

**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

LEGAL SUBMISSIONS ON BEHALF OF

TAUMATATOTARA WIND FARM LIMITED

13 NOVEMBER 2023

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MAY IT PLEASE THE COMMISSIONER

1. INTRODUCTION

1.1 This hearing concerns a resource consent application made by Taumatotara Wind Farm Limited (“T4”) to the Waitomo District Council to vary Resource Consent RM050019 which authorises the construction and operation of a utility scale wind farm at Taumatotara West Road, Tahaaroa (“the Existing Consent”).

1.2 The application for variation (“Variation Proposal”) pursuant to s127 of the Act seeks to:

- (a) halve the number of consented turbines from 22 to 11; and
- (b) increase the tip height of the remaining turbines from 110 metres to 172.5 metres.

1.3 The Variation Proposal aims to ensure that the Existing Consent can be implemented more efficiently and effectively by leveraging the significant technological advantages that have developed since the Existing Consent was first granted, and in a way that will result in a substantial overall reduction of the adverse effects on the environment.

1.4 Projects such as the T4 Wind Farm represent a real opportunity to provide for increased generation capacity and security of supply in an environmentally sustainable manner that is entirely consistent with the Government’s objectives, including as contained in the National Policy Statement for Renewable Electricity Generation 2011 (“NPSREG”), to achieve a decarbonised future.

2. SUBMISSION OUTLINE

2.1 These submissions outline the application and evidence in the context of the relevant legal and policy issues by:

- (a) Introducing the T4 Wind Farm and Existing Consent;
- (b) Outlining the Variation Proposal;
- (c) Outlining the witnesses, the scope of their briefs and their effects assessments;

- (d) Addressing the statutory context and relevant legal issues;
- (e) Addressing the submissions made and matters raised by the s42A report;
- (f) Addressing the proposed consent conditions and amendments that respond to relevant matters raised by submitters;
- (g) Summarising the Variation Proposal.

2.2 T4's principal submission is that the Variation Proposal satisfies the relevant provisions of the RMA, including:

- (a) Those in s104, as modified by s127;
- (b) The higher order planning documents, including the NPSREG;
- (c) The Waikato Regional Policy Statement ("RPS"); and
- (d) The Operative and Proposed Waitomo District Plans

2.3 The Variation Proposal is founded on extensive expert assessment and incorporates comprehensive management measures. The Applicant has volunteered on an Augier basis, a number of "updating conditions" to address concerns raised by the submitters and council that improve on the Existing Consent.¹ It is submitted that the effects of the T4 Wind Farm will be appropriately managed by the Variation Proposal and the sustainable management purpose of the Act will be promoted by granting the application.

2.4 Overall, it is submitted that the evidence demonstrates, and that you can justifiably conclude, that the application should be granted in its entirety, subject to appropriate conditions.

¹ Where an Applicant gives an undertaking and, relying on that undertaking, the local authority grants planning consent subject to a condition in terms broad enough to embrace the undertaking, the Applicant cannot say later that there is no power to require compliance with the undertaking: *Augier v Secretary of State for the Environment* (1978) 38 P & CR 219 (QBD).

3. BACKGROUND TO THE APPLICATION

- 3.1 Ventus Energy (NZ) Limited first obtained a consent to construct a 22-turbine wind farm at Taumatotara West Rd, Te Anga in 2008, (“the Original Consent”). The full history of the consent is set out in the AEE.²
- 3.2 In 2011 Ventus Energy (NZ) Limited applied for a change of conditions of the Original Consent to increase the turbine height of the northern 11 turbines to 121.5m. This was approved as a s127 variation, without notification that same year (“the Existing Consent”). The Council was subsequently notified that the Existing Consent had been transferred to T4.
- 3.3 Around the time of the grant of the Original Consent, there was a significant drop in the wholesale electricity market associated with the 2009 Global Financial Crisis which put the wind farm’s construction on hold. Subsequently, wind farm technology underwent rapid changes enabling greater efficiency in relation to transportation and generation capacity.
- 3.4 By 2019, with an improved outlook for wholesale electricity prices and consequent viability of wind farm projects, the Existing Consent was now ready for implementation. However, even greater efficiencies in technology and construction suggested that the turbines should be replaced with larger diameter turbines in part, because these generate power more effectively.
- 3.5 Two applications were made to change the conditions of the Original Consent. The first (lodged 25 September 2019) sought a change to the tip height of all 22 turbines. The Council was unsure as to whether this application should be considered under s127 or s88. It provided a view on this by way of letter dated 20 August 2019. In response to these concerns and others raised by various parties the Applicant revised its proposal in a new application lodged 9 July 2020 (“the Variation Proposal”). This is the current application which proposes to reduce the number of turbines from 22 to 11. On 23 September 2021 an independent hearings commissioner determined that notification was required.

² Page 5

- 3.6 Further issues associated with the Covid-19 pandemic and ongoing consultation resulted in delays between the notification decision and the date of notification on 30 March 2023.
- 3.7 Your Minute 5 determines on a preliminary basis that the matter is to be assessed as a variation under s127 of the Act. These legal submissions proceed on this basis.

4. THE CONSENTED T4 WIND FARM

- 4.1 The Existing Consent authorises a maximum of 22 turbines with a tip height of 121.5m for turbines 1-11 and 110m for turbines 12-22. Each turbine consists of a supporting tower nacelle, (housing all the generating componentry), hub (the blades to the generating drive train) and rotor blades (the propeller-like blades which capture the wind resource). The overall height of each turbine is measured to the vertical blade tip, and represents a combination of the tower height, hub diameter and blade length.
- 4.2 The Existing Consent was transferred to T4 on 23 August 2019.³ The Existing Consent contains a series of conditions traversing the following matters:
- (a) The authorisation of the construction and operation of a utility scale wind farm comprising a maximum of 22 horizontal axis turbines and associated substation buildings, earthworks and access roads and activities for the purpose of generating electricity (condition 2);
 - (b) The maximum height of the turbines from the ground to the top of the vertically extended blade tip being 121.5m for turbines 1-11 (condition 3);
 - (c) The size of the turbine contingency zone – no greater than 100m radius (condition 4);
 - (d) A requirement for a plan specifying the final proposed locations of turbines 19 to 22 (condition 5);

³ Refer to the EIC of G Starr at para 1.11.

- (e) A requirement for an as built plan (condition 6);
- (f) Limits on operational noise (condition 7);
- (g) The requirement to comply with NZS6808: 1998 (condition 8);
- (h) A requirement for detailed ambient noise monitoring (condition 9);
- (i) A pre-development noise report (condition 10);
- (j) A limit on the rotor tip height of 110 metres to ensure compliance with NZS6805, but subject to advice note 7 (condition 11);
- (k) Limits on construction noise (conditions 12 – 13);
- (l) A requirement for a construction noise management plan (conditions 14 – 15);
- (m) Noise monitoring (conditions 16 to 17);
- (n) A requirement for a construction programme (condition 18);
- (o) A requirement for a traffic management plan (conditions 19, 20 and 21);
- (p) A requirement to provide pavement deflection data for district roads (condition 22);
- (q) A requirement to provide bridge inspection findings and details of axle loadings, together with supervision of heavy loads across district bridges (condition 23);
- (r) A requirement to provide detailed roading design plans for internal site access roads (condition 24);
- (s) A requirement to provide a road maintenance regime (condition 25);
- (t) Payment of a bond for performance of condition 25 (condition 26);
- (u) Details of vehicle access points and permanent entranceways along Taumatotara West Road (conditions 27 and 28);

- (v) Preparation of a landscape mitigation plan (condition 29);
- (w) Minimisation of the colour and reflectivity of the turbines (condition 30);
- (x) Removal of “dead” turbines and components after they cease to function (condition 31);
- (y) Removal of all visible structures from the site following decommissioning (condition 32);
- (z) A requirement to comply with Civil Aviation Authority determinations (condition 33);
- (aa) A requirement to fit lights to various turbines (conditions 34 and 35);
- (bb) A requirement to undertake a geotechnical review prior to construction (condition 36);
- (cc) A requirement to keep a wildlife register to observe effects on wildlife (condition 37);
- (dd) An ongoing requirement to inspect turbine bases for evidence of wildlife mortality (conditions 38 – 39);
- (ee) Development of a wildlife plan in the event of significant adverse effects (condition 40);
- (ff) A requirement to annually report on conditions 37-40 (condition 41);
- (gg) A stipulation that no telecommunications devices with signs will be connected to the turbines or other structures (conditions 42 and 43);
- (hh) A requirement that the turbine towers must be tubular in design (condition 44);
- (ii) A restriction on the clearance and trimming of native vegetation (condition 45);

- (jj) An obligation to implement a weed control programme (condition 46);
- (kk) A requirement to manage any disruptions to communications systems (condition 47);
- (ll) An obligation to maintain a complaints register (conditions 48 – 49);
- (mm) Review and costs conditions (conditions 50 – 52);
- (nn) Lapse period (condition 53);
- (oo) Various advisory notes (1-7) Advice note 7 provides for a greater height of 110 for turbines 1-11 subject to compliance with NZS6808: 1998.

