

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

IN THE MATTER of the Resource Management Act 1991 (“Act”)

AND

IN THE MATTER of an application to vary resource consent
RM050019 by Taumatotara Wind Farm
Limited under s127 of the Act

REPLY LEGAL SUBMISSIONS ON BEHALF OF

TAUMATATOTARA WIND FARM LIMITED

29 NOVEMBER 2023

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MAY IT PLEASE THE COMMISSIONER

1. INTRODUCTION

- 1.1 These legal submissions address matters raised during the hearing and respond to the supplementary legal submissions on behalf of the Director General of Conservation (“DOC”).
- 1.2 At the outset it is recorded that over the course of the hearing the Council and Applicant have worked constructively to resolve any outstanding issues to the point where draft proposed consent conditions are agreed. A copy of the agreed revised consent conditions, including a tracked changes version will be filed by the Council tomorrow.
- 1.3 Other than the Council’s and Applicant’s expert evidence, the only expert evidence from a third party was produced by DOC, whose experts addressed ecological effects, the related planning aspects of the application and the appropriate management of the activity through consent conditions.
- 1.4 However, sight should not be lost of the fact that there are a range of other effects which have been comprehensively addressed and for which there is no contrary expert evidence. In addition, following the development of a memorandum of understanding with Ngaati Mahuta ki te Hauaauru, a representative appeared at the hearing in support of the project. Through consultation, several new conditions have been incorporated into the consent to ensure a consultative approach with the Runanga over the life of the project.
- 1.5 For the reasons to be outlined in these submissions, the Applicant remains of the position that the Updated Variation Proposal, as a s127 application, can be appropriately granted consent. This position is supported by the Council’s Section 42A Report.¹

2. FRAMEWORK FOR ADDRESSING ISSUES:

- 2.1 These legal submissions address the following points:

¹ The recommendation was subject to conditions which have been met. Refer to FN 7.

- (a) Is there adequate ecological information on which to grant consent? The Applicant says that there is.
- (b) What does the evidence conclude in relation to the ecological effects? The Applicant submits that the ecological effects are overall positive.
- (c) Whether the site is significant habitat for indigenous fauna? The Applicant submits that arguments as to whether it is habitat or whether it meets the criteria are not a matter that you need to conclusively determine. This is only a relevant consideration if there is any question as to whether the activity does not protect the values identified in s6(c) – and there is not.
- (d) The relevance of the effects management hierarchy: In response to DOC's advocacy for strict implementation of the effects management hierarchy as described in the NPSIB, through the consent conditions, the Applicant contends that it is the NPSREG which provides the appropriate framework.²

2.2 Other matters addressed:

- (a) Additional matters raised by DOC including:
 - (i) The application is appropriately assessed as a Variation;
 - (ii) There is no "precedent effect" associated with granting the application;
- (b) The proposed consent conditions;
- (c) Concerns of submitters other than DOC.

2.3 This is followed by a summary and conclusions.

² Though its position was modified in its supplementary legal submissions.

3. THERE IS ADEQUATE INFORMATION TO ALLOW AN ASSESSMENT OF THE ECOLOGICAL EFFECTS

- 3.1 Mr Chapman's evidence refers to the surveys undertaken in support of the assessment of effects for the 2008 consent, and the further surveys conducted as part of the variation application in response to the s92 requests which established that long tailed bats are present in the vicinity of the turbine locations. In this regard it is noted that the detectors were located in bush remnants in areas near, but not within, the project envelope.
- 3.2 A detailed report was prepared in 2021 by Dr John Craig and Mr Chapman, with peer review by Dr Mark Bellingham.³ The experts adopted a conservative approach to assessing effects. They noted that none of the known risk factors in relation to bird strike are present for the T4 proposal and that small bats flying at heights over 17.5 m over pasture are assessed as possible but highly unlikely.⁴
- 3.3 T4 rejects any suggestion that there is insufficient ecological information before you or that the application should be declined under s104(6) of the RMA noting:
- (a) The Council accepted the application for processing and an independent commissioner determined that the application should be publicly notified.^{5, 6}
 - (b) You have the benefit of the comprehensive responses to information requests by the Council which included peer reviews.⁷
 - (c) The effects assessments have been subject to independent peer reviews as part of the s42A Report process.

³ Dr J Craig, S Chapman, Dr M Bellingham "Ecological Effects Assessment of the Existing 22 Turbine Consented Activity plus the Proposed Tip Height Variation in response to s92 requests (10 August 2021).

⁴ Note that this report was in relation to the 11 turbine option.

