

**BEFORE THE NEW PLYMOUTH DISTRICT AND  
TARANAKI REGIONAL COUNCILS**

**IN THE MATTER** of the Resource Management Act 1991

**AND**

**IN THE MATTER** applications from NZTA to alter a designation and for  
resource consents for the Mt Messenger Bypass Project  
SH 3 between Uruti and Ahititi ("the Project")

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

**(Reconvened hearing scheduled for 9 October 2018)**

Dated: 8 October 2018

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**COUNSEL:**  
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## Introduction

1. DOC has filed the following evidence in response to updated documentation provided by the Transport Agency:
  - 1.1. Dr Colin O'Donnell (Bats);
  - 1.2. Ms Lynn Adams (Herpetofauna);
  - 1.3. Dr Laurence Barea (Compensation and conditions); and
  - 1.4. Mr Ben Inger (Conditions).
2. A primary purpose for the request for the adjournment, as stated in Counsel for the Applicant's Memorandum 15 August 2018, was for ecological matters to be considered and addressed.
3. DOC has had productive discussions during the adjournment on matters of herpetofauna (lizards) and bats.

### Lizards

4. Ms Adams considers that Agency's most recent proposal, subject to details around translocation sites/methods, is preferable to a fenced enclosure managed only for 12 years, and is generally acceptable.

### Bats

5. The primary remaining issue between DOC and the Transport Agency relates to compensation for potential adverse effects on the long-tailed bat. A clean copy of DOC's proposed 'bat conditions' are **attached** to these legal submissions.

### ***What should 'bat compensation' achieve?***

6. DOC rejects the proposition that compensation for the Project would be achieved by slowing the population decline of long-tailed bats.<sup>1</sup>
7. Dr O'Donnell disagrees with Mr Chapman's statement that<sup>2</sup>:

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<sup>1</sup> MacGibbon Second Supplementary Statement at [43]: "*Compensation for the effects of the Project on bats will be achieved if the existing rate of population decline of long-tailed bats is slowed.*"

<sup>2</sup> Chapman Second Supplementary at [40(a)].

*“...the adverse effects of the Project would, at worst, exacerbate the existing population decline by a small amount (especially given that VRPs will be applied to reduce the Project’s direct adverse effects on bats).”*

8. The Applicant has found high levels of long-tailed bat activity in areas where it is proposed many trees will be felled during construction.<sup>3</sup> Long-tailed bats were recorded at 94% of survey locations, with activity rates of up to an average of 157 bat passes per night per station. Dr O’Donnell commented on these bat surveys stating:<sup>4</sup>

*“Based on my experience in surveying for long-tailed bats over three decades across much of New Zealand, these findings are among the highest bat pass rates I am aware of (e.g. O’Donnell 2000b, 2000c; O’Donnell et al. 2006).”*

9. Dr O’Donnell’s opinion is that:<sup>5</sup>

*“... based on the evidence I present, the adverse effects of the Mt Messenger Bypass Project are likely to be very high for bats, and to a large degree irreversible for the Mt Messenger long-tailed bat population, unless mitigation is significant.”*

10. The threshold for the level of compensation for effects on the long-tailed bat is in dispute. DOC considers a higher bar than slowing decline is required, and that the objective should be to maintain or restore long-tailed bat populations.<sup>6</sup>

### ***Proposed Radio-tracking***

11. DOC welcomes the Applicant’s radio-tracking proposal. At the hearing in August this year DOC requested a minimum pest-controlled area of 5000 ha. That was on the basis that maternity roost trees had not been identified through adequate radio-tracking studies undertaken by the Applicant. DOC agrees with the Applicant that identification of maternity roost trees would enable a lesser 3650 ha area of pest management centred upon maternity roost trees.

<sup>3</sup> Despite the surveys conducted in winter when long-tailed bat activity can be suppressed: O’Donnell EIC [6.1] – [6.4]: citing Figure 1 and Opus 2017a, 2017b, Chapman & Choromanski 2017, Chapman 2018.

<sup>4</sup> EIC at [6.4].

<sup>5</sup> O’Donnell EIC at [3.8].

<sup>6</sup> Refer also Barea Supplementary Statement at [2.7].