5. THE SITE

- 5.1 The proposed wind farm site is 10km south of Tahaaroa Village and above the Taumatotara Gorge in the Waitomo District. Located on farms owned by three separate landowners, the site and the adjacent hills generally have very defined but level ridgelines with steep slopes on the flanks. The local peak to the northern end of the site has an elevation of 340m with the remainder of the site ranging between 300m and 320m at the southern end. The gradient of the construction site is moderate to steep with slopes generally between 1 in 20 and 1 in 5. The site and most of the wider ecological area is fully grazed and has no pest control. Forest remnants are unfenced, grazed and are mostly in a poor state and in decline.⁴
- 5.2 The site is located in the Rural Zone of the Operative and Proposed Waitomo District Plan, outside the coastal environment.
- 5.3 There are a small number of dwellings with sight lines to the turbines.⁵

⁴ Dr J Craig, Mr S Chapman, M Bellingham; Ecological Effects Assessment in response to s92 Requests (10 August 2021) at para 10.1

⁵ Refer to Appendix 3 of the EIC of C Shearer.

6. THE VARIATION PROPOSAL

6.1 The Variation Proposal is to simultaneously surrender the southern 11 of the maximum 22 turbines and increase the tip height above existing ground of the 11 remaining northern turbines from 110m to 172.5m. There is no change to the positioning of the remaining turbines from the consented locations.

6.2 It is important to note that the Existing Consent authorises a “maximum” of 22 turbines, so a reduction in the number of turbines would not trigger a need for variation. As such, the key aspect of the Variation application is the increase in size of the turbines / rotor blade diameter. The mitigation for the increase in size of each turbine is the reduction in the maximum number of turbines that can be constructed.

6.3 The key conditions that require variation are conditions 3 and 11:

3. The turbines shall have a maximum height of 110 metres measured from the ground to the top of the vertically extended blade tip.

11. The wind turbines shall not exceed a rotor tip height of 110 metres above ground level and a sound power of 107.2dBA unless it can be demonstrated by a person specialising in acoustics and accepted by the Manager, Policy and Planning, Waitomo District Council that higher turbine heights or sound power will still comply with the requirements of NZS6808: 1998.

6.4 Condition 5 will be deleted as it relates to turbines 19-22, which are to be surrendered from the project.

6.5 Through the course of the submission period the Applicant has identified that some further consequential amendments to conditions may be appropriate. In particular, the Applicant is prepared to agree on an Augier basis that amendments to the noise conditions are appropriate to refer to the updated New Zealand Standard. It is also prepared to accept some modifications to the ecology conditions to address issues raised by the Council and submitters including the Department of Conservation, though it also proposes these on an Augier basis.

6.6 Consequential amendments are proposed to:

- (a) Condition 1 so that the Variation Proposal documents are incorporated in a manner consistent with the way the 2011

variation was incorporated. This is standard practice for a variation consent where the Original Consent lists the documents relied on as part of the Application. However, it is not considered necessary or appropriate to refer to the s92 requests as these potentially confuse the interpretation of the consent, particularly as many of the requests were not predicated on the basis of a s127 application;

- (b) Condition 1A to clarify that conditions take precedence in the event of any inconsistencies with the listed documents, as a matter of good drafting;
- (c) Condition 33 requires updating as it referred to an earlier (2011) Civil Aviation Authority (CAA) approval which needs to be revised and is the subject of an application to the CAA that is pending determination;⁶
- (d) Condition 34 to delete references to the removed turbines;
- (e) Deletion of advice note 7, which is redundant.

Refinements to the Variation Proposal

6.7 In response to submissions and discussions, the Applicant is proposing refinements to the Variation Proposal (“the Updated Variation Proposal”). These have been set out in the information provided to the parties on 15 September 2023 and include:

- (a) A further reduction in the number of turbines from 11 to 8 (removing turbines 2, 4 and 9);
- (b) A *de minimis* increase in the maximum diameter of the rotor area from 155m to 163m. This represents a 5% increase in overall height over the Variation Proposal;
- (c) A subsequent *de minimis* increase in the maximum rotor tip height from 172.5m to 180.5m (also a 5% increase);

⁶ EIC G Starr at para 12.2

- (d) A reduction in rotor swept area of 14% (compared to the Existing Consent).⁷

6.8 It is common practice for Applicants to utilise an iterative process involving refinements to applications before they are heard.⁸ The changes do not raise any jurisdictional issues regarding the scope of T4's applications, as they:

- (a) do not materially alter the scale or intensity of the Variation Proposal (and in fact, overall have further reduced or constrained the Variation Proposal); and
- (b) have not altered the character of effects (and in fact have decreased the level of adverse effects); and
- (c) are not of a nature that may have altered who would have submitted on the applications.⁹

6.9 No party has objected to categorising the changes as *de minimis*, further to your Minute No 3 of 19 September 2023.

Positive effects of the Variation Proposal and Updated Variation Proposal

6.10 There are a number of positive effects comparing the Existing Consent with the Variation Proposal and the updated Variation Proposal:

- (a) There is a significant reduction in the number of turbines over the Existing Consent (from 22 to 11/8 respectively). The removal of 11/14 respectively turbines will:
 - (i) remove those turbines from the landscape which will have positive physical effects;¹⁰

⁷ EIC G Starr at paras 2.3 – 2.5

⁸ In *Wakatipu Environmental Society v Queenstown Lakes District Council* (C164/04) the Court observed that it is inevitable that applications undergo refinement and that “this is to be expected and encouraged by the Court to obtain the best possible outcome in environmental terms” (paragraph 9). See also the High Court’s decision in *Atkins v Napier City Council* CIV 2008-441-000564 which analysed several earlier cases and synthesized the legal tests.

⁹ *Te Runanga o Ngati Awa v Bay of Plenty Regional Council*, [2019] NZEnvC 196, (2019) 21 ELRNZ 539, 2019 WL 6888667: Character generally refers to the nature of the effect, while intensity refers to how often it occurs, and scale refers to the degree of the effect. Changes in the character of an effect clearly have the potential to mean that the activity is different in nature, while changes in the intensity and scale of an effect mean that the activity, whatever its nature, operates in a manner that has greater or lesser effects.

¹⁰ EIC M Moore at 2.6

- (ii) overall have positive visual effects, with the degree of effect dependent on the specific viewing location;¹¹
 - (iii) reduce the area impacted by earthworks;¹²
 - (iv) have no increased effects on the road network;¹³
 - (v) remove those turbines previously located in the vicinity of remnant indigenous forest;¹⁴
 - (vi) reduce impact on the freshwater environment by avoiding the wetland and stream headwaters that are in the southern part of the site.¹⁵
- (b) The reduction in the rotor sweep area will minimise the effects on commuting and foraging terrestrial avifauna and bats. ¹⁶
 - (c) As more energy can be produced from fewer, larger turbines this is a more efficient use of natural and physical resources. ¹⁷
- 6.11 The potential for adverse effects is addressed in section 8.

7. T4'S EVIDENCE

7.1 T4 calls evidence from the following witnesses:

- (a) Mr Glenn Starr – Director, Ventus Energy Limited and Taumatotara Wind Farms Limited
- (b) Mr Michael Moore – Landscape and visual effects
- (c) Mr Michael Smith – Acoustics
- (d) Mr James Daly – Transport
- (e) Mr Simon Chapman – Ecology
- (f) Mr Craig Shearer – Planning

¹¹ EIC M Moore at 2.6

¹² EIC M Moore at 2.4

¹³ EIC M Daly at 5.2

¹⁴ Ecological Effects Assessment - at Appendix 7 to letter dated 15 September 2023 and report of 10 August 2021 (section 11)

¹⁵ EIC S Chapman at para 2.4-2.5

¹⁶ EIC S Chapman at para 2.6

¹⁷ EIC G Starr at para 6.4 and 13.2

- 7.2 Mr Smith and Mr Daly will join us via AVL, while the remaining witnesses appear in person.

