

**BEFORE THE HEARINGS PANEL APPOINTED BY KAIPARA DISTRICT COUNCIL**

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

**AND**

**IN THE MATTER OF** an application by Tararua Wind Power Limited to the Kaipara District Council for all necessary resource consents for the proposed Kaiwaikawe Wind Farm

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**LEGAL SUBMISSIONS ON BEHALF OF THE KAIPARA DISTRICT COUNCIL  
FOLLOWING EXPERT CONFERENCING  
DATED 21 JANUARY 2022**

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**MAY IT PLEASE THE HEARINGS PANEL:**

**1. INTRODUCTION**

**1.1** My name is Warren Bangma. I am the legal secondee to the Kaipara District Council (**Council**) under a secondment agreement between the Council and Simpson Grierson.

**1.2** I have been asked to prepare these legal submissions by Mr Dwayne Daly the author of the section 42A report.<sup>1</sup>

**1.3** As the Hearings Panel will be aware:

(a) This matter was originally set down for two days of hearing in Dargaville on 17 and 18 August 2021. However, it was adjourned, part heard, at the end of the first day of hearing, following the Government's announcement of Covid-19 Level 4 restrictions.

(b) At the request of the parties, the Hearings Panel subsequently issued directions facilitating expert conferencing on planning and ecological matters.<sup>2</sup>

(c) The planning and ecological witnesses have conferenced and produced the following joint witness statements (**JWS**):

(i) JWS Miscellaneous Planning Matters dated 8 September 2021 (Richard Turner and Dwayne Daly).

(ii) JWS Avifauna and Planning dated 30 September 2021 (Richard Turner, Dwayne Daly, Maggie Burns, Ueli Sasagi, Stephen Fuller, Della Bennet, Rhys Burns, Emma Williams).

(iii) JWS Bats and Planning dated 4 October 2021 (Richard Turner, Stephen Fuller, Dwayne Daly, Jamie Mackay, Maggie Burns, Tertia Thurley).

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<sup>1</sup> Mr Ueli Sasagi who reviewed the section 42A Report and attended the first day of the Hearing on Tuesday 17 August 2021, and participated in expert conferencing, has since left the Council.

<sup>2</sup> Directions of the Chair dated 31 August 2021.

- (iv) JWS Avifauna and Planning dated 12 October 2021 (Richard Turner, Stephen Fuller, Ueli Sasagi, Dwayne Daly, Della Bennet, Maggie Burns and Rhys Burns).
- (v) JWS Avifauna, Bats and Planning dated 20 October 2021 (Richard Turner, Stephen Fuller, Dwayne Daly, Della Bennet, Jamie Mackay, Maggie Burns, Rhys Burns, Emma Williams, Tertia Thurley).
- (vi) JWS Planning dated 3 November 2021 (Richard Turner, Dwayne Daly, Maggie Burns).

**1.4** In addition, as anticipated in the JWS planning dated 3 November 2021, following completion of expert conferencing, Ms Burns for the Department of Conservation prepared and circulated proposed conditions of consent relating to habitat mapping and Long-Tailed Bat carcass monitoring.<sup>3</sup>

**1.5** The Hearings Panel indicated in its directions dated 20 October 2021 that in relation to the expert conferencing:

- (a) Other than the JWS, it is not seeking further evidence from any party.
- (b) If any party seeks to file additional evidence, it will need the approval of the Hearings Panel.

**1.6** In a Joint Memorandum dated 22 November 2021 the parties sought leave to file supplementary evidence on baseline monitoring for Australasian Bittern and Long Tailed Bats, by Mr Fuller (on behalf of the applicant) and Dr Williams (on behalf of DoC) by 5pm 19 January 2021.

**1.7** The Hearings Panel issued a direction on 22 November 2021 confirming that this supplementary evidence is able to be provided; and also that the parties may provide further legal submissions in relation to the outcome of expert conferencing and the supplementary evidence by 21 January 2022.

