

IN THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

of the Proposed Waikato District Plan (Stage
1) – 21A – Significant Natural Areas

**LEGAL SUBMISSIONS ON BEHALF OF THE DIRECTOR-GENERAL OF CONSERVATION
IN RELATION TO HEARING 21A – SIGNIFICANT NATURAL AREAS**

16 NOVEMBER 2020

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1. INTRODUCTION

- 1.1 These legal submissions are made for the Director-General of Conservation (**Director-General**).
- 1.2 Many aspects of the Director-General's submission and further submission on the "significant natural area" (**SNA**) section of the Proposed Waikato District Plan (**Proposed Plan**) are addressed in the accompanying evidence, prepared for the Director-General.
- 1.3 These legal submissions are structured as follows:
 - a. evidence;
 - b. kauri dieback;
 - c. long-tailed bat protection;
 - d. offsetting.

2. EVIDENCE

- 2.1 In addition to these legal submissions, evidence will be presented by:
 - a. Mr Riddell on planning in respect of identification of SNA, kauri dieback, long-tailed bat protection and biodiversity offsetting;
 - b. Mr Beauchamp on kauri dieback;
 - c. Dr Corkery on offsetting and compensation;
 - d. Ms Thurley on long-tailed bats.

3. KAURI DIEBACK

- 3.1 The Director-General's submission opposes the Proposed Plan on the basis that it does not contain adequate measures to appropriately manage and / or prevent the spread of kauri dieback. Whilst the submission touches on wider

issues than those that are included in Hearing 21A,¹ he understands that the kauri dieback issues raised in his submission are to be addressed collectively at this hearing.²

- 3.2 A fundamental concern for the Director-General is that there appears to be a lack of understanding in respect of Waikato District Council's (**Council**) role in managing the disease and in relation to how the disease is identified and / or spread.

Framework

Biosecurity Act 1993

- 3.3 In considering the relationship between the Biosecurity Act 1993 (**BA**) and the Resource Management Act 1991 (**RMA**), the Environment Court found that the BA is easily reconciled with the RMA. The BA builds on the assumption that the RMA provides a clear relevant legislative foundation for the management of kauri dieback.³
- 3.4 Part 5 of the BA is relevant to the matter of kauri dieback. The express purpose of this Part is to provide for the eradication or effective management of harmful organisms that are present in New Zealand by developing instruments and measures to prevent or eliminate adverse effects from harmful organisms and for the appropriate distribution of costs.⁴
- 3.5 Similarly to the RMA, Part 5, BA provides for a cascade of documents which require that the lower order instruments are consistent with the higher.⁵ Mr Riddell and Mr Beauchamp's evidence sets out the status of national level policy and discusses the Waikato Regional Pest Management Plan 2014 – 2024 (**WRPMP**), which was prepared in accordance with sections 68 - 70, BA. In short, they conclude that the higher order instruments cannot be relied on to protect and / or maintain indigenous biodiversity as the future of the Proposed

¹ The Director-General's submission [585.33] seeks that the Proposed Plan is amended to include new objectives, policies and rules to address the management of kauri dieback.

² Email from Fletcher Bell to Troy Urlich regarding kauri dieback evidence for Hearing 18 – Rural, submission [585.5], dated 1 September 2020.

³ *Thames-Coromandel District Council v Director General of Conservation* [2018] NZEnvC 133 (**TCDC**) at [65] – [66].

⁴ BA, s 54.

⁵ BA, ss 69(1), rules made under the BA prevail over regional level regulations in the case of inconsistency.

National Level Policy is uncertain⁶ and the WRPMP largely relies on voluntary measures to address kauri dieback in respect of areas outside of the Hunua Ranges.⁷

RMA

3.6 Section 31, RMA prescribes Council's functions and the purpose for those functions as follows:

(1) *Every territorial authority shall have the following functions for*

the purpose of giving effect to this Act:

(a) *The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district...*

(b) *The control of actual or potential effects of the use, development, or protection of land, including for the purpose of...*

(iia) the prevention or mitigation of any adverse effects of the development, subdivision, or use of contaminated land...

