

IN THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

of an application by Tararua Wind Power (now Mercury Energy) under section 88 of the RMA for the Kaiwaikawe Wind Farm, to construct, operate and maintain up to 19 wind turbines within a defined project envelope on the property at 379 Maitahi Road, Omamari legally described as Lot 1 DP 201886.

**FURTHER LEGAL SUBMISSIONS IN RELATION TO THE OUTCOME OF
EXPERT CONFERENCING AND EVIDENCE ON
FURTHER MONITORING**

DIRECTOR-GENERAL OF CONSERVATION

21 JANUARY 2022

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1. INTRODUCTION

1.1. The Hearing of this matter was adjourned on 17 August due to the nationwide COVID Level 4 lockdown. This was before the Panel had heard much of the Applicant's (now referred to as "Mercury") evidence, and prior to the presentation of the Director-General of Conservation's case.

1.2. Since then, in accordance with various directions from the Panel:

(a) Legal submissions were filed and exchanged on behalf of the Director-General on 24 August 2021;

(b) Proposed amendments and comments by the Director-General's experts on Mercury's draft conditions were filed and exchanged for the purpose of expert conferencing on 9 September 2021;

(c) Several rounds of expert witness conferencing on the conditions and the production of several joint witness statements (JWSs) occurred; and

(d) Mercury and the Department of Conservation have undertaken further monitoring over Spring, and statements of supplementary evidence on the results of the monitoring were filed and exchanged on 19 January 2022.

1.3. These further legal submissions have been prepared in accordance with the Panel's directions of 22 November 2021 and a joint memorandum of counsel filed on behalf of Mercury, the Director-General and the Council on the same date. A set of proposed conditions with additional amendments to those provided by the Director-General's experts through expert conferencing is attached as **Attachment 1**. The amendments are explained in comment boxes in the conditions document where considered necessary, and in more detail later in these submissions.

2. FURTHER MONITORING OVER SPRING AND IMPLICATIONS

2.1. Further monitoring has been undertaken during Spring 2021 by Mercury and the Department. At the time of writing these submissions Mr Fuller's supplementary evidence describing the results and implications of the

Mercury monitoring has not been exchanged, therefore our comments in respect of the Mercury monitoring are confined to the discussion of the data and analysis, and conclusions from them as set out in Dr Williams's supplementary evidence of today's date.

- 2.2. Dr Williams has included in her supplementary evidence a single integrated picture of what was captured by automatic recording devices (ARDs) in terms of booming males present in various locations on the proposed wind farm site and the adjacent Maitahi and Omamari wetlands.
- 2.3. Dr Williams concludes that the booming sequences recorded came from at least four male matuku. This does not represent the total number of birds present however, as the recordings do not capture females or non-booming males.
- 2.4. For the reasons explained in her supplementary evidence, Dr Williams also concludes that the area of the proposed wind farm is a stronghold for matuku in Northland.

Spring 2021 Long-tailed bat monitoring

- 2.5. Mercury reports that no bat passes were recorded during monitoring undertaken during the adjournment. As there are no issues, the conditions have been updated accordingly. Ms Turley will address the Panel on this orally.

3. EXPERT CONFERENCING

- 3.1. Several rounds of expert conferencing have resulted in agreement being reached on some issues, however critical differences in opinion remain outstanding as between Mercury's, the Director-General's and Council's experts in terms of:
 - (a) The extent of monitoring that should be required before and during construction of the wind farm, and during operation;
 - (b) The standard of protection to be achieved for threatened species (avoidance or no more than minor effects), and what determines this;

- (c) In the event triggers and thresholds for action are included in the conditions, whether those proposed by the Director-General's experts modelled on the ones in the *Waipipi* (Waverley) wind farm conditions are appropriate; and
- (d) The management responses that are appropriate for inclusion in the conditions to address risk of harm to threatened species, and to address harm if it does occur.

(a) The extent of monitoring that should be required

3.2. The Director-General's experts have provided a track changed version of conditions including monitoring requirements, as Appendix 2 to the 3 November 2021 JWS. That set of conditions forms the basis of the further proposed conditions in **Attachment 1** to these submissions. The detail of the monitoring sought by the Director-General's experts is summarised in the next section of these submissions.