8. STATUTORY FRAMEWORK AND REGULATORY CONTEXT

- 8.1 The most relevant parts of s104 RMA to which the Panel is required to have regard in determining the applications, read as follows (emphasis added):

When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to:

(a) Any actual and potential effects on the environment (s104(1)(a));

(ba) Any measure proposed or agreed to by the Applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity;

(b) Any relevant provisions of:

- (i) a national environmental standard:
- (ii) other regulations:
- (iii) a national policy statement:
- (iv) a New Zealand coastal policy statement:
- (v) a regional policy statement or proposed regional policy statement:
- (vi) a plan or proposed plan; and

(c) Any other matter the Panel considers relevant and reasonably necessary to determine the applications (s104(1)(c)).¹⁹

- 8.2 Your assessment is subject to Part 2. The meaning of that phrase in the context of a resource consent application was considered by the Court of Appeal in *R J Davidson Family Trust v Marlborough District Council*.¹⁸ While section 104 obliges you to consider Part 2, Davidson records that, in many cases, doing so will not have any practical import because the relevant planning provisions have been established in accordance with and give effect to Part 2 so any analysis is unlikely to change the outcome

¹⁸ *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316

of enquiry. However, if it appears that the plan has not been prepared in a manner that appropriately reflects the provisions of Part 2, and / or has not been competently prepared, then it will be appropriate and necessary to refer to - and give emphasis to - Part 2. In other words, the extent to which Part 2 is relevant to the determination or outcome of a resource consent application will depend on the applicable RMA plans.

8.3 As the NPSIB is a national policy statement specifically addressing matters raised in part 6(c) (significant indigenous vegetation and significant habitats of indigenous fauna) and the NPSREG is a national policy statement specifically addressing s7(j) (renewable energy) the particularity of these documents informs your consideration of part 2 matters.

8.4 In King Salmon the Court of Appeal held that:¹⁹

...the RMA envisages the formulation and promulgation of a cascade of planning documents, each intended, ultimately, to give effect to s 5, and to pt 2 more generally. These documents form an integral part of the legislative framework of the RMA and give substance to its purpose by identifying objectives, policies, methods and rules with increasing particularity both as to substantive content and locality.

8.5 As outlined by Mr Shearer, it cannot be assumed that the Waitomo District Plan is consistent with the higher order documents as it was made operative on 1 March 2009 and therefore predates the relevant national policy statements: the NPS-REG 2011 and NPSIB.²⁰ Accordingly, both the Section 42A Report Officer and Mr Shearer have undertaken full Part 2 assessments. This is addressed further at para 8.75.

Section 104(1)(a): Assessment of Actual and Potential Effects

8.6 Section 104(1)(a) requires consideration of “*any actual and potential effects on the environment of allowing the activity*”. The potential effects of the Variation Proposal are addressed in the AEE and technical reports submitted with the application, together with the T4 evidence.

8.7 Effects are defined by s3 of the RMA as:

¹⁹ *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd*, [2014] NZSC 38, (2014) 17 ELRNZ 442, [2014] 1 NZLR 593, [2014] NZRMA 195, 2014 WL 1512472 at [30]

²⁰ EIC C Shearer at para 13.1.

- (a) any positive or adverse effect; and
- (b) any temporary or permanent effect; and
- (c) any past, present, or future effect; and
- (d) any cumulative effect which arises over time or in combination with other effects—regardless of the scale, intensity, duration, or frequency of the effect, and also includes—
- (e) any potential effect of high probability; and
- (f) any potential effect of low probability which has a high potential impact.

8.8 In the case of a proposal to vary an existing consent pursuant to s127 RMA, sections 88 to 121 of the Act apply, with all necessary modifications, as if –

- (a) the application were an application for a resource consent for a discretionary activity; and
- (b) the references to a resource consent and to the activity were references only to the change or cancellation of a condition and the effects of the change or cancellation respectively.

8.9 Accordingly, the “effects” to be assessed pursuant to s104 refer to the difference between those effects that have been consented by the Existing Consent and the effects of the Variation Proposal.

8.10 The legal tests for a s127 variation were set out in the Applicant’s legal submissions dated 27 September 2023 and those submissions stand. Minute 5 provided a preliminary determination that the application be assessed as a variation under s127 on an integrated basis based on the available information.

8.11 No party has raised any issues with the determination or that the matter should not be assessed as an application for variation under s127.

Consideration of all consent conditions

8.12 Minute 5 records that an integrated assessment would “allow the full package of conditions to be considered when considering the application

against the existing consent (and the effects on the environment it seeks to manage).”

- 8.13 When assessed against the provisions of s127 which refer to limiting an assessment “to the effects of the change” of the activity, the Applicant submits that regard may be had to the package of conditions, but a specific consent condition can only be contested to the extent that there is a direct relationship with the effects of the change of the activity.
- 8.14 This follows from s108AA which is also modified by s127. This means that a condition can only be amended in four circumstances:
- (a) Where the Applicant agrees (s108AA(1)(a)); or
 - (b) The condition is directly connected to an adverse effect on the environment resulting from the effects of the change of activity;²¹
 - (c) The condition is directly connected to an applicable district or regional rule or NES; or
 - (d) The condition relates to administrative matters that are essential for the efficient implementation of the relevant resource consent.
- 8.15 For example, condition 40 which specifically excludes any modification or restriction on the operation of wind turbines as a means of addressing adverse effects from a [post construction mortality] plan, is not a condition directly connected to any adverse effect of the change of activity as the effects are not new effects and are overall reduced. As such, the proposal by the Section 42A Report to delete that part of condition 40 is beyond the scope of s108AA.

Other consents

- 8.16 A land disturbance consent was granted by Waikato Regional Council on 18 August 2020 (AUTH141827.01.01), with a lapse period of 10 years (2035). This consent authorises earthworks associated with the development of the 11 turbine wind farm including construction of tracks and wind turbine platforms.²²

²¹ S108AA (1)(b) “the condition is directly connected to ... an adverse effect of the activity on the environment”.

²² A copy of the earthworks consent is attached as Appendix One to the EIC of C Shearer.

Weight of plan

- 8.17 The Proposed Waitomo District Plan was notified after the application on 20 October 2022 but does not change the status of the activity. Further submissions closed recently on 31 July 2023, and hearings have yet to be held.
- 8.18 Where provisions of a Proposed Plan did not exist at the time of the original grant of consent, the Court of Appeal has held that the starting point on a s127 application is the existence of the present right defined by the resource consent which it is sought to vary and that:

... the legislature could not have intended that a subsequent plan provision could be used to cut down the right preserved by s 9 to continue to use the land in the manner authorised by the original consent. Where the variation sought may properly be considered as falling within the scope of the original grant, the consent authority has no power to apply the proposed plan in a way which would limit the consent holder's ability to exercise the right in the terms originally granted."²³

- 8.19 As such, where an application is considered under s127, the provisions of the proposed plan cannot limit the consent holder's ability to exercise the consent in the terms originally granted.
- 8.20 In any event, as will be outlined by Mr Shearer, because of the early stage of the Proposed District Plan, it is submitted that no weight should be accorded to it.

Section 42A Report Recommendation

- 8.21 The s42A Report largely concurs with the assessment of effects such that there is a high level of agreement between most of the experts for T4 and the Council. The remaining drafting issues are outlined in para 10.7.
- 8.22 The Officer has recommended the grant of consent subject to the clarification of various issues. These are addressed below.

Positive Effects

- 8.23 Those positive effects that are strictly relevant to the s104 assessment as modified by s127 have been addressed in section 6.

²³ The Court of Appeal agreed with the High Court in *Body Corporate 97010 v Auckland City Council* CA64/00

- 8.24 Although not strictly related to the change of effects further to s127, it is noted that the project enabled by the Variation Proposal will also result in:
- (a) A reduction in greenhouse gas emissions, achieved through meeting New Zealand's need for electricity without emitting greenhouse gas gases during operation, that would otherwise be emitted through coal or gas generation;
 - (b) A reduction in dependence on the national grid;
 - (c) Greater security of supply;
 - (d) Reduction in transmission losses;
 - (e) Greater reliability of supply;
 - (f) Development benefits;
 - (g) Contribution to New Zealand's renewable energy targets.²⁴

Other effects

- 8.25 Theoretically, the differences in rotor diameter and tip height of the remaining turbines have the potential to create effects that are greater than the effects associated with the Existing Consent. In formulating the Updated Variation Proposal, careful consideration has been given to some of the concerns raised by submitters, and the refinements to the proposal result in the further mitigation of any potential adverse effects of the Variation Proposal.
- 8.26 Evidence submitted for the Applicant concludes that the Updated Variation Proposal will reduce overall effects on the environment.
- 8.27 Potential adverse effects of the Variation Proposal, assessed against the Existing Consent and associated mitigation are addressed below.

Landscape and visual effects

- 8.28 The Variation Proposal included a first assessment by WSP, which was later updated further to three s92 requests.²⁵ Mr Moore, a registered landscape architect with substantial experience in assessing wind farm

²⁴ *Genesis Power Limited v Franklin District Council* [2005] NZRMA 541, at [64].