(iii) the maintenance of indigenous biological diversity...

3.7 Under the RMA, "contaminated land" is defined to include a "hazardous substance", which in turn, is defined to include any substance with ecotoxicity.⁸ While the RMA does not contain a definition of ecotoxicity, the Hazardous Substances and New Organisms Act 1996 does - it defines "ecotoxic" to mean capable of causing ill health, injury or death to any living organism.⁹

3.8 In *Thames – Coromandel v Director General (TCDC)*, the Environment Court considered the above provisions and observed that:¹⁰

a. kauri dieback is a form of a hazardous substance in that the associated ecotoxic pathogen is capable of causing death, injury or ill health to kauri;

⁶ Mr Riddell, EIC at [150], Mr Beauchamp, EIC at [8.4].

⁷ Mr Riddell, EIC at [146], Mr Beauchamp, EIC at [9.10] – [9.11].

⁸ RMA, s 2.

⁹ Hazardous Substances and New Organisms Act 1996, s 2.

¹⁰ TCDC at [45], [106].

- b. contaminated land includes land within three times the dripline of kauri that is known to or may potentially contain the related pathogen. All kauri should be treated as potentially contaminated until proven otherwise;
- c. district council's functions include maintaining indigenous biological biodiversity, which it is to achieve through integrated management of effects, including the adoption of controls to prevent or mitigate the actual or potential effects of contaminated land;
- d. district plan regulation of kauri dieback is not only desirable it is necessary. There is no silver bullet. Various agencies must take steps within their respective areas of jurisdiction or influence to address kauri dieback.

3.9 Leaving the control of kauri dieback to regional and national levels and to voluntary and / or educational measures, as proposed in the Section 42A and Federated Farmer's Rebuttal Evidence is inconsistent with the clear direction from the Environment Court and Council's core functions.¹¹ The RMA does not contemplate Council devolving its function of controlling contaminated land to other regional or national level agencies – instead, it imposes a positive obligation on Council to control such contamination.

3.10 The Director-General says that any claim that kauri dieback can be effectively managed as a result of kauri being situated on the Department or Council's land¹² or via consideration of related effects of earthworks,¹³ managing earthworks within kauri root zones and voluntary measures¹⁴ is likely to be unduly optimistic. Mr Beauchamp's evidence highlights that all kauri are vulnerable to the pathogen, there is a lag period between infection and detection, there is a lack of district-wide sampling and challenges with accurate sampling and that the pathogen is spread via means other than earthworks.¹⁵

¹¹ Section 42A Rebuttal Evidence at [152] – [154].

¹² Section 42A Report, Part 1, Hearing 18 – Infrastructure at [248].

¹³ Section 42A Report, Part 1 at [308], [309].

¹⁴ Section 42A Report, Part 1 at [310].

¹⁵ Mr Beauchamp, EIC at [6.9], [9.5].

3.11 Although the Director-General acknowledges the Section 42A Report comments relating to the complexities of establishing and implementing comprehensive kauri dieback controls in the Proposed Plan,¹⁶ he says that such complexities do not relieve Council from its functions. In *Ngati Kahungungu v Hawkes Bay Regional Council*, the Environment Court observed that a council function prescribed by the RMA is not optional – it is something that a council must do, whether difficult or easy.¹⁷

3.12 The Director-General is of the view that the provisions of the Proposed Plan do not go far enough to achieve integrated management via the adoption of controls to prevent or mitigate the spread of kauri dieback for the purposes of maintaining biodiversity. He says that the controls such as those set out in the evidence of Mr Riddell are appropriate and necessary to effect proper exercise of the Council’s functions and achieve sustainable management.

4. LONG-TAILED BATS

4.1 The Director-General’s principal concerns include that:

- a. the Proposed Plan does not provide adequate protection of the habitat of threatened bats. As relief, he seeks that the Proposed Plan is amended to include related mapping, objectives, policies and rules on the basis that such provisions are required to protect bat habitat;¹⁸
- b. his submission has been misinterpreted. The Section 42A Report Rebuttal Evidence records that the original submission seeks to include “provisions in the proposed plan to manage this species”.¹⁹ This is not correct. As identified above, the Director-General’s submission and the relief sought relate directly to bat habitat.