(b) The standard of protection to be required for threatened species

- 3.3. The 12 October 2021 JWS¹ appears to record that all planning experts agree Policy 4.4.1 of the NRPS is the appropriate policy to consider the proposal against²
- 3.4. We refer you to paragraphs 6.2 to 6.26 of the Director-General's 24 August 2021 Legal Submissions. The Director-General's submission remains that the more stringent policy framework of the Kaipara District Plan should be applied to the proposal.

(c) Whether the *Waipipi* triggers and thresholds are appropriate

3.5. The issue of whether the triggers and thresholds in the *Waipipi* (Waverley) wind farm conditions was raised in expert conferencing on conditions, and is linked to the previous issue (b) regarding the appropriate standard of protection for threatened species – i.e. whether adverse effects should be avoided or no more than minor.

¹ 12 October 2021 JWS, page 16, 27.

² Proposed Conditions 54A – 54E of Mercury's experts' version of conditions, or 54C – 54FE of the Director-General's experts' track changed version of conditions.

- 3.6. In addition to Mr Turner's comment in the 12 October 2021 JWS on page 16 regarding Policy 4.4.1 of the NRPS, it is recorded later in that JWS at page 27 that:

RT advised that he was involved in the drafting of the Waipipi conditions and presented evidence on their consistency with the policy framework. He advised that they were developed to satisfy Policy 11 of the NZCPS and its focus on the avoidance of adverse effects on threatened and at risk species. The policy context for the KWF is different, and Policy 4.4.1 of the RPS has a focus on ensuring no more than minor adverse effects on threatened and at risk species, such that copying the Waipipi conditions is not directly applicable.

- 3.7. What Mr Turner appears to be saying is that, if the Kaiwaikawe wind farm site was located across the line demarcating the coastal environment, adverse effects on threatened taxa would need to be avoided, but because the wind farm is across the line and located outside of the coastal environment, adverse effects are acceptable under the policy framework as long as they are no more than minor.
- 3.8. Applying this approach to matuku, higher numbers of deaths of matuku would be acceptable for the Kaiwaikawe wind farm simply because they would occur outside of the coastal environment.
- 3.9. In the Director-General's submission, it cannot be consistent with Part 2 of the Act to focus on Policy 4.4.1 of the NRPS which, on its face, appears to allow adverse effects to occur in respect of a critically endangered species on one side of the coastal environment line, and avoid effects on the same species on the other side of the line.
- 3.10. This also reinforces the Director-General's submission that the more stringent policy framework of the Kaipara District Plan should be applied, and that this is a case where it is appropriate, and perhaps necessary, to refer back to Part 2 in accordance with the guidance by the High Court in *Davidson*³ in order to decide the appropriate level of environmental protection warranted, and whether consent should be granted or declined.

³ *Davidson* High Court decision cited at footnote 23 of the Director-General's 24 August 2021 Legal submissions, paras [70] to [75].

3.11. In any event, Dr Williams’ expert view as noted in the 12 October 2021 JWS⁴, is that the effect of the death of one matuku would be more than minor. Mr Fuller did not record a contrary view in the JWS, and while Mercury has relied on modelling of predicted collisions with turbines which it says is low, that does not provide any assurance that matuku will not be harmed by the proposed wind farm.

3.12. In addition, as is noted above, Mercury’s own information is that, even with mitigation in place, the “no more than minor” standard will not be met for some important aspects of the proposal. Mercury’s EclA⁵ (extract below) records that construction effects on matuku, as well as adverse effects from the loss of the three stock ponds to be infilled would cause “moderate” adverse effects:

Table 40: Assessment of Level of Effect with recommended mitigation

Ecosystem Component	Ecological Value	Magnitude of Impact	Level of Effect
Terrestrial Vegetation			
Construction Effects (Omamari Station Wetland crossing)			
• Improved pasture	Negligible	Negligible	Very low
• Scrub reversion in pine slash	Low	Negligible	Very low
• Seral kanuka forest (avoided)	Moderate	n/a	-
• Limestone exposure (avoided)	Low	n/a	-
• Plantation forestry	Low	Negligible	Very low
• Homestead gardens (avoided)	Moderate	n/a	-
• Road margins (Maitahi Road and Babylon Coast Road)	Negligible	Negligible	Very Low
Wetlands			
Construction Effects (Omamari Station Wetland crossing)			
• Omamari Station Wetland crossing 1 (upper)	Very high	Negligible	Low
• Omamari Station Wetland crossing 2 (lower)	Very high	Negligible	Low
• Maitahi Wetland crossing – Corridor (avoided)	Low	Negligible	Very Low
• Stock ponds (vegetated) P10, P11, P16	Moderate	Negligible	Very Low
• Stock Ponds (open water) All other ponds	Low	Low	Very Low
Avifauna (Threatened or At Risk) - Operational Effects			
Construction Effects (Omamari Station Wetland crossing)			
• Australasian bittern (Threatened – Nationally Critical)	Very High	Low	Moderate
• Loss of Habitat (Stock Ponds filled 45, 70, 89)	Moderate	Moderate	Moderate
Wind Farm Operation			
• Australasian bittern (Threatened – Nationally Critical)	Very High	Negligible	Low

⁴ 12 October 2021 JWS, page 16.

⁵ Table 40, page 98.

(d) Appropriate management responses to address risk of harm to threatened species, and harm if it occurs

3.13. The details of the management responses sought by the Director-General's experts are set out as track changes to the conditions in Appendix 2 to the 3 November 2021 JWS. Updated conditions in **Attachment 1**, are summarised in the next section of these submissions.

4. CONDITIONS – AMENDMENTS SOUGHT BY THE DIRECTOR-GENERAL, SHOULD CONSENT BE GRANTED

Further amendments proposed by the Director-General

4.1. As foreshadowed in the 22 November 2021 joint memorandum, a set of proposed conditions is attached to these submissions for the Panel's consideration. It is based on the Director-General's experts' tracked changed version of conditions included as Appendix 2 to the 3 November 2021 JWS, as modified in accordance with JWS and Ms Oliver's 9 December 2021 memorandum.

4.2. The updated proposed conditions attached as **Attachment 1**, set out further amendments and comments on behalf of the Director-General, indicated by track changes and grey highlighting. These have been worked through further in order to ensure the conditions would operate in the way intended by the Director-General's experts and address the concerns set out in their evidence and the JWSs.

4.3. The further amendments proposed also reflect that the version of proposed conditions circulated on behalf of the Director-General on 9 September 2021 for conferencing purposes, and which have been further developed through conferencing were prepared as directed under a "counsel hands-off" approach.

4.4. In terms of key implications for the proposal, the updated set of conditions proposed by the Director-General would effectively delay the construction of the wind farm to provide for adequate baseline monitoring, would require extra resources to be expended by Mercury, and would leave open the possibility that the wind farm cannot be constructed.

4.5. It is settled law that conditions which are expensive or could make a proposal uneconomic may be imposed provided they relate to the effects of the

proposal. For example, in *Westfield (New Zealand) Limited v Hamilton City Council*⁶ a question arose whether conditions proposed were so onerous as to remove the substance of the consent. The High Court concluded⁷:

[65] It is well known that a condition of a resource consent must be such as arises fairly and reasonably out of the subject matter of the consent. However, in our view, a consent is not “negated”, or rendered “impracticable” or “frustrated”, merely because it requires the carrying out of works which might be expensive. We agree with Mr Cooper’s submission that such may be the price which an applicant has to pay for implementing a resource consent in certain circumstances.

- 4.6. As was the case in *Westfield*, costs arising fairly and reasonably out of the subject matter of the consent are the price the consent holder can reasonably be expected to bear in order to implement the consent. In the case of this application, the Director-General says these costs are reasonable and relate directly to the fact that the wind farm is proposed for an area where matuku are known to be present.

Avifauna - key differences between the conditions proposed by the Director-General and those proposed by Mercury

- 4.7. There are five key areas where the Director-General and her experts are proposing substantially different conditions from those proposed by Mercury’s experts at this time in respect of avifauna, the primary concerns being in respect of matuku:

- (a) Baseline monitoring requirements;
- (b) Environmental bottom lines;
- (c) Requirements to be met before construction can proceed;
- (d) Monitoring requirements during construction and operation; and
- (e) Triggers and thresholds for action in the event of bird mortality.

