

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

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

AND

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

**Summary Statement and Supplementary Evidence of
Elizabeth Moya Williams
for the Director-General of Conservation *Tumuaki Ahurei*
Resource Management Act Planner
Dated: 14 November 2023**

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Summary Statement

1. It is noted that although the number of turbines will be reduced, the increase height and rotor diameter of the remaining 8 turbines will increase each turbine's rotor sweep area by 114%. Based on the evidence of Ms Pryde, this has *'the potential to cause more damage to bats'*(para 129) even with the reduction in the number of turbines.
2. Based on the ecological assessments to date, it has not been possible to compare the ecological effects of the existing consented development with the proposed variation and confirm that the proposed variation will result in reduced effects for bats. As highlighted in evidence provided by Council Ecologist Dr Bull and Ms Pryde the baseline surveys undertaken do not provide evidence of how long-tailed bats are using the site. It is submitted that without this data, it is not possible to determine the effects of the proposed variation on bats.
3. I consider that Part 2, Section 6(c) and Section 31(1)(b)(iii) of the Act is relevant to this assessment which requires the protection of significant indigenous vegetation and significant habitats of indigenous fauna and maintenance of indigenous biodiversity. It is submitted in my evidence that Clause 1.3 of the NPSIB simply states that it does not apply to REGs. This retains the status quo RMA regulatory settings for REG development affecting indigenous biodiversity. As described in the evidence provided by Technical Advisor, Ms Pryde (para 96, 97-99), long tailed bats have been confirmed to be present at the application site and the environment at the site is consistent with bat habitat in that it would provide roosting and foraging opportunities. Ms Pryde confirms (para 103) that *"Habitats that support critically threatened species are significant"*.
4. Given this uncertainty around potential ecological effects on bats, it is recommended that the application be declined under s104(6) on the basis that there is not adequate information submitted with the application to make a determination on the proposed variation.
5. However, if the Commissioner is minded to grant consent, I have proposed conditions of consent which I consider to be *fair and reasonable* in light of the absence of adequate information and the ecological concerns relating

to the potential adverse effects of the proposed variation in relation to the 'threatened-nationally critical' long-tailed bat.

6. I will now summarise some key points raised at the hearing yesterday and provide some further explanation on these key points in relation to the planning matters raised.

Section 31 Functions of Territorial Authorities under the Resource Management Act

7. The applicant's legal submissions considered that Section 31 only applies to the preparation and change of a district plan and not to the grant of a resource consent. Section 31(1)(b) states that:

1. Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:...

(b) the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of –

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

8. It is my view that Section 31 is a general provision, which isn't limited in its application. Section 74 sets out what a Council must consider when preparing a District Plan. Section 74 does not put a constraint on the application of Section 31.
9. It is also noted that the maintenance of indigenous biological diversity through the application of Section 74 and preparation of plans, means that objectives and policies are established on this basis and assessed accordingly at the resource consent decision stage. For example, ECO-P1 of the Waikato Regional Policy statement requires the maintenance or enhancement of indigenous biodiversity.

The proposed Waitomo District Plan

10. I did not address the proposed Waitomo District Plan in my evidence, and I note that it came up in discussions at the hearing yesterday.
11. Section 104(1)(b) requires the decision maker, subject to Part 2, must have regard to any relevant provisions of (vi) *a plan or proposed plan*. The

objectives and policies of a proposed plan have legal effect immediately upon public notification of a plan change. The proposed Waitomo District Plan was notified on 20 October 2022. I agree with the applicant, that less weight can be applied given that the plan process is at the early stages of development and has not yet been exposed to independent decision making through the hearing process.

12. Section 86B of the Act sets out that rules have immediate legal effect upon notification where the rule protects areas of significant habitats of indigenous fauna. It is noted that the application was lodged on 5 July 2020 prior to the notification of the proposed Waitomo District Plan.

13. The relevant objectives and policies within the Energy chapter of the proposed plan requires that renewable electricity generation of national significance is recognised and provided for (ENGY-O2). Policy ENGY-P5 seeks to allow activities associated with the investigation, identification and assessment of potential sites and energy sources for REG, however they must be avoided within (6) *a significant natural area*. As shown on the site plan circulated yesterday, there are SNAs proposed near to the application site.

14. The introduction in the Energy Chapter states that:

“The location of renewable electricity generation activities is often driven by their functional and operational need to access natural resources. Often, these locations have other values associated with them such as important natural features and landscapes, coastal environment values and significant natural areas. Where possible a balance is required to ensure renewable electricity generation activities can locate where resources are, providing these values are not unduly compromised”.

