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**IN THE HEARINGS COMMITTEE
WAIPĀ DISTRICT COUNCIL**

UNDER the Resource Management Act 1991

AND

IN THE MATTER OF of Proposed Plan Change 20 – Northern Precinct Extension
to the Operative Waipā District Plan

LEGAL SUBMISSION

**ON BEHALF OF THE ROYAL FOREST AND BIRD PROTECTION SOCIETY
OF NEW ZEALAND INC**

16 March 2023

Royal Forest and Bird Protection Society of New Zealand Inc.
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May it please the Commissioners

Introduction

1. These legal submissions are made on behalf of the Royal Forest & Bird Protection Society of New Zealand Inc. ("Forest & Bird") in respect of the protection of long-tailed bats (*Chalinolobus tuberculatus*) ("long-tailed bats") with respect to the proposed plan change 20 to the Waipā District Plan ("PC20"). Forest & Bird requested to be heard on its submissions.
2. Forest & Bird submits the s42A recommendations are an improvement on the notified PC20 provisions and the revisions put forward by the Applicant are commendable. However, there is disagreement between the bat ecology experts as to whether the proposed onsite avoidance and mitigation measures are fit for purpose. There is also dispute as to whether the proposed compensation package is adequate. Forest & Bird relies on the evidence provided by the Department of Conservation to submit that the avoidance and mitigation measure are not fit for purpose and the preliminary compensation package is not adequate.

Background

3. The principal question at the heart of these proceedings at least for Forest & Bird is what provisions most appropriately protect the values and attributes of the habitat of bats and ensure that the bats themselves, (to the extent that this is possible), may continue to benefit from the values and attributes of the area and thrive. As the Court in *Weston Lea Ltd v Hamilton City Council*¹ pointed out:

[t]he issue is not one solely affecting this site. This site forms a small but important part of the home range of local Long Tail Bats ... However, the habitat of these Bats and their home range is relatively extensive. It appears to include the stretch of the Waikato River from above Sandford Park and continuing downstream well past the Amberfield Development.

¹ *Weston Lea Ltd v Hamilton City Council* [2020] NZEnvC 189 at [9]

4. The population of bats that use the PC20 site range from the southern extent of Hamilton City to south of Hamilton Airport,² which would incorporate the area discussed in *Weston Lea*. The Court in *Weston Lea* went on to state in relation to management of the local long-tailed bat population:

[11] 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.

5. Forest & Bird submits that PC20 presents a critical stage in the spatial planning in relation to ensuring the south Hamilton long-tailed bat population persists. In *Weston Lea* it involved the transformation of rural pastoral land into a large 800 plus lot subdivision. This subdivision was to be the first of other interconnected large subdivisions. The Court in *Weston Lea* observed that the Hamilton City Council had identified numerous significant natural areas under its plan. However, the Court was surprised: "*... in light of the warranted concern held for the future of long-tailed bat, that no commonly identified and generally agreed Bat Protection Area is currently contained in schedule 9C...*" of the plan.³ The Court went onto say that:

[41] This is an unfortunate oversight. It is a matter requiring urgent redress. In fairness, we understand this to be the case with the necessary policy development work being undertaken by the Council.

[42] At the same time, the oversight cannot be ignored. There is a diminishing population of an endangered species of native New Zealand fauna, deemed to be so rare as to be classified "Nationally Critical" pursuant to the New Zealand Threat Classification System. Given the acknowledged adverse effects from land use development, appropriate steps need to be taken based on Part 2 of the Act s 6(c) and relevant plans.

² Georgia Cummings, Statement of Evidence, 28 February 2023, at [33]

³ *Weston Lea Ltd v Hamilton City Council* [2020] NZEnvC 189 at [40]

6. In this case, Council is now aware of the presence of long-tail bats at the plan change/structure development plan stage. Council has the opportunity to avoid the oversight Hamilton City Council made and provide for long-tail bat habitat protection areas that ensure the south Hamilton long-tailed bat population will not be lost because of the PC20 development.
7. The Department of Conservation evidence clearly articulates that PC20 is surrounded by future development⁴ and the greatest threat to long tail bat persistence is loss of habitat.⁵ This reiterates the importance of identifying viable and functional long tailed bat habitat protection areas.