**1.8** The deadline for lodgement of the supplementary evidence was subsequently extended until the close of business today. Accordingly, as at the time of lodgement of these legal submissions, the section 42A team has not seen the

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<sup>3</sup> There were forwarded to the Hearings Panel by the facilitator of the expert conferencing, Ms Oliver, on 9 December 2021.

supplementary evidence. However, the section 42A team will be in a position to comment on the supplementary evidence, at the hearing.

**1.9** Counsel understands that the purpose of these legal submissions is to:

- (a) Provide the Hearings Panel with an updated statement of the parties' positions following expert conferencing, and identify the key matters still in dispute; and
- (b) Address any legal issues arising from the consent conditions proposed as a result of expert conferencing.

**1.10** By way of a high level summary of the position of the section 42A team, following expert conferencing:

- (a) Mr Daly, and the section 42A team, continue to support the grant of consent, subject to conditions.
- (b) As set out in the JWS Miscellaneous Planning Matters dated 8 September 2021, there is now agreement on all "non-ecological" conditions following the expert conferencing between Mr Turner and Mr Daly. In particular, matters relating to noise and traffic that were not agreed at the time of the hearing on 17 August 2021, are now agreed.
- (c) In terms of the proposal's potential for adverse effects on Australasian Bittern and Long-Tailed Bats, the section 42A team remain of the view (as expressed in the section 42A report) that these effects can be appropriately addressed through the conditions. As a result of expert conferencing, there is now a higher level of agreement in relation to some aspects of the ecological conditions.<sup>4</sup> To the extent that agreement has not been reached through conferencing:
  - (i) The section 42A team's position, in respect of the conditions proposed to manage potential effects on Australasian Bittern is, in general, fairly closely aligned with the applicant;

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<sup>4</sup> Changes to the conditions that have been agreed through expert conferencing are shown in red text in Appendix 2 of the JWS of the Experts in Relation to Planning dated 3 November 2021.

- (ii) In respect of the proposed conditions to manage effects on Long-Tailed Bats, the sections 42A team's position is, in general, closely aligned with the applicant's. Although the section 42A team have adopted some of the conditions proposed, through expert conferencing, by the experts called on behalf of the Department of Conservation.

**1.11** A copy of the proposed consent conditions now recommended by the section 42A team, as a result of the expert conferencing that has taken place, is **attached** to these legal submissions as **Attachment A**. The attached conditions:

- (a) have been prepared using Appendix 2 to the JWS dated 3 November 2021.
- (b) For the Hearing Panel's ease of understanding in the attached conditions:
  - (i) Changes shown in blue text show changes agreed between Mr Turner and Mr Daly as part of their expert conferencing in relation to non-ecological conditions, or other minor agreed changes.
  - (ii) Changes shown in red reflect changes agreed by experts in the JWS dated 3 November 2021.
  - (iii) Where, as a result of the expert conferencing agreement was not reached and alternative consent conditions were proposed in conferencing by the experts called on behalf of the applicant and the experts called on behalf of the Department of Conservation, Mr Daly has indicated which of those alternative conditions are supported by the section 42A team in the attached condition set through the use of comment boxes stating e.g. "Agree with the applicant's condition" or "Agree with DoC's condition".

**1.12** I have reviewed the conditions of consent contained in Appendix 2 to the JWS dated 3 November 2021. In my view, the conditions produced through expert conferencing do not give rise to any legal issues apart from with respect to the objectives proposed for the Australasian Bittern Monitoring and Management Plan and in particular proposed Condition 54C(d).

**1.13** As indicated in my Opening Legal Submissions dated 13 August 2021, case law in relation to management plans requires the standard that is being set in

the management plan to be sufficiently clear so that the management plan that is later prepared can be approved by a Council officer in a certifying role.<sup>5</sup> To address this issue, I have proposed an amendment to Condition 54C(d). This amendment is included in the section 42A Team's recommended conditions attached to these submissions and is supported by Mr Daly. This proposed change is discussed further at paragraphs 4.1-4.11 of these submissions.

**1.14** These submissions address the following matters:

- (a) Agreement on the non-ecological conditions.
- (b) An update on the section 42A team's position on the ecological conditions, in light of the expert conferencing.
- (c) The legal issue in relation to Condition 54C(d) (discussed above) and the proposed amendment in response.
- (d) Conclusion.