⁵ Refer to s88(3) of the RMA

⁶ As determined by Commissioner Greg Hill

⁷ Refer to s104(7)

- (d) The assessment of effects is for a variation, not a new application and as such the evidence of effects is proportional to the potential effects of the activity for which consent is sought;⁸
- (e) The Council recommends the grant of the application, subject to conditions (which were met during the course of the hearing).⁹

- 3.4 DOC asks you to decline the application and have the Applicant go back to the drawing board to establish comprehensive baseline surveys prior to making a new application. They do not explain why this cannot be done as part of the pre-construction work, noting that the thrust of their ecology evidence is that such information is necessary to influence matters such as turbine location.¹⁰ There is no acknowledgement that these are matters which have already been determined by the existing consent.
- 3.5 They assert that without baseline information it is very difficult to assess the effects on the bats of the variation proposal.¹¹
- 3.6 The Applicant says that the proposed conditions requiring baseline data prior to construction cure any perceived information shortfall by providing the necessary foundation from which to apply an adaptive management approach. By definition, establishing the extent of the effects on bats and birds from the turbines cannot be determined until there are turbines in place.
- 3.7 Additionally, the consent conditions have been crafted to be sufficiently nimble to respond should there be any unanticipated effects on bats. The revised conditions as agreed between the Applicant and the Council have the added advantage of more comprehensively addressing any effects arising from the construction of the turbines than would have occurred under the Existing Consent.¹² The conditions are addressed in further detail in section 8 below.

⁸ *Newlove v Northland Regional Council* (A30/94 3NZPTD p.420)

⁹ In the Section 42A report at page 32. Refer also the s42A Addendum Report where the draft conditions are noted as agreed. Support of Ngaati Mahuta ki te Hauaauru has been obtained and a full landscape and visual effects assessment was provided by Mr Moore.

¹⁰ EIC M Pryde at 73 – “good baseline monitoring enables turbines to be sited”

¹¹ DOC Amended Legal Submissions at 22.

¹² rather than addressing the difference between the Existing Consent and Variation.

- 3.8 It is submitted that there is clearly adequate evidence before you to assess the effects on the environment of the change of the consent conditions to the extent appropriate.

4. EVIDENCE OF ECOLOGICAL EFFECTS

- 4.1 In the Meridian Energy wind farm case, the Court said:

[404] There is a risk of collision mortality to the bird species frequenting the site. ... No doubt some people will find any loss of birdlife in this manner to be unacceptable but the RMA is not a “no effects” statute. The question for us is whether or not in the end analysis the effect of collision mortality from wind turbines on a particular bird population can be said to be adverse.¹³

- 4.2 The question for this application is whether in the end analysis the effect of collision mortality from wind turbines on bats as between the existing consented environment and the proposed environment can be said to be adverse.

- 4.3 Mr Chapman has carefully worked through the differences between the Existing Consent and the Variation Proposal to establish the positive changes which arise from removing turbines, halving the length of the site, decreasing proximity to wetlands, streams and remnant forests, and reducing the total rotor swept area.¹⁴

Weight of evidence

- 4.4 In response to questioning Mr Chapman was able to draw on this significant ecological experience with wind farms and other infrastructure projects and his familiarity with the site to confirm a very high level of confidence in his conclusions that the difference in effects between the Existing Consent and Updated Variation Proposal would be positive, while appropriately acknowledging that there will always be a degree of uncertainty in assessing future effects.¹⁵

¹³ *Re Meridian Energy Ltd*, [2013] NZEnvC 59, 2013 WL 1815210

¹⁴ EIC S Chapman at 10.1

¹⁵ Refer to paras 8.30 to 8.33 of the Applicant’s opening legal submissions.

- 4.5 The evidence of Mr Chapman is to be preferred as he has had his reports peer reviewed and is the only ecologist to provide a clear comparison between the Existing Consent and Updated Variation Proposal.
- 4.6 Conversely, while Ms Pryde's experience with bats is acknowledged, she has not visited the site, does not state that she has any experience with wind farms or other infrastructure projects and generally fails to engage with the Existing Environment.¹⁶ Her evidence states that bats can fly high (>60m)¹⁷ and that they can fly above the canopy of trees that are at least 30m high¹⁸, but in a clarification question put to her she agreed that there was no evidence to suggest that bats fly at heights greater than 121.5m and suggested that the issue was that they could be attracted to the turbines. Obviously, if bats are attracted to turbines this would also occur with the 121.5m turbines.
- 4.7 Taking this a step further, if bats are not known to fly at heights greater than 121.5m then the area of rotor sweep between 121.5m and 180.5 m is irrelevant and yet, DOC misguidedly uses the overall increase in the rotor sweep area covered for each of the 8 turbines as a major plank in their argument that there is a greater chance of bats being in the rotor sweep area.¹⁹ The corollary is that the area between 121.5m and 180.5m should be excluded from Ms Pryde's calculations, but it is not. The 114% increase referred to by Ms Pryde to support her contentions is accordingly misconceived.²⁰
- 4.8 Ms Pryde says that "without adequate survey work to assess how bats are using the habitat within the project site throughout each season there is a risk that there will be adverse effects on bats and these adverse effects have not been properly quantified or avoided, remedied or mitigated."²¹ This misses the point that survey work in relation to an environment with a notional wind farm does not change the nature of the risk to wildlife, it simply provides a baseline from which to understand any future effect after

