

13 March 2020

Ministry for the Environment  
PO Box 10362  
Wellington 6143

**By email to:** indigenousbiodiversity@mfe.govt.nz

## **SUBMISSION ON THE PROPOSED NATIONAL POLICY STATEMENT FOR INDIGENOUS BIODIVERSITY**

1. We act for Weston Lea Limited.
2. Please find **attached** a submission on behalf of Weston Lea Limited on the proposed National Policy Statement for Indigenous Biodiversity.
3. Weston Lea thanks the Ministry for the Environment for the opportunity to provide comment on the proposed National Policy Statement for Indigenous Biodiversity.
4. Please contact me if you have any questions regarding Weston Lea's submission.

Yours faithfully  
**Wynn Williams**



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# WESTON LEA LIMITED'S SUBMISSION ON THE PROPOSED NATIONAL POLICY STATEMENT FOR INDIGENOUS BIODIVERSITY

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## INTRODUCTION

1. This submission is made by Weston Lea Limited (**Weston Lea**).
2. Weston Lea thanks the Ministry for the Environment for the opportunity to provide comment on the proposed National Policy Statement for Indigenous Biodiversity (**NPS-IB**).
3. This submission has been collaboratively prepared by Kate Woods (solicitor), Dave Serjeant (planner) and Dr Sarah Flynn (ecologist) on behalf of Weston Lea.

## BACKGROUND AND CONTEXT

4. Weston Lea represents the Peacocke family in relation to its applications for subdivision and development of approximately 139ha of land at Peacocke, Hamilton. In May 2018 Weston Lea applied for resource consents for 833 residential lots and related roading and reserve development. The land, known as Amberfield, is within the Peacocke Structure Plan Area (**PSPA**), located to the south of the Hamilton CBD, north of Hamilton Airport and beside the Waikato River.
5. In November 2019 Hamilton City Council granted consent to the Amberfield application. The consent has since been appealed by Weston Lea, principally in relation to conditions on the management of ecological effects on the long-tailed bat. Another submitter has also lodged an appeal in relation to these conditions. Long-tailed bats are classified as Threatened – Nationally Critical due to habitat degradation and loss, and predation from introduced predators.
6. The entire PSPA comprises approximately 720ha of land in southern Hamilton, zoned for urban development. The PSPA's zoning represents a significant part of the Hamilton City's future urban growth, designed to fulfil the Council's obligations as a high growth area under the National Policy Statement on Urban Development Capacity (**NPS-UDC**).
7. The proposed Amberfield development is located on the western margin of the Waikato River, across the river from Hammond Bush. The Mangakotukutuku gully is located approximately 1 km to the west. The Waikato River, Hammond Bush, and the Mangakotukutuku gully are important landscape features for the long-tailed bat population. The former location is an important commuting and foraging corridor, while the latter two locations provide high-quality foraging habitat and contain maternity roosts. The Amberfield site itself is largely comprised of pasture with some shelterbelts and gully areas providing commuting corridors.
8. The ecology of the long-tailed bat within and around the Amberfield site was the subject of extensive survey and assessment by Weston Lea. This assessment was within the context of previous studies of the long-tailed bat in Hamilton; in particular those carried out for the designation of new arterial roading throughout the PSPA by Hamilton City Council and the New Zealand Transport Agency for the roading programme known as Southern Links. Consequently, it was already well understood

that the long-tailed bat populations in southern Hamilton had an extensive home range.