12. Dr O'Donnell agrees with the details of the radio-tracking programme proposed by the Applicant, except that radio-tracking should not cease at the time 10 or more maternity roost trees are found within the "Wider PMA".<sup>7</sup>

***Using radio-tracking to inform the location of the PMA***

13. DOC has emphasised throughout<sup>8</sup> the importance of adequate pest control for long-tailed bat maternity roosts, including at the perimeter of the PMA. Dr O'Donnell's opinion is that a significant majority of maternity roosts would need to be at least 1 km further in from the boundaries of any Confirmed PMA. This is required to buffer sensitive breeding sites against invasion by pests from surrounding land. 1km is based on the ranges of such pests.
14. NZTA's proposal to carry out intensive pest control for up to 5 maternity roosts located within a 500 metre distance of the margin is inadequate. The proposed intensive management methods do not provide confidence they will be effective. Further, there is insufficient monitoring to either demonstrate success or adaptively manage the pest control programme.<sup>9</sup>
15. DOC agrees that a requirement for a significant number of maternity roosts to be more than 1km inside the PMA would make it *less likely* the "Intended" or "Wider" PMA's will be selected. DOC considers this concern should take second priority to what it considers to be a primary purpose of the PMA: to deliver an outcome that maintains or restores long-tailed bat populations (which would require achieving annual survival of adult female long-tailed bats greater than 79%).
16. The conditions DOC has proposed adopt the 'Scenario 1' approach, but with the internal 1km buffer requirement added. DOC considers that the Applicant's Scenarios 2-4 are overly prescriptive. Rather than adopt this unnecessarily prescriptive process, the better approach would be for all the information from the radio-tracking study to be provided to a specially informed Ecological Review Panel who would recommend the appropriate location of the PMA if Scenario 1 does not apply. If, following 3 months, the Review Panel with the 3 bat experts cannot agree, the PMA would be located at the Waitaanga Conservation Area, centred on the known locations of maternity roosts of short-tailed bats.

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<sup>7</sup> O'Donnell Supplementary Statement at [2.6].

<sup>8</sup> E.g. Legal Submissions for Director-General of Conservation at [43].

<sup>9</sup> Barea Supplementary Statement at [4.1].

### **Alternative PMA**

17. The proposed "Alternative PMA" at the Waitaanga Conservation Area allows resource consents to be granted, or a recommendation to confirm a requirement, with confidence that the consents/NOR could ultimately be implemented.
18. The location of some short-tailed bat maternity roosts at Waitaanga are known, but no long-tailed bat roosts (only long-tailed bat detections are known). DOC has agreed that a PMA at Waitaanga could be centred upon the known short-tailed bat roosts. This would prevent NZTA needing to do further radio-tracking at Waitaanga.<sup>10</sup>
19. The Applicant admits that Waitaanga is a 'fallback' option<sup>11</sup> but considers it less preferable. Dr Barea's evidence is that neither 'proximity', 'additionality', nor 'like-for-like' considerations make Waitaanga a less preferable option, particularly as the PMA is *compensation* for the Project's effects, and not an offset.
20. DOC's approach to the location of PMA places critically endangered long-tailed bat at high importance. DOC considers that Waitaanga would also provide compensation for other effects including vegetation and avifauna. There is no need for the presence of coastal vegetation to be a deciding matter for the location of the PMA, when all options are within the North Taranaki Ecological District.<sup>12</sup>

### **Timing**

21. The 'bat conditions' proposed by NZTA include the following (under Scenario 3):

*"Where the bat expert determines that land that is both outside the Wider PMA and not administered by DOC should be included in the PMA:*

- (a) That land will only be included in the PMA if the requiring authority confirms to the bat expert that it is able to acquire the necessary rights over that land in order to carry out the pest control and related activities*

<sup>10</sup> Dr O'Donnell says short-tailed bat maternity roosts can be a 'proxy' for long-tailed bat roosts: Supplementary Statement at [2.31].

<sup>11</sup> MacGibbon Supplementary Statement at [62].