Statutory & Policy Context

8. The statutory and policy context is well traversed in the evidence and will not be repeated here. However, it is worth noting a few points.
9. The Starting point is the Purpose and Principles in Part 2 of the RMA. The principles include s6(c) which requires that everyone exercising functions and powers under the RMA must recognise and provide for, as a matter of national importance, the protection of areas of significant habitat of indigenous fauna. The Council also has the function, for the purpose of giving effect to the RMA, of maintaining of indigenous biodiversity.

Settlement Act

10. It is important in setting the direction for PC20 to give effect to the Vision and Strategy for the Waikato River (Te Ture Whaimana o Te Awa o Waikato) found in the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (“Settlement Act”), schedule 2. The Vision and Strategy is deemed to be a part of the WRPS.⁶ Any person exercising a function or power under the RMA must have regard to the Settlement Act.⁷ The Court in *Weston Lea* whilst considering the Settlement Act wrote:

⁴ Jesse Gooding, Statement of Evidence, 7 February 2023, section 6

⁵ Tertia Thurley, Statement of Evidence, 7 March 2023, at [4.3]

⁶ Settlement Act, s 11

⁷ Settlement Act, s 17

[26] ... Nevertheless, issues in relation to the catchment including, in our view, the riparian margins as well as the waterways which lead to the river require a particular sensitivity and consideration of the vision and strategy for the River. We do not say this to criticise any party given all parties including Tainui accept that the Application seeks to achieve this. The issues relating the BPA [Bat Protection Areas] also collaterally achieve the objectives of the vision and strategy and in fact the Settlement Act as a whole.

[27] In our view, there can be no doubt that providing for the habitat of the New Zealand Long Tail Bat, particularly by reinforcing water quality, riparian margins and gullies leading into the river improves the mauri of the Waikato River and therefore the mana of the Iwi and the purposes of the Settlement Act.

Waikato Regional Policy Statement

11. Turning now to the Waikato Regional Policy Statement ("WRPS") its purpose is to achieve the purpose of the RMA. The WRPS includes objective ECO-01 Ecological integrity and indigenous biodiversity, and policy ECO-P1 establishes a list of responses to achieve objective ECO-01. ECO-P2 requires the protection of significant habitats of indigenous fauna by ensuring characteristics that contribute to its significance are not adversely affected. The WRPS includes a raft of methods by which these policies are to be achieved. Finally, one of the WRPS's anticipated environment results is ECO-AER8 which provides that: "[t]here is no human-induced loss of indigenous species or their natural range within the region."

12. The Court in *Weston Lea* observed that:

[33] The Court concludes that the provisions of Chapter 11 of the RPS [now the ECO Chapter] should dictate the actions taken in respect of the on-going validity and survival of the known indigenous bio-diversity in the locality. The policies, implementation methods, and rules of this chapter are as on point with respect to the valuable qualities of the site short of the document simply being an instruction manual to the preservation and enhancement of the long-tailed bat. The relevance of these matter is undeniable.

[34] At the same time, the RPS reveals an unfortunate lacuna in respect of the breadth of its provisions as these relate to avoiding adverse environmental effects of activities on significant natural areas. In particular, the RPS fails to identify the significant habitat of long-tailed bats in the Waikato Region or Hamilton City. While the principles underpinning

significant habitats are embraced, the relevant elements are discussed very generally only and without any spatial identification or focus.

District Plan

13. The Waipā District Plan at section 1.1.19 says it gives effect to the WRPS and includes numerous provisions such as section 24 – Indigenous Biodiversity.

Plan Change development and Give Effect

14. There is no dispute that PC20 must give effect to higher order documents, including the WRPS.⁸ However there is dispute as to whether PC20 does give effect to the WRPS.
15. Forest & Bird notes that the s42A report did not consider the WRPS ECO Chapter provisions or how PC20 would give effect to them.⁹ Mr Inger says that PC20 will give effect to the WRPS.¹⁰ Mr Gooding, however, considers that PC20 does not resolve the tension in the WRPS between provisions that support greenfield development and those that require the avoidance of adverse effects on significant habitat.¹¹ Ms Andrews says that she is unable to confidently assess whether PC20 gives effect to the WRPS because the ecologists have not reached consensus.¹²
16. The Supreme Court in *Environmental Defence Society Inc v New Zealand King Salmon*,¹³ stated that give effect to simply means implement. It is a strong directive creating a firm obligation. The Supreme Court made it clear that decision makers could not decline to implement aspects of higher order documents.¹⁴
17. This is not to say that PC20 must give effect to the WRPS word for word. There is a degree of flexibility and choice, but this scope is not infinite and the requirement to “give effect to” the WRPS is intended to constrain decision-makers.¹⁵ Forest & Bird