¹⁶ In answer to a question noting that the starting point is the existing environment, she accepted that she finds it difficult if the turbines are not there.

¹⁷ EIC M Pryde at 121

¹⁸ EIC M Pryde at 125

¹⁹ EIC M Pryde at 129

²⁰ Ibid

²¹ EIC M Pryde at 33.

the turbines are constructed. This work is appropriately undertaken through the consent.

- 4.9 Ms Pryde’s sole rationale for baseline monitoring and data collection is to influence site design and turbine location.²² These are not live matters in the context of a variation. Absent the useful application of this data prior to the grant of consent, there is no justification for declining the application on the basis that further data collection is required, or that a “precautionary approach” should be applied.²³ In the context of a variation where the turbine locations have been determined, the collection of such data is only relevant to the extent that it could be used to employ future adaptive management approaches if evidence of effects of bats can be established.²⁴
- 4.10 Like Ms Pryde, Ms Williams’ has not disclosed experience with wind farm or infrastructure applications and appears to have no experience working with applicants. She has not visited the site, relying instead on Ms Pryde’s evidence (who has also not visited the site) and a desk top examination to establish that the site contains patches of forests.²⁵ However, as noted by Mr Chapman, the turbines will be located on pastoral farms, though small fragments of native bush exist in the surrounding area.²⁶ This highlights the importance of understanding the site in person.
- 4.11 Further, Ms William’s reliance on s31 of the RMA is misconceived²⁷ and her references to s6(c) and part 2 without reference to s7(j) lack context. She also refers to methods ECO-M1 and ECO-M2 of the Waikato Regional Policy Statement (“RPS”) as justification for applying the effects management hierarchy (“EMH”) without appropriately acknowledging that

²² EIC M Pryde at 73 – “good baseline monitoring enables turbines to be sited”

²³ Refer DOC Amended Legal Submissions at para 24. Note that the RPS provision IM-O4 referred to by DOC as a basis for adopting a precautionary approach encompasses the use of adaptive management, which is provided for by the consent conditions. Refer to DOC Amended Legal Submissions at 16.

²⁴ EIC M Pryde at 74-79

²⁵ EIC E Williams at 24 and Supplementary evidence at 22

²⁶ EIC S Chapman at 3.3

²⁷ EIC E Williams at 27 and 35, and Supplementary Evidence of E Williams at 7. There is no case law granting consents which relies on s31. This matter is relevant only in establishing the function of the Council to hear a matter and there is no dispute in relation to that issue.

these methods are directing regional and district plans, not decision makers.²⁸

ECO-M1

Regional and district plans shall maintain or enhance indigenous biodiversity, including...

ECO-M2

Regional and district plans shall recognise that adverse effects on indigenous biodiversity ... may include: ...

- 4.12 Having regard to the matters raised it is submitted that the evidence of both of the DOC witnesses needs to be weighted accordingly.
- 4.13 In comparison Mr Shearer has many years of experience as a planner and significant experience within Council and working with applicants, including wind farms. He appropriately references the key provisions of the plans in the context of the Applicant's evidence. It is submitted that his evidence is to be preferred.

Burden and standard of proof

- 4.14 The Environment Court has summarised issues relating to the burden and standard of proof as follows:

(1) In all applications for a resource consent there is necessarily a legal persuasive burden of proof on the applicant. The weight of the burden depends on what aspects of Part 2 of the Act apply.

(2) There is a swinging evidential burden on each issue that needs to be determined by the Court as a matter of evaluation.

(3) There is no one standard of proof: if that phrase is of any use under the Act. The Court can simply evaluate all the matters to be taken into account under section 104 on the evidence before it in a rational way, based on the evidence and its experience; and give its reasons for exercising its judgment the way it does.

