

**BEFORE A HEARING PANEL  
OF WAIPĀ DISTRICT COUNCIL**

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

**AND**

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

---

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

Dated 16 March 2023

---

---

**Counsel for the Director-General of Conservation:**

Michelle Hooper  
Department of Conservation/Te Papa Atawhai  
Private Bag 3072  
HAMILTON  
Telephone: 027 324 6314  
Email: [mhooper@doc.govt.nz](mailto:mhooper@doc.govt.nz)

## 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 Private Plan Change 20 (**PC20**). The Director-General is the administrative head of the Department of Conservation (**DOC**).
2. I note that Mr Welsh has made a number of comments about what DOC will say at this hearing on a number of topics, including that DOC will argue that compensation is not available<sup>1</sup> Mr Welsh has also referred to aeronautical safety. It is unfortunate that Mr Welsh has incorrectly characterised the Director-General's position on PC20. To be clear, the Director-General recognises the need for aeronautical safety. The Director-General is not proposing that bat habitat be put ahead of human safety. It is also incorrect to say that the Director-General will argue that compensation is not a step in the effects management hierarchy.
3. In these legal submissions I will address:
  - a) DOC's position on PC20;
  - b) The legal framework;
  - c) Key issues;
  - d) Relief; and
  - e) Evidence.

## DOC'S POSITION ON PC20

4. The Director-General's position on PC20 is based on the Environment Court decision in *Weston Lea Limited & The Director-General of Conservation v Hamilton City Council*.<sup>2</sup> In this case, the Environment Court noted that there is a need for a unified catchment approach to habitat protection. The Court said:<sup>3</sup>

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

---

<sup>1</sup> For example, Opening Legal Submissions on behalf of Titanium Park Limited and Rukuhia Properties Limited dated 15 March 2023, at paragraph 8.45.

<sup>2</sup> *Weston Led Ltd v Hamilton City Council* [2020] NZEnvC 189.

<sup>3</sup> *Weston Led Ltd v Hamilton City Council* [2020] NZEnvC 189 at paragraph 11.

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. The Director-General seeks an integrated unified catchment approach to habitat protection. Habitat loss is the key issue facing the remaining population of long-tailed bats (pekapeka) that are present at, and in the area surrounding, the PC20 site.<sup>4</sup>
6. The Director-General's ecological evidence<sup>5</sup> confirms that the site meets the significance criteria in the Waikato Regional Policy Statement (**WRPS**). This is also confirmed by the Applicants ecological assessment submitted as part of the section 32 evaluation. The ecological assessment prepared by Mr Markham of Tonkin & Taylor for the section 32 report states on page 18 that:<sup>6</sup>

Based on information provided within this report, the provision of bat habitat resulting in bat commuting pathways should be provided across the TPL property to safeguard the ability for bats to continue to traverse through the landscape. Based on the threat classification of bats, it is considered that the vegetation across the TPL property meets criteria 3 of the WRPS for determining significance in biodiversity.

7. It is therefore the professional opinion of two expert ecologists that the PC20 site meets criteria 3 in the WRPS. The Director-General notes that the section 42A reporting officer, Mr Williamson, has obtained and relied upon technical reports from Mr Morgan (transport), Ms Scrimgeour (engineer), and Ms Brown (landscape architect). However, the s 42A report does not have its own technical report from a bat ecologist. This is a significant oversight given the threat status and vulnerability of pekapeka.
8. The pekapeka is a taonga species and it has a threat classification of Threatened – Nationally Critical. The pekapeka is New Zealand's only native land mammal and the remaining population of pekapeka is predicted to decline by greater than 70% over the next three generations of bats (36 years).<sup>7</sup>
9. On day 1 of the hearing, Mr Morgan indicated to the hearing panel that the ownership of Titanium Park Limited is important context. Titanium Park

---

<sup>4</sup> Appendix 8 (Ecological Assessment) to Titanium Park Limited and Rukuhia Properties Limited Request for Private Plan Change at paragraph 3.2.