9. Relevant to the provisions of the NPS-IB, the Amberfield site contains some bat habitat and is an area of importance to the bats as highly mobile fauna.
10. The Hamilton City District Plan provides little recognition of the presence of the long-tailed bat and its significant areas of habitat. Some, but not all, of the Waikato River margins in the vicinity of Amberfield are mapped as Significant Natural Areas, although not specifically for the purposes of protecting the long-tailed bat or its habitat. It was an agreed position in evidence before the appointed independent commissioners on the application that the District Plan was both incomplete and uncertain and that recourse to Part 2 of the Resource Management Act 1991 (**RMA**) was necessary for consideration of the application.
11. The Amberfield proposal was required to respond to the land's long recognition as an important growth cell for Hamilton City and a significant part of the city's capacity for residential development, as specified in the Waikato Regional Policy Statement's density targets for greenfield residential development. Recognition of the value of the site and its surrounds for the long-tailed bat was also required in the development design. While acknowledging that the consents are subject to appeal, Weston Lea considers that the subdivision design and the mitigation package proposed for long tailed bats achieves the s.5 sustainable management purpose of the RMA.
12. The Amberfield application was lodged in the statutory context of both Hamilton City Council and Waikato Regional Council having nascent policies on the establishment of sub-regional or landscape scale programmes for the management of indigenous biodiversity that would have had the long-tailed bat as a key focus. Unfortunately, neither Council had made much progress in advancing these policies.
13. The subdivision design and onsite mitigation package incorporates a wide range of methods to address potential adverse effects on long-tailed bats. Importantly, the subdivision design avoids the areas of high value bat habitat (Waikato River riparian margin, shelterbelts and gully areas). The onsite mitigation package includes significant habitat restoration and enhancement (including the installation of artificial roost boxes) composing 18.65ha. This is 7 times the area of vegetation that will be removed.
14. The risk of a time lag effect, between planting and buffering from planting becoming fully established, will be mitigated through early planting, lot deferrals, and subdivision staging over several years (possibly up to 10 years). The potential impacts of light spill on bat habitat will be effectively mitigated through a bat-sensitive lighting regime for streetlights and all lots adjacent to sensitive locations.
15. While Weston Lea's ecologists considered that proposed mitigation package will address all adverse effects of the proposal on the long-tailed bat population, the Hamilton City Council's ecologist remained concerned as to the potential for short-term effects on the bats while immediate to longer-term mitigation measures become established (e.g. vegetation). To address Hamilton City Council's concerns, the ecologists agreed that additional mitigation in the form of a pest management fund managed by Hamilton City Council across key city-wide habits would enhance the resilience of the long tailed bart population.
16. The purpose of the fund is to provide predator control in core maternity roost sites within the South Hamilton landscape to improve breeding success in bat colonies across Hamilton.

17. The Hamilton City Council predator control fund recognises the need for a habitat wide approach to dealing with city wide adverse effects on long-tailed bats. It is anticipated that ratepayers and other developers will need to contribute to the funding of the city wide management plan for the long-tailed bat. Long-tailed bats are a highly mobile species and site-specific mitigation yields diminishing returns. In simple terms, a point is reached (depending on the nature of the habitat) where additional site-based mitigation would not contribute to the survival of a species across its wider habitat. In these circumstances, additional mitigation is better utilised in other habitats across a species' ecological home-range.
18. The mitigation of effects not directly related to a particular site (i.e. offsite) recognises that ecology does not conform to human imposed jurisdictional or property-based boundaries. Accordingly, effective ecological management often requires onsite mitigation and the implementation of measures designed to enhance survival of a species across its wider home-range.

## **PURPOSE AND SCOPE OF WESTON LEA'S SUBMISSION**

19. The purpose of making this submission is to provide the Ministry for the Environment with a case study that represents a real world example of the significant tension that can exist between national policy statements (NPS-UDC and NPS-IB), the possible shortcomings of current provisions to recognise and provide for indigenous biodiversity, and the challenges faced by the NPS-IB.
20. It is noted that if the NPS-IB comes into force prior to the Environment Court making its decision on the appeals relating to Amberfield, then the Court will need to have regard to the NPS-IB under section 104 of the RMA. While Part 2 (Objectives and Policies) of the NPS-IB will be relevant to the Court's consideration, Part 3 (Implementation Requirements) does not appear to be applicable as it largely provides direction to local authorities when making or amending their plans, or policy statements, or managing indigenous biodiversity generally under the RMA. However, once these requirements are implemented by local authorities, these provisions will be relevant to the Amberfield site and any further development moving forward.
21. This submission addresses the issues most relevant to the Amberfield case study below under the 'Specific Discussion Points.' The submission addresses, where appropriate, the questions contained in the discussion document.

## **SPECIFIC DISCUSSION POINTS**

### **SNA and other definitions**

22. Weston Lea has concerns relating to the various definitions of areas of indigenous biodiversity value that are referred in the NPS-IB, in particular:
  - a. Definition of "SNA", and corresponding definition of "habitat" (3.8, 3.9);
  - b. Interpretation of "highly mobile fauna areas" (3.15); and
  - c. Interpretation of "areas that provide important connectivity or buffering functions" (3.16).
23. Weston Lea considers that there may be significant overlap between the different areas of indigenous biodiversity value and confusion as to what definitions apply, particularly when it comes to highly mobile fauna.