²⁵ The original consultant employed no longer works for WSP.

applications has subsequently undertaken a further comprehensive and independent assessment of the landscape and visual effects which address queries raised by Mr Mansergh in his Section 42A Technical Report. Mr Moore concludes that the sensitivity of the rural environment landscape to the proposed variation is low, that in areas to the north of the site the larger turbines will have some no more than minor adverse effects, though these will be positive to the south due to the removal of a number of turbines. The overall assessment is that the effects of either the Variation Proposal or Updated Variation Proposal will be positive from a landscape and amenity perspective.²⁶

Shadow Flicker

- 8.29 Shadow flicker occurs only where a turbine is in close proximity to a dwelling and at very low sun angles. The Proposed Variation would have no shadow flicker effects on any dwellings outside the site.²⁷ In any event, any shadow flicker effects will be less with the proposed variation than the Existing Consent as there are fewer turbines and none are within the shadow flicker zone.²⁸

Ecology

- 8.30 When the application was made in 2020 Ecology NZ prepared a report assessing the difference in effects comparing the Existing Consent with the Variation Proposal. It noted that the key difference was the increase in height of the blade tips but that ground clearance would be maintained. It observed that the "International literature regarding the ecological effects of wind farms on birds and bats focuses almost entirely on wind farm location and the configuration/positioning of individual turbines" and referred to the only study investigating the influence of turbine dimensions on bird and bat fatalities. That study concluded that turbine rotor dimensions did not influence the rate of bird or bat fatality and that turbine height also had no effect on bird fatalities. While the study concluded that increasing turbine height may increase the risk of fatalities of migrating bats, New Zealand's bat species are non-migratory. On that basis, Mr Chapman predicted that the risk of long-tailed bats encountering turbine blades and/or zones of higher/lower air pressure would remain unchanged

²⁶ EIC M Moore at paras 8.1 - 8.2 with the nearest third party dwelling being located 2087m from a turbine (the Martins).

²⁷ AEE page 17

²⁸ EIC M Moore at para 8.2

with the proposed increase in turbine size and that the 50% reduction in turbine numbers would likely have a positive ecological benefit overall.²⁹

- 8.31 Following a subsequent s92 request the Applicant commissioned WSP to collect on-site data supplementing the original data provided with the original application. The bat and bird surveys carried out on site showed low levels of long tailed bat activity that were not indicative of feeding or roosting. No NZ falcon were seen or heard on site despite specifically looking and listening for them. The findings of the field-based investigations confirmed Mr Chapman's conclusion that "the proposal to vary the existing consent to allow for fewer larger turbines is not expected to significantly change impacts on native bats and avifauna. Any adverse ecological impacts arising from the amended proposal would also occur when the existing consent is implemented." In his view the appropriate mechanism was to require an Ecological Management Plan to be prepared and implemented through the consent conditions.³⁰
- 8.32 In response to more s92 information requests, a subsequent report was prepared by Dr John Craig and Mr Chapman, with peer review by Dr Mark Bellingham (10 August 2021).³¹ 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.³² They concluded that the Proposed Variation to the consent conditions would have clear positive effects for ecology.³³
- 8.33 In his evidence, which is updated in response to the proposal to further reduce turbine numbers to 8, Mr Chapman maintains these conclusions.³⁴ He outlines the way in which the Updated Variation avoids, remedies or mitigates ecological effects by removing turbines, halving the area of the turbines, decreasing proximity to wetlands, streams and remnant forests, and reducing the total rotor swept area.³⁵ He addresses the consent conditions recommended by the Blue Green Ecology NZ Report ("Blue

²⁹ Chapman S, 30 June 2020, Attachment 7 of AEE, page 2.

³⁰ Memo from S Chapman dated 10 April 2021 in response to s92 request.

³¹ 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).

³² Ibid at paras 7.1 and 7.2. For this reason the clearance height is unaltered by the Updated Variation Proposal.

³³ Ibid at section 11.

³⁴ EIC S Chapman at para 10.6

³⁵ EIC S Chapman at para 10.1

Green Report”) and with some minor exceptions, considers these to be generally appropriate, in light of changes to best practice since the grant of the Existing Consent.

- 8.34 The Blue Green Report places emphasis on the DoC Bats and Windfarm Advice Note V:5.0 dated October 2023.³⁶ The opening paragraph of the Bats and Windfarm Advice Note, states:

Bats are Absolutely Protected Wildlife under the Wildlife Act 1953. Under Section 63 of the Act, it is an offence to kill, hunt, possess, molest or disturb bats. DoC is not able to authorise disturbing bats under the Wildlife Act and is unlikely to authorise killing bats because that would be inconsistent with the Act’s purpose (i.e., the protection and control of wildlife).

The Department of Conservation Bat Recovery Group supports the development of the use of sustainable energy in New Zealand.³⁷

- 8.35 DoCs position as expounded in the Advice Note is that “windfarms should not be developed in areas occupied by bats because of the risks to these threatened species from operating turbines”. Appendix 2A of the Advice Note shows that the distribution of long-tailed bat records covers the majority of the North Island.

- 8.36 DoC’s Advice Note is founded on an erroneous interpretation of the Wildlife Act. Section 63 of the Wildlife Act provides that, no person may, without lawful authority:

- (a) Hunt or kill any absolutely protected ... wildlife...
- (b) ...
- (c) Rob, disturb, or destroy, or have in his possession the nest of any absolutely protected or partially protected wildlife or of any game. (emphasis added)

- 8.37 It is the hunting or killing by any person, or the disturbance of “the nest” of any absolutely protected wildlife that is an offence. This is made clear by the second “of” before the words “any game” in subclause (1)(c).

³⁶ For example, refer to page 24 of the Blue Green Report. It is noted that DoC does not refer to this in its evidence.

³⁷ This is repeated in the s92 Request dated 10 May 2021 at page 2

- 8.38 T4 does not propose to fell any vegetation in a way that would disturb bat roosts for the construction of the turbines. Nor can it be said that wind farm turbines themselves disturb nests. In the same vein, as structures, turbines cannot be deemed to be “a person” that kills wildlife.
- 8.39 No aspect of the Variation Proposal is contrary to s63 of the Wildlife Act. T4 submits that the Advice Note has little relevance to this application, particularly as it is a variation.

Geotechnical Stability

- 8.40 This was addressed in the AEE which concluded that there will be no increase in geotechnical stability effects associated with the taller towers.³⁸ No issues are raised in the Section 42A Report.

Turbine Foundations

- 8.41 This was addressed in the AEE which concluded that there will be no increase in effects from the larger pads.³⁹ No issues are raised in the Section 42A Report.

Transportation

- 8.42 Transportation effects were also addressed in the AEE. The Variation Proposal will remain subject to the original consent conditions 21-28. The evidence of Mr Daly (Traffic Engineer) concludes that there will be no increase in effects on the road network relative to the Existing Consent, that the numbers of component transporters will be reduced, and that no changes are required to the consent conditions as these adequately address traffic related assessments.⁴⁰ This assessment is consistent with the Section 42A Report’s review of traffic effects.

Aviation

- 8.43 Following T4’s decision to proceed with the Updated Variation Proposal, Mr Starr confirms that he has applied for an updated determination from the Civil Aviation Authority.⁴¹ The existing consent condition has been amended to allow for the updated determination.⁴²

³⁸ Page 17

³⁹ Page 17

⁴⁰ EIC J Daly at paras 4.1 and 5.1 -5.2

⁴¹ EIC G Starr at para 12.2

⁴² Refer to revised condition 33 EIC C Shearer at Appendix 6

Acoustics

- 8.44 Noise modelling shows a reduction in sound levels at all dwellings, particularly in the southern group where turbines 12 – 22 are removed. All predicted sound levels are well below the consented noise limit and in all cases the Variation Proposal shows a reduction in noise received at each dwelling to the nearest dB.⁴³
- 8.45 No changes are required to the construction noise standards set out in the Existing Consent.

Iwi – cultural effects

- 8.46 Effects on iwi are addressed in response to submissions below.
- 8.47 T4 acknowledges that the whenua, and various taonga hold significance to iwi. It also acknowledges that the relationship between the various iwi and hapu parties and natural resources are a “given”⁴⁴.
- 8.48 Consultation with Ngaati Mahuta ki te Hauaaauru, has been ongoing.⁴⁵ A cultural effects assessment report has been prepared by Maketuu Marae, Aaruka Marae, Te Kooraha Marae, Tahaaroa Lakes Trust and Te Ruunanga o Ngaati Mahuta ki te Hauaaauru, who collectively submitted on behalf of Ngaati Mahuta ki te Hauaaauru. Ngaati Mahuta ki te Hauaaauru and the Applicant have signed an MOU in which the parties agree to propose some new conditions for the consent and to manage other issues via the MOU. Ngaati Mahuta ki te Hauaaauru have confirmed via letter dated 26 October 2023 that provided appropriate conditions are included in the consent, the application is supported by the parties to the MOU. These conditions are addressed further by Mr Shearer.
- 8.49 The Applicant considers that the arrangements agreed with Ngati Mahuta ki te Hauaaauru appropriately address concerns regarding cultural effects of the activity.