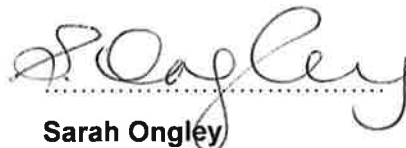
<sup>12</sup> Barea Supplementary Statement at [2.31]: "*What matters is the degree of similarity retained between the impact site and the compensation site, not a comparison between alternative compensation sites*" and at [2.34] "*Although there are some differences in vegetation associations between the impact site and the Waitaanga forests, e.g. the presence of silver beech-dominated forest (hard beech replaces silver beech at the intended PMA) there are many similarities in vegetation and fauna.*"

*required in the PMA under the pest management chapter of the ELMP;  
and*

*(b) Where (a) is not met, and the bat expert (having consulted with others as required under this scenario) determines there is no appropriate alternative for setting the PMA within the Study area, Scenario 4 below will apply."*

22. DOC considers that the requirement for the requisite land ownership rights to be obtained should be stated upfront in relation to both pest management and riparian planting proposals.<sup>13</sup> There should be a requirement that Construction Works should not commence until evidence of the legal agreements and/or other authorisations necessary to implement all mitigation and compensation works *in perpetuity*, are provided to the consent authorities (condition 32(a)).
23. Further, the Applicant's proposed conditions provide that *implementation* of the pest management programme must commence prior to the completion of Construction Works. This could occur after operation of the new State Highway commencing. DOC requests that once the PMA is confirmed, pest management should then occur as soon as possible (refer condition 32(e)(ii)).
24. Finally, Mr Inger considers that the consent/designation conditions should be finalised first, and the ELMP should then be finalised in the usual way (to reflect the final state of conditions). This is the more orthodox approach. It would enable feedback, and certification.

**DATED** at New Plymouth this 9<sup>th</sup> day of October 2018



**Sarah Ongley**

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

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<sup>13</sup> Currently stated as a matter for the Requiring Authority to confirm to its own bat expert.

**DOC Proposed Bat Conditions (attachment to S Ongley legal submissions 09.10.18)**

<p>(a) The Requiring Authority shall implement a programme of long-tailed bat radio tracking (the "Monitoring Programme") within the Study Area. The purpose of the Monitoring Programme is to identify and define a PMA of at least 3,650ha, centred on long-tailed bat Maternity Roosts.</p>	
<p><b><i>Bat Monitoring Programme</i></b></p>	
<p>(b) The Monitoring Programme shall be carried out for one season during the period of peak long-tailed bat activity (1 October to 31 March).</p>	
<p>(c) The Monitoring Programme will confirm and map the location of long-tailed bat Maternity Roosts within the Study Area. Knowledge gained from the monitoring programme will be used to confirm the location of the PMA, and to identify the roost trees that will be subject to the VRPs.</p>	
<p>(d) The Requiring Authority shall appoint a bat expert (the "bat expert") who will manage the Monitoring Programme and prepare the Bat Monitoring Report. The Requiring Authority will also appoint Dr Stuart Parsons, or an alternative independent peer reviewer selected by the Planning Lead (or Nominee) in consultation with the Requiring Authority and DOC (the "independent peer reviewer").</p>	
<p>(dd) The bat expert and the bat peer reviewer shall meet the E Class bat competency, as set out in Table D2 of Appendix D: to 'NZ Transport Agency research report 623 'Effects of land transport activities on New Zealand's endemic bat populations: reviews of ecological and regulatory literature' (Smith et al. 2017)'. All other personnel involved in implementing the monitoring programme shall meet the bat competency class of D for all personnel involved in bat handling, or C2 for all personnel involved in roost identification, as set out in Table D2 of Appendix D: to NZ Transport Agency research report 623.</p>	
<p>(e) The Monitoring Programme shall be undertaken in accordance with the DOC best practice manual of conservation techniques for bats Version 1 (DOCDM-131465), and the methodology as set out in the draft ELMP dated [insert], except as otherwise amended by the requirements in (f) of this condition.</p>	
<p>(f) The Monitoring Programme described in Condition 30(e) shall involve:</p>	

- (i) At least 30 calendar days of bat trapping effort in conditions suitable for bat activity;
- (ii) The use of at least 8 harp traps, as well as mist-net traps and acoustic lures;
- (iii) An additional 10 calendar days of trapping should fewer than 10 Maternity Roosts have been identified at the conclusion of 30 calendar days of monitoring; and
- (iv) The fitting of bats with radio transmitters, and the subsequent tracking of those bats until the transmitters are no longer transmitting.

