Court of Appeal in *Hawthorn* confirmed that the concept of the future environment as it applies to the term environment in section 104(1)(a) encompasses not only resource consents that have been granted and are likely to be implemented, but also the environment: *as it might be modified by the utilisation of rights to carry out permitted activity under a district pla*n. This means that if the Applicant's

argument was taken to its logical conclusion, wherever any kind of 'structure' was allowed as a permitted activity the effect would be to exclude it from the definition of 'habitat' and any area associated with such structures would be excluded from the significance criteria under the RPS. That would serve to prevent the assessment of many SNAs and significantly undermine the NPS IB. For example, if the residential-rural zone or the rural zone of a plan permitted the construction of ancillary farm buildings to house livestock, and yet the habitat of a threatened species was found on a (presently undeveloped) site in that zone, the applicant's argument would prevent that area being considered an SNA. The Department submits that this cannot be the case.

21. Finally, the Department submits that the Applicant may in fact be implying an entirely erroneous interpretation to the scope of the chapeau in Appendix 5. The Applicant contends that '**areas** that have been created and maintained in connection with….artificial structures…..' means 'areas' generally associated with an artificial structure. In reality, on this interpretation it could be quite unclear as to how far an 'area', and therefore the exclusion, would extend. Applying it to the current case, would the 'area' apply to the footprint of the turbine only or to the wider area? A more straightforward reading is that '**areas**' means **areas of significant indigenous biodiversity**. So, on that reading, the interpretation would be:

> *Areas of significant indigenous biodiversity shall not include areas [**of significant indigenous biodiversity**] that have been created and subsequently maintained for or in connection with:*
>
> - *Artificial structure (unless they have been created specifically or primarily for the purpose of protecting or enhancing biodiversity)*

22. On this interpretation, the exclusion would apply, for example, to areas of significant indigenous biodiversity that have been created, i.e. planted or fenced, and then maintained in connection with a structure e.g. around a house***.*** This would result in a much more focused approach to the 'areas' which would be excluded from the significance criteria.

23. The Department does not seek to express a view as to whether that is in fact the correct interpretation of Appendix 5– rather the Department submits that whichever way the interpretation is approached, it does not support the

position put forward by the Applicant that the chapeau would exclude the area within which the turbines have been consented but not built.

24. In summary, the Department's position is that the granted but unimplemented consents and the case law relating to the 'future state' of the environment in the context of section 104(1)(a) are not relevant to the assessment of whether or not the site constitutes significant habitat. The fact remains that a threatened - nationally critical species together with landscape features that provide suitable habitat for that species are known to be present at the site. To suggest that the consented but unbuilt turbines are determinative that the site cannot be considered significant habitat would be to ignore that reality. That approach cannot constitute the sustainable management of the relevant natural and physical resources,[4] which includes the bats present at the site.[5]

Department's position on whether the application should be considered on the basis of section 127 or section 88 of the RMA

Background

25. In Minute 1 issued September 12 2023, the Commissioner sought legal or planning submissions from any party regarding:

> (a) the relevant legal tests for determining if a modification to a consented proposal should be considered under s127 or as a new application under s88 of the RMA.
>
> (b) the relevance of the previous modifications to the consented proposal as set out in the second bullet point of Minute 1; and
>
> (c) any other relevant matters that would assist determination of this matter.

26. The Applicant and the Council filed legal submissions. The Department did not file legal or planning submissions. This was on the basis that the Department, as a submitter, considered this to be a procedural matter that was best determined as between the Applicant and the Council and on the basis that the Department would abide by the decision of the Commissioner. Certainly it would have been preferable for all parties if the Council had clearly made a decision as to which process applied to this application at the

[4] Resource Management Act, section 5(1)
[5] Resource Management Act section 5(2), section 2 – definition of **natural and physical resources**

point of notification. As discussed further below, the Department's decision not to file submissions on this point was also in the context of the Department's primary opposition to the proposal being the insufficiency of information provided with the application.