Overall Effects Summary

- 8.50 Overall, with the changed dimensions of the proposal, with the exception of some of the visual effects, the actual and potential environmental effects

⁴³ EIC M Smith at section 4

⁴⁴ Supra FN 24 at [100].

⁴⁵ Refer to the consultation record attached as appendix 5 to the EIC of Mr C Shearer.

have been shown to be less than the existing consented environment. To the extent that there may be any residual adverse visual effects, these are assessed as being minor or 'less than minor' in RMA terms.

- 8.51 All other effects originally assessed and approved in the 2008 consent will not change as a result of the new proposal – they will be no greater with this amended proposal than that originally assessed, and are likely to be much less due to the reduced number of turbines.

Section 104(1)(b) Statutory Documents

- 8.52 Further to s104(1)(b)⁴⁶ you must have regard to the various statutory documents outlined in the evidence of Mr Shearer that are relevant to the change of conditions of resource consent.⁴⁷ For the purposes of assessing the Variation Proposal the key documents are:

- (a) The National Policy Statement for Renewable Electricity Generation 2011 ("NPSREG");
- (b) The National Policy Statement Indigenous Biodiversity 2023 (NPSIB);
- (c) The Waikato Regional Policy Statement;
- (d) Waikato Regional Plan; and
- (e) The operative Waitomo District Plan;

- 8.53 The relevant objectives and policies in the above documents are detailed in the evidence of Mr Shearer, who draws on the evidence of the other experts to conclude that, overall, the effects of the Variation Proposal are well aligned with the applicable planning documents.⁴⁸

- 8.54 This conclusion is consistent with the Section 42A Report as outlined at paras 8.21 and 8.22 above.

⁴⁶ Refer to para 8.1

⁴⁷ This assessment does not extend to those aspects of the original application where there are no changes proposed.

⁴⁸ EIC C Shearer at para 14.1

NPSREG

8.55 While varying levels of policy support for the T4 Wind Farm are found in all of the documents listed above, the NPSREG was specifically promulgated to recognise the national significance of renewable electricity generation activities, such as windfarms by providing for the development, operation, maintenance and upgrading of new and existing renewable electricity generation activities. Of particular relevance to the T4 Wind Farm:

- (a) Part A requires decision-makers to recognise and provide for the benefits of renewable energy generation. “Recognise and provide” is a high level of obligation for decision-makers under RMA. Renewable electricity will help reduce greenhouse emissions, increase national electricity supply, and provide the benefits set out in the Policy.
- (b) Policy B(c) requires that decision-makers shall have particular regard to the practical implication that exceeding the Government’s national target for renewable electricity generation will require the significant development of renewable electricity generation activities. The T4 Wind Farm will assist in meeting the national target.
- (c) Part C recognises the practical constraints of renewable energy generation activities, including Policy C(1)(a) which recognises that such activities need to locate where energy sources are available. This inevitably can create conflicts with cultural, ecological and landscape values. Wind monitoring at the site has indicated that the resource is available.
- (d) Policy C1(c) requires that decision-makers have particular regard to the location of existing structures and infrastructure, including the distribution network and the national grid. The evidence of Mr Starr describes how the project site is favourably located with connection to the national grid and road access is available at the site.⁴⁹

⁴⁹ EIC G Starr at para 5.6

- (e) Policy C2 specifically acknowledges that environmental offsetting/compensation are legitimate measures for addressing residual environmental effects which cannot be otherwise avoided, remedied or mitigated:

Policy C2

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.

- 8.56 I will return to this specifically in the context of responding to DoC.

National Policy Statement – Indigenous Biodiversity

- 8.57 The NPSIB was approved on 31 May 2023 and gazetted on 7 July 2023. The NPSIB sets out various decision making principles relating to indigenous biodiversity, followed by objectives and policies, including in relation to indigenous biodiversity outside of significant natural areas. It requires any adverse effects on an SNA to be managed by applying the effects management hierarchy. An applicant is required to demonstrate how each step of the hierarchy will be applied.⁵⁰

- 8.58 Importantly, at the outset the NPSIB provides:⁵¹

Nothing in this National Policy Statement applies to the development, operation, maintenance or upgrade of renewable electricity generation assets and activities and electricity transmission network assets and activities.

- 8.59 It is incontrovertible that the NPSIB does not apply to the Variation Proposal. In the meantime, the Guidelines for the NPSIB note that “There is other national direction being developed for renewable energy and that the NPSREG and Electricity Transmission (NPSET) and National Environmental Standards on Electricity Transmission Activities “are being updated and it is proposed that they provide a consent pathway for

⁵⁰ Policy 3.10

⁵¹ Part 1.3

development adversely affecting SNAs”⁵² This is addressed further below in relation to the DoC evidence.

- 8.60 In addressing ecological effects pursuant to the two national policy statements, the first submission is that the ecological effects of the proposal are evaluated as being less than those effects arising under the Existing Consent.⁵³ Second, even if there were residual adverse effects, in the absence of further amendments to the national direction, there is no scope to apply an effects management hierarchy approach to this application. Instead, the approach supported by the NPSREG is that “regard be had” to “offsetting or compensation which may include measures or compensation which benefit the local environment and community affected”. This is not the same as offsetting or compensation as understood and defined by the NPSIB where the effects management hierarchy relies on the principles in Appendix 3 and Appendix 4 to define the terms offsetting and compensation for the purpose of that national policy statement.
- 8.61 Further, recalling that there is no proposal to remove any indigenous vegetation, the indigenous biodiversity provisions of the Operative District Plan (or the Proposed District Plan) are also not relevant considerations for renewable energy activities. If there is any conflict between these documents, the NPSIB prevails as these plans must “give effect” to any national policy statement.⁵⁴

Waikato Regional Policy Statement

- 8.62 The Waikato Regional Policy Statement reflects the NPSREG in Objective EIT-01 Energy.
- 8.63 Although the RPS also contains objectives and policies relating to landscape, natural character and amenity Mr Shearer assesses the proposal as not being inconsistent with the objectives and policies to the extent they are relevant to the Variation Proposal.⁵⁵

⁵² National Policy Statement for Indigenous Biodiversity General Summary, page 5 FN 3

⁵³ EIC S Chapman at para 2.7

⁵⁴ For example refer to Objective 11.3.4 of the District Plan referred to in the Section 42A Report at page 27. This will be addressed further in legal submissions.

⁵⁵ EIC C Shearer at para 11.20

- 8.64 The relationship with Māori with the environment is also recognised in the RPS.⁵⁶ This issue is addressed at para 8.18 above. The engagement with Ngaati Mahuta ki te Hauaauru ensures that any cultural concerns are appropriately addressed.

Waikato Regional Plan

- 8.65 As the Regional Plan is largely an air, land and water plan, the proposed height increase of the height of the turbines and minor consequential changes to other parts of the project, such as roading, will not increase the impact on the resources that the Regional Plan manages. In any event, the impact on these resources will be less than the Existing Consent.
- 8.66 A copy of the earthworks consented issued by Waikato Regional Council for the project is attached to the evidence of Mr Shearer.

Operative Waitomo District Plan

- 8.67 The Operative District Plan became operative before the 2011 NPSREG or NPSIB and has not been updated to reflect those documents. Mr Shearer assesses the relevant provisions of the Operative District Plan to conclude that the changes proposed by the Variation Proposal will not lead to any reduction in the rural working environment. If anything, the project will enhance it by providing improved access to the wind farm area through improved roads, and by providing an additional source of productivity to the land without affecting the existing productivity.⁵⁷
- 8.68 With respect to roading, there will be less turbine componentry, leading to less disruption on public roads. Existing conditions of consent ensure that T4 will be required to maintain the standards of the roads to ensure other legally established rural activities are not adversely affected. With respect to amenity values, as the increased tip heights of the turbines, when compared to the Existing Consent will have impacts on landscape character values that are very low, it is considered by the experts that the amenity values of this rural environment will be maintained by the Variation Proposal.⁵⁸

⁵⁶ EIC C Shearer at para 11.14

⁵⁷ EIC C Shearer at para 11.23

⁵⁸ EIC C Shearer at para 11.25

- 8.69 Mr Moore’s assessment has concluded that the landscape and rural character are positive overall when compared to the Existing Consent. With respect to the increased height of the turbines, he acknowledges that there will be a greater degree of visual dominance in some cases but that the adverse effects on landscape / visual amenity values resulting from this will be no more than minor.⁵⁹

Proposed Waitomo District Plan

- 8.70 The Proposed Plan refers to the NPSIB noting that it was in draft at the time the plan was notified. It does not refer to the exemption for renewable energy.
- 8.71 As noted above, the proposed district plan should be given no weight.