***Bat Monitoring Report***

- (g) On completion of the Monitoring Programme a report (the "Bat Monitoring Report") shall be prepared by the bat expert that:
  - (i) Details the methods used and the monitoring effort undertaken;
  - (ii) Sets out the findings of the Monitoring Programme; and
  - (iii) Identifies the location of all identified long-tailed bat roosts, including Maternity Roosts (if found) within the Study Area;
  - (iv) Sets out any comments received from the independent peer reviewer or DOC's nominated bat expert regarding whether the monitoring programme has been completed in accordance with the requirements of these Conditions; and
  - (v) Recommends the location of the PMA in accordance with the following Scenario 1, or recommends that the location of the PMA be confirmed under the process in Scenario 2.

***Scenario 1:***

In the event that the Monitoring Programme identifies:

- (1) 10 or more Maternity Roosts within the Intended PMA, located 1km or more from the edge; or
- (2) 10 or more Maternity Roosts within the Study Area and 70% of these are located 1km or more from the edge (and within) the Intended PMA:

the Intended PMA will be recommended by the bat expert as the Confirmed PMA.



**Scenario 2:**

In the event that Scenario 1 does not apply, the Bat Monitoring Report shall be sent to the Ecological Review Panel established under condition 35 and the Ecological Review Panel will appoint as experts to that Panel:

- (a) the bat expert,
- (b) the independent peer reviewer; and
- (c) another bat expert nominated by DOC.

The Ecological Review Panel, with the assistance of the 3 bat experts, will recommend the location and boundaries of the Confirmed PMA within either the Study Area or Alternative PMA, having regard to the following factors:

- (a) The size, nature and location of the Maternity Roosts and their value to the long-tailed bat population;
- (b) minimising the number of Maternity Roosts within 1 km of the edge of the Confirmed PMA;
- (c) minimising the overall length of the edge of the Confirmed PMA;
- (d) minimising the length of the edge of the Confirmed PMA that adjoins mature forest;
- (e) the practicality of implementing pest management, including access;
- (f) the effectiveness of the PMA in offsetting or compensating for the effects of the Project on other ecological values, in particular vegetation and avifauna;
- (g) the location of offset and mitigation planting associated with the Project and the benefits of providing for pest management in perpetuity over those areas; and
- (h) the benefits of the vegetation types that are present within the Project Area also being present in the Confirmed PMA, in terms of offsetting and compensating for vegetation loss and effects on avifauna.

(i) any other relevant matters that relate to determining the suitability of the Study Area for bat habitat.

(j) for the Alternative PMA, the PMA area shall be centred on the known locations of maternity roosts of short-tailed bats.

The Ecological Review Panel will submit a report to the Planning Lead (or Nominee) within 3 calendar months of receiving the Bat Monitoring Report, containing recommendation as to the location and boundaries of the Confirmed PMA. In the event that the Ecological Review Panel does not agree on the location and boundaries of the PMA within this 3 months, the Ecological Review Panel shall submit a report to the Planning Lead (or Nominee) setting out areas of agreement and disagreement, and the Confirmed PMA shall be located in the Alternative PMA.

(h) The Report of the Ecological Review Panel shall be provided to the Planning Lead (or Nominee), for Certification that the Confirmed PMA, identified pursuant to Scenarios 1 or 2, has been recommended in accordance with the process set out in Conditions 30(g) – 30(k). The Planning Lead (or Nominee) will carry out best endeavours to consider and certify within 20 working days. Any dispute between the Requiring Authority and NPDC in respect of the Certification of the Confirmed PMA will be resolved through the process stipulated under Condition 14.

(i) The Requiring Authority shall implement the findings of the final Bat Management and Pest Management ELMF Chapters, including the location of the PMA.

(j) Construction Works shall not commence until the PMA has been certified as Confirmed (including following any dispute resolution process) and evidence of the legal agreements and/or other authorisations necessary to allow, in perpetuity, pest management over that area has been provided to the Planning Lead (or Nominee) under Condition 32.