⁸ RMA, s75(3)(c); Section 42A Report at [7.1.8] and [7.6.1]

⁹ Jesse Gooding, Statement of Evidence, 7 February 2023, at [8.22]

¹⁰ Ben Inger, Statement of Evidence, 28 February 2023, at [15]

¹¹ Jesse Gooding, Statement of Evidence, 1 March 2023, at [8.47]

¹² Katrina Andrews, Statement of Evidence, 7 March 2023 at [99]

¹³ *Environmental Defence Society Inc v New Zealand King Salmon* (2014) 17 ELRNZ 442 at [77]

¹⁴ *Environmental Defence Society Inc v New Zealand King Salmon* (2014) 17 ELRNZ 442 at [90]

¹⁵ *Environmental Defence Society Inc v New Zealand King Salmon* (2014) 17 ELRNZ 442 at [91]

submits that the “give effect to” constraint means that it is not open to the Panel to decline to implement the WRPS, ECO chapter and APP5 provisions.

Section 32 analysis

18. Forest & Bird submits that a great amount of planning work has gone into ss 32 and 32AA evaluations that do not adequately consider the WRPS. The s32AA analysis located in Mr Grala’s, Annexure 3 and the s32 analysis provided in PC20, as notified, Appendix 20 do not go into any detail about the WRPS or how any of the new provisions would give effect to the WRPS.
19. Irrespective, Mr Grala states: *“PC20 will achieve the purpose of the Act and will give effect to the relevant National Policy Statements and the WRPS.”*¹⁶ However, how PC20 is the most efficient way to give effect to the WRPS is not clear from the s32 and s32AA evaluations undertaken by the Applicant.
20. The s42A report records that a s32AA analysis will be conducted to confirm the decision relating to PC20.¹⁷ Section 32AA requires a further evaluation to be undertaken for any changes proposed for PC20 since the original s32 report was prepared.
21. It is important to remember that the WRPS limits the objective and policy options available to PC20. The requirement for a s32 report is a procedural obligation and does not remove the necessity for PC20 to “give effect to” the WRPS, the requirement to ‘give effect to’ limits the options available to decision makers.¹⁸
22. The effect of this is that options that are required to be evaluated under s 32 excludes options that do not give effect to the WRPS. A s32 analysis cannot be used to justify not giving effect to a higher order document. As it stands there is still dispute between the experts as to whether PC20 gives effect to the WRPS.¹⁹

¹⁶ Nicholas Grala, Statement of Evidence, 28 February 2023, at [12](c)

¹⁷ Section 42A Report, at [7.1.2]

¹⁸ *Environmental Defence Society Inc v Otago Regional Council* (2019) 21 ELRNZ 252 at [111]; confirmed by the Court of Appeal in *Port Otago v Environmental Defence Society Inc* [2021 NZCA 638, currently under appeal to the Supreme Court

¹⁹ Katrina Andrews, Statement of Evidence, 7 March 2023, at [99]; and Jesse Gooding, Statement of Evidence, 7 February 2023, at [10.6(b)], [10.11]

Significance Assessment

23. A critical determination for PC20 is whether the site contains significant habitat for long-tailed bats. This seems to be the basis for the structure plan set out in Mr Grala's Annexure 2,²⁰ which has guided the development of the policy, rules and standards for addressing effects on long-tail bats at PC20.
24. The ecological assessment commissioned by Tonkin and Taylor records that the PC20 site has very high ecological values for bats.²¹ The Department of Conservation's expert Ms Thurley says that the PC20 site meets the criteria for a significant habitat for indigenous fauna under WRPS, APP5, criteria 3.²² The Applicant's expert Ms Cummings takes another view explaining that the PC20 site has many high value sites around it but only moderate to low values within. It is notable that these surrounding sites are to the west, north and east of the PC20 site.²³ Ms Cummings relies on the 'professional judgement' formulated in Mueller et al., (2021) to establish corresponding values to particular types of bat habitat. Under that formulation, according to Ms Cummings, if there are no confirmed high value habitat types then the area cannot be significant in accordance with WRPS, APP5. Ms Cummings concluded that the highest value at the PC20 site was moderate for established woody vegetation and associated "open edge".²⁴ Ms Cummings utilised this approach because it was used in the recent assessments for the Hamilton City Council's Plan Change 5 and she considered it was important to maintain a consistent approach across the bat population's range.²⁵
25. The Waipa District Plan, policy 24.3.3.2 guides ecologists to utilise the WRPS for their significance assessment. WRPS, APP5 sets out the criteria for determining significance. It states that: "*To be identified as significant an area needs to meet one or more of the criteria identified...*":