(4) The ultimate issue under section 105(1) is a question of evaluation, to which the concept of a standard of proof does not apply."²⁹

²⁸ EIC E Williams at 11

²⁹ Derived from *Shirley Primary School v Christchurch City Council*, [1999] NZRMA 96 which was summarised in *Re Meridian Energy Ltd*, [2013] NZEnvC 59, 2013 WL 1815210 at [56]

- 4.15 In this case, the Applicant's experts have discharged the burden of proof by rationally assessing the application as having a positive ecological effect.³⁰ There is no requirement to establish that there is no risk. In evaluating the matter, you need to have regard to DOC's expert's concession that there is no evidence to establish that bats will fly higher than 121.5m. That must also be considered in the context of the other matters addressed by Mr Chapman to reach his conclusion – and that these factors have not been acknowledged by DOC.³¹
- 4.16 You should also have regard to DOC's criticism of the application as not having adequate survey information by considering why collecting baseline information in advance of the turbines being commissioned will make any difference to the outcomes in the context of a consented wind farm in the same location. It is submitted that it will not and that to the extent there is any uncertainty, the consent conditions cure any perceived defect.

5. WHETHER THE SITE QUALIFIES AS SIGNIFICANT HABITAT MAKES NO PRACTICAL DIFFERENCE

Part 2 considerations

- 5.1 Although it should be read with some care in light of the Court of Appeal's subsequent decision, the Environment Court's earlier decision in *RJ Davidson Family Trust v Marlborough District Council* is considered to still provide some useful guidance.³² The Environment Court held that the correct way of applying s 104(1)(b) in the context of s 104 as a whole is to ask, does the proposed activity, after:
- (a) assessing the relevant potential effects of the proposal in light of the objectives, policies and rules of the relevant plans;
 - (b) having regard to any other relevant statutory instruments but placing different weight on their objectives and policies depending on whether:

³⁰ Other effects are also assessed as positive.

³¹ Refer para 4.3 above.

³² [2016] NZEnvC 81

- (i) the relevant instrument is dated earlier than the district (or regional) plan in which case there is a presumption that the district (or regional) plan particularises or has been made consistent with the superior instruments' objectives and policies;
 - (ii) the other, usually superior, instrument is later, in which case more weight should be given to it and it may override the district plan even if it does not need to be given effect to; and/or
 - (iii) there is any illegality, uncertainty or incompleteness in the district (or regional) plan, noting that assessing such a problem may in itself require reference to pt 2 of the Act, can be remedied by the intermediate document rather than by recourse to pt 2;
- (c) applying the remainder of pt 2 of the RMA if there is still some other relevant deficiency in any of the relevant instruments; and
- (d) weighing these conclusions with any other relevant considerations;

achieve the purpose of the Act as particularised in the objectives and policies of the district/regional plan? ³³

- 5.2 The planning witnesses are agreed that Part 2 matters can be considered, although recourse to Part 2 may not add much to the evaluation of the application as in the context of section 6 matters, s6(c) of the Act, is mirrored by the key objective of the operative district plan. Objective 11.3.4 is:

To protect areas of significant indigenous vegetation and significant habitat of indigenous fauna

- 5.1 This objective is supported by the following policy, which focusses on removal of habitat:

11.4.10 To avoid, remedy or mitigate the adverse effects of removal of areas of significant indigenous vegetation and significant habitat of indigenous fauna.

- 5.2 Section 6(c) is also reflected in Policy ECO-P2 of the RPS:

³³ Ibid at [262]

“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.”

- 5.3 Since the Operative District Plan, the NPSREG has been released which, following the R J Davidson approach above, means more weight should be given to it when considering the objectives and policies of the plan. The NPSIB, in expressly excluding renewable energy activities, acknowledges and reinforces the difficulty of applying strict biodiversity approaches to renewable energy projects. The NPSIB was also released after the operative district plan. These matters are relevant in terms of weighing up any of the Part 2 matters referred to in these documents.
- 5.4 Notwithstanding, the Applicant submits that arguments as to whether the Site meets the criteria for significant habitat of indigenous fauna are not a matter that you need to conclusively determine as this is only a relevant consideration if the activity is contrary to s6(c) (or equivalent plan provisions). The Applicant submits that the change of approach encompassed by the Variation is more likely to reduce the ecological effects of the Existing Consent and so better protect indigenous fauna.^{34, 35}
- 5.5 Even if you were to find that the ecological effects were not overall positive, s6(c) alone is not the basis for declining the consent. In the NZ Rail case, the High Court held that s6 factors are subordinate to, and must serve the purpose of, promoting sustainable management:³⁶
- 5.6 Following NZ Rail, the Environment Court in the Meridian Energy wind farm case examined the relationship between section 6 and 7 matters holding that where there are conflicting values in a proposal, as between a value identified in s 6 and one identified in s7, the “internal ranking” among these sections does not mean that the s6 value must prevail. In

³⁴ Mr Chapman in questioning expressed very high confidence that this would be the case.

