

BEFORE THE INDEPENDENT HEARING COMMISSIONERS
APPOINTED BY THE WAIKATO DISTRICT COUNCIL

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

AND

IN THE MATTER of hearing submissions and further submissions on the
Proposed Waikato District Plan

Opening Legal Submissions on behalf of the Director-General of Conservation

Dated 26 September 2019

Submission Number: 585

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MAY IT PLEASE THE COUNCIL HEARING COMMISSIONERS:

Overview

1. The Director-General of Conservation (the **Director-General**) submitted on the Proposed Waikato District Plan (the **Proposed Plan**). The Director-General's submissions primarily relate to ensuring that the planning framework provides for appropriate mechanisms to manage environmental effects and for clear, user friendly guidance.
2. This submission addresses the:
 - (a) Director-General's interest in the Proposed Plan;
 - (b) Director-General's key submissions (the **Submissions**);
 - (c) Conclusion.

Director General's Interest in the Proposed Plan

3. As the administrative head of the Department of Conservation (the **Department**), the Director-General has all powers as are reasonably necessary and expedient to enable the Department to perform the functions provided for in the Conservation Act 1987 (the **Conservation Act**).
4. The Department's functions that are particularly relevant in this instance include advocating for the conservation of natural resources generally and to promote the benefits of conservation of natural resources for present and future generations.¹
5. In the context of the functions prescribed by the Conservation Act, the following definitions apply:²
 - (a) Conservation means the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic value, providing for their appreciation and recreational enjoyment by the public and safeguarding the options for future generations;

¹ Conservation Act 1987, section 6.

² Conservation Act 1987, section 2.

- (b) Natural resources are the plants and animals of all kinds, air, water and soil that are animal habitats, landscape and landforms, geographical features, systems of interacting living organisms and their environment and any interest in a natural resource.
6. On this basis, the Director-General's interest in the Proposed Plan is to seek to ensure that the Proposed Plan adequately provides for the conservation of natural resources.

The Submission

7. Key factual matters or matters of particular concern central to the Director-General's Submission include the:³
- (a) Content and Structure;
 - (b) Kauri Dieback;
 - (c) Kānuka and Mānuka status;
 - (d) Mapping;
 - (e) Bats;
 - (f) Eco-sourced indigenous species;
 - (g) Biodiversity offsetting
 - (h) Coastal environment;
 - (i) Small and community scale electricity generation (**Electricity Generation Projects**).

Content and Structure

8. Regarding the content and structure of the Proposed Plan, the Director-General seeks the:
- (a) Inclusion of introductions and zone descriptions at the beginning of each chapter to provide users with adequate information and with guidance as to its structure;

³ Directions from Hearing Commissioners Regarding "Opening Submissions" dated 9 August 2019 at [4.b], per the directions, counsel has included legal matters as appropriate.

- (b) Reintroduction of schedules of outstanding natural features (**ONF**) and outstanding natural landscapes (**ONL**).
9. The Submissions outline that introductions and zone descriptions are an important part of addressing biodiversity issues within the district. For example, amending Chapter 3 to include an overview of the indigenous biodiversity in the area, the loss of indigenous vegetation and ecosystems and the significance of the associated biodiversity would assist in addressing biodiversity issues by providing plan users with information and guidance.
10. Ensuring that information relating to natural and physical resources and biological diversity is readily available in the Proposed Plan will better enable decision-makers to make efficient decisions that achieve the purpose of the Resource Management Act 1991 (the **Act**).⁴

Kauri Dieback

11. The Director-General seeks that the Proposed Plan includes objectives, policies and rules to address the management of Kauri dieback.
12. Kauri are threatened with functional extinction as a result of Kauri dieback, which is caused by an ecotoxic pathogen (*Phytophthora agathidicida* or Pa). Soil movements or land disturbance work within three times the radius of the canopy of the dripline of a Kauri tree is likely to contaminate the soil and spread the disease if appropriate hygiene procedures are not implemented through the Proposed Plan.⁵
13. Collaborative efforts to effectively manage the disease are required to prevent the disease from spreading.
14. In a very recent Environment Court decision, the *Director-General of Conservation v Thames-Coromandel District Council*⁶, the Court considered the extent of territorial authorities' responsibilities in respect of Kauri dieback and confirmed:

⁴ *R J Davidson Family Trust v Marlborough District Council* [2017] NZCA 194, plans are designed to give Substance to Part 2 of the Resource Management Act 1991. Resource Management Act 1991, section 5, decision-makers must ensure that the potential of natural and physical resources are sustained to meet the reasonably foreseeable needs of future generations and that the life supporting capacity of air, water, soil and ecosystems is safeguarded while promoting sustainable management of natural and physical resources.

⁵ Soil movements that may spread the disease include relatively minor activities such as contamination via footwear, equipment and/or by vehicles.

⁶ [2018] NZEnvC 133

- (a) Territorial authorities are charged with maintaining indigenous biological diversity through the integrated management of effects, which includes adopting controls to prevent or mitigate the actual or potential effects relating to the use of contaminated land;⁷
- (b) Regulating Kauri dieback is not only desirable, it is necessary;⁸
- (c) Provisions that the territorial authority was required to further consider or incorporate in its proposed plan.⁹

15. Counsel submits that integrated management of Kauri dieback includes incorporating management objectives, policies and rules. Ensuring that the Proposed Plan adopts controls to address contamination and potential spread of Kauri dieback is a necessary requirement and responsibility that the Waikato District Council must satisfy.

Kānuka and Mānuka Status

16. The Director-General seeks that the Proposed Plan is amended as appropriate to include objectives, policies and rules to recognise and implement measures to manage the threatened status of Mānuka and Kānuka.

17. Myrtle rust has affected Mānuka and Kānuka to such a degree that they are now considered threatened species. Measures to appropriately manage these species are required to ensure their continued existence.

18. Unlike Kauri Dieback, there are no real measures that could be incorporated into the Proposed Plan that seek to address the effects Myrtle rust has had, and continues to have, on Mānuka and Kānuka. This is because Myrtle rust is aerially spread¹⁰ whereas Kauri Dieback spreads through soil and root movement. Instead, the Director-General seeks appropriate controls in

⁷ *The Director-General of Conservation v Thames- Coromandel District Council* at [44]-[45], Resource Management Act 1991, sections 2 and 31(1)(b).

⁸ *The Director-General of Conservation v Thames- Coromandel District Council* at [122], noting that the Waikato Regional Council and Waikato District Council have recognised the importance of taking measures to prevent the spread of Kauri dieback, for example, <https://www.waikatodistrict.govt.nz/news/media-releases/article/2017/12/07/kauri-die-back-prevention-effort-leads-to-national-award>, the Waikato District Council reports that it contributed \$20,000 towards combatting Kauri dieback. Also see <https://www.waikatoregion.govt.nz/services/regional-services/plant-and-animal-pests/plant-pests/kauri-dieback/>, where the Waikato Regional Council classifies reducing the further spread of the disease as a high priority.

⁹ *Director-General of Conservation v Thames-Coromandel District Council* [2018] NZEnvC 244 at [89]-[90].

¹⁰ Myrtle rust spores can easily spread across large distances by wind and can be transported on contaminated clothing, insects, rain splashes and equipment

the Proposed Plan to restrict the clearance of Mānuka and Kānuka. The effects of Myrtle rust, which ultimately kills these species, as well as their continued clearance in this district, is of grave concern to the Director-General given the threatened conservation status of these species.

Mapping

19. In respect of mapping contained in the Proposed Plan, the Director-General seeks that the:
- (a) Coastal environmental line at Port Waikato is reassessed and remapped to account for the coastal marine area boundary per the Waikato Regional Coastal Plan;
 - (b) Management regimes that apply to mapped Significant Natural Areas (SNA) should also apply to areas that, although have not been mapped, satisfy the Waikato Regional Policy Statement (the **WRPS**) SNA criteria.
20. The Director-General otherwise supports the Proposed Plan's approach to the mapping of the coastal environmental line and SNA.