<sup>5</sup> Statement of Evidence of Ms Tertia Thurley dated 7 March 2023.

<sup>6</sup> Appendix 8 (Ecological Assessment) to Titanium Park Limited and Rukuhia Properties Limited Request for Private Plan Change page 18 at 6 (policy interpretation relevant to ecological matters).

<sup>7</sup> Statement of Evidence of Ms Tertia Thurley dated 7 March 2023 at paragraph 4.1.

Limited is a subsidiary of Waikato Regional Airport Limited and Waikato Regional Airport Limited is a council-controlled organisation that is owned by five territorial authorities, being Waipa District Council, Hamilton City Council, Waikato District Council, Matamata Piako District Council and Otorohanga District Council. Mr Morgan also referred to the recent upgrade of the terminal building at Hamilton Airport which uses the pekapeka in the design of the terminal building and for the associated artwork and promotional/marketing material.<sup>8</sup>

10. The Director-General agrees that this is important context and notes that the Applicants cost – benefit assessment set out in Table 1 at paragraph 3.2 of the section 32 analysis has failed to adequately consider the economic benefits / costs associated with the threatened-nationally critical pekapeka.
11. A key area of difference between the ecological experts is the question as to whether the proposed onsite avoidance and mitigation will be fit for purpose. In the light of the unique context that applies to PC20, the Director-General seeks a careful integrated catchment approach to the design of the overall effects management approach to achieve a no net loss outcome.

## LEGAL FRAMEWORK

### The role of the Director-General and DOC

12. DOC's functions are set out in section 6 of the Conservation Act 1987, and relevantly include:<sup>9</sup>

The functions of the Department are to administer this Act and the enactments specified in Schedule 1, and, subject to this Act and those enactments and to the directions (if any) of the Minister,—

- (a) to manage for conservation purposes, all land, and all other natural and historic resources, for the time being held under this Act, and all other land and natural and historic resources whose owner agrees with the Minister that they should be managed by the Department.
- ...
- (b) To advocate the conservation of natural and historic resources generally:

---

<sup>8</sup>Hearing Recording from Day 1 and <https://www.nzherald.co.nz/waikato-news/news/hamilton-airport-refurbishment-draws-on-rich-cultural-history-of-greater-region/XMGHRFFPUUSNXU2R57VSX7X5A/>

<sup>9</sup>“Conservation” is defined in s2 of the Conservation Act as: “*The preservation and protection of natural and historic resources for the purpose of maintaining the intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations.*”

13. DOC also administers the Wildlife Act 1953. The Ecological Assessment attached as Appendix 8 to the Applicants request for PC20 identifies that two necklace poplar shelterbelts were removed from the site not long after surveys identified that the site was possibly being used for temporary roosting.<sup>10</sup> The Director-General understands that they were removed for Health and Safety reasons and that no pekapeka were harmed during the removal process. The Wildlife Act 1953 is administered separately from the RMA. It is however worth noting that in *Royal Forest and Bird Protection Society v Minister of Conservation*<sup>11</sup> the High Court established that in certain circumstances the activity of removing habitat could come within the definition of “possession”, or of “hunt or kill” and it may constitute an offence under section 63 of the Wildlife Act 1953.

## RMA

14. Council’s functions are set out in section 31 of the RMA. Here, subsections 31(1)(a) and (b)(iii) are particularly relevant:

**31 Functions of territorial authorities under this Act**

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

(a) the establishment, implementation, and review of **objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:**

(aa) the establishment, implementation, and review of objectives, policies, and methods to ensure that there is sufficient development capacity in respect of housing and business land to meet the expected demands of the 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:**

...

15. The principles of the RMA are set out in sections 6 to 8. These sections are:
- a) Section 6 - matters of national importance which must be “recognised and provided for” (this includes: section 6(c) “*protection of significant indigenous vegetation and significant habitat of indigenous fauna*”);

---

<sup>10</sup> Appendix 8 (Ecological Assessment) to Titanium Park Limited and Rukuhia Properties Limited Request for Private Plan Change at paragraph 3.2.