**1.15** Mr Daly (the author of the section 42A report), Dr Bennet (the section 42A team's avifauna expert) and Dr MacKay (the section 42A team's bat expert) will be in attendance throughout the hearing, and available to answer questions from the Hearings Panel.

**2. AGREEMENT ON THE NON-ECOLOGICAL CONDITIONS**

**2.1** As outlined in the opening legal submissions on behalf of the Council (dated 13 August 2021), at that time there were two key areas of disagreement between the applicant and section 42A Team on the "non-ecological conditions":

- (a) First, the applicant and the authors of the section 42A Report were largely in agreement in relation to traffic matters. However, the authors of the section 42A Report proposed a condition requiring the consent holder to pay a bond of \$100,000 to cover damage caused to any Council assets (primarily roading) as a result of the project, or

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<sup>5</sup> Opening Legal Submissions on behalf of the Council dated 13 August 2021, paragraphs 3.1-3.3 and 4.11 – 4.16.

if any additional work was required to “top-up” any repairs undertaken by the applicant.<sup>6</sup>

- (b) Second, in relation to noise, Mr Styles<sup>7</sup> proposed some changes to the noise conditions prepared by the applicant. At the Hearing on 17 August 2021 the Hearings Panel granted a waiver under section 42A(5) of the RMA allowing Mr Styles’ report to be received 10 working days late. However, due to the adjournment of the Hearing at the end of the first day, Mr Daly did not have the opportunity to confirm his position in relation to Mr Styles’ proposed conditions.<sup>8</sup>

**2.2** In relation to the proposed bond, Mr Turner and Mr Daly agreed in the JWS dated 8 September 2021 that:

- (a) A bond (proposed Condition 52D) is not required.
- (b) This is because proposed Conditions 52C and 52D provide for the monitoring and rehabilitation of effects on any council assets.<sup>9</sup>

**2.3** In respect of the changes to the applicant’s noise conditions proposed by Mr Styles (Conditions 41 and 42), Mr Turner and Mr Daly agreed that:

- (a) No amendment is required to the applicant’s proposed Condition 41, as what is proposed by the applicant is consistent with Rule 12.10.16 of the Kaipara District Plan and “NZS6808: 2010 Acoustics – Wind Farm Noise.”; and
- (b) No amendment is required to the applicant’s proposed Condition 42, as that condition provides for monitoring and compliance to be undertaken in accordance with “NZS6808:2021 Acoustics – Wind Farm Noise”, and provides for compliance monitoring to be clearly understood.<sup>10</sup>

**2.4** Mr Turner and Mr Daly also agreed on a number of other minor changes to the non-ecological consent conditions. As a result, there is now complete agreement between the applicant and the section 42A team in relation to the proposed non-ecological consent conditions.<sup>11</sup>

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<sup>6</sup> Opening Legal Submissions on behalf of the Council dated 13 August 2021, paragraph 8.3.

<sup>7</sup> The acoustic consultant engaged by the authors of the section 42A Report to provide specialist advice.

<sup>8</sup> Ibid, paragraph 9.4.

<sup>9</sup> JWS – Miscellaneous Planning Matters dated 8 September 2021, paragraph 19.

<sup>10</sup> Ibid, paragraphs 17-18.

<sup>11</sup> Ibid, paragraphs 22-23.



**3. UPDATE ON THE SECTION 42A TEAM'S POSITION ON THE ECOLOGICAL CONDITIONS**

**3.1** As set out in the opening legal submissions on the behalf of the Council in relation to ecological matters:

(a) Overall, there is a relatively high level of agreement between the independent experts engaged by the applicant and the independent experts engaged to provide input into the section 42A Report.<sup>12</sup>

(b) The section 42A Report prepared by Mr Daly (and peer reviewed by Mr Sasagai<sup>13</sup>) recommends that consent be granted, subject to conditions requiring monitoring and adaptive management plans to address the proposal's potential effects on Australasian Bittern and Long Tailed Bats.<sup>14</sup>

**3.2** Following expert conferencing, Mr Daly, and the section 42A team, continue to support the grant of consent, subject to conditions.