²⁰ Nicolas Grala, Statement of Evidence, 28 February 2023, Annexure 2, page 5

²¹ Section 42A Report, at [9.7.4]

²² Tertia Thurley, Statement of Evidence, 7 March 2023, at [4.6]

²³ Georgia Cummings, Statement of Evidence, 28 February 2023, annexure A

²⁴ Georgia Cummings, Statement of Evidence, 28 February 2023, at [67]

²⁵ Georgia Cummings, Statement of Evidence, 28 February 2023, at [62]

- a. *Criteria 3: It is vegetation or habitat that is currently habitat for indigenous species or associations of indigenous species that are: classed as threatened or at risk; and*

26. Forest & Bird submits that the plain meaning of criteria 3 is clear and does not require further interpretation. Forest & Bird submit that when ECO-P2, ECO-M13 and ECO-M14 are analysed that there is a clear direction to identify significant habitat and that they will be protected by ensuring the characteristics that contribute to its significance are not adversely affected to the extent that significance of the habitat is reduced. Mr Gooding has pointed out that nowhere in APP5 or ECO-M14 are ecologists instructed to use an alternative criteria²⁶ as suggested by Ms Cummings. Mr Gooding considers the WRPS significance criteria should be read and implemented as written.²⁷ Forest & Bird submits the consistent approach should be the plain meaning of WRPS, APP5, not an alternative formulated by ecologists that has not gone through an RMA, schedule 1 process.

27. Forest & Bird submit that Ms Thurley's assessment is to be preferred to that of Ms Cummings and the Panel should treat PC20 as significant habitat for long-tail bats and protect the characteristics that contribute to its significance to the extent that the significance of the habitat is not reduced.

Use of the Biodiversity Compensation Model ("BCM")

28. The Applicant has called evidence in the form of a BCM for long-tail bats. The BCM purports to calculate losses and gains for long-tail bats and concludes that the proposed compensation will result in a surplus of biodiversity gains over losses. Forest & Bird submit that the Panel should give this evidence little weight because as Ms Thurley referenced, it lacks transparency, has high sensitivity to input error, has meaningless structure of the output,²⁸ and does not comply with the Environment Court Practice Note (2023), section 9.3(a)(x).

²⁶ Jesse Gooding, Statement of Evidence, 7 February 2023, at [7.5]

²⁷ Jesse Gooding, Statement of Evidence, 7 February 2023, at [7.6]

²⁸ Tertia Thurley, Statement of Evidence, 7 March 2023, at [77] she references three briefs of evidence one of those is from Justyna Giejsztowt on behalf of Forest & Bird for ENV-2017-CHC-090 whose expertise encompasses the assessment of conceptual and statistical robustness of models representing ecological values

29. The Environment Court Practice Note (2023), section 9.3, states:

(a) In giving any evidence, an expert witness must:

...

x. if relying on a mathematical model, include appropriate or generally accepted sensitivity and uncertainty analyses for that model ...

30. Mr Markham records in his evidence that he has read and agreed to comply with the Environment Court Practice Note (2023).²⁹ However, upon review of Mr Markham's evidence there is no evident sensitivity or uncertainty analysis.

31. Mr Markham does not address Ms Thurley's referenced criticisms stated above other than to reference the BCM User Guide. Mr Markham states that the BCM is a reliable model and has been used, accepted and supported in other RMA forums.³⁰ In support of this proposition Mr Markham refers to the Auckland Council Decision on the Auckland Regional Landfill. Forest & Bird notes that this matter is still before the Environment Court. Mr Markham also refers to the Te Ahu a Tararua: Manawatu Tararua Highway Project. In that case the Court drew attention to the lack of transparency in the BCM model (i.e., the steps between "impact to be compensated (ha)" and "required compensation (ha)" were not evidenced from the tables nor were they explained.³¹ The Court said for transparency the link should be clear otherwise the final figures cannot be verified.³² Ultimately the Court did not have to make any findings about the adequacy of the BCM because it accepted the agreed findings between the parties' experts on the proposed offset and compensation quanta.³³ Forest & Bird submit that the Court in the *Manawatu Highway* case did not use, accept or support the BCM, it simply accepted the agreed findings of the parties on an appropriate offset and compensation package. Mr Markham also refers to the Hamilton City Council decision on PC5, which Forest & Bird understands is still subject to the appeal period.