Section 104(1)(c) – Other matters

- 8.72 In accordance with s104(1)(c) the Panel must have regard to any other matter it considers relevant and reasonably necessary to determine the applications. Several such matters are highlighted below.
- (a) New Zealand Energy Strategy 2011–2021
 - (b) Emissions Reductions Plan 2022 which sets a target of 50 per cent of total final energy consumption to come from renewable sources by 2035;
 - (c) Transpower’s 2018 long-range planning report called “Te Mauri Hiko, Electricity Futures”;
 - (d) The Climate Change Response Act as amended by the Climate Change (Zero Carbon) Amendment Act 2019 to set a domestic greenhouse gas emissions target for NZ to reduce net emissions of all greenhouse gases (except biogenic methane) to zero by 2050.
- 8.73 These documents outline the higher-level strategic goals identified for New Zealand in achieving its goals for renewable energy: The Variation Proposal has been assessed against these policy documents and has

⁵⁹ EIC M Moore at Appendix E page xiv.

been found to contribute to giving effect to them by facilitating the development of the site as a wind farm.⁶⁰

Part 2 of the RMA

8.74 Section 104(1) is subject to Part 2 of the RMA. Mr Shearer sets out the relevant provisions as being sections 5, 6, 7 and 8 of the Act and provides an assessment against those sections. He considers that the application to vary the existing consent which provides for less, albeit taller turbines, is consistent with sections 6-8 and meets the purposes and principles of the Act.⁶¹

8.75 Accordingly, it is submitted that the grant of consent will actively promote sustainable management and the achievement of the matters in part 2 of the Act.

9. RESPONSE TO KEY ISSUES RAISED IN THE EVIDENCE, SUBMISSIONS AND S42A REPORT

Section 42A report

9.1 The Section 42A Report's concurs with Mr Shearer that the proposal is consistent with Part 2 of the Act with the caveat that the landscape matters raised are appropriately addressed, the additional ecology conditions are accepted and there is demonstration that the cultural / iwi effects can be appropriately addressed.⁶²

9.2 The Applicant has appropriately addressed these matters by:

- (a) Providing, subsequent to the Section 42A Report, a full landscape and visual effects assessment as part of Mr Moore's evidence;
- (b) Adopting ecology conditions that are generally consistent with the proposed draft conditions submitted with the Section 42A Report;
- (c) Receiving support from Ngati Mahuta ki te Hauaauru subject to the inclusion of additional conditions in the consent.

⁶⁰ EIC C Shearer at para 12.4

⁶¹ EIC C Shearer at para 13.9

⁶² Section 42A Report at page 32

- 9.3 Further to queries in the technical reports to the Section 42A Report the Applicant confirms:
- (a) An updated road maintenance bond quantum.⁶³
 - (b) That the project will not be staged.⁶⁴ with specific reference to the ecology conditions.
- 9.4 There is a high degree of alignment between the experts for T4 and the council. The key area of disagreement relates to whether the consent conditions should provide for curtailment. A minor issue arises in relation to condition 9 (noise). These are addressed below at para 10.7.

Evidence – other parties

Cultural effects

- 9.5 Consultation with Ngaati Mahuta ki te Hauaauru, has resulted in support for the project subject to the Applicant advocating for the inclusion of several new conditions of consent. These are proposed in the version attached to be tabled at the hearing.
- 9.6 It is acknowledged that not all submitters who raised cultural effects support the application.
- 9.7 Faced with a development that might be seen by some iwi as an anathema to their role as kaitiaki, it is understandable that those iwi could never "agree" to it occurring. Nonetheless, even where there are adverse effects,⁶⁵ the development may still proceed where effects are appropriately managed. This was neatly summarised in the Environment Court's decision in the Port of Tauranga dredging decision (*Te Runanga o Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council*):⁶⁶

[298] On balance, taking into account those developments, we all conclude that the proposed conditions offered by the Port during the closing of its case and as varied in this decision, adequately avoid, mitigate or remedy all these cultural effects. We accept that the appellants' view of Mauao and Te Awanui as their tipuna or ancestors, and that they cannot as a matter of tikanga, ever agree to the Port's application. But, and as a

⁶³ EIC G Starr at para 11.6

⁶⁴ EIC G Starr at para 11.2

⁶⁵ which is not agreed in a legal sense with respect to the T4 s127 Variation Proposal

⁶⁶ *Te Runanga o Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council* [2011] NZEnvC 402 at [298].

number of cases including *Whangamata Māori Committee v Waikato Regional Council* indicate, the provisions of Part 2 of the Act dealing with Māori interests where well founded in the evidence, give no veto power over developments under the Act. Rather, these interests must be balanced against the other matters listed in Part 2 and the over-riding purpose of the Act under Section 5 to promote the sustainable management of natural and physical resources.

- 9.8 This approach was endorsed on appeal to the High Court, noting "This analysis is exactly what the Act requires. There is no error".⁶⁷

Noise

- 9.9 Although there is only a reduction in noise levels when comparing the Existing Consent with the application, for completeness it is noted that the Environment Court in *Meridian Energy Limited* has observed:⁶⁸

[190] It is important to note that changes to noise levels in the existing environment are permitted as long as they are not unreasonable. Accordingly just as there is no legal right to a view, there is no legal right for an existing quiet and tranquil environment to remain so. Whether or not a sound can be heard is not the issue. The issue is whether or not the sound is unreasonable [...] what level of noise can be reasonably expected in an environment is typically outlined in District Plan provisions.

Ecological issues

- 9.10 Ecological issues raised in the Technical Assessment by Dr Leigh Bull of Blue Green Ecology Limited have been addressed in detail in Mr Chapman's evidence.
- 9.11 T4 acknowledges that effects on threatened or at-risk species are important. However, your consideration of these effects is limited to the extent to which the Variation Proposal changes the effects arising from the Existing Consent. To this end, the only potential adverse effect on ecology that can be considered is the increased tip height of the rotor blades. To the extent that the increased tip height of the rotor blades could increase the risk to bats and birds (and there is no evidence to suggest this is the case), this is mitigated by the overall reduction in total rotor sweep area.

⁶⁷ *Ngāti Ruahine v Bay of Plenty Regional Council* [2012] NZHC 2407 at [75].

⁶⁸ *Re Meridian Energy Limited* [2013] NZEnvC 59

Department of Conservation

- 9.12 DoC relies on s6(c)⁶⁹ of the Act as the basis for its objection to the Variation Application, and that the presence of long tailed bats triggers the significance criteria of the Waikato RPS “as the ecological values include habitat that is currently habitat for indigenous species that are classed as threatened or at risk”. Ms Williams refers to the definition of “habitat” in the NPSIB and concludes that as the site contains patches of forests and open pasture used by bats which are classed as threatened or at risk, that it is likely bat habitat.⁷⁰ T4 submits that if this proposition were to be applied to its logical conclusion most of the rural North Island would be significant habitat, noting the distribution map and that bats are known to fly long distances over the landscape.⁷¹
- 9.13 Ms Williams overlooks that the chapeau of Appendix 5 of the Waikato RPS provides that “Areas of significant indigenous 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; but does not include built structures or an area or environment where an organism is present only fleetingly.”
(*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.
- 9.16 As such, s6(c) does not apply because the turbine areas, being the part of the site where the risks apply to indigenous fauna are not part of the “habitat” of indigenous fauna. Nor can they be described as “significant habitat” for the purpose of s6(c). Policies in the RPS that focus on habitat are also not relevant.

⁶⁹ “In achieving the purpose of this Act, all persons exercising functions and powers under it .. shall recognise and provide for the following matters of national importance: ... (C) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.”

⁷⁰ EIC E Williams at para 24

⁷¹ EIC G Starr Appendix 3 – map showing distribution of bats in North Island.