⁶ (2004) 10 ELRNZ 254 (*‘Westfield’*)

⁷ *Westfield* at [65].

(a) Baseline monitoring

- 4.8. The Director-General seeks three years of baseline monitoring and GPS tracking of a 15 bird sample of matuku, to better understand the use of the site by matuku and inter-year variability. Mercury's experts say one further year at specific locations is all that is needed and the further monitoring during the adjournment fulfils this requirement and the windfarm can be built there on the basis of what is already known.
- 4.9. The Director-General says, notwithstanding the further monitoring, there remains insufficient baseline information about the current use of the project site by threatened taxa, to enable you to properly understand the environment against which the effects of the proposal are required to be assessed.
- 4.10. This includes where and how the project site and surrounds (not just the 'Project Envelope' within which the wind turbines and supporting infrastructure are proposed) are used by threatened species.
- 4.11. The conditions include requirements for baseline monitoring of a meaningful home range over 3 years using a number of monitoring techniques: including male booming and tracking of bittern with GPS. Both measures are important in different ways and Dr Williams has explained, including essential height and flightpath data⁸.
- 4.12. To be meaningful as a baseline, monitoring needs to take account of inter-annual and seasonal variation and be targeted at an appropriate home range.
- 4.13. The Director-General's proposed conditions include a desktop mapping exercise that helps clarify a meaningful range of habitat. The Council's expert Mr Daly agreed in conferencing this is an appropriate step, noting that the home range made sense and would be reasonable with a desktop exercise⁹. However, Mercury's experts Mr Turner and Mr Fuller disagree with this, preferring to focus on a very narrow definition of impact area being the project envelope where birds may traverse frequently at rotor swept height.

⁸ Insert reference to evidence.

⁹ Appendix 1 to JWS 20/10/21 Comment [MD5]

Mr Fuller and Mr Turner consider that the ecological surveying and design work that had been done at the time of conferencing for the project is appropriate and adequate alongside the conditions proposed.¹⁰

(b) Environmental bottom lines

4.14. The Director-General says environmental bottom lines for effects on avifauna must be included in the conditions as clear enforceable standards (in the same way Mercury's proposed conditions include standards for noise and shadow flicker which must be complied with to protect people from adverse effects). Reliance should not be placed on unenforceable qualitative objectives of management plans and responses within those, as proposed by Mercury's experts.

4.15. The predictions on levels of effects included in an applicant's AEE are not enforceable either. As was demonstrated in *New Zealand Windfarms Limited v Palmerston North City Council*¹¹, the information filed with the application for resource consent for the wind farm had significantly underpredicted the actual noise generation characteristics of the wind turbines and their noise impact on surrounding residents. The High Court, in allowing the applicant's appeal, decided that notwithstanding the standard "Condition 1" condition being imposed, the applicant was not bound by its consultant's predictions, but rather was only bound by the specific noise standards contained in the consent conditions – i.e. that "only the specific noise conditions bite".

4.16. In the case of the Kaiwaikawe wind farm, it is critical that clear standards are included in the conditions reflecting Mercury's predictions. They are needed to ensure that the predictions "have bite" and must be complied with.

4.17. As the Director-General's experts have signaled, the status quo for matuku is severe decline. When placing a windfarm in habitat used by matuku, the Director-General, supported by her experts, says the appropriate standard is zero mortality, with avoidance as the primary approach to addressing effects.¹²

¹⁰ Appendix 1 to JWS 20/10/21 Comment [MD6].

¹¹ *New Zealand Windfarms Limited v Palmerston North City Council*, [2013] NZHC 1504, Williams J, at [1], [[57] to [62].

¹² Proposed Condition 54C(aaa).