²⁹ Joshua Markham, Statement of Evidence, 28 February 2023, at [9]; Markham, Statement of Rebuttal, 10 March 2023, at [2]

³⁰ Joshua Markham, Statement of Rebuttal, 10 March 2023, at [6]

³¹ *Waka Kotahi NZ Transport Agency v Manawatu-Whanganui Regional Council* [2020] NZEnvC 192 at [162]

³² *Waka Kotahi NZ Transport Agency v Manawatu-Whanganui Regional Council* [2020] NZEnvC 192 at [163]

³³ *Waka Kotahi NZ Transport Agency v Manawatu-Whanganui Regional Council* [2020] NZEnvC 192 at [175]

32. The Environment Court faced a similar situation in the Escarpment Mine.²⁹ In that case the applicant, Bathurst Resources, had put forward a biodiversity offset model. This provided little assistance to the Court.

[216] The form in which evidence on the biodiversity offset offered was presented to us did not assist the Court as much as it might have in evaluating the mitigation/compensation offered by BCL. This was for two reasons: the heavy emphasis in the evidence on a computer model put forward by BCL which claimed to show a surplus of biodiversity gains over biodiversity losses; and the emphasis of BCL witnesses on adherence to the Business and Biodiversity Offset Programme by the company in devising the compensation/offset package it offered. It is not entirely surprising that BCL, having framed its case in this way, the opposition parties responded to it in similar terms.

33. In the Escarpment case the applicant abandoned the model, leaving the Court to “stick to its knitting”:

[219] The use of the model having been abandoned (rightly in our view), the task for the Court is to consider what would be the various adverse effects likely to result from the mine, to what extent that are proposed to be mitigated, and where no mitigation is possible, how relevant and how significant would be the compensation offered; then to evaluate all these matters in the light of the statutory instruments and the RMA. This has always been the role of consent authorities under the RMA. We think of this as “sticking to the knitting”.

34. One matter not referenced by Mr Markham that put forward the BCM was the application for the proposed Te Kuha coal mine with the West Coast Regional and Buller District Councils. In the Environment Court hearing on the proposed Te Kuha coal mine³⁴, the Court had concerns about the use of the BCM (the same model put forward by Mr Markham) and explained to parties in the hearing that it was inclined to “stick to its knitting”. The Court explained on page 170, line 3:

So we have a joint statement arising from the expert conferencing and I appreciate it was a very condensed timeframe and it might have been a bit ambitious but I have been really sort of guided by some of your expert witnesses who had wanted the opportunity for further discussion just because of the fact that there was a need to better understand where there were, you know the reasons for disagreeing on certain inputs into the model, and I think that the position that we have gotten to is that the experts have been unable to reach agreement on inputs and as matters stand there was too much disagreement over firstly, the utility of the model as it has been built presently, i.e., not being based on statistically based inputs as opposed to values, and as to the inputs, the disagreement around

³⁴ *Royal Forest & Bird Protection Society of New Zealand Inc v Buller District Council & West Coast Regional Council*, ENV-2017-CHC-090, Notes of Evidence taken before the Environment Court, at page 170, per Judge Steven, line 3 – 25; the Environment Court decision on Te Kuha has not been issued

transparency and all of those matters that we probably cannot give it too much weight and we're going to be inclined to stick to our knitting and just base our decision on what the experts predict about the success of the offsets and things like that which is where the judge has got to in the Escarpment Mine Case.

So for that reason we are probably not going to ask questions about the model but we are not going to tell you how to run your case and we are not going to direct that you not ask those questions if you think that there is some utility in doing it, but we just thought we will see if we can get to a position where it is going to be of some use to us. Sense checking objective opinions but if it is not then we will just probably give it little weight, and so that is where we are sitting at the moment.