Bats

21. The Director-General seeks the inclusion of mapping, objectives, policies and rules which recognise bat zones and protection of bat habitats.
22. Bats are absolutely protected under the Wildlife Act 1953 (the **Wildlife Act**).¹¹ Despite this, the range and number of bats have declined significantly, with the long-tailed bat now being categorised as "Nationally Critical", which means that the long tailed bat is severely threatened and faces immediate risk of extinction.¹²
23. The decline in bats has resulted from a combination of threats, including the degradation, disturbance, fragmentation and/or loss of their habitats.¹³ Permitting activities within areas

¹¹ Wildlife Act 1953, sections 2 and 3, all wildlife is absolutely protected. Wildlife being any mammal living in a wild state, subject to exclusion of certain species of wildlife as explicitly provided for under the Wildlife Act 1953. Bats do not fall within these exclusions.

¹² Hamilton City Council Resource Consent Application: 10.2018.00009853.001 and 11.2018.00006695.001, Statement of Evidence in Chief of Moira Anne Pryde for the Director-General of Conservation dated 23 April 2019 at [4.2] and [4.3].
<https://www.hamilton.govt.nz/our-services/planningguidanceandresourceconsents/publicly-notified-applications/2018%20Document%20folder/Adare%20R4%20Submitters%20Evidence%20-%20Moira%20Pryde.pdf>

¹³ *ibid* at [4.4].

that form a part of the bats habitats may result in the loss of roost trees, feeding and breeding habitats, the fragmentation or severance of routes used to commute and disturbance from light and noise. Consequently, bats may die or suffer injury or disturbance.¹⁴

24. Long-tailed bats are particularly vulnerable as they have specialist requirements in terms of their breeding sites, home range and foraging requirements.¹⁵ For example, female long-tailed bats generally breed once a year and generally have one pup. They congregate in maternity roosts between November and March and usually move to a new roost each night.¹⁶ Long-tailed bats largely select older and larger exotic and native trees for maternity roosts.¹⁷ Such habitats are considered significant in virtue particularly given the threatened status of the long-tailed bats.¹⁸
25. Incorporating the measures that the Director-General seeks in this regard will assist the Waikato District Council in discharging its obligation to recognise, provide for and protect these significant habitats.¹⁹

PauaMAC5 v Director-General of Conservation

26. As noted, the long-tailed bat is absolutely protected under the Wildlife Act. For context and to illustrate why it is important to protect bat habitat in the district, under s 63(1)(a) of the Wildlife Act it is an offence to “hunt and kill” a long-tailed bat without lawful authority (under the Wildlife Act) to do so.
27. “Hunt and kill” has a statutory meaning as set out in s 2 of the Wildlife Act and includes pursuing, disturbing or molesting any wildlife. In *PauaMAC5 v Director-General of Conservation & others*²⁰, disturb has a broad meaning, and includes interference with an animal’s normal course of travel. Interfering with or the removal of bat roost would, according to the Court of Appeal, constitute disturbance for the purpose of the Wildlife Act. While authority is able to be granted under s 53(1) of the Wildlife Act to “catch alive or kill” protected wildlife, the Court of Appeal confirms that such granting cannot be for any accidental or

¹⁴ Evidence in Chief of Moira Anne Pryde for the Director-General of Conservation dated 23 April 2019 at [2.7].

¹⁵ *ibid* at [5.1].

¹⁶ *ibid* at [5.1],

¹⁷ *ibid* at [5.4] and [5.8].

¹⁸ *ibid* at [6.5]-[6.6].

¹⁹ Resource Management Act 1991, section 6(c), Waikato Regional Policy Statement, Policy 11.2.

²⁰ [2018] NZCA 348

unintentional killing and must promote the purpose of the Wildlife Act, which is to protect and control wildlife.

28. The purpose of mentioning this decision is to reinforce how critical it is to protect bat habitats in the Waikato District from vegetation clearance activities, especially given their severely threatened conservation status and real risk of extinction.

29. Accordingly, I submit it is vital for continued survival of the species that the Proposed Plan implement appropriate provisions to recognise bat zones and to protect bat habitats.