27. In their legal submissions, the Council and Applicant set out the relevant legal test for determining whether an application should be considered under section 88 or 127.[6] The Council did not express a definitive view as to how those tests applied to the current application. The Applicant concluded that the application met the legal tests for a section 127 variation, with the acknowledgement that: '*whether the effects of the changes are material may require final determination following the receipt of evidence from other parties'*.[7]

28. In Minute 5 (reissued on 4 October), the Commissioner recorded as follows:

> On balance, I agree with the Applicant that the activity being sought by way of the application remains the same as that provided for in the existing consent; being to construct and operate a utility scale wind farm and identified ancillary activities at a defined location.
>
> …
>
> Accordingly, I recommend that the application be assessed on an integrated basis as a variation under s127 based upon the information before me. However, given that the potential change in effects requires a consideration of fact and degree, and all the evidence has not yet been heard, I record that I may need to reconsider my conclusion should the evidence compel me to do so.

Department's further legal submissions

29. The Department endorses the summary of the applicable legal tests set out in the submissions of both the Applicant and the Council.

30. The Department notes in particular that one of the relevant considerations arising from the case law[8] is the consideration of whether a variation has 'materially different adverse effects'.[9]

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[6] See section 6, Applicant's legal submissions, paragraphs 2 – 7 Council's legal submissions.
[7] Applicant's legal submissions, paragraph 9.2
[8] *Body Corporate 970101 v Auckland City Council* CA64/00, 17 August 2000, (2000) 6 ELRNZ 303, [2000] 3 NZLR 513, [2000] NZRMA 529, 2000 WL 35500953
[9] Ibid at [37].

31. The difficulty in the circumstances of this case is that the Department's primary objection to the proposal is that there is insufficient information provided in support of the application. It is for this reason, as set out in the Department's legal submissions, that the Department considers the application should be declined pursuant to section 104(6) of the RMA. For the same reason that the Department considers there is inadequate ecological data to allow an assessment of difference in ecological effects of the proposal of long-tailed bats as between the existing consent (as varied in 2011) and the proposed variation, it is equally difficult to assess whether the variation will result in 'materially different adverse effects'.

32. While acknowledging the information gaps, the ecological evidence presented on behalf of the Director-General is that the proposed variation creates a real risk of harm to bats with 'the potential to cause more damage to bats'[10] than the consented activity, due to the increased size of the remaining turbines. The Department refers the Commissioner in particular to the evidence presented at hearing that demonstrates the massive size increase of each individual turbine, in terms not just of height but increased rotor length and sweep.[11] The diagram provided in Glenn Star's evidence[12] demonstrates this difference in pictorial form and is **attached** to these further submissions as Appendix 1. The Department submits that on that basis, it would be open to the Commissioner to conclude, having now seen the evidence from the parties, that the application should in fact be progressed pursuant to section 88 rather than section 127.

33. The Department acknowledges that this would have considerable procedural implications and that the hearing was conducted on the basis that the application was being considered under section 127. Consistent with its overall position on the application, the Department's position is that the appropriate course is for the application to be declined pursuant to section 104(6). Once appropriate baseline monitoring has been completed, this would provide a much more appropriate basis on which to assess whether any future application should be progressed under section 127 or 88.

[10] Evidence of Moira Pryde, paragraph 129.
[11] Evidence of Moira Pryde, paragraph 129; Evidence of Elizabeth Williams, paragraph 47
[12] Evidence of Glenn Starr – Appendix One

Department's involvement in original application

34. In March 2006, the Department made a submission on the original application which noted the potential for bird and bat strike arising from the operation of the turbines. The submission stated that "[t]here is a need for some monitoring, and good recording, of any evidence of strike should it occur."[13] The position taken by the Department on the original application was based on the information known to the Department in 2006. The Department did not know about barotrauma in 2006.

35. The Department was not notified of the 2011 variation application. This means that the Department was not able to provide input, or to lodge a submission, on the 2011 variation application.

36. The Department takes an evidence-based approach to its engagement in RMA processes. The position taken by the Department on the current variation application is based on the latest available information on the impacts of windfarms on bats. The Department has repeatedly requested monitoring.

37. There is a real risk of 'materially different adverse effects' from the proposed variation when compared with the 2011 consent. This is due to the massive increase in the size of each individual remaining turbine. There has been plenty of time for the applicant to put its best foot forward by completing baseline monitoring and a proper assessment of the effects of the turbines on bats for both the 2011 consent and the proposed variation. However, the Applicant has failed to do this.