**3.3** A summary of the section 42A team's updated position, following expert conferencing, regarding management of effects on Australasian Bittern and Long Tailed Bats is set out below.

***Effects on Australasian Bittern***

**3.4** With respect to the proposal's potential effects on Australasian Bittern, key features of the alternative conditions proposed by the section 42A team in the addendum to the section 42A Report filed prior to the Hearing on 17 August 2021 were:

(a) Prior to the location of the proposed turbines within the project envelope being confirmed, the consent holder be required to undertake a targeted survey of Australasian Bittern over a period of one year, with the results of this survey used to help inform the final turbine location.

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<sup>12</sup> The Opening Legal Submissions on behalf of the Council, paragraph 1.3(e).

<sup>13</sup> Mr Sasagi has since left the Council.

<sup>14</sup> The Opening Legal Submissions on behalf of the Council, paragraphs 1.3(f) and (g).



- (b) The conditions for the ABMMP be amended to include a clear performance standard so the Council officer certifying the ABMMP knows what the ABMMP is required to achieve.
- (c) The conditions relating to the ABMMP specify the additional level of environmental compensation (habitat creation and pest control) that is to be provided in the event that the modelled rate of 1 Australasian Bittern mortality in 27.8 years is exceeded.
- (d) Proposed monitoring to be undertaken within the project envelope to identify when Australasian Bittern have been injured or killed as a result of the project.
- (e) Conditions that require the Consent Holder to report to the Council when the monitoring has identified an Australasian Bittern has been killed or injured as a result of the project, and the specific management response that is to be undertaken in response, as set out in the ABMMP (so that the conditions do not inappropriately delegate a decision-making power).
- (f) A specified purpose of the section 128 review to be undertaken every 5 years would be to review the effectiveness of the measures undertaken under the ABMMP, and if necessary, consider the need for any amendments.<sup>15</sup>

**3.5** Following expert conferencing there is now a fairly high degree of alignment between the section 42A team and the applicant on these matters:

- (a) In respect of the baseline survey of Australasian Bittern, the independent experts engaged by the applicant support a baseline survey for one spring season, whereas the experts for the Department of Conservation consider there is a need for three seasons of survey data.<sup>16</sup> The section 42A team consider that while three seasons of data is better than one season, one season of spring data, as proposed in the applicant's Condition 53, is sufficient. In addition, Mr Daly advises he has a concern that the alternative Condition 53 proposed by the Department of Conservation could require the consent holder to obtain third party approvals to go onto

<sup>15</sup> As set out in paragraph 4.25(a) to (g) of the Council's Opening Legal Submissions.

<sup>16</sup> JWS of experts in relation to planning dated 3 November 2021, Appendix 1, page 8, condition 53.

other sites to undertake monitoring (should monitoring on other sites be required under the map to be prepared in accordance with the Department of Conservation's proposed Condition 53AA).

- (b) In relation to the proposed ABMMP, the section 42A team does not support the Department of Conservation's proposed requirement for the ABMMP to achieve a "zero mortality" outcome for Australasian Bittern as a result of the operation of the windfarm.<sup>17</sup> Such a requirement may not be achievable; and the experts called on behalf of the Department of Conservation have not shown how this requirement corresponds with Policy 4.4.1.1(a) of the Northland Regional Policy Statement.<sup>18</sup> Overall, having carefully considered the matter, the section 42A team support the conditions for the ABMMP proposed by the experts called on behalf of the applicant.<sup>19</sup>
- (c) With respect to Bird Collision Monitoring, as a result of expert conferencing a number of additional conditions have been agreed. For some Bird Collision Monitoring Conditions agreement was not reached in conferencing and alternative conditions are proposed by the experts called on behalf of the applicant and the Department of Conservation. In respect of these conditions, the section 42A team supports the conditions proposed by the applicant.<sup>20</sup>
- (d) Lastly, in respect of the proposed section 128 review condition, the section 42A team had identified a concern that under the condition as proposed reviews were only 5 yearly. As a result of expert conferencing, it is now proposed that the section 128 review condition would, in addition to the 5 yearly review, provide for the possibility of additional reviews under section 128 as provided for by Conditions 54M, 55D and 55J.<sup>21</sup> The section 42A team support this change, and note it addresses their initial concerns.