4.2 Recognising and providing for the protection of significant habitat of indigenous fauna is a matter of national importance under section 6(c), RMA. It appears to

¹⁶ Section 42A Report, Part 1 at [307] – [308]. The Director-General questions the value of the comparative exercise undertaken in relation to the Whangarei District Plan. These provisions were appealed by the Director-General on the basis that this district plan has significant gaps in the kauri dieback management provisions, per the Notice of Appeal Against Decision on Proposed Plan Change to the Whangarei District Plan, dated 14 July 2020 at [4].

¹⁷ *Ngati Kahungungu Iwi Inc v the Hawke’s Bay Regional Council* [2015] NZEnvC 50 at [29].

¹⁸ Submission [585.38].

¹⁹ Section 42A Rebuttal Evidence at [166].

be agreed that threatened bat habitat qualifies for this protection.²⁰ The point of disagreement relates to the role of Council and the Proposed Plan in protecting such habitat.

Section 41A Report – Long-tailed Bats

- 4.3 The Section 41A Report records that it may be appropriate to include rules such as those contained in the Timaru District Plan, where mapping has occurred. Ultimately it is recommended that the Director-General's submission is rejected for want of spatial data.²¹
- 4.4 Ms Thurley's evidence contains spatial data in the form of maps that identify long-tailed bat distribution within the Waikato district.²²
- 4.5 Ms Thurley's evidence also sets out the habitat requirements for long-tailed bats and the key pressures that bat communities are facing, being habitat fragmentation, loss of foraging and roost trees and increases in lighting and noise.²³
- 4.6 Notably, the key pressures identified in Ms Thurley's evidence are easily reconciled with the *Western Lea v Hamilton City Council (Western Lea)* Environment Court observation that avoiding disturbance from light and noise, providing suitable areas for roosting and improving the habitat quality of long-tailed bats are all critical if the species is to continue.²⁴
- 4.7 Mr Riddell's evidence identifies important factors to achieving sustainable management with respect to long-tailed bats, within the planning framework. He proposes provisions that he considers appropriately recognise and provide for the protection of long-tailed bat habitat.²⁵
- 4.8 The Director-General acknowledges the gaps in data relating to bat habitat within the Waikato District. He says that the above evidence provides an

²⁰ Waikato District Plan Review, Technical responses to submissions relating to ecology at [2.3], Section 42A Report, Part 1 at [300], Mr Riddell, EIC at [195].

²¹ Section 42A Report, Part 1 at [300]. The Timaru District Plan rules relate to removal of trees within bat protection areas.

²² Ms Thurley, EIC at [8.2], Appendix 1, noting that the identified distribution of long-tailed bat habitat is not exhaustive.

²³ Ms Thurley, EIC at [6.7] and Part 7.

²⁴ *Ltd v Director-General of Conservation* [2020] NZEnvC 189 (*Western Lea*) at [125].

²⁵ Mr Riddell, EIC at [194], [199] – [200]. Also see the attachment to Mr Riddell's Highlight's Package.

adequate, appropriate and necessary starting point to implementing a framework that recognises and provides for the significant habitat of long-tailed bats.

Section 42A Rebuttal Evidence – Long-tailed Bats

4.9 The Section 42A Rebuttal Evidence records agreement with Waikato Regional Council’s evidence, namely that while plans may have a role in managing long-tailed bat habitat through protection, the surveying, sourcing and disseminating of data or protection of species should not be undertaken by local authorities – this would transfer the Department of Conservation’s (the **Department**) role to Council.²⁶

4.10 The Director-General agrees that the Department is responsible for the protection of wildlife itself. Council is responsible for the protection of significant habitats – which in some instances, may entail obtaining and / or collating sufficient information to enable its plan to provide for adequate protection of such habitats. The Section 42A Report appears to accept the latter to a degree, in that it recommends ground truthing currently mapped SNAs and identifying others at the time of resource consents.²⁷

4.11 In *Western Lea*, the Environment Court considered the identification, or lack of, bat habitat in the Waikato Regional Policy and Plan the Hamilton District Plan as follows:²⁸

“...the RPS reveals an unfortunate lacuna...in particular, the RPS fails to identify the significant habitat of long tailed bats in the Waikato Region...