<sup>11</sup> *Royal Forest and Bird Protection Society v Minister of Conservation* [2006] NZAR 265 at paragraphs 21 - 22.

- b) Section 7 - other matters which must be given “particular regard to” (this includes section 7(d) “*intrinsic values of ecosystems*”); and
- c) Section 8 - the Treaty of Waitangi clause.

16. Here, section 6(c) of the RMA is particularly relevant. In carrying out its functions in its district, Council is required by section 6(c) to recognise and provide for significant indigenous vegetation and significant habitats of indigenous fauna.
17. The Waipa District Plan does not map the significant habitat of pekapeka.<sup>12</sup> This is a gap in the coverage of the plan. The ecological evidence is clear. Pekapeka “cannot just move to a different, more suitable location. They stay in the same social groups and return to the same roosts and foraging grounds year after year. As habitat for them declines, they will have to find resources to survive and breed from a smaller and smaller area.”<sup>13</sup> This increases the risk to the threatened nationally critical Pekapeka and it increases the significance of the PC20 site as habitat for the small local population of pekapeka that currently reside in South Hamilton.
18. In *Weston Lea Limited & The Director-General of Conservation v Hamilton City Council*, the Environment Court held that there is a need to avoid adverse effects on “significant habitats of indigenous fauna” whether we take an approach to protection “under s 6(c), under the Regional Policy Statements and Plans or under Chapter 20 of the District Plan”.<sup>14</sup> Legal Counsel for the applicant in that case noted that all roads lead to Rome.

*Te Ture Whaimana o Te Awa o Waikato - Vision and Strategy for the Waikato River*

19. Mr Welsh has said that the evidence demonstrates that PC20 gives effect to the Vision and Strategy.<sup>15</sup> However, the Applicants evidence fails to recognise that Objective (i) of the Vision and Strategy extends to fauna. Objective (i) states:<sup>16</sup>

---

<sup>12</sup> It is this gap that triggers the need to refer to Part 2 of the Resource Management 1991. See *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38.

<sup>13</sup> Statement of Evidence of Ms Tertia Thurley dated 7 March 2023 at paragraph 4.4

<sup>14</sup> *Weston Lea Limited & The Director-General of Conservation v Hamilton City Council* [2020] NZEnvC 189 at [22].

<sup>15</sup> Opening Legal Submissions on behalf of Titanium Park Limited and Rukuhia Properties Limited dated 15 March 2023, at paragraph 7.4.

<sup>16</sup> Vision and Strategy for the Waikato River, objective (i).

(i) The protection and enhancement of significant sites, fisheries, flora and fauna. [emphasis added]

20. The Director-General submits that the higher policy level direction of “protect and enhance” applies to pekapeka. The Vision and Strategy has the status of a national policy statement and it prevails over any inconsistent national policy statement.<sup>17</sup>
21. The Applicants accept that:
- a) PC20 needs to give effect to the Vision and Strategy for the Waikato River; and
  - b) The hearing panel must have particular regard to the Vision and Strategy.<sup>18</sup>
22. Further, the qualifying matters in the National Policy Statement on Urban Development 2020 (NPS-UD), provide a clear mechanism for decision makers to:<sup>19</sup>
- a) recognise and provide for the significant habitat of pekapeka as required by section 6(c) of the RMA; and
  - b) give effect to any other national policy statement.

Waikato Regional Policy Statement (WRPS)

23. ECO-P2 requires the protection of significant indigenous vegetation and significant habitats of indigenous fauna. ECO-M14 requires the criteria in APP5 to be used to achieve consistency as to when an area will be considered significant. APP5 specifies that to be identified as significant an area needs to meet one or more of the criteria in Table 28. Criteria 3 in Table 28 includes:

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, or
- endemic to the Waikato region, or

---

<sup>17</sup> Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, section 12.

<sup>18</sup> Opening Legal Submissions on behalf of Titanium Park Limited and Rukuhia Properties Limited dated 15 March 2023, at paragraph 7.4.