³⁵ For the record, the Applicant does not agree with the DOC supplementary legal submissions that the site is significant habitat merely because long tailed bats have been surveyed in the bush areas near the site. The arguments made in relation to the Hawthorn case fail to engage with the fact that this is a variation.

³⁶ *NZ Rail Ltd v Marlborough DC* [1994] NZRMA 70 (HC), per Greig J.

any case, all Part 2 factors are subservient to the s5 purpose of sustainable management:³⁷

- 5.7 As to the approach to weighing competing interests, in *Ngati Ruahine v Bay of Plenty RC* the High Court acknowledged that the requirement to “recognise and provide for” in s6 does not operate in a vacuum, but relates to achieving the purpose of the Act.³⁸
- 5.8 As arose with the Meridian wind farm, s7(b) and (j) matters are also relevant.³⁹ Even if there is doubt about potential adverse ecological effects on bats, there is no evidence that the Variation Proposal will alter the effects that would have arisen with the Existing Consent. Balancing these matters clearly weighs against s6(c) prevailing, even if the area is significant habitat of indigenous fauna.

6. THE APPLICATION OF THE EFFECTS MANAGEMENT HIERARCHY

- 6.1 DOC’s reply submissions acknowledge that in light of the carve out in clause 1.3(3) in the NPSIB, it is the RPS policy framework which governs the management response to adverse effects on biodiversity.⁴⁰ They say that a critical issue is whether the draft conditions step through the EMH as prescribed by methods ECO-M13 and ECO-M3 of the RPS.
- 6.2 However, this argument is flawed as the provisions of the RPS referred to provide direction to regional and district plans (i.e “Regional and district plans shall...”) and so are not directed to decision makers. Further, the operative district plan does not mandate a EMH approach and the proposed district plan is not a matter for consideration for s127 applications.⁴¹ Irrespective, where the proposed district plan refers to the EMH it is giving effect to the draft NPSIB, which does not apply to renewable energy. At a broader level it is hard to see how a district plan could create a “work around” to a matter addressed by a national policy statement that the plan must eventually give effect to.

³⁷ *Meridian Energy Ltd v Wellington CC* EnvC W031/07.

³⁸ [2012] NZHC 2407, [2012] NZRMA 523 at [64]–[65]

³⁹ In *Meridian* the Court commented that efficiency is one of the least well understood concepts in the RMA.

⁴⁰ DoC Supplementary Submissions at 39.

⁴¹ Refer to opening legal submissions at 8.18

- 6.3 The question as to how any residual effects are to be managed is best answered by reference to Policy C2 of the NPSREG.^{42, 43}
- 6.4 It is important to note that the key difference between the EMH advocated by DOC and the approach to the consent conditions drafted by the Applicant and Council is that the EMH approach in the NPSIB, and to some extent in the RPS, is more prescriptive as it requires an applicant to avoid, then remedy, then mitigate, following which, if there are residual adverse effects, offsetting is a first priority, and compensation (applying strict tests) is a second priority. In contrast, the NPSREG also applies an avoid, remedy or mitigate approach, but this is then followed by offsetting and compensation which are not as prescriptive as the EMH provisions of the NPSIB.⁴⁴
- 6.5 As the application has avoided effects by reducing the number of turbines, and removing turbines away from wetlands etc, the consent conditions appropriately provide for the consideration of other matters if there are residual adverse effects, including mitigation measures, offsetting and compensation in a manner consistent with the NPSREG. As noted by the Section 42A Report the revised consent conditions align with the requirements of Policy C2 of the NPSREG.⁴⁵

7. OTHER MATTERS RAISED BY DOC

Variation as opposed to a new application

- 7.1 In its submissions on s127 the Applicant acknowledged that whether the effects of the changes are material may require final determination following the receipt of evidence from other parties.
- 7.2 With respect to the ecology evidence, DOC asserts that the Variation Proposal creates “a real risk of harm to bats with the potential to cause

⁴² When considering any residual adverse environmental effects of renewable electricity generation activities that cannot be avoided, remedied or mitigated, decision-makers shall have regard to offsetting measures or environmental compensation including measures or compensation which benefit the local environment and community affected.

