

**BEFORE A HEARING PANEL
OF HAMILTON CITY COUNCIL**

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

AND

IN THE MATTER of Proposed Plan Change 9 – Historic Heritage and
Natural Environment

**LEGAL SUBMISSIONS ON BEHALF OF THE DIRECTOR-GENERAL OF
CONSERVATION**

Dated 17 May 2023

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MAY IT PLEASE THE HEARING PANEL

INTRODUCTION

1. These legal submissions are presented on behalf of the Director-General of Conservation (**Director-General**) in support of her submission and further submission on Plan Change 9 (**PC9**). The Director-General is the administrative head of the Department of Conservation (**Te Papa Atawhai**).
2. The Director-General is calling two witnesses in support of her case:
 - a) Dr Kerry Maree Borkin¹ who is a bat ecologist with 24 years of experience, including about 17 years focused specifically on New Zealand bats. Dr Borkin's PhD research focused on the ecology of long-tailed bats in plantation forests. Her recent experience has included research into the effect of light and how to minimise its effects on New Zealand bats, international workshops focusing on the impacts of artificial light on bats, and United Nations workshops developing international guidance to manage artificial lighting and its impacts on bats.
 - b) Ms Ashiley Sycamore² who is a planner with experience advising Councils and Te Papa Atawhai on consenting and planning matters.
3. In these submissions, I will address:
 - a) Identification and Protection of Significant Natural Areas (SNAs);
 - b) Landscape Wide Approach;
 - c) Setbacks;
 - d) Lighting and glare;
 - e) Noise;
 - f) Biodiversity offsetting and compensation; and
 - g) Notification.

¹ Dr Borkin EIC.

² Ms Sycamore EIC and Rebuttal Evidence.

Identification and Protection of SNAs

4. The Director-General seeks recognition in the plan that areas of significance include both: (a) mapped areas; and (b) unmapped areas that meet the criteria for 'significance' under the Waikato Regional Policy Statement (**WRPS**).

5. In rebuttal evidence, Mr Inger for the Adare Company Limited has said:³

PC9 recognises that additional SNAs may be identified and added to the District Plan through the First Schedule process under the RMA (Purpose 20.1(d)). This is the most appropriate approach if additional sites are identified in the future which meet the criteria in APP5 of the WRPS.

6. In *Cabra Rural Developments Ltd v Auckland Council* the Environment Court said:⁴

If areas of significance gain no protection because they have not been mapped, this would not only be contrary to the decisions of the High Court in relation to these issues, but also to the clear obligations under Policy 11 and Part 2 of the Act.

7. This is clear direction from the Court. The Plan Change 9 area is outside the coastal environment. Therefore, the protection is in section 6(c) of the RMA. Section 6(c) requires decision makers to recognise and provide for "*the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.*"
8. The Director-General submits that section 6(c) will apply if an area meets the significance criteria in the WRPS. Section 6(c) has been present in the RMA since first enactment and it applies absolutely.⁵ It does not have an activity qualifier like section 6(a).⁶

³ Mr Inger Rebuttal Evidence at [20].

⁴ *Cabra Rural Developments Ltd v Auckland Council* [2018] NZEnvC 90 at para [167]. This case was appealed in *Auckland Council v Cabra Rural Developments Ltd* [2019]. The point raised at para [167] was not addressed in the appeal. The position adopted by the parties at the rehearing decision in [2020] NZEnvC 153 was that it was only necessary to revisit the original decision to the extent that it affected the wording of the relevant plan provisions. The concepts from para [167] of the original decision were referred to in paras [45] to [48] of the rehearing decision and at para [46] the Court said "*The issue therefore, is how to protect areas of significant ecological value as required under Policy 11 (or s 6(c) of the Act outside the coastal environment), particularly where there is no formal protection in place currently.*"

⁵ *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38 at para [28].

⁶ Note that section 6(a) is qualified by the words "from inappropriate subdivision, use, and development while section 6(c) has no activity qualifier.