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<sup>17</sup> Ibid, page 11, the Department of Conservation's proposed condition 54E(aa).

<sup>18</sup> Which requires, outside of the coastal environment, use and development to avoid, remedy or mitigate adverse effects on Indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists, to the point where those effects are "no more than minor".

<sup>19</sup> Ibid, pages 11-12, applicant's proposed conditions 54C and 54D.

<sup>20</sup> See Conditions 58F, 58FC, 58G and 58J in the conditions proposed by the applicant, and included in the conditions attached to these legal submissions.

<sup>21</sup> Ibid, page 41, condition 88, agreed changes shown in red text.

## ***Effects on Long-Tailed Bats***

**3.6** With respect to the proposal's potential effects on Long-Tailed Bats, the Council indicated in its opening legal submissions that Dr MacKay:<sup>22</sup>

- (a) Was sceptical about the benefit of predator control as environmental compensation for adverse effects on Long-Tailed Bat populations.
- (b) Supports the conditions of consent proposed by the Department of Conservation in relation to Long-Tailed Bats. These conditions generally require:
  - (i) Detailed surveys of Long-Tailed Bats to be undertaken prior to construction.
  - (ii) The development of a Long-Tailed Bat Monitoring and Management Plan.
  - (iii) A key feature of this Plan, that is supported by Dr Mackay, is that it would provide for modelling of when Long-Tailed Bats are likely to be active on the site near the turbines (based on the surveys undertaken) and for "curtailment" of turbines based on when Long -Tailed Bats are likely to be active.<sup>23</sup>

**3.7** The section 42A team has not yet seen the supplementary evidence in relation to monitoring. However, counsel has been advised by counsel for the applicant that monitoring for Long-Tailed Bats on the site has been undertaken by the applicant in a manner that meets or exceeds the requirements for the Baseline Survey in proposed Condition 60, and no Long-Tailed Bats have been identified as being present.

**3.8** As a result of expert conferencing in relation to Long-Tailed Bats, and in light of the above indication that no Long-Tailed Bats have been identified within the site it is noted that:

- (a) There is agreement amongst the independent experts on the establishment of an Expert Long-Tailed Bats Panel, and the baseline survey for Long-Tailed Bats that is to be undertaken.<sup>24</sup>
- (b) In respect of the section 42A team's position:

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<sup>22</sup> The independent bat expert engaged by the Section 42A team to provide expert advice.

<sup>23</sup> The opening legal submissions on behalf of the Council, paragraphs 5.14-5.16.

<sup>24</sup> JWS of the experts in relation to planning, Appendix 2, pages 28-29, conditions 59C-59J and condition 60.

- (i) Dr MacKay's initial view that the probability of Long-Tailed Bats being present on the site is low has been confirmed.
- (ii) Dr MacKay remains sceptical about the benefits of predator control as a management response, given the dispersed nature of Long-Tailed Bat populations.
- (iii) With respect to the proposed conditions, the section 42A team:
  - Support the applicant's proposed conditions in relation to monitoring.
  - Support the use of curtailment of turbines as a management response identified under the Long-Tailed Bat Monitoring and Management Plan.<sup>25</sup>
  - Do not support the Department of Conservation's proposed Conditions 60J(b) and (c) which would require turbine locations to be revised.
  - In relation to the Long-Tailed Bat Monitoring and Management Plan and Long Tailed Bat Collision Monitoring conditions prepared by Ms Burns on behalf of the Department of Conservation dated 3 December 2021, Dr Mackay notes these conditions have not been the subject of expert conferencing. Dr Mackay has reviewed the Department of Conservation's proposed conditions dated 3 December 2021 and notes there are some aspects of those conditions that he prefers to the applicant's proposed conditions. In particular, the use of curtailment of turbines, rather than predator control. Dr MacKay is able to discuss his views further at the Hearing, if this would be of assistance to the Panel.