⁴³ The DoC legal submissions refer you to the recent Council Decision of *Simpson v MacKenzie District Council*. This decision arises in a different context as it involved a solar farm in an ONL which was a non-complying activity. T4 does not contend that the NPSIB directs the Panel to prefer renewable energy generation over the protection of indigenous biodiversity. It is also noted that council decisions have no precedent or persuasive value.

⁴⁴ This approach was acknowledged by Mr Dawson in his 14 November 2023 Section 42A Report.

⁴⁵ Ibid at 2.2

more damage to bats than the consented activity.”⁴⁶ Yet, as noted, DOC’s bat expert cannot point to any evidence or experience suggesting that bats fly higher than 121.5m. Recalling that the overall rotor sweep area is reduced by 14 percent, the grounds for the hypothesis that bats will be more affected by fewer, larger turbines fail to meet a basic threshold of reliability. Put simply, there is no evidence establishing that there are any material adverse effects associated with the change that mean that the application should not be assessed as a variation.

Precedent effect

- 7.3 The Director-General is also concerned that this application will set a precedent for wind farm applicants to proceed on the basis of inadequate baseline information. The case of *Dye v Auckland Council*,⁴⁷ relied on by DOC is authority for the proposition that the granting of a resource consent has no precedent effect in the strict sense but that it is a relevant factor to consider in relation to a non-complying activity. As this is a case concerning a variation to be assessed as a discretionary activity, there is no issue as to precedent effects.

8. THE PROPOSED CONSENT CONDITIONS INCLUDING THE VALIDITY OF CONDITIONS

Validity of Conditions

- 8.1 Before addressing the proposed consent conditions, I outline the relevant legal tests for assessing the validity of a proposed condition.
- 8.2 The power to impose conditions on a planning consent is not unlimited. In addition to the restrictions that now apply under s 108AA, to be valid at law, a condition must:
- (a) Be for a resource management purpose, not for an ulterior one;
 - (b) Fairly and reasonably relate to the development authorised by the consent to which the condition is attached; and

⁴⁶ DOC Supplementary Legal Submissions dated 24 November 2023 at 32. The supplementary legal submissions do not refer to Ms Pryde’s acknowledgement regarding the heights at which bats are known to fly.

⁴⁷ *Dye v Auckland RC* [2002] 1 NZLR 337, (2001) 7 ELRNZ 209, [2001] 11 NZRMA 513 (CA) at [49]

- (c) Not be so unreasonable that a reasonable planning authority, duly appreciating its statutory duties, could not have approved it.

8.3 In *Sampson v Waikato RC*⁴⁸, the Environment Court noted that to impose a condition, requiring the applicant to take measures beyond what is required to mitigate effects caused by an activity, would be unreasonable.

8.4 In *Aubade NZ Ltd v Marlborough DC*⁴⁹, the Court set out five interrelated sets of factors upon which the meaning, lawfulness and validity of a condition depend:

- (a) The meaning and application of the condition – what is it trying to manage and how?
- (b) The powers exercised and the process followed when granting the resource consent and/or imposing the condition.
- (c) The purpose of the condition – why is it imposed?
- (d) All the surrounding circumstances that are reasonably relevant including the factual matrix at the time of the grant and at the time of the challenge.
- (e) The persons potentially affected and the importance of the condition to them.

Revised Consent conditions

8.5 Immediately prior to the hearing DOC provided a suite of significantly revised conditions.⁵⁰ The parties met at the earliest opportunity after the close of the hearing two days later (Thursday), and the Applicant and council staff acceded to substantial revisions to the conditions to take account of the changes proposed by DOC. Despite the Applicant and Council staff circulating a redraft by the following Monday morning, prior to the second scheduled Thursday meeting, DOC had not provided further revisions. These were not received until the deadline for providing the final conditions to you (Friday 24 November 2023).

⁴⁸ EnvC A178/02

⁴⁹ [2015] NZEnvC 154

⁵⁰ On the Thursday evening before the Monday morning hearing.