9. Further, objective (i) in Te Ture Whaimana o Te Awa o Waikato – Vision and Strategy requires: *“The protection and enhancement of significant sites, fisheries, flora and **fauna**.” [emphasis added]*. The Director-General submits that this objective would also apply to the threatened-nationally critical long tailed bat (**Pekapeka**).
10. Te Ture Whaimana o Te Awa o Waikato has the status of a national policy statement, and it prevails over any inconsistent national policy statement.⁷ This is important because section 75(3) of the RMA requires a district plan to give effect to any national policy statement and any regional policy statement.
11. Objective 20.2.1 in the Hamilton City district plan also requires that *“Significant Natural Areas are protected, maintained, restored and enhanced.”*
12. Ms Sycamore has set out two proposed policies at paragraph 48 of her Evidence in Chief⁸ that would: (a) address the Director-General’s concerns; and (b) be the most appropriate, efficient and effective way to implement the objectives identified above to the intent that there would be recognition in the plan that areas of significance includes both: (a) mapped areas; and (b) unmapped areas that meet the criteria for ‘significance’ in APP5 of the WRPS.
13. The SNA mapping exercise increases certainty as to the location of SNAs. However, it is highly likely that the mapping exercise has missed areas of significance and new areas will become significant over time. The unmapped areas of significance identified through a resource consenting process should still be afforded the protection in section 6(c) and in the relevant planning objectives.
14. It would be contrary to section 6(c) and the planning objectives if areas of significance gain no protection because they have not been mapped. The proposition that an area that meets the significance criteria in the WRPS will not be protected until such time as it has been identified and added to the plan through the First Schedule process is incorrect as a matter of law and planning practice.

⁷ Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, section 12.

⁸ See paragraph 48 of Ms Sycamore’s EIC.

Landscape Wide Approach

15. In *Weston Lea Limited & The Director-General of Conservation v Hamilton City Council*⁹ the Environment Court said that:

It is clear from the evidence given in this case that a unified catchment approach to the Bat's habitat and protection needs to be adopted. Cases such as this and that relating to the Southern link have highlighted the need for a unified approach to the Bat population in this area. We note in particular that recent calculations accepted by experts at this hearing show an alarming decline in the Bat population with a predicted continuing decline in current circumstances of between 6 percent and 9 percent per annum in the following years. This is alarming given that this species is threatened nationally critical, i.e., close to extinction.

16. Pekapeka are:

- a) Present in Hamilton City;¹⁰
- b) Threatened - Nationally Critical (i.e. one step away from extinction due to the rate of decline);¹¹ and
- c) Highly philopatric (i.e. loyal to specific locations).¹²

17. Hamilton's pekapeka population are mainly located in the southern part of the city and the adjoining peri-urban area. The Waikato River, the southern Hamilton gully systems, and the Peacocke Structure Plan areas are considered particularly important because they contain roosts and connections between roosts and places that bats feed.¹³ Bat surveys have confirmed that there is less bat activity within the parts of Hamilton that are highly urbanised.¹⁴

18. Therefore, a unified catchment landscape wide approach should focus on protecting and enhancing the home range of the pekapeka (being the area that they use relatively regularly).¹⁵

⁹ *Weston Lea Ltd v Hamilton City Council* [2020] NZEnvC 189.

¹⁰ Dr Borkin EIC at [8.2].

¹¹ Dr Borkin EIC at [8.1].

¹² Dr Borkin EIC at [9].

¹³ Dr Borkin EIC at [9.4].

¹⁴ Dr Borkin EIC at [10.1].

¹⁵ Dr Borkin EIC at [9.1].

19. The Director-General submits that PC9 presents a critical stage in the spatial planning that is urgently required to be undertaken by Hamilton City Council, Waipa District Council and Waikato District Council to ensure that the local populations of pekapeka that are currently present in the area persist and do not become extinct.

Setbacks

20. Suitable roosts are essential for pekapeka to remain in the landscape. The ecological evidence identifies that roosts can become unsuitable when exposed to light and noise.¹⁶
21. The Proponent's lighting expert (Mr McKensey) has said in his rebuttal evidence that:¹⁷

While setbacks of 50m or more may be possible in a greenfield area, they are not achievable in an existing built area. In addition, the present level of activity of the NZ long-tailed bat in such locations is so with the present building setbacks and spill light, which are estimated to be similar to the proposed by the examples in my primary evidence.