<sup>19</sup> National Policy Statement on Urban Development 2020 at 3.32 Qualifying Matters.

- at the limit of their natural range.
24. Criteria 3 in Table 28 of the WRPS clearly applies to the PC20 site. As noted above, both Mr Markham and Ms Thurley consider that PC20 site meets the significance criteria 3 in the WRPS.

#### Effects Management Hierarchy

25. Mr Welsh has asked: “*what is the applicable effects management hierarchy?*” This question is a red herring. The Director-General is simply seeking that good practice be followed when the effects management hierarchy is applied. The effects management hierarchy in the NPS-FM and in the draft NPS-IB have been developed using the good practice guidance contained in the August 2014 publication entitled “*Guidance on Good Practice Biodiversity Offsetting in New Zealand*” and the September 2018 publication entitled “*Biodiversity Offsetting under the Resource Management Act*”.
26. Section 10 of the Legislation Act 2019 states that “[t]he meaning of legislation must be ascertained from its text and in light of its purpose and its context”. The addition of the word “context” to the principles of interpretation means that the interpretation of the WRPS should look beyond the words themselves and consider what was intended at the time the WRPS was passed. The Director-General submits that when the WRPS was passed it was intended that good practice would be applied when implementing the effects management hierarchy.

#### The Biodiversity Compensation Model (BCM)

27. The Director-General submits that little weight should be given to the BCM evidence. The BCM lacks transparency and the process for inputs creates meaningless outputs.
28. In *Kotahi NZ Transport Agency v Manawatu-Whanganui Regional Council*,<sup>20</sup> the Environment Court was not asked to determine the use of the BCM as the parties had reached agreement. It’s worth noting that this decision mentioned at [162] and [163] in direct relation to the BCM that:

*“We draw attention to an issue we have identified about the ‘transparency’ of the modelling results in terms of the link between the results of the model calculations contained in Mr Markham’s tables and the hectares required to achieve the offsets.*”

---

<sup>20</sup> [2020] NZEnvC 192



*While the calculations have been summarised in the tables, the steps between “impact to the compensated (ha)” and “required compensation (ha)” are not evident from the tables nor are they explained in the text.*

*For transparency the link between the detailed offsets and compensation modelling tables (which contain the detail about each biodiversity component) and the overall result (the proposed hectares of revegetation, retirement, pest control) should be clear in the accompanying text otherwise the final figures reached cannot be verified through the documentation provided”.*

29. The Director-General is currently involved in two Environment Court hearings where the proposed use of the BCM has been strongly challenged by the appellants. During the course of those hearings the presiding Environment Court judges have made comments to indicate that the Environment Court prefers to base decisions on the opinions of experts. The presiding judges appear to have reservations about relying on a mathematical and scientific model that lacks transparency and where final figures cannot be verified. The first of those decisions is expected shortly.
30. The Director-General also notes that the BCM does not comply with clause 9.3(a)(x) of the code of conduct for expert witnesses which states “*if relying on a mathematical model, include appropriate or generally accepted sensitivity and uncertainty analyses for that model*”.<sup>21</sup>
31. The Director-General submits that the hearing panel should base its decision on the opinions of experts not the BCM.

#### Waipa District Plan

32. The purpose of a district plan is to assist Councils to carry out their functions in order to achieve the purpose of the RMA.<sup>22</sup> The Director-General submits the District Plan is the only way to slow or prevent habitat loss for the pekapeka. This is because it is the District Plan that controls the use of private land.

#### **RELIEF**

33. In the light of the unique context that applies to PC20, the Director-General seeks a careful integrated catchment approach to the design of the overall effects management approach to achieve a no net loss outcome. The relief sought by the Director-General will be more specifically explained by the

---

<sup>21</sup> Environment Court Practice Note 2023 at 9.3(a)(x).

<sup>22</sup> Section 72 of the RMA.

Director-General's expert planner Mr Gooding. Mr Gooding will present his evidence directly after Ms Thurley presents her expert bat ecology evidence.



---

M Hooper  
Counsel for the Director-General of Conservation