#### **4. LEGAL ISSUES RAISED BY THE PROPOSED CONDITIONS**

- 4.1** I have reviewed the conditions of consent contained in Appendix 2 to the JWS dated 3 November 2021.

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<sup>25</sup> As proposed by the Department of Conservation under Condition 60(e).

- 4.2 In my view, the conditions produced through expert conferencing do not give rise to any legal issues apart from one issue with respect to the objectives proposed for the Australasian Bittern Monitoring and Management Plan and in particular proposed Condition 54C(d).
- 4.3 As indicated in my Opening Legal Submissions dated 13 August 2021, case law in relation to management plans requires the outcome or standard that is to be achieved under the management plan to be sufficiently clear so that the management plan that is later prepared can be approved by a Council officer in a certifying role.<sup>26</sup>
- 4.4 Condition 54C of the proposed consent conditions attached as Appendix 2 to the JWS dated 3 November 2021 requires the consent holder to submit an Australasian Bittern Monitoring and Management Plan to the Resource Consents Manager Kaipara District Council for certification that the plan meets the objectives in Condition 54C(a) to (d).
- 4.5 The objective in Condition 54C(d) currently provides:  
*"The identification of potential further measures to avoid, remediate or mitigate adverse effects on Australasian Bittern in the event that it is established that the construction or operation of the Kaiwaikawe Wind Farm has an adverse effect on the population of Australasian Bittern utilising the Omamari Station Wetland in the vicinity of Maitahi Road and the Maitahi Wetland (as identified on the map attached as **Appendix X** to these conditions and dated X)."*
- 4.6 In my respectful submission, this objective for the Management Plan does not meet the requirements set out in the case law identified in my opening legal submissions. In particular, while the objective requires the Management Plan that is to be submitted to the Council for certification to identify "*potential further measures to avoid, remediate or mitigate adverse effects on Australasian Bittern*" it does not specify the outcome or standard that the additional measures identified in the Management Plan must achieve.
- 4.7 In contrast, I note that the conditions of consent for the Long-Tailed Bat Monitoring and Management Plan require that when that Management Plan is submitted to the Resource Consents Manager for certification it must show how it meets the objective set out in Condition 60C(c) which provides:

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<sup>26</sup> Opening Legal Submissions on behalf of the Council dated 13 August 2021, paragraphs 3.1-3.3 and 4.11 – 4.16.



"The measures to avoid, remedy, mitigate or compensate for more than minor adverse effects on the local population of long-tailed bats from the operation of the Kaiwaikawe Wind Farm." (my emphasis)

- 4.8 This sets a clear standard that the measures proposed in the Long-Tailed Bat Monitoring and Management Plan must achieve.
- 4.9 I understand this objective for the Long-Tailed Bat Monitoring and Management Plan is consistent with Policy 4.4.1.1(a) of the Northland Regional Policy Statement which requires, outside of the coastal environment, use and development to avoid, remedy or mitigate adverse effects on Indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists to the point where those effects are "no more than minor".
- 4.10 In my submission, amending the objective for the Australasian Bittern Monitoring and Management Plan (contained in Condition 54C(d)) in a similar way would provide a clear standard for the Management Plan to achieve, ensure consistency with the equivalent provision in relation to the Long-Tailed Bat Monitoring Plan, and be consistent with Policy 4.4.1.1(a) of the Northland Regional Policy Statement.
- 4.11 Suggested amended text is included in the recommended conditions, **attached** to these legal submissions.

## 5. CONCLUSION

- 5.1 Mr Daly, the author of the section 42A Report, supported by advice from Dr Bennet and Dr Mackay, continues to recommend consent be granted, subject to the conditions **attached** to these legal submissions.<sup>27</sup>



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Warren Bangma

Counsel for the Kaipara District Council

21 January 2022

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<sup>27</sup> Noting only that the section 42A team has not yet seen the supplementary evidence on behalf of the applicant and the Department of Conservation.

**Attachment A to legal submissions – conditions of consent proposed by the section 42A team**