22. This statement by Mr McKensey misses the point on some key aspects of the bat ecological evidence. Therefore, little weight should be given to this statement. Mr McKensey is not a bat ecologist. And he has not referred to any bat surveys or considered how pekapeka are using the landscape. As noted in earlier paragraphs, Hamilton's bat population is found mainly in the southern part of the city and the adjoining peri-urban area. Bat surveys have confirmed that there is less bat activity within the parts of Hamilton that are highly urbanised.¹⁸
23. The bat ecological evidence suggests that if peri-urban area is developed on the basis of present building setbacks and light spill then there will be a significant reduction in bat activity. The existing built areas that are most frequently used by pekapeka are either close to, accessible to, or adjoining wide open spaces. The wide open spaces are an important factor for the continued presence of pekapeka in Hamilton City.

¹⁶ Dr Borkin EIC at [11].

¹⁷ Mr McKensey Rebuttal Evidence at [9].

¹⁸ Dr Borkin EIC at [10.1].

24. The bat ecologists agree that less light and noise is better and that wider setbacks and/or buffer planting is a suitable tool to achieve the objective of reducing lighting impacts on pekapeka.¹⁹ The ecological evidence supports the proposition that the wider the setback the better the outcomes for pekapeka.²⁰

Lighting and glare

25. Protection is not defined in the RMA but it has been interpreted as meaning “keep safe from harm, injury or damage”.²¹ As already noted, the ecological evidence identifies that roosts can become unsuitable when exposed to light.²² The Director-General submits that the protective action required by section 6(c) of the RMA and objective 20.2.1 in the district plan requires a proactive approach to the threat of lighting and glare effects on significant bat habitat.
26. Dr Muller agrees with Dr Borkin that a lower lux limit of 0.1 lux at the SNA boundary (rather than 0.3 lux) would reduce adverse effects.²³ It is also agreed that this is more in line with the Environment Court decisions in *Weston Lea Ltd* and *Hamilton City Council*.²⁴
27. The two outstanding issues on lighting and glare are:

a) **Colour temperature**

The Proponent’s planning witness (Ms Galt) supports the recommendation proposed by Ms Sycamore to change Rule 25.6.4Xb.ii by replacing 3000k with 2700k.²⁵ This change would address the Director-General’s concerns with respect to colour temperature. The Director-General notes that this approach is consistent with key guidance documents which specifically recommend choosing lighting with a correlated colour temperature of 2700k.²⁶

¹⁹ See Dr Muller’s Rebuttal Evidence at [17] where she says “*Wider setbacks and/or buffer planting may be more suitable tools to achieve the objective of reducing lighting impacts on long-tailed bats.*”

²⁰ Dr Borkin EIC and Dr Muller EIC and Rebuttal Evidence.

²¹ *Royal Forest and Bird Protection Society of New Zealand v New Plymouth District Council* [2015] NZEnvC 219 at para [63].

²² Dr Borkin EIC at [11].

²³ Dr Muller Rebuttal Evidence at [10] to [12].

²⁴ See *Weston Lea Ltd & Director-General of Conservation v Hamilton City Council* [2020] NZEnvC 189 (interim decision); [2021] NZEnvC 111 (decision); and [2021] NZEnvC 149 (final decision with conditions attached).

²⁵ Ms Galt Rebuttal Evidence at [10(a)] and Ms Sycamore EIC at [24].