- 4.18. In contrast, Mercury’s experts do not specify what is ‘no more than minor’ in terms of effects, and this is left to the expert panel and Council manager to decide. In the Director-General’s submission, this is an unlawful delegation, and the appropriate standard needs to be decided by the Panel. What effects are considered acceptable is also fundamental to whether consent can and should be granted in the first place.
- 4.19. As Counsel for KDC noted in his opening submissions, conditions must be specific as to what is required and not leave decisions till later and a Council manager.¹³ The Courts have been consistent in holding that it is not lawful to delegate substantive decisions to another decision maker and another day.¹⁴
- 4.20. In *Director-General of Conservation v Marlborough District Council*¹⁵ a condition requiring a consent authority to decide whether a site was important to Hector’s dolphin went to the issue of whether the consent should have been granted. The High Court held this was a decision for it to make, and not one that could be properly delegated to a consent authority later.
- 4.21. The Director-General’s experts have threaded the ‘what’ (zero mortality) through the consent conditions, allowing the ‘how’ to be worked out by the Consent Holder, with help from the Expert Panel, results of monitoring data and with Council certification to a clear objective and mitigation thresholds to trigger actions.¹⁶
- 4.22. The Director-General says this is the only appropriate way open to the Panel to proceed, given the critical values at issue.

¹³ Opening Legal Submissions by Counsel for the Kaipara District Council, 3.3.

¹⁴ See for example *Director-General of Conservation v Marlborough District Council* [2004] 3 NZLR 127 (HC);; *Royal Forest and Bird Protection Society Inc v Gisborne District Council* [2013] NZRMA at 337, *Summerset Villages Lower Hutt Ltd v Hutt City Council* [2020] NZEnvC 31.

¹⁵ *Director-General of Conservation v Marlborough District Council* 11 ELRNZ 15, High Court, Wellington, MacKenzie J (Clifford Bay), paragraph 28..

¹⁶ Support for an environmental bottom line has recently come from the Supreme Court in another context – the Exclusive Economic Zone Act. *In Tans-Tasman Resources v Taranaki-Whanganui Conservation Board* [2021] the court gave operative effect to a purpose provision which contained an bottom line decision-makers could not cross - making for a more robust consenting process for marine discharges and dumping.

(c) Requirements to be met before the wind farm can be constructed

4.23. The Director-General says that, given the uncertainty around matuku use of the site and its significance to matuku as habitat (including for overflight), any resource consent granted needs to:

- (a) Include a requirement in the conditions for a “green light” before construction can proceed, based on the three years’ further monitoring demonstrating that the site is not significant for matuku and the wind farm project will be effectively benign for matuku as assessed by Mercury¹⁷, and that it has been demonstrated to the Council’s satisfaction that the wind farm is capable of operating without causing any matuku deaths – in the same way assessments are required to demonstrate the noise and shadow flicker standards in the conditions are able to be met; and
- (b) Be clear on its face (either through a condition or advice note¹⁸) that this is the basis upon which the wind farm has been consented. This is important to ensure that review of consent conditions under s128 can result in cancellation of the consent should unanticipated significant adverse effects occur (as was the case for the *Clifford Bay* marine farm).

4.24. Such requirements are not proposed by Mercury’s experts. However, as we are not aware whether these issues were raised in expert conferencing, Mercury’s experts’ view is not clear.

4.25. The Director-General says the conditions need to require reliable baseline monitoring and an assessment confirming the site is not significant for matuku before the wind farm can be constructed. Such a condition is appropriate given the risks to matuku¹⁹. This is discussed in detail in Section

¹⁷ Applicant’s EclA report, pages v and 103, at page 92 the report notes the site is “benign” and “relatively benign” respectively.

¹⁸ See the Environment Court’s decision in *Director-General of Conservation v Marlborough District Council*, C 113/2004 (Clifford Bay), Condition 14, page 25:
14. *It is recorded that this coastal permit was granted on the basis of information from the applicant that the site is not of special significance for Hector’s dolphins as a breeding, nursing, feeding or shelter area when compared with the remainder of Cloudy and Clifford Bays.*

¹⁹ *Director-General of Conservation v Marlborough District Council* 11 ELRNZ 15, High Court, Wellington, MacKenzie J.

2 of the Director-General's 24 August 2021 Legal Submissions, and a requirement that this be demonstrated before construction can proceed is now included in the conditions proposed by the Director-General.

4.26. Mercury's experts have insisted that they have done enough to understand the use of the site, as they say matuku are not using habitat within the 'Project Envelope'²⁰. Calculating risk accordingly (using figures based on the assumption that if matuku do use the site, they will fly through saddles) the long-term risk is characterised as 'negligible'²¹.