Eco-sourced Indigenous Species

30. The Director-General seeks that the Proposed Plan includes provision to enable the reintroduction of eco-sourced indigenous species suitable for the habitat.

31. Eco-sourcing refers to plants grown from seeds or propagules collected from the naturally occurring vegetation close to any given site. This practise is important as:

(a) Plant species often adapt to local conditions;

(b) There are marked genetic variation between certain plant species;²¹

(c) Eco-sourced planting will assist in preventing exotic species invading and impacting on local vegetation.

32. Recognising opportunities and implementing initiatives to reintroduce, maintain and/or enhance local vegetation is an important component of preserving and enhancing the natural character of the district.²²

Biodiversity Offsetting

33. The Director-General seeks amendments to the Proposed Plan's biodiversity offsetting provisions to set out the hierarchical approach to offsetting in SNA and to ensure consistency with the WRPS and the Guidance for Biodiversity Offsetting.

34. The approach adopted to biodiversity offsetting includes that:

²¹ Examples of variations are found in Kānuka, Mānuka and Kowhai.

²² Ecological Restoration in the Waikato, <https://www.doc.govt.nz/get-involved/run-a-project/restoration-advice/native-plant-restoration/local-planting-guides/ecological-restoration-in-the-waikato/>, the Waikato District Council has recognised the importance of eco-sourcing and provided funding for related initiatives.

- (a) Adverse effects must be preferentially avoided;
- (b) Mitigation or remedial measures may be taken only where preferential avoidance cannot be achieved;
- (c) Compensation may be considered appropriate, where adverse effects cannot be reasonably avoided, mitigated or remedied.

35. Counsel notes that incorporating the hierarchy in the Proposed Plan will give effect to the Waikato District Council's obligation to recognise, provide for and protect areas of significant vegetation²³ and to avoid associated adverse effects in preference to remediation or mitigation,²⁴ whilst providing plan users with certainty as to the scope and order of taking compensatory measures to offset adverse effects.²⁵

Coastal Environment

36. The Director-General seeks that the Proposed Plan is amended to include protection of the natural character of the coastal environment from inappropriate subdivision, use and development and that activities that damage the functioning of the coastal dune system are avoided.

37. Dune systems have a level of instability that forms a component of the natural processes associated with functioning systems. On this basis, avoiding damage to dune systems includes recognising and providing for avoidance of adverse effects to the natural processes associated with dune systems.

38. Counsel notes that including the above provision in the Proposed Plan will give effect to the Waikato District Council's obligation to recognise and provide for the preservation of the natural character of the coastal environment from inappropriate subdivision, use and development.²⁶

Electricity Generation Projects

39. The Director-General seeks that the Proposed Plan includes additional matters of discretion to address any adverse effects associated with Electricity Generation Projects.

²³ Resource Management Act 1991, section 6(a), Waikato Regional Policy Statement, Policy 11.2.2(a)(b).

²⁴ Waikato Regional Policy Statement, Policy 11.2.2(a)(b).

²⁵ Resource Management Act 1991, section 104(1)(b)(iv).

²⁶ Resource Management Act 1991, section 6(a). New Zealand Coastal Policy Statement, Policy 13.

40. Electricity Generation Projects have the potential to have significant adverse ecological effects, particularly on avifauna and bats.
41. Incorporating measures to address the adverse effects associated with Electricity Generation Projects during the establishment, operation and decommissioning phases is an important part of ensuring sustainable management.²⁷

Conclusion

42. A consideration central to the review of the Proposed Plan is that the Waikato District Council must give effect to or discharge obligations that are imposed by existing legislation and regulations.
43. The amendments that the Director-General seeks in respect of the Proposed Plan largely, whilst seeking to protect and preserve the conservation values in the Waikato District, align with the obligations and requirements that the Waikato District Council must discharge and/or environmental initiatives that have been supported and progressed on a localised level.
44. Adopting the Director-General's amendments as proposed will provide plan users with more clarity and guidance and potentially enable more efficient and informed application, whilst ensuring wider legislative and regulatory consistency and compliance.



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26 September 2019.

²⁷ As required by the Resource Management Act 1991, section 5.