Draft conditions

38. The Department has been in discussions with both the Council and the Applicant with the view to agreeing the draft conditions. Some changes have been agreed. However, there is still a fundamental disagreement on the interpretation of the carve out in clause 1.3(3) of the National Policy Statement for Indigenous Biodiversity (NPSIB). As the Commissioner is aware, the Applicant wishes to proceed on the basis that the carve out in clause 1.3(3) of the NPSIB means that current planning provisions for the

[13] Submission by the Department of Conservation on original resource consent application by Ventus Energy Ltd to construct and operate a 22 turbine windfarm at Taumatatotara.

protection of biodiversity be ignored. This cannot be correct. The carve out in clause 1.3(3) is simply to retain for renewable energy the situation that existed before the NPSIB came into effect. The planning provisions in the Waikato Regional Policy Statement and the Waitomo District Plan are still relevant and must be considered along with the need to recognise and provide for the benefits of renewable electricity generation. For further discussion on this, see paragraphs 41 to 45 of the Department's legal submissions dated 12 November 2023 (as amended prior to the hearing) and presented at the hearing on Tuesday 14 November 2023.

39. In light of the carve out in clause 1.3(3) in the NPSIB, it is the Waikato Regional Policy Statement policy framework which governs the management response to adverse effects on biodiversity. The Environment Court has said:[14]

> The Court concludes that the provisions of Chapter 11 of the RPS should dictate the actions taken in respect of the on-going validity and survival of the known indigenous bio-diversity in the locality. The policies, implementation methods, and rules of this chapter are as on point with respect to the valuable qualities of the site short of the document simply being an instruction manual to the preservation and enhancement of the long-tailed bat. The relevance of these matters is undeniable.

40. A critical issue for the Commissioner is whether the draft conditions step through the effects management hierarchy as prescribed by the Waikato Regional Policy Statement. Both ECO-M13 (which applies to significant habitat) and ECO-M3 (which applies to non-significant habitat) prescribes an effects management hierarchy which requires avoidance, remediation and mitigation before any offsetting and compensation. ECO-M13 and ECO-M3 are **attached** to these further submissions as Appendix 2.

41. The Department has made some suggested changes to the draft conditions to add the avoid, remedy and mitigate steps into the draft conditions. The Department's suggested changes are **attached** to these legal submissions as Appendix 3.

42. Some of the suggested changes are to recognise the ecological realities. For example, an advice note has been added to note that mortality monitoring may not identify dead bat carcasses due to the small size of long-tailed bats

[14] *Weston Lea Limited v Hamilton City Council* [2020] NZEnvC 189 at [33].

and due to scavenging by rats, stoats, harriers and cats. The Department is concerned that activity monitoring alone will not provide an accurate picture on bat mortality. Reduced bat activity may be caused by a range of different reasons. For example, a reduction in bat activity may be caused by the use of bat deterrents. The Department has therefore suggested a new condition 68 which includes a trigger for mortality monitoring.

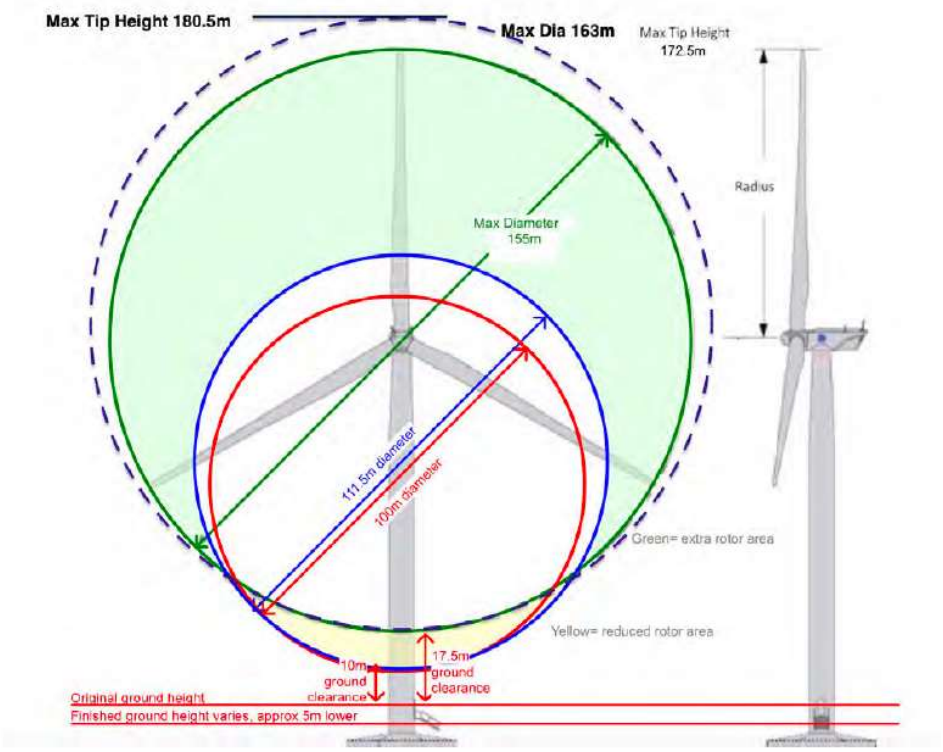
43. The Department's suggested changes to the draft conditions is subject to the Department's primary position that there is inadequate baseline information. Long-tailed bats are threatened-nationally critical and there is a real risk of 'materially different adverse effects' from the massive size increase of each individual turbine, in terms not just of height but increased rotor length and sweep.[15] There is also a real risk that the effects will be irreversible. In the circumstances, the Department continues to seek that the application be declined pursuant to s 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). If the Commissioner is minded to grant on basis of inadequate information in reliance of adaptive management conditions then the Department would like the Department's suggested changes to the conditions to be considered and for the conditions to be carefully reviewed against the *Sustain Our Sounds* criteria for adaptive management.