24. As noted above, the species that is relevant to the Amberfield case study is the long-tailed bat which has a nationally Threatened (Critical) status. Under the NPS-IB, there is no question that its “habitat” would be scheduled as an SNA by the relevant local authority and rated High under the criteria in Appendix 2. However, being highly mobile fauna, the question with the long-tailed bat is at what point the “habitat” is determined to be a SNA or just part of the bat’s extensive natural range (referred to as “highly mobile fauna areas” under 3.15 the NPS-IB). The classification of highly mobile fauna area is open to very wide interpretation under the NPS-IB.
25. Further, 3.16 under the NPS-IB refers to “areas that provide important connectivity or buffering function.” It appears that this is an additional requirement for local authorities to “enhance and protect” these areas that may fall outside of an SNA.
26. Applying all of this to the Amberfield site, there are numerous landscape areas of variable habitat value to the long-tailed bat. The level of value attaching each of these areas, was a matter of contention between the experts for various parties at the Council hearing (e.g. whether broad areas of pasture should be considered high-value or significant habitat).
27. Given the potential confusion and overlap between these definitions, Weston Lea considers that the NPS-IB needs to more clearly define or clarify the habitat covered by the different provisions of the NPS-IB. Alternatively, further guidance needs to be produced by the Ministry for the Environment to ensure that local authorities are interpreting and applying these provisions consistently.

### **Managing ‘highly mobile fauna’**

*Q.17. Part 3.15 of the proposed NPSIB requires regional councils and territorial authorities to work together to identify and manage highly mobile fauna outside of SNAs. Do you agree with this approach? Yes/no? Why/why not?*

28. Weston Lea agrees that management of highly mobile fauna requires a collaborative approach that is consistent across territorial boundaries. However, an evidence-based, species-specific plan should underpin such management, with clear guidance on measures that will best support conservation measures for the individual species.
29. As noted above, any overlap with SNA provisions of areas that provide important connectivity and buffering functions need to be better clarified. In the case of Hamilton South, long-tailed bats utilise a variety of relatively recently established landscape features as both connective linkages and core habitat. For example,
  - a. a 15-year-old poplar shelterbelt that intersects the Amberfield site is frequently used for commuting between natural gully systems (in contrast, an existing natural gully at the southern end of the site is infrequently used); and
  - b. contrary to many experts’ expectations, artificial roost boxes installed within reserves in urban Hamilton have proved resoundingly successful. In particular, boxes placed in a small stand of old pine trees in an urban reserve (Sandford Park), immediately adjacent to residential properties are routinely used by a colony of bats.
30. These examples illustrate both the challenge of recognising the landscape features that are important to bats, and the opportunities to maintain and enhance mobile fauna populations through innovative restoration and targeted management interventions that improve landscape quality and support coexistence with humans.

31. Further, in our experience, it would appear to be extremely difficult to map the 'highly mobile fauna areas' (given very its wide definition). By way of illustration, the range of long tailed bats in South Hamilton (and surrounding districts) encompasses a huge and diverse geographic area, including urban and rural environments. It is hard to imagine a suite of objectives, policies and methods that local authorities could consistently apply to activities within that large geographical area.
32. Weston Lea acknowledges the definition of highly mobile fauna as stated in the NPS-IB. Policy 13 is "to identify possible presence of and manage highly mobile fauna". The implementation action of councils in 3.15(1) is to "survey and record areas outside SNAs where highly mobile fauna have been, or are likely to be, sometimes present" and then to include objectives, policies or methods with the overall purpose of maintaining "viable populations of highly mobile fauna across their natural range". It is also noted that 3.13(1)(b) requires local authorities to apply the effects management hierarchy to areas outside SNAs, which would include highly mobile fauna areas.
33. When taken together Weston Lea considers that the implementation of these provisions would likely lead to areas outside of SNAs, such as the highly mobile fauna area of the long-tailed bat, to become de facto SNAs. In this situation, the implementation of the NPS-IB will have the potential to conflict significantly with national direction on urban development capacity.
34. To address this issue, Weston Lea considers that one option may be for the provisions that relate to "highly mobile fauna" (3.15) to more expressly focus on preferential pathways or areas within the natural range of a species (as necessary to maintain a viable population) rather than "areas where highly mobile fauna have been, or are likely to be, sometimes present."