15. The relevant objectives and policies within the Energy chapter requires that renewable electricity generation of national significance is recognised and provided for (ENGY-O2). Policy ENGY-P5 seeks to allow activities associated with the investigation, identification and assessment of potential sites and energy sources for REG, however they must be avoided within (6) *a significant natural area*. As shown on the site plan circulated yesterday, there are SNAs proposed near to the application site but no turbines are proposed within these areas.

16. Objectives ECO-P1 and ECO-O4 seek to protect or enhance indigenous biodiversity within SNAs as listed in SCHED6 and to maintain or enhance indigenous biodiversity outside of SNAs.
17. For development within an SNA, ECO-P1 applies an effects management hierarchy approach. ECO-P2 seeks to recognise, protect and enhance the ecological sustainability, and indigenous biodiversity values of SNAs by at point 5: *protecting and enhancing connectivity along and between significant natural areas and other areas of indigenous vegetation and habitat of indigenous fauna.*
18. ECO-P5 also provides a consenting pathway in limited circumstances of unavoidable removal of indigenous vegetation or habitats of indigenous fauna requiring that regard must be had to the following matters including point 2 and 3:
1. *Effects on the required range of habitats, including roosting, nesting, foraging and migratory pathways of fauna; and*
 2. *Effects on the habitats of threatened and at risk species including migratory pathways*
19. ECO-P13 also requires that for the removal of indigenous vegetation, or habitats of indigenous fauna outside of SNAs, consideration is given to avoid, remedy or mitigate the effects on indigenous biodiversity. This includes the consideration of the maintenance of habitat of nationally threatened or at-risk indigenous species (point 7).

Assessment of the existing environment and consideration of Appendix 5 of the Waikato Regional Policy Statement

20. The applicant's legal submission raised a point in paragraph 9.13 regarding the Waikato Regional Policy Statement Appendix 5 exemption and the existing environment. It was noted that Appendix 5 states that areas of significant indigenous biodiversity shall not include areas that *have been created and maintained in connection with artificial structures*. This is a provision in the Waikato Regional Policy Statement which is intended to assist plan users on how to assess whether habitats of indigenous fauna would meet the significance criteria. The plan provision does not mention whether the 'consented environment' is a relevant consideration in this

assessment only that the site should not include areas that have been created or maintained.

21. I acknowledge that the 'environment' upon which effects are assessed for the purpose of section 104(1)(a) includes the existing and reasonably foreseeable future environment. This includes the environment as it might be modified by implementing the original 2011 resource consent i.e the 22 turbines.
22. However, for the purposes of identifying whether an area is significant, the ecological evidence submitted has examined the site as it is described presently containing patches of forests and open pasture where there have not been any artificial structures such as wind turbines created or maintained. The bat surveys undertaken by the applicant have also been undertaken prior to any artificial structures being created or maintained. These surveys have been used to inform the assessment of whether the site is significant.
23. Based on the above, I do not agree with the applicant that the chapeau in Appendix 5 means that the site cannot be assessed as habitat in accordance with the Waikato RPS.

Applying the precautionary approach in relation to proposed conditions

24. In my evidence, para 58, I have referred to applying the precautionary approach as part of my consideration of proposed conditions. This is considered necessary as noted in my evidence (para 58) and based on the ecological evidence of Ms Pryde, because the effects of the proposed variation are uncertain but potentially significantly adverse resulting in the loss of a nationally critical species the long-tailed bat.
25. The Commissioner has asked the question of how the application of the precautionary approach sits within the New Zealand Planning Framework. It is acknowledged that the NPS-IB which includes a precautionary approach under Policy 3 does not apply to REGs as per Clause 1.3(3). There are also no National Policy Statements that include a policy to adopt a precautionary approach (such as the New Zealand Coastal Policy Statement) that applies to the assessment of this application for REGs.
26. However, it is noted that the Waikato Regional Policy Statement, in its objectives for integrated management (IM-O3) and supporting policy IM-M7 on planning approach, requires that resource management decision

making is holistic and consistent and at point 4 states: “adopts a precautionary approach, including the use of adaptive management, where appropriate, towards any proposed activity whose effects may be significant or irreversible but are as yet uncertain, unknown or little understood”¹. The RPS sets out that this objective is achieved through various policies including ECO-P1 and ECO-P2 which have been referred to in my evidence (refer to para 41-43).