- 8.6 Nevertheless, in the intervening three days since receiving DOC's revisions and preparing these reply submissions, the Applicant and Council staff have worked constructively to further refine the conditions to incorporate further amendments proposed by DOC. Overall, a substantial number of changes have been proposed to the ecology conditions with the Applicant adopting a very proactive (and not strictly necessary) approach to monitoring and compensation.
- 8.7 The intent of the revised ecology conditions is as follows (with reference to bats):
- (a) Baseline information: Initial baseline surveys are to be undertaken prior to construction on the site. These set objectives and methods which are to be included in the population monitoring plan. For bats, there are three specific seasons which require assessment before construction can commence.
 - (b) Post construction monitoring: An expert is to analyse the bat data to determine whether post construction monitoring is required, and if so, to prepare a post construction monitoring plan. There is a trigger in condition 56 for determining whether additional measures are necessary to give effect to the objectives of the monitoring plan. The monitoring plan is also required to consider whether mortality monitoring is required based on a second trigger (59(c)) and what methodologies are appropriate.
 - (c) Bat Mitigation, Offset or Compensation Plan "BMOCP": If the monitoring plan finds a significant adverse effect then the BMOCP is to be developed to identify methods and options to mitigate, offset or compensate for the adverse effects identified by the monitoring.
 - (d) Review provisions: New conditions have been drafted to provide for the situation where any measures proposed by the experts under the BMOCP are not agreed by the Applicant or would nullify the grant of consent. This utilises the review mechanism under s128. If the measures are agreed, the Applicant is required to implement them.

- (e) Bat Monitoring Review Report (BMRR): Every five years the Applicant is required to review the monitoring programme to ascertain its efficacy etc.

8.8 For birds, a population monitoring plan is to be undertaken prior to construction, with appropriate objectives and methods. A mortality plan is to be developed if required pending the results of the population monitoring plan. There are no differences between the parties in relation to the avifauna conditions.

8.9 All of the above ecological conditions are drafted with objectives and methods. Consultation is mandatory and provision is made for lack of response within reasonable timeframes. The timeframe for the baseline studies differs from the other conditions as the Applicant wishes to begin the baseline studies as soon as possible. The Council is required to certify the management plans by reference to the objectives and methods of the relevant plan.

8.10 Offered on an Augier basis is a new consent condition (75). This commits the sum of \$45,000 per year for 5 years from the commission of the turbines to support an investigation of bat populations in the local area.

8.11 Other conditions relating to matters such as reporting, bat roosts, clearing of native vegetation and implementation of a weed control programme for the site and access roads remain unchanged. These are shown in the tracked changes version of the consent conditions to be circulated by the Council.

8.12 The remaining key areas of disagreement with DOC are:

- (a) DOC seeks to have a Bat Monitoring and Management Plan that addresses the EMH, whereas the Applicant and Council have adopted an approach that requires a series of plans with specific objectives and methods. This includes a specific plan to address any effects (the BMOCP). It is considered that this is clearer and consistent with the NPSREG.
- (b) DOC seeks that the post construction bat monitoring plan expressly refers to the different types of methodologies that may be used for monitoring. The Applicant / Council position is that

this is not necessary as this is open to the expert to determine in consultation with the parties.

- (c) DOC seeks a no net loss outcome objective for the monitoring plan. Conditions requiring a no net loss approach are simply not reasonable nor practicable. From a practical perspective a no net loss approach is difficult to prove or disprove and could be attributable to a range of issues, including changes in flight patterns or an overall regional decline in bat population.⁵¹ The approach is not supported by the RPS and fails to take into account that this is a variation. The RPS explains the “no net loss” approach as follows:

“No net loss of indigenous biodiversity is to be achieved at a regional scale and does not create a no adverse effects regime. Some activities may result in a loss of indigenous biodiversity; however this will be countered by other regulatory and non-regulatory methods that result in positive indigenous biodiversity outcomes.”

- (d) DOC seeks the application of a EMH approach through the conditions (eg their condition 60 (e) and 61 (f)). For reasons explained above, this is not appropriate.
- (e) DOC seeks that the detectors are attached at a minimum height of 60m instead of 15m. The Applicant and Council’s bat experts agree that 15m is more appropriate to ascertain future effects.
- (f) DOC proposes specific methodologies for addressing mortality, whereas the Applicant and Council prefer such matters to be determined by the experts in consultation with the other parties, noting that technologies change over time.
- (g) DOC also proposes a requirement for consideration of specific measures including the use of deterrents and curtailment to address the objectives of the management plan. This is addressed below.

⁵¹ EIC M Pryde at 103 “In areas where long tailed bats are not managed for predators they are declining at between 5-9% per annum.”