- 9.17 It is submitted that the fact that the NPSIB specifically addresses s6(c), as part of the hierarchy of documents described in King Salmon means that your assessment of s6(c) matters is pursuant to the NPSIB and the NPSREG. It is not appropriate to default to Part 2 to deal with a matter particularised by the NPSIB.⁷²
- 9.18 In addition to s6(c), Ms Williams relies on s31(1)(b).⁷³ This is also incorrect.
- 9.19 Section 31(1) of the Act is not apposite to your assessment⁷⁴ as this section relates to the functions (not powers or duties) of a territorial authority. Section 74 clarifies that it is the preparation and change of its district plan where this function is relevant. There is no reference to s31 in relation to the grant of a consent.

The Effects Management Hierarchy does not apply to wind farms

- 9.20 DoC's references to the draft Proposed National Policy Statement for Renewable Electricity Generation released in April 2023 as evidence that the effects management hierarchy is intended to be applied to the assessment of REGs⁷⁵ are inappropriate for two reasons. First, the document is a draft and no weight can be attached to it;⁷⁶
- 9.21 Second, the reverse proposition is true: the document clarifies that the effects management hierarchy is only to be applied to an REG activity where the activity is in an area with "significant environment values", which this activity is clearly not. The test for areas without significant environment values is whether the adverse effects of the REG activities on the values of the area "are avoided, remedied or mitigated to the extent practicable".⁷⁷
- 9.22 The DoC evidence and the Blue Green Report are critical of a lack of background data on bats and New Zealand falcons and contend that this

⁷² EIC E Williams at para 35. With respect to the NPSIB Ms Williams states that the fact that there is now an NPSIB which does not apply to the NPSREG does not change the assessments on how to manage renewable energy previously undertaken.

⁷³ EIC E Williams at para 35.

⁷⁴ EIC E Williams at para 27

⁷⁵ EIC E Williams at para 37

⁷⁶ Under s104 regard must only be had to National Policy Statements, not Proposed NPSs or draft Proposed NPSs.

⁷⁷ Refer policy 3.7 and the definition of "areas with significant environment values" would not apply in this case.

means that the appropriateness of the effects management hierarchy cannot be assessed.⁷⁸ It is the Applicant's submission that as the effect of the recent NPSIB is that the effects management hierarchy does not apply to wind farms, whether there is an imprecise or strict application of that hierarchy is irrelevant.

- 9.23 In this case, consistent with the NPSREG, to the extent that there are any residual adverse environmental effects that cannot be avoided, remedied or mitigated, you must have regard to offsetting measures or environmental compensation which may include measures or compensation which benefit the local environment and community affected.
- 9.24 The Applicant's ecological evidence is that the ecological effects are likely to be less than under the existing consent. Notwithstanding, the Applicant has accepted additional ecology conditions which include environmental compensation payments in the sum of \$25,000 per year for five years to support bat population investigations. The conditions are discussed further below.

Certainty / risk

- 9.25 A consistent theme within the DoC evidence is that the ecological effects assessment does not provide sufficient certainty as to outcomes. The standard advocated by DoC goes far beyond that required by the case law.
- 9.26 The leading case on assessment of risk under the RMA is *R J Davidson Family Trust* which related to the potential risk from a new mussel farm on a population of New Zealand King Shag.⁷⁹ The High Court held that:
- (a) The assessment of existing factual circumstances – including the assessment of any actual effects on the environment – must be assessed on the balance of probabilities.⁸⁰
 - (b) Consent authorities must also take into account potential effects, which cannot be assessed on the balance of probabilities. The

⁷⁸ EIC M Pryde at paras 33-34, Section 42 A Report, Appendix 7

⁷⁹ *RJ Davidson Family Trust v Marlborough District Council* [2017] NZHC 52. Affirmed by the Court of Appeal.

⁸⁰ At [129]

assessment of potential effects depends on an evaluation of all the evidence but does not depend on proving that potential effects will more likely than not occur.⁸¹

9.27 A number of other cases make findings that are relevant to the question of risk:

- (a) In *Envirowaste Services Ltd v Auckland Council*⁸² the Court reiterated that the RMA is not a no risk statute (as has been stated in many decisions). It is therefore necessary to take a practical and robust approach to both the risk itself and its prevention.
- (b) *McIntyre v Christchurch City Council*⁸³ established that the existence of a serious scientific hypothesis is not necessarily sufficient by itself to establish a potential effect, even one of low probability but high potential impact. Like any other evidence relating to a contested fact, the grounds for the hypothesis have to be tested and scrutinised to see whether they meet a basic threshold of reliability to assist the decision-maker to weigh the evidence and make a finding.
- (c) In *Ngati Kahu Ki Whangaroa Co-op Soc Ltd v Northland Regional Council* the Environment Court stressed that opponents could not invoke the precautionary approach in default of presenting a case.⁸⁴
- (d) In *West Coast Environment Network Inc v West Coast Regional Council*⁸⁵ the Environment Court considered the proposed Escarpment Mine on Denniston Plateau. In terms of certainty when assessing ecological effects, the Court held:

[80] ... Certainty is impossible and professional judgement will still be called for. Our better than average present knowledge enables us to make a judgment of how what is proposed in terms of mining and mitigation will compare with what is there now.

⁸¹ At [129]

⁸² [2011] NZEnvC 130 at paragraph 64.

⁸³ [1996] NZRMA 289 (PT) at page 27.

⁸⁴ [2001] NZRMA 299 at paragraph 161

⁸⁵ *West Coast Environmental Network Inc v West Coast Regional Council* [2013] NZEnvC 047

9.28 The DoC evidence is that there is an inability to compare effects of the existing consented development with the proposed variation and confirm that the proposed variation will result in reduced effects for bats, and that a precautionary approach should be applied.⁸⁶

9.29 In the Meridian Energy case⁸⁷ which also concerned a wind farm the Court referred to assessments on bird populations:

We agree that in an ideal world there would be more data available about bird populations in particular parts of New Zealand, but we observe that the responsibility for improving this is a collective responsibility. We do not agree that this should be the task of Meridian to the extent proposed by Ms Meares, Mr Onley or Mr Carr, but it is certainly open to those in the community to do something about the lack of data should they choose to do so. Overall, we are satisfied that the data collated by Mr Hooson is adequate for us to reach an informed view about the risk of collision, and we are also satisfied that the proposed conditions are nimble enough to respond should there be unanticipated adverse effects on any non- threatened population species.

9.30 Ms Pryde's evidence suggests that the Applicant should go back to the drawing board and complete a whole new assessment of effects to assess the actual and potential effects of the change.⁸⁸ At no point does Ms Pryde engage with the fact that a 22 turbine wind farm can be built or clarify which option would be preferred. This ignores the legal effect of the existing environment and that the effects of the activity referred to are not new effects. There is also no clear articulation of why a perceived lack of baseline information would alter the management of this activity.⁸⁹

9.31 Ms Pryde's approach differs somewhat from Ms Williams's evidence which seeks that "the level of effect on bats as a result of the existing consented development should be quantified to compare the level of effect with the current variation for the proposed wind farm." Ms Williams also does not explain how the additional data DoC seeks will provide evidence of the differentiation of the effects.⁹⁰

⁸⁶ EIC E Williams at paras 53 and 58

⁸⁷ *Re Meridian Energy Ltd*, [2013] NZEnvC 59

⁸⁸ EIC M Pryde at para 109

⁸⁹ Parts of Ms Pryde's evidence (at para 72-74) refer to good baseline monitoring as influencing the siting of turbines but this is not appropriate when site selection has been confirmed through an existing consent.

⁹⁰ EIC E Williams at para 54.

- 9.32 Having established the presence of bats through surveys, showing the difference between something that only notionally forms part of the existing environment and something proposed can only be a qualitative assessment. It is logical that, as expressed by Mr Chapman, halving the area over which the turbines will be located, halves the potential impact on flight paths for avifauna and long tailed bats.⁹¹ This is borne out by the bat activity surveys which show over half of the activity occurred in the area to be removed from the consent. Proximity to freshwater environments and SNAs are reduced. Removing the turbines away from the end of a ridge also reduces risk.⁹² None of these factors are assessed by the DoC witnesses.
- 9.33 As noted by Mr Chapman, assessing the impact on the heights at which bats pass is difficult and no literature has measured bat heights.⁹³ However, an inability to quantitatively measure one aspect of an effect is not a reason to decline a consent in the context of all of the information before you.
- 9.34 Finally, I note that DoC seeks that you decline the application under s104(6) for lack of information. No reference is made to s104(7) which refers to further information provided pursuant to s92 requests. In fact, T4's experts have spent considerable time and effort understanding the potential for ecological effects associated with the wind turbines in response to various s92 requests.⁹⁴
- 9.35 Overall, the work undertaken by Mr Chapman, Dr Craig and Mr Bellingham and the nature of the changes has enabled Mr Chapman to reasonably assess that the potential effects of the Variation Proposal will be positive with a sufficient degree of certainty for you to assess them as providing a sufficient evidential foundation for the approach proposed in conditions.