35. The Court went on later in questioning to state on page 276, line 8:

Can I just Mr Anderson, just bear in mind that we said yesterday we're not going to be taking into account the model, and we're not going to be making decisions on issues in dispute as between the witnesses because it's not our role to arbitrate on how the model should be constructed, whether it should be statistically-based or values-driven, what the input should be, what level of confidence should be incorporated into it and all those kinds of adjustments. It's not our field. We're going to be basing our decision on the opinions of the experts, so just bear that in mind because I just don't want to end up having a large part of the hearing traversing those issues that we're effectively going to ignore.

36. And then at page 277, line 1:

And that's why I referred you to the Escarpment mine decision, and that the passage there, and I know that that was an earlier version of it, but it seems as though there's still a bit of work to go before this model can be useful, and so I just want you to bear in that mind ...

37. In conclusion, Forest & Bird submit Mr Markham's evidence does not comply with the Environment Court Practice Note 2023. It also does little to address any of the referenced criticisms raised by Ms Thurley other than to refer to a Resource Management Journal article and the BCM User guide.³⁵ Forest & Bird submit the Panel should follow the Environment Court's lead and "stick to its knitting" and ignore the BCM.

Provisions

10.3.3.2A

38. New proposed policy 10.3.2.2A requires the maintenance and enhancement of significant long tailed bat habitat. This policy was largely agreed to by the experts in

³⁵ Joshua Markham, Statement of Rebuttal, 10 March 2023, at [8]

the JWS Ecology except for one small addition. Mr Gooding, Ms Thurley and Mr Kessels all consider it appropriate to add:

To maintain or enhance significant long-tailed bat habitat values by:

- (a) Providing functional Bat Habitat Areas for long-tailed bats with the Northern Precinct; ...

39. Forest & Bird submits that without this addition the policy does not give effect to the WRPS.³⁶ However, as stated by Mr Gooding if Ms Thurley's concerns regarding the lack of functionality are addressed then Forest & Bird's concerns would fall away as well.

40. Mr Inger disagrees with this addition because he says it is unclear what "functional" means. The online Oxford Dictionary has three definitions for functional; they are all useful and are: "1. *Practical and useful; with little or no decoration.* 2. *Having a special purpose; making it possible for somebody to do something or for something to happen;* 3. *(especially of a machine, an organization or a system) working able to work*".³⁷ The term functional is expressly used in WRPS, ECO-O1. It states that (bold my emphasis):

The full range of ecosystem types, their extent and the indigenous biodiversity that those ecosystems can support exist in a healthy and **functional** state.

41. It is also expressly used in ECO-P1 and ECO-M2. Forest & Bird submit that the meaning of functional if not already clear to plan users is ascertainable by reference to the plain meaning of the word and by reference to the WRPS. The word 'functional' is also used throughout Ms Cummings' evidence when she describes 'functional habitat',³⁸ throughout PC20 itself³⁹ and in Mr Inger's rebuttal evidence where he refers to PC20, Appendix 10, S10.3.13.⁴⁰

³⁶ Jesse Gooding, Statement of Evidence, 7 February 2023, at [10.6(a)]

³⁷ <https://www.oxfordlearnersdictionaries.com> accessed 13/03/2023

³⁸ Georgia Cummings, Statement of Evidence, 28 February 2023, at [69], [70], [81(a)(ii)], [94], [120]

³⁹ Section 42A Report, Appendix 1d, at S10.1.2, S10.1.11 and S10.3.13

⁴⁰ Ben Inger, Statement of Rebuttal, 10 March 2023, at [44(c)], PC20, Appendix 10, S10.3.13

42. Mr Inger also says that the Structure Plan already has a BHA and provisions on how it is to be enhanced. Forest & Bird submits this is not good planning. The lower order provisions should not guide the development of higher order provisions. The policy should drive the development of the Structure Plan.
43. Mr Inger finally states that functionality (assuming it means frequency of use by long-tail bats) could be influenced by other outside factors from PC20. Forest & Bird submits this is not what functional means when Ms Cummings' evidence, the WRPS and the word's plain meaning are all considered.
44. Forest & Bird also notes that 10.3.2.2A(d)(iii) seems to indicate that offsetting may be applied equally to areas both within and outside of the BHA. If the intention is that it only applies to areas outside of the BHA then that expression should be made clear. If it is intended to apply to both areas then the limits to offsetting need to be reflected in the policy as set out in WRPS, ECO-M13(6). Mr Inger's evidence seems to indicate the former.⁴¹