4.27. Dr Williams has produced evidence demonstrating that matuku do not always fly over saddles²², and has made it clear that 3 years' baseline monitoring is necessary to understand the risk of a windfarm on critically endangered species before a windfarm can be built there. Dr Burns has described the further avifauna work required and this has been translated into proposed conditions which have been difficult to formulate in the absence of knowledge of the results of this work.

4.28. A pragmatic response is to await this monitoring instead before the windfarm gets "green light" to go ahead.

4.29. In *Director-General of Conservation v Marlborough District Council* (Clifford Bay) the High Court confirmed the appropriateness of conditions requiring an initial 2-year survey of the site and ongoing research be carried out and that the consented activity could only go ahead if "...the results satisfy the consent authorities that it is very probable the site is not of special significance for the Cloudy/Clifford Bays population of Hector's dolphin in terms of breeding, nursing, feeding or sheltering."²³. The RMA does "...allow

²⁰ See for example matuku 'hypothetical flight paths, EclA (maps 3 and 4, page 25).

²¹ Richard Turner statement of Evidence dated 2 August 2021, paragraph 71.

²² Dr Emma Williams statement of evidence dated 9 August, paragraphs 16.9(d) and (e), pages 31 to 34.

²³ *Director-General of Conservation v Marlborough District Council* (2005) 11 ELRNZ 15 [3]. Provided they were not framed as (or equate to) 'conditions precedent' such conditions did not nullify grant of the consent. MacKenzie J put it this way:

"...the imposition of a condition which, if it is not satisfied, will mean that the activities authorised by the consent cannot commence is not uncommon. In this case, the objective of the condition is to have a survey conducted into whether the site is of special significance for Hector's dolphin. The results of that survey are intended to be assessed by the consent authorities. Depending on the outcome, the marine farm authorised by the proposed consents may or may not be able to

a condition which requires studies prior to commencement of the activity to which the consent relates (as opposed to during the exercise of the consent).

(d) Ongoing monitoring requirements during construction and operation

4.30. The Director-General says that ongoing monitoring (including GPS tracking) should be required to continue throughout construction, and for three further years following completion of construction, together with ARD monitoring and collision (carcass) monitoring for the life of the wind farm. Mercury's experts do not agree that this should be required, and instead rely on five years' carcass monitoring.

(e) Triggers and thresholds for bird mortality requiring action

4.31. The Director-General says that clear triggers, thresholds and actions (including the possibility of curtailment such as is proposed by Mercury for shadow flicker in their proposed Conditions 71 and 72), based on the threat status and vulnerability of each bird species put at risk by the wind farm need to be specified in the conditions.

4.32. Mercury's experts instead rely on actions in the management plans and the advice of the expert panel, with action being based on a five yearly review of carcass monitoring results (proposed Condition 58G), or whether the Council manager decides adverse effects are more than minor, and/or potentially a s 128 review of conditions if Mercury as consent holder does not agree with the expert panel as to the need for, quantum of, or any additional ecological management, mitigation or compensation (as per their proposed Condition 58J)

4.33. The Director-General's experts propose that during operation, bird collision monitoring is included with immediate action (including curtailment) if one matuku death occurs.

4.34. The clear standard guiding all actions throughout, should be the avoidance of adverse effects and zero mortality.

proceed. I do not consider that a condition that which has two possible outcomes, one of which will enable the activities authorised by the consent to proceed, and one of which will not, is for that reason a condition which would frustrate the consent, or which is otherwise unreasonable under the Newbury test."

5. LONG-TAILED BATS

- 5.1. The Applicant undertook further monitoring for long-tailed bats in October and November 2021, and has advised that no bat passes were recorded during the survey.
- 5.2. Ms Thurley has requested that the GPS locations, dates and number of nights that the recorders were out, so she can understand what ground the survey covered to check that coverage of the survey is adequate. Ms Thurley will speak to any concerns at the hearing.
- 5.3. On the basis that there are no bats present, proposed conditions relating to bats are no longer being pursued by the Director-General, with one exception. Condition 61A proposed by Mercury provides that if a nationally critical bird or bat species is found injured or dead at the site, DOC will be contacted immediately and the bat photographed and the location noted on a map.
- 5.4. Long tailed bats would also come under existing collision monitoring provisions, should they be found on site in the future.