²⁶ See Dr Borkin’s EIC at [18].

b) **Duration of motion sensor timer**

Mr McKenney disagrees with the proposed change in timer duration but he does not give any reasons for this disagreement.²⁷ Dr Muller has said that she is not aware of any scientific evidence that provides guidelines on the length of motion sensor timings but she does agree that a shorter sensor time would be preferable.²⁸

The Director-General submits that the shorter 1 minute duration is more in line with the proactive approach to the threat of lighting and glare effects that is required by section 6(c) and objective 20.2.1. There is no evidence that a 1 minute duration compared to a 5 minute duration will have any material effect on the occupiers of the properties that will be subject to this rule. There is however ecological evidence that roosts can become unsuitable when exposed to light.²⁹ The bat ecologists also agree that a shorter duration after motion has stopped is preferable. Further, there is guidance to support a 1 minute duration. This guidance which Dr Borkin can speak to recommends that any external lighting should be set on motion-sensors and short (1min) timers.³⁰

Noise

28. There is a growing body of evidence to confirm that noise has an effect on pekapeka. The ecology evidence identifies that roosts can become unsuitable when exposed to noise.³¹ The Director-General submits that the protective action required by section 6(c) of the RMA and objective 20.2.1 in the district plan requires a proactive approach to the threat of noise effects on significant bat habitat.

29. Ms Galt has said that she considers that there is no scope within PC9 to introduce noise standards in relation to SNAs.³² This is incorrect. The Environment Court has confirmed that a submission is not beyond scope simply because the matter was not evaluated in the section 32 report.³³ Noise provisions are a relevant matter. They are not out of left field. Noise

²⁷ Mr McKenney Rebuttal Evidence dated 12 May 2023 at para [8].

²⁸ Dr Muller Rebuttal Evidence dated 12 May 2023 at par

²⁹ Dr Borkin EIC at [11].

³⁰ Dr Borkin EIC dated 28 April 2023 at paragraph 19.

³¹ Dr Borkin EIC at [11].

³² Ms Galt Rebuttal Evidence at [15].

³³ *Bluehaven Management Ltd v Western Bay of Plenty District Council* [2016] NZEnvC 191.

provisions are a logical and natural extension of the provisions. The Director-General submits that noise provisions would be within the scope of PC9.

Biodiversity offsetting and compensation

30. The good practice guidance is a useful tool to assist with the proper implementation of the effects management hierarchy. The concepts of offsetting and compensation are explained in the good practice guidance and the guidance includes some key principles that have been developed to aide proper implementation. It is clear from a close reading of Appendix 6 (principles for aquatic offsetting) and Appendix 7 (principles for aquatic compensation) in the National Policy Statement for Freshwater Management (**NPSFM**) that these appendices have been prepared on the basis of the good practice guidance. The same can be said for Appendix 3 (principles for biodiversity offsetting) and Appendix 4 (principles for biodiversity compensation) in the draft National Policy Statement for Indigenous Biodiversity (**NPSIB**).
31. Following good practice guidance is the most appropriate and the most efficient and effective way to achieve the objective 20.2.1. The Director-General therefore agrees with the recommendation in the s 42A report to add an additional information requirement that references the good practice guidance.
32. The good practice guidance is clearly the base guidance that has been used for the NPSFM and the draft NPSIB. There is no material inconsistency and the protective action required by section 6(c) of the RMA means that it is entirely appropriate to follow the good practice guidance.
33. The Environment Court has recently held that decisions on the expected outcomes of offsetting and compensation will ultimately come down to the body of expert opinions.³⁴ Good practice guidance assists the experts in reaching their expert opinions. Having a requirement to follow good practice guidance generally improves standards and it results in a more robust and consistent approach by the experts.

³⁴ *Royal Forest & Bird v West Coast Regional Council and Buller District Council and Stevenson Mining Limited* [2023] NZEnvC 68 at [168]. In this case the Environment Court said, “we are left with the competing opinions of the ecology experts on the likelihood of expected outcomes and have come to a decision based on that body of expert opinion evidence with no further reference to the use of the BCM.

Notification

34. The RMA was originally enacted to encourage involvement in resource management decisions. Submissions and evidence enable more informed and better decision making. The Director-General submits that it would be appropriate to update Figure 1.1.9a to allow limited notification to the Department of Conservation – Te Papa Atawhai where an activity causes minor or more than minor adverse effects on threatened or at risk species.

Conclusion

35. The Director-General supports the intent of PC9 and the Director-General appreciates the changes that have been made to address the Director-General's concerns.
36. The Director-General will now call her witnesses to speak to the remaining ecological and planning concerns.



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