Curtailment

⁹¹ EIC S Chapman at para 7.4

⁹² EIC S Chapman at Section 7

⁹³ EIC S Chapman at para 7.9

⁹⁴ Refer ss 104(6) and (7). DoC makes this request on this basis.

- 9.36 Despite Dr Bull and the DoC witnesses advocating for curtailment strategies, the DoC Advice Note observes that “no one has tested curtailment strategies for New Zealand bats”.⁹⁵
- 9.37 Curtailment involves the restriction of turbine operation as a method to mitigate bat mortality. Both the Blue Green Ecology Report and DoC propose curtailment as an option to address effects on long tailed bats. The Blue Green Report proposes the deletion of part of existing condition 40 which would pave the way for curtailment options as part of the post construction mortality plan.⁹⁶ DoC proposes consent conditions that specifically anticipate curtailment.⁹⁷
- 9.38 Conditions providing for future curtailment are strongly opposed. First, as noted curtailment strategies for New Zealand bats remain untested and the Applicant is not aware of any current wind farm that has conditions requiring curtailment. According to DoC’s own literature a requirement for curtailment is dependent on the use of bat detectors and “there has been no widespread uptake of this technique [curtailment] and further research would be required”.⁹⁸ Second, the management of significant adverse effects on wildlife and bats was considered as part of the Existing Consent. The ecological effects being addressed by DoC are known effects, not new effects. While DoC may consider that there were shortcomings to those original assessments, that does not mean that these are new effects.
- 9.39 Third, unless the Applicant agrees, a consent authority must not include a condition in a consent unless the condition is directly connected to an adverse effect of the change of the activity (ss108AA and s127).⁹⁹ In this case, there is no adverse effect of the change of activity that authorises the removal of the existing proviso that the operation of the wind turbines is not to be restricted as part of any management plan.
- 9.40 Finally, the unknown extent to which curtailment might be proposed through a monitoring plan has the potential to have a significant economic impact on the commercial viability of the project.¹⁰⁰

⁹⁵ An earlier version of the Advice Note suggested that Wildlife Act permits would also be required

⁹⁶ That condition currently provides that “any modification or restriction on the operation of the wind turbines” will be excluded from the management plan.

⁹⁷ Eg Refer to EIC E Williams Appendix One page 24-25, 29

⁹⁸ Advice Note at page 7

⁹⁹ Refer to para 8.14

¹⁰⁰ EIC G Starr at para 11.5

Other submitters

- 9.41 Other submitters include a number of residents who live close to the Site. The issues raised by their submissions are addressed in the expert evidence.
- 9.42 Mr Starr has addressed outstanding management issues raised by submitters including by updating a map and responding with respect to questions about the future disposal of blades. Ngaati Mahuta ki te Hauaauru will be consulted when it comes time to remove turbines and associated structures from the site with a view to ensuring materials are disposed of in an environmentally sustainable manner.

10. CONSENT CONDITIONS

- 10.1 The key conditions to be amended are set out at para 6.3 and the list of consequential amendments is set out in para 6.6.
- 10.2 In response to consultation with other parties, and following further consultation with the Council following the circulation of evidence, T4 has proposed a revised set of amendments to the Variation Proposal that it considers will not only appropriately and effectively manage any potential adverse effects of the Variation Proposal, but step beyond the strict statutory requirements associated with a Variation application. A revised set of conditions will be tabled at the hearing.

Ecology conditions

- 10.3 Notwithstanding the Applicant's evidence that the risk to bats and avifauna is reduced by the Updated Variation Application, T4 has included requirements in conditions for additional pre, during, and post construction monitoring, coupled with management responses in the event that the effects are different to what has been predicted. Conditions provide a framework through which any effects arising (however unlikely) can be remedied before they become irreversible. The existing conditions include the ability for the Council to review the consent conditions in such circumstances.¹⁰¹ To the extent that there is any remaining risk and

¹⁰¹ As the High Court stated in *New Zealand Windfarms Ltd v Palmerston North City Council* [2013] NZHC 1504 at paragraph 69, the s128 review process is "no mere tinkering exercise". The

uncertainty, the regime provided in conditions will sufficiently diminish any concerns.

10.4 The Applicant proposes the following suite of ecology conditions:

- (a) A new condition implementing baseline studies for avifauna and bat population monitoring prior to commissioning of the first turbine for preparation by a suitably qualified expert in terrestrial ecology (SQEP) and in consultation with other parties;
- (b) Amendments to the existing condition requiring a post construction avifauna and bat population monitoring and management plan, if required as a result of the baseline monitoring, to implement a monitoring plan for a period of two years. The monitoring plan will need to be prepared by a SQEP and identify methods and options to avoid, remedy, mitigate, offset or compensate for any significant adverse effects;
- (c) A requirement to keep a register of observations of effects of the wind farm activities on wildlife (per existing condition 37);
- (d) A requirement for reporting and recording of evidence of bird strikes (this amends existing conditions);
- (e) A new condition requiring the use of bat detectors on turbines 1, 7 and 11.
- (f) A new condition requiring the Applicant to forward bat records to the Department of Conservation;
- (g) Annual reporting to the Council (existing condition 41)
- (h) Retention of the existing conditions relating to bird perches (conditions 42-44)

Court stated at paragraph 67: "[t]he provisions in RMA covering public notification, submissions and hearings in respect of resource consents all apply with respect to a review under s 128. There is therefore a very public correction process and a reconsideration of the appropriate consent conditions." The High Court's decision was confirmed on appeal in *Palmerston North City Council v New Zealand Windfarms Ltd* [2014] NZCA 601

- (i) Retention of existing conditions 45 and 46 limiting clearance of native vegetation and implementing a pest plant control programme;
- (j) A new condition requiring the Applicant to provide compensation in the sum of \$25,000 per year for five years to support bat population investigations.

10.5 Some of the above are new conditions requiring baseline studies for avifauna and bat populations and the use of bat detectors. These conditions arise from the Existing Consent rather than the Variation Proposal. Even if this is not accepted, the suite of conditions appropriately manage any potential residual effects.

10.6 Importantly, many of these conditions are generally consistent with the conditions proffered by DoC.

Outstanding issues as between the Council and T4

10.7 There are two outstanding issues regarding consent conditions as between the Council and the Applicant:

- (a) The proposal by the Section 42A Report to delete that part of condition 40 which specifically excludes any modification or restriction on the operation of wind turbines from a [post construction mortality] plan is opposed.
- (b) The proposal by the Section 42A Report to retain the wording of condition 9 relating to the point at which the background sound levels need to be established. Mr Smith explains why this is impractical and can be amended in his evidence without compromising the assessments.¹⁰²

11. CONCLUDING SUBMISSION

11.1 The Government's policy guidance strongly encourages increased generation capacity from renewable energy, which the Variation Proposal will unlock.

¹⁰² EIC M Smith at paras 9.2 – 9.9

- 11.2 The Existing Consent and the Updated Variation Proposal are entirely consistent with the Government's commitment to renewable energy, including as contained in the NPSREG. Granting this Variation application will more efficiently provide for electricity generation capacity and security of supply, which will contribute to the country's decarbonised future. The Proposal is consistent with the NESREG, Regional Policy Statement and the operative Waitomo District Plan, and those documents provide considerable policy support.
- 11.3 The Applicant has invested significant time and resource into this project. The technological advances and wholesale electricity market have coalesced to a point where it is appropriate to implement the project. The grant of the Updated Variation Proposal represents an opportunity to more efficiently harness the wind resource at the site, while reducing potential ecological effects, and landscape effects on the local community.
- 11.4 Ultimately, your assessment of the applications requires an evaluation of the evidence presented and the concerns raised by the submitters in the context of the narrow envelope of effects as constrained by s127 of the Act.
- 11.5 T4's principal submission is that the Updated Variation Proposal should be granted because:
- (a) it satisfies the requirements of the RMA, including Part 2 and s104; There can be no doubt that access to secure, sufficient, efficient and reliable electricity is of critical importance to the social and economic wellbeing of New Zealanders and it is appropriate to do this as efficiently as possible;
 - (b) there is adequate information currently before you to provide sufficient certainty regarding the difference in effects between the Existing Consent and the Variation Proposal;
 - (c) The evidence demonstrates that the effects of the Updated Variation Proposal are likely to be overall less than the effects of the Existing Consent; and that if there are any residual visual adverse effects, these are minor or less than minor; and
 - (d) The evidence demonstrates that the consent conditions adopt an integrated management approach by updating the Existing

Consent to reflect current best practice and by ensuring that there are appropriate measures in place to ensure that any residual adverse effects are appropriately managed.

Gill Chappell

Counsel for T4