6. REMAINING UNCERTAINTY AND RISK

Areas of risk and uncertainty that cannot be addressed through conditions

- 6.1. In the event the Panel is minded to grant consent now, and even if consent is granted on the conditions sought by the Director-General, concerns remain around the level of risk and uncertainty for matuku.
- 6.2. Even with three years of baseline monitoring and GPS tracking immediately prior to construction, this does not mean that no matuku will:
 - (i) Be displaced (and potentially starve);
 - (ii) collide with construction traffic;
 - (iii) fly through the project envelope and collide with a wind turbine or wind monitoring mast; and/or
 - (iv) collide with the 66 kV transmission line.
- 6.3. By the time action is required to be taken to address mortality, matuku may have already suffered irreversible loss. Review of conditions needs to be seen as a last resort – triggers and actions need to be included in the

conditions to ensure this need does not arise. A review of conditions traditionally takes years, and is likely to take too long to ensure irreversible effects do not occur.

- 6.4. In addition to the potential for irreversible effects, displacement remains of significant concern. It will not necessarily be possible to determine if displacement from the wind farm is a factor causing a decline in the matuku population. Birds may leave the site and/or starve elsewhere or in locations their bodies will not be found and/or where no one is looking for them in relation to the windfarm.
- 6.5. In addition, there may be such a time lag with any effect of displacement, it will be impossible to determine cause and effect.
- 6.6. In *Admiralty Bay*²⁴ the Environment Court considered the practical effect of this:

“[48]...Effective monitoring of adverse effects, using appropriate indicators (as the King Salmon judgement puts it) raises at least two issues that, with present knowledge, cannot be accurately determined. The first is the indicator itself. Should it be just population numbers at a certain time of year? Should it be the times of arrival in significant numbers, or departures in significant numbers? Whichever measurement is chosen, what number should/ would be regarded as the baseline?”

[49] Assuming those issues can be resolved, and an adverse effect is measured, how is a cause to be attributed to that effect? As was mentioned as an example in the hearing, a catastrophic oil spill in a habitat could provide an identifiable cause of animal deaths, or of abandonment of the habitat. Such a cause, and its extent, would be immediately apparent to any above-surface observer. But something less dramatic and obvious, and taking longer-possibly years or more-for its causative link to emerge, may have done irreparable damage before cause and effect can be identified.”

²⁴ Final decision *Friends of Nelson Haven and Tasman Bay Inc. v The Marlborough District Council* [2016] NZEnvC 151.

- 6.7. Such problems exist here with displacement, and conditions cannot overcome them. The risk of catastrophic harm to matuku is inherent in the concept of building a wind farm in matuku habitat network.
- 6.8. Displacement is likely to be the biggest effect albeit shorter term; involving multiple contemporaneous stressors at scale with widespread diffuse effects. And any annual variability of matuku within the area of interest will add to the complexity of understanding and measuring effects.
- 6.9. This can be contrasted with collision mortality which can at least be attributed to the wind farm infrastructure during operation, or vehicles during construction – assuming adequate monitoring occurs and carcasses are found in proximity to the cause.
- 6.10. Mercury’s approach is that displacement is not of concern. For example, Boffa Miskell’s Ecological Impact Assessment (EclA) determined:

“Combining Very High ecological value with low magnitude effect, equals adverse effects that are moderate and which will persist for the duration of construction...If bittern is displaced or works affect breeding, these issues should resolve themselves once construction has ended...”²⁵

- 6.11. However, this view is not shared amongst the Director-General’s or Council’s experts.²⁶

7. ADJOURNMENT VERSUS MAKING A DECISION NOW

- 7.1. As was outlined in the Director-General’s earlier Legal Submissions, and notwithstanding the further information gained from the Spring 2021 monitoring (which indeed confirms the presence of matuku within and around the project site), important information that is critical to the Panel’s decision

²⁵ Omamari Wind Farm, EclA report, Prepared for Tilt Renewables, Boffa Miskell, 12 November 2020, page 90.