Consideration of curtailment or other strategies monitoring

- 8.13 The starting point is that the Existing Consent expressly precludes curtailment as a response to any monitoring. Unless there is clear evidence of an effect arising from the variation then there is no basis for including curtailment provisions in a consent which has previously expressly excluded curtailment.⁵²
- 8.14 In the Applicant / Council version of the consent conditions the existing provision excluding curtailment is shown as struck through. This is because the Applicant's position is that it will accept consent conditions that are silent as to whether curtailment is a future adaptive management approach only if the conditions do not specify that curtailment is a specific matter to be considered.
- 8.15 In other words, it conditionally agrees to delete that part of the consent excluding curtailment further to s108AA(1)(a) subject to retaining the BMOCP conditions as drafted by the Applicant and Council. This is a significant concession.
- 8.16 As noted above, carefully considered review conditions have been proposed as a mechanism for addressing this issue if it arises in future.
- 8.17 These matters need to be considered in the context that the ecological evidence for the Applicant is that the variation will create overall positive ecological effects. You also need to bear in mind that if the 8 turbine proposal is not consented the less efficient 22 turbine option can be implemented.
- 8.18 Additionally, the significantly amended suite of conditions appropriately manage any potential residual effects.

Other conditions not related to ecological effects

- 8.19 DOC has proposed an amendment to condition 3 to specify the ground clearance for the turbines. While not strictly necessary as it is covered by the application documents, this is agreed.
- 8.20 DOC also wishes to delete the lapse condition. This is not considered appropriate as the application is to vary the existing consent. The history

⁵² Refer also to the Opening Legal Submissions at 9.37 to 9.40.

of the lapse clause and its current status does not alter upon grant of the varied conditions. Deletion of the existing lapse condition would cause confusion and potentially extend the lapse period to the default lapse under the Act.

9. CONCERNS RAISED BY OTHER SUBMITTERS

9.1 There are unsurprisingly other people who remain opposed to the grant of the application. The panel heard from a range of submitters who understandably have concerns about changes to the environment whether from the existing unimplemented consent or the variation. A wide range of reasons have been presented. Without wishing to diminish from the opinions of submitters, specific references to adverse effects are not supported by expert evidence and do not recognise the extent to which the working rural environment anticipates activities other than farming or forestry.

9.2 In relation to landscape and visual effects, which were of key importance to some locals, larger turbines are mitigated by the reduction in numbers of turbines and their removal from over half of the ridge line area. The evidence concludes that the physical landscape effects will be positive while the visual effects will be overall positive (acknowledging effects will vary from specific viewing locations).⁵³

9.3 Further, the Courts have observed that there is no right to a view:

When dealing with landscape and visual amenity issues several basic legal principles need to be remembered. The first is that there is no right to a view. Even though we must have particular regard to the maintenance and enhancement of amenity values, this is not the same thing as saying there is a right to a view. The second is that a landowner is permitted to use their land as they see fit, providing that the use of it does not breach any legal requirement. It follows that the use of land by a neighbour in some circumstances can lawfully change an existing view.⁵⁴

⁵³ EIC M Moore at 2.6

⁵⁴ *Re Meridian Energy Ltd*, [2013] NZEnvC 59, 2013 WL 1815210 at [112]

- 9.4 Noise modelling shows a reduction in sound levels and the area of disagreement between the Council's and Applicant's experts in relation to the drafting of condition 12 was resolved during the hearing.
- 9.5 Shadow flicker, transport, geotechnical and aviation matters are addressed in opening submissions.
- 9.6 Overall, effects of the Variation Proposal will be no greater than with Existing Consent and are likely to be much less due to the reduced number of turbines.

10. SUMMARY AND CONCLUSIONS

- 10.1 The case for T4 is that adequate information has been provided to establish the potential future effects of the application, and in turn these have been appropriately assessed: avoidance and mitigation measures have been proposed, principally through removal of 14 turbines. Any unanticipated future effects on wildlife can be appropriately managed through the conditions of consent.
- 10.2 In relation to other effects, including transport, noise and landscape, overall the effects have been established through the evidence as being reduced when compared to implementation of the Existing Consent. On top of that, Ngaati Mahuta ki te Hauaauru now supports the proposal and there are mechanisms in the consent to address cultural effects.
- 10.3 While some of the locals understandably continue to have concerns, in the round those issues are not a sufficient basis on which to decline this consent, particularly as a s127 application.
- 10.4 In summary, the Applicant submits that an evaluation of the evidence shows that having regard to the proposal to vary the Existing Consent the Variation:
- (a) Is consistent with the relevant objectives and policies of the applicable statutory planning documents;
 - (b) There are overall positive effects from the proposal;

(c) If there are any residual adverse effects these can be appropriately managed through the conditions of consent, especially having regard to the fact that this is a variation.

10.5 Finally, T4 notes that all species face the prospect of climate change effects and as a renewable energy project, T4 has a meaningful contribution to make to New Zealand's decarbonised economy.

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