Michelle Hooper / Alice McCubbin-Howell
Legal Counsel for the Director-General of Conservation

[15] Evidence of Moira Pryde, paragraph 129; Evidence of Elizabeth Williams, paragraph 47

Appendix 1 – Diagram from evidence of Glenn Starr

Appendix One – Updated Variation Proposal



Appendix 2 – ECO-M3 and ECO-M13 of the Waikato Regional Policy Statement

ECO-M3- Avoidance, remediation, mitigation and offsetting (for indigenous biodiversity that is not significant)

Regional and district plans:

1. *for non-significant indigenous vegetation and non-significant habitats of indigenous fauna (excluding activities pursuant to ECO-M4):*
    a. *shall require that where loss or degradation of indigenous biodiversity is authorised adverse effects are avoided, remedied or mitigated (whether by onsite or offsite methods).*
    b. *should promote biodiversity offsets as a means to achieve no net loss of indigenous biodiversity where significant residual adverse effects are unable to be avoided, remedied or mitigated.*
    c. *when considering remediation, mitigation or offsetting, methods may include the following:*
        i. *replacing the indigenous biodiversity that has been lost or degraded;*
        ii. *replacing like-for-like habitats or ecosystems (including being of at least equivalent size or ecological value);*
        iii. *the legal and physical protection of existing habitat;*
        iv. *the re-creation of habitat; or*
        v. *replacing habitats or ecosystems with indigenous biodiversity of great ecological value.*

ECO-M13- Protect areas of significant indigenous vegetation and significant habitats of indigenous fauna

Regional and district plans shall (excluding activities pursuant to ECO-M4):

1. *protect areas of significant indigenous vegetation and significant habitat of indigenous fauna;*
2. *require that activities avoid the loss or degradation of areas of significant indigenous vegetation and significant habitats of indigenous fauna in preference to remediation or mitigation;*
3. *require that any unavoidable adverse effects on areas of significant indigenous vegetation and significant habitats of indigenous fauna are remedied or mitigated;*
4. *where any adverse effects are unable to be avoided, remedied or mitigated in accordance with (2) and (3), more than minor residual adverse effects shall be offset to achieve no net loss; and*
5. *ensure that remediation, mitigation or offsetting as a first priority relates to the indigenous biodiversity that has been lost or degraded (whether by on-site or off-site methods). Methods may include the following:*
    a. *replace like-for-like habitats or ecosystems (including being of at least equivalent size or ecological value);*
    b. *involve the re-creation of habitat;*
    c. *develop or enhance areas of alternative habitat supporting similar ecology / significance; or*
    d. *involve the legal and physical protection of existing habitat;*
6. *recognise that remediation, mitigation and offsetting may not be appropriate where the indigenous biodiversity is rare, at risk, threatened or irreplaceable; and*
7. *have regard to the functional necessity of activities being located in or near areas of significant indigenous vegetation and significant habitats of indigenous fauna where no reasonably practicable alternative location exists.*

Appendix 3 – The Department's suggest amendments to the conditions