²⁶ For example, in response to Boffa Miskell above, Wildlands commissioned by the Council to review ecological aspects of the Assessment of Effects said: “... *This statement implies that it is acceptable for Australasian bittern to fail to breed for the duration of the construction period. As Australasian bittern is classified as Threatened – Nationally Critical, this stance is inappropriate...*” Ecological Review of Resource Consent for Kaiwaikawe Windfarm, Omamari, Wildlands, 2020, p15.

is still not available. In the Director-General's submission, this cannot be rectified through conditions.

- 7.2. Adjournment is an option which has been exercised in other cases where information is absent but able to be obtained. For example, in the Environment Court's *Admiralty Bay* interim adjournment decision²⁷ the Court adjourned the hearing of that matter for 3 years in order for further monitoring considered necessary there to occur. The Court recorded its reasons as follows:

What can be lawfully decided, at this point

[30] *The issue of whether we could validly come to a decision which purported to grant either or both consents, but defer decisions on their locations, dimensions, and duration of seasonal removal was raised at the hearing, but not resolved to our satisfaction. Reflection since has not relieved our concern. The point is that, obviously, we do not know exactly what the baseline information gathering exercise might throw up. If we knew that, it would not need to be done. It is possible, even if unlikely, that its results might throw doubt on whether consent should be granted at all. If that outcome is possible, the validity question is twofold. First, we would be making a decision in the absence of information which even the applicants now agree should be available before the conditions of the consent can be settled. We have to go further and say that it is information which, potentially at least, might indicate that the consent should be declined. A decision made on that inadequate state of knowledge would, self-evidently, be fundamentally flawed.*

[31] *Secondly, the suggestion made to us is that, assuming the gathered information indicates that a consent can be granted, the settling of locations, dimensions and seasonal duration could be resolved by the Council. That would go well beyond a validly delegated certifying role, and would purport to delegate to the Council fundamentally important parts of the decision-making process. That seems to be exactly the situation*

²⁷ *Marlborough Aquaculture Limited v Marlborough District Council* W 027/2009.

examined by MacKenzie J in Director-General of Conservation v Marlborough DC [2004] 3 NZLR 127. In dealing with a condition materially indistinguishable from the second scenario, he said:

It is a question which, if it is sufficiently important to have a bearing on whether the consent should be granted or not, should be decided by the Court itself. It is not a question which can properly be delegated.

Interim result

[32] The only principled way forward that we can see is to defer final resolution of all of these appeals until the results of the three-year study are known, and decisions can be taken on the basis of what it may disclose, additional to what is already known...

- 7.3. The Director-General says that adjourning the Kaiwaikawe Wind Farm application hearing would enable the information her experts say is needed to be gathered before the Panel makes its decision.

8. CONCLUSIONS

- 8.1. Dr Williams's evidence confirms that there are matuku present on the project site and adjacent wetlands.
- 8.2. Dr Williams' expert opinion is that the death of one matuku by the wind farm would be a more than minor effect.
- 8.3. The Director-General says that, for critically endangered species placed at risk by the proposal such as matuku, any conditions of consent need to ensure that adverse effects on them are avoided.
- 8.4. The conditions proposed by Mercury would not ensure that the adverse effects of the proposed wind farm are appropriately addressed.
- 8.5. To grant consent now (even subject to conditions as proposed by the Director-General) would effectively put the cart before the horse. The Director-General says there is not yet sufficient information to determine that this is an appropriate site for a wind farm.

8.6. The Director-General therefore requests that the Panel either:

- (a) adjourns the hearing pending the provision of the information that her experts say is needed to properly determine the application; or
- (b) declines the application on the basis you are satisfied that, on the information currently available, the risk to matuku is too high; or
- (c) declines the application on the basis of insufficient information; or
- (d) if minded to grant the application, that the consent is made subject to the conditions proposed by the Director-General as attached in **Attachment 1**.

DATED 21 January 2022



Shona Bradley



/ Lisa Sutherland

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

Papatūānuku thrives

Te ora o Papatūānuku – Healthy nature

Te ora o Hapori – Thriving communities

Te hunga Atawhai – People who care

ATTACHMENT 1
CONDITIONS PROPOSED BY THE DIRECTOR-GENERAL OF CONSERVATION