...it comes as a surprise to the Court, in light of the warranted concern held for the future of the Long-tailed Bat, that no commonly identified and generally agreed Bat Protection area is currently contained in Schedule 9C. This is an unfortunate oversight. It is a matter requiring urgent redress...”

4.12 The above indicates that there is an expectation that lower order planning instruments will identify areas of significant habitat, particularly where a

²⁶ Section 42A Rebuttal Evidence at [166] - [167].

²⁷ Section 42A Report, Part 1 at [62].

²⁸ *Western Lea* at [34], [40] – [41]. Hamilton District Plan, Schedule 9C identifies SNA.

diminishing population of endangered species relies on that habitat. This is in line with *King Salmon*, in terms of the Proposed Plan being designed to give substance to Part 2, RMA by identifying provisions with increasing particularity both as to substantive content and locality.²⁹

- 4.13 Against this background, the Director-General says that the Proposed Plan has a critical role in ensuring adequate protection of significant habitat, particularly given that it is designed to achieve the RMA's purpose.³⁰ Sustainable management requires safeguarding ecosystems essential for the long-tailed bat and that the protection of such habitat is recognised and provided for as a matter of national importance. In the case of long-tailed bat habitat, protection likely entails Council obtaining and / or collating sufficient information to ensure that appropriate protection of significant habitat is recognised and provided for – put another way, the Proposed Plan ought to have due particularity as to its substantive content and locality to give substance to section 6(c), RMA.

5. OFFSETTING

- 5.1 The Director-General's submission seeks that the Proposed Plan is amended to include a definition of "biodiversity offset", in line with the Guidance for Biodiversity Offsetting in New Zealand (**GBONZ**), or such alternative relief to like effect.³¹
- 5.2 The Section 42A Report recommends accepting the Director-General's submission.³²
- 5.3 Dr Corkery's evidence highlights that following the Director-General's submission, the Biodiversity Offsetting Under the Resource Management Act guidance for local government (**BOURMA**) was developed.³³ It includes a definition for a biodiversity offset.³⁴ For present purposes, the key differences in the BOURMA definition is that it addresses "residual adverse biodiversity

²⁹ *Environmental Defence Society Inc v NZ King Salmon Company* [2014] NZSC 38 at [31], [33], [34], [37], [41].

³⁰ RMA, s 72.

³¹ Submissions [585.9], [585.10].

³² Section 42A Report, Part 2 at [700], [703].

³³ BioManagers Group, *Biodiversity Offsetting Under the Resource Management Act, A Guidance Document*, September 2018, pp. 64, 67.

³⁴ Dr Corkery, EIC at [5.2].

effects” and includes direct reference to “principles”. In contrast, the GBONZ addresses “significant residual adverse biodiversity effects” and does not reference offsetting principles.

- 5.4 Dr Corkery and Mr Riddell conclude that the BOURMA definition is preferable, as it provides for a comprehensive understanding of the parameters in which offsetting must be applied³⁵ and is consistent with the higher order planning instruments.³⁶
- 5.5 From a legal perspective, *Mainpower NZ v Hurunui District Council* demonstrates that the BOURMA definition of biodiversity offset is consistent with the approach adopted to assess the adequacy or otherwise of an offset proposal – that is, the Court considered any “residual effect” and offsetting principles.³⁷
- 5.6 The Director-General says that substantively, his submission sought to clarify what a “biodiversity offset” is. He accepts that his original submission relied on material that is now outdated and says that the alternative relief proposed by Mr Riddell and Dr Corkery readily aligns with the relief sought in his submission.

Dated 16 November 2020



Troy Ulrich

³⁵ Dr Corkery, EIC at [5.7],

³⁶ Mr Riddell, EIC at [241] – [242], [244].

³⁷ *Mainpower NZ Ltd v Hurunui District Council* [2011] NZEnvC 384 at [462], [207], [229] – [230], [260].