#### **Identification of SNA other than through Schedule 1 process**

35. Provision 3.13(2) of the NPS-IB states that if an area outside an SNA is assessed as significant (following an assessment in accordance with Appendix 1), a local authority must manage the adverse effects on indigenous biodiversity in the area as if the area were an SNA.
36. Weston Lea has concerns with the apparent intention and practical effect of this provision. This appears to imply that SNAs can effectively be created through resource consent process, without going through the Schedule 1 process under the RMA. This may have the effect of undermining the Schedule 1 process for identifying SNAs (given the strong policy direction that applies to SNAs). This will also provide uncertainty to applicants on the applicability of the NPS-IB provisions.
37. It is inappropriate for the classification of an SNA to play out in an ad hoc way in various resource consent applications. Weston Lea considers that the creation of SNAs in this manner is contrary to virtually all of the principles and approaches for the assessment and classification of SNAs as set out in 3.8(2).
38. It is not clear in provision 13(2) as to who the SNA assessment would be undertaken by to activate the provision. It would not be unusual for there to be some disagreement between different ecologists engaged by different parties in a resource consent process as to the "significance" of some natural areas of a site (as was the case in at the Council hearing on the Amberfield hearing). Weston Lea considers that SNA's should be classified through the Schedule 1 process as this ensures that all evidence on the "significance" of a natural area is properly tested and exposed to independent decision making. Local authorities have an obligation to update their

plans at least every two years (following initial implementation requirements) to ensure all additional areas of SNAs are added (3.8(8)).

39. Weston Lea considers that the NPS-IB should be amended to remove 3.13(2) (i.e. the requirement for a local authority to manage the adverse effects on indigenous biodiversity in the area as if the area were an SNA).

### **Effect management hierarchy**

*Q20. Do you agree with the use of the effects management hierarchy as proposed to address adverse effects on indigenous biodiversity instead of the outcomes-based approach recommended by the Biodiversity Collaborative Group? Yes/no? Why/why not?*

40. In short, no. In Weston Lea's view, all effects management should have an outcomes-based focus. We agree that avoidance or minimisation of adverse effects should be given priority, but not beyond the point of diminished returns, i.e., where offsite measures achieve greater ecological / biodiversity benefits than avoiding further effects.
41. We are concerned that the NPS-IB, as currently drafted, will prioritise avoidance of potential habitat in accordance with the Effects Management Hierarchy without consideration of quality or context, and placing unnecessary constraints on proposed activities.
42. Such an approach treats maintenance of the status quo as the best possible outcome. It would not directly address key threats to the population or facilitate protection or enhancement of important habitats; even though these measures would much more proactively provide for the protection of the target fauna.
43. For example, in the Amberfield application, one of the submitter's experts argued strongly for retention of a number of solitary exotic trees with no discernible roost features on the basis that they were potential roost sites for bats, and also identified pasture as foraging habitat because small numbers of passes were recorded. Therefore, this submitter's position was that the principles of the Effects Management Hierarchy dictated that these features should be avoided as a first priority. In contrast, the merits of the extensive habitat enhancement proposed to protect and strengthen a key commuting corridor for bats were downplayed because the Applicant had "jumped to mitigation" without fully exhausting options for avoidance.
44. Weston Lea agrees with the Biodiversity Collaborative Group that the Effects Management Hierarchy may mean that councils decline resource consent applications for some activities that could have minimal impact on biodiversity.<sup>1</sup> Weston Lea considers that better biodiversity outcomes could be gained through onsite and offsite mitigation and biodiversity measures designed to benefit species across a broader habitat range.
45. In a similar vein, Weston Lea considers that the Effects Management Hierarchy has the potential to preclude habitat wide or district wide approaches to dealing with adverse effect on highly mobile species. As noted above with the Amberfield example, Weston Lea's payment to a fund for predator control enables a habitat wide approach to dealing with potential city-wide effects on the long-tailed bat population.
46. To conclude, Weston Lea considers that adverse effects on indigenous biodiversity should be addressed through an outcomes-based approach, rather the strict Effect

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<sup>1</sup> Discussion Document, page 43.

Management Hierarchy, as this will result in better environmental outcomes overall. The NPS-IB should be amended to reflect this.