Key Principles of Conditions

27. Discussions at the hearing yesterday, touched on the principles of fair and reasonable conditions. There are a number of important key principles when developing consent conditions which I have included a copy of in **Appendix 2**. One of these principles is that they must be fair, reasonable and practical. Section 108AA(1)(b)(i) of the Act also requires that a condition is directly connected to an adverse effect of the activity on the environment.
28. It is submitted that the conditions that I have proposed and amended, meet these principles and requirements. As noted in my evidence (para 62) the conditions I have recommended are comprehensive and stringent due to the absence of adequate ecological assessments undertaken as part of the variation proposal as described in the ecological evidence of Ms Pryde. The effects of the proposed variation on long-tailed bats are currently uncertain but potentially significantly adverse resulting in the loss of a nationally critical species.
29. The requirement for baseline studies in Conditions 37,37b and 38 set out what will be required to undertake robust surveying of bat activity at the site and surrounding area. The purpose of the monitoring is to go a step further from the bat survey already undertaken and to analyse how the bats are using the site. This is to then inform the Bat Adaptive Management Plan.
30. It is important to note that, as part of the Bat Adaptive Management Plan, I have proposed wording such as **A review of....** and **Consideration of the need for** in the condition as it is the baseline monitoring that will inform

¹ [RPS2022-Part-2-Resource-management-overview.pdf \(waikatoregion.govt.nz\)](https://www.waikatoregion.govt.nz/rps2022-part-2-resource-management-overview.pdf)

the decisions made at this preconstruction stage by a suitably qualified and experienced person. The condition is also worded to allow for consideration of curtailment options not that it is definitely required, this will be informed by the baseline studies undertaken.

31. In regards to curtailment, I understand that there are different options such as stopping the blades 'feathering' during low wind speed when the turbines aren't generating electricity which would not have an impact on the operation of the windfarm. However, these are options that can be reviewed based on the information that is provided by the baseline study.
32. It is considered that these conditions are required to directly address the potential adverse effects on long-tailed bats as a result of the proposed variation, in particular, the effects of the increase in the height and rotor sweep area of the remaining 8 turbines.

Elizabeth Williams

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Date: 14 November 2023

Appendix 1

IM-O3 – Decision making

Resource management decision making is holistic and consistent and:

1. is aligned across legislation and national and regional strategies;
2. takes an integrated approach to managing resources that cross regional and functional boundaries;
3. adopts an appropriate planning timeframe;
4. adopts a precautionary approach, including the use of adaptive management, where appropriate, towards any proposed activity whose effects may be significant or irreversible but are as yet uncertain, unknown or little understood;
5. is transparent;
6. has regard to the potential for cumulative effects from activities;
7. is based on the best available information, including mātauranga Māori;
8. allows for flexible solutions for local variations;
9. recognises that time may be needed for change to occur;
10. includes working with tangata whenua;
11. includes working with key stakeholders;
12. considers a mix of methods to achieve objectives; and
13. results in solutions which include processes to minimise conflicts.

IM-M7 – Planning approach Regional and district plans shall:

Regional and district plans shall:

1. ensure that cumulative adverse effects are managed;

2. recognise the long timeframes at which natural physical processes operate (e.g. coastal erosion and accretion cycles) and adopt at least a 100-year planning timeframe to allow for changes in these processes, while acknowledging that a shorter timeframe typically applies when modelling Development Geothermal Systems;
3. adopt a precautionary approach towards any proposed activity whose effects may be significant or irreversible but are as yet uncertain, unknown or little understood, including the use and management of coastal resources particularly vulnerable to effects from climate change; and
4. recognise lag times between human actions and environmental results.

Appendix 2: Six key principles when developing consent conditions²

1. Within a council's powers under the RMA
2. For a resource management purpose –
3. Certain – Consent conditions must be certain so the consent holder, the council and any layperson viewing the consent have no doubt about what is required by the conditions and the obligations the consent holder has. It is important conditions are drafted in plain English and can be readily interpreted and understood by council officers monitoring the consents and subsequent consent holders.
4. Relevant to the subject matter of the consent
5. Fair, reasonable and practical
6. Exclusively between the consent holder and the consent authority –Such conditions can be prefaced with a clause that clarifies their origin, for example, “As volunteered by the applicant ...”.

It is also noted that the Environment Court Practice Note 2023 at paragraph 10.4 contains requirements for the presentation of draft conditions.

² Quality Planning website, Resource Consent Conditions 2013 [Consent Steps \(qualityplanning.org.nz\)](https://www.qualityplanning.org.nz)