Rule 10.4.2.14A

45. Forest & Bird notes that rule 10.4.2.14A is not entirely consistent with the findings of the Environment Court in *Weston Lea*. In *Weston Lea* the Court found that the appropriate luminosity was 0.1 lux standard to be achieved within 3 meters of the boundary of the BPA.⁴² The explanation for adopting only a 0.3 lux at the boundary of the BHA only refers to consistency with the Hamilton City Council Plan Change 5.⁴³ Mr McKenney states that light spill will dissipate over a distance of approximately 5 – 10 m.⁴⁴ It is not clear what Mr McKenney means by dissipate because he does not describe what lux level will be achieved at 5 – 10 meters.

⁴¹ Ben Inger, Statement of Evidence, 28 February 2023, at [81]

⁴² *Weston Lea Ltd v Hamilton City Council* [2020] NZEnvC 189 at [64]

⁴³ Georgia Cummings, Statement of Evidence, 28 February 2023, at [135]; and John McKenney, Statement of Evidence, 28 February 2023, at [26]

⁴⁴ John McKenney, Statement of Evidence, 28 February 2023, at [27]

Structure Plan / Proposed Bat Habitat Area

46. Forest & Bird supports the relief put forward in the evidence for the Department of Conservation. That is that the Structure Plan and the BHA require a significant redesign to address the concerns raised by Mr Thurley in respect of the BHA.⁴⁵

Application of the Mitigation Hierarchy

47. Long-tail bats are still found across the entire PC20 site despite the felling of two poplar shelterbelts.⁴⁶ Ms Thurley states that the industrialisation of the PC20 will result in the complete or almost complete removal of long-tail bats.⁴⁷ Ms Cummings is of the opinion that if moderate to low value long-tail bat habitat is removed that this will result in a very high level of effect on long-tail bats.⁴⁸
48. Ms Cummings goes on to explain that she considers adverse effects have been appropriately avoided and minimised through the BHA / Structure Plan standards. Ms Thurley is of the opinion that there is a very high uncertainty that bats will use the BHA.⁴⁹ Ms Thurley provides a series of reasons why there is high uncertainty. Forest & Bird submits the evidence of Ms Thurley should be preferred.
49. Ms Cummings also explains that residual effects will be addressed through compensation. Mr Markham using the BCM reached a preliminary conclusion that to compensate for the residual effects on long tail bats and achieve a 10% predicted net gain outcome in biodiversity over a decade for PC20 would likely require:
- a. 11 ha of vegetation restoration or enhancement outside the PC20 site; and
 - b. 80 ha of pest animal control over a 10 year period.⁵⁰
50. Ms Cummings relied on Mr Markham's approach for compensation to dispute Ms Thurley's approach which relied on studies on species of bats in the UK.⁵¹ For the

⁴⁵ Jesse Gooding, Statement of Evidence, 7 February 2023, at [10.11] and Tertia Thurley, Statement of Evidence, 7 March 2023, at [10(a) – (d)]

⁴⁶ Tertia Thurley, Statement of Evidence, 7 March 2023, at [9.4]

⁴⁷ Tertia Thurley, Statement of Evidence, 7 March 2023, at [10.1]

⁴⁸ Georgia Cummings, Statement of Evidence, 28 February 2023, at [16]

⁴⁹ Tertia Thurley, Statement of Evidence, 7 March 2023, at [10.2]

⁵⁰ Joshua Markham, Statement of Evidence, 28 February 2023, at [61]

⁵¹ Georgie Cummings, Statement of Rebuttal, 10 March 2023, at [29]

reasons set out above the Panel should place little weight on Mr Markham's assessment of an adequate compensation package. In the absence of better evidence Ms Thurley's example of an appropriate compensation measure is to be preferred over Mr Markham and Ms Cummings'.

Conclusion

51. Forest & Bird submit that the South Hamilton long-tail bat population faces increased fragmentation across its home range. The removal of long-tail bat habitat will result in a very high level effect on long-tail bats. A redesign of the structure plan and BHA is warranted to address the concerns raised in the evidence from the Department of Conservation. Also, whilst commendable the proposed compensation package does not adequately address the residual adverse effects on long tail bats.

Dated 16 March 2023



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