47. However, if the Ministry wishes to retain the Effects Management Hierarchy within the NPS-IB, Weston Lea has some comments on the wording of the definition of the Effects Management Hierarchy.
48. Weston Lea assumes that the intent of the qualifier “where possible” in relation to effects being avoided (in (a)) or remedied (in (b)), is to make the requirement in each case less absolute, and thus make it clear that the hierarchy is a menu. However, “where possible” sets a very high, if not insurmountable, bar to not avoiding the adverse effect. The drafting of the definition therefore has a determining effect on the implementation of the relevant policies in 2.2.
49. Weston Lea supports the policies in 2.2 and considers them to be clear as stated. Policy 6 is:

“to identify and protect areas of significant indigenous vegetation or significant habitat of indigenous fauna by identifying and managing them as SNAs”.
50. Weston Lea’s reading of the policy is that the ‘identification and protection’ at the beginning of the policy is to be achieved by identification and management as SNAs at the end of the policy. The menu or options for management are then defined in the Effects Management Hierarchy, where much emphasis is likely to be placed on the qualifiers “where possible”.
51. Weston Lea considers that further explanation of what “where possible” means is required (i.e. does this relate to physical, spatial, financial, or technical possibilities’) or an alternative drafting approach is needed.

### **Biodiversity offsetting and biodiversity compensation**

*Q34. Do you agree with the framework for biodiversity offsets set out in Appendix 3? Yes/no? Why/why not?*

52. No. The ‘biodiversity offsetting’ framework includes a number of implicit assumptions. For example, that biodiversity losses and gains are able to be objectively and reliably measured or estimated with sufficient precision to directly assess performance and demonstrate “no net loss”, and that restoration or management can replicate ecosystems in a “like for like” fashion. The offset accounting methods integral to the proposed framework require numerous subjective judgements which undermine claims of objectivity. The requirement for “permanence” devalues interventions such as pest control that can be of immediate benefit to biota in urgent need of aid to support population recovery, and creates a bias in favour of revegetation programmes, though these may have long lag times before ecological benefits are achieved.
53. We consider that while the principles that underpin the offsetting framework are a useful guidance when formulating an offset or compensation package, the requirement that all offsetting principles are met will limit opportunities to undertake offsetting and will not necessarily deliver the best biodiversity outcomes.

*Q35. Do you agree with the framework for biodiversity compensation set out in Appendix 4? Yes/no?*

54. As for offsetting above – the only difference in compensation with respect to the NPS-IB is that the requirement to quantify losses and gains is removed.



*Why/why not? Include an explanation if you consider the limits on the use of biodiversity compensation set out in Environment Court Decision: Oceana Gold (New Zealand) Limited v Otago Regional Council as a better alternative.*

55. We support the principle that there are limits to offsetting and compensation (i.e., there are some effects, such as loss of species, that cannot be compensated or offset). However, we disagree with the provision in the Oceana Gold decision that removal of habitat of a threatened species cannot be compensated. In practice, defining the habitat of a species can be difficult, and some threatened species are commonly found occupying sub-optimal habitats (for example, on the Amberfield site a solitary bat was recorded roosting in a small, isolated exotic tree for a single night, however protection of this tree would offer a negligible benefit to the bat population).

Q36. *What level of residual adverse effect do you think biodiversity offsets and biodiversity compensation should apply to?*

- a. *More than minor residual adverse effects*
- b. *All residual adverse effects*
- c. *Other. Please explain.*

56. We consider that these should apply to all for consistency with the RMA.

### **Statutory frameworks**

Q60. *Do you think there are potential areas of tension or confusion between the proposed NPSIB and other national direction? Yes/no? Why/why not?*

57. In short, yes. Weston Lea considers that there will likely be tension and/or conflict between the NPS-IB and other national direction. This will lead to inconsistencies on how different local authorities interpret and implement the various pieces of national directions, and also flow on to uncertainty for developers on how these the various national policy statements apply in each district.

58. One example where this could arise is the between the NPS-IB and the NPS-UDC. It will be difficult for local authorities to apply development density targets under the NPS-UDC (if any area has been identified as a high growth area) whereby those density targets apply to areas that are later identified as SNAs, or the subdivision, use or development of those areas may "affect" neighbouring SNAs.

59. As noted above, in relation to the Amberfield development, the PSPA is an important part of Hamilton City Council's implementation of the NPS-UDC. It is an area where Hamilton City Council and the New Zealand Transport Agency have significant infrastructure investment which is already committed and underway. The reduction in the land area available due to bat mitigation has led to a situation where Amberfield is unlikely to meet the anticipated dwelling numbers for the PSPA. This will only likely be compounded further when Hamilton City Council is required to implement the various implementation requirements under the NPS-IB.

60. We consider that the Ministry for the Environment needs to provide guidance to local authorities (and the public) on how any conflict between conflicting national direction is balanced or resolved, including whether one piece of national direction prevails over one another.



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Signature of Kate Woods on behalf of the Weston Lea Limited

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