

23 October 2019

Dear

Via email:			

IMPLICATIONS FOR 1080 PEST CONTROL OPERATIONS RESULTING FROM SUPREME COURT'S PAUAMAC5 DECISION

- I refer to your letter dated 14 October 2019 written on behalf of Kaitiaki Tuku Iho Inc to the Director-General of Conservation. Your letter asks that urgent consideration is given to the implications of the Supreme Court's decision in Shark Experience Limited v PauaMAC5 Incorporated [2019] NZSC 111 [11 October 2019]. I have been asked to respond on the Director-General's behalf.
- 2. The Department of Conservation has considered the Supreme Court's decision carefully and is seeking further advice on how it applies beyond shark cage diving. The Director-General does not intend "to place all imminent aerial poison operations on hold" as you request. There is nothing in the Supreme Court's decision on the offence provisions relating to shark cage diving which has direct implications for the authorisations being granted in relation to 1080. Your letter has confused a number of matters relating to health and safety, consultation, compliance with labels and other mandatory conditions of approval and DOC is already complying with the law.
- 3. I note your comments under the heading "Hunt or kill" and "disturb". It is not correct that the aerial spreading of 1080 amounts to "disturb" as defined by the Supreme Court. Pest control operations are conducted to protect and grow populations of indigenous species. In the case where they may be some deaths of individual protected wildlife, these have been authorised under the Wildlife Act.
- 4. Under your heading **Limits on Jurisdiction to Authorise s53 and s54**, DOC has always accepted that it (and third parties) must act in accordance with the Wildlife Act as it is interpreted by the Courts. The authorisations granted under these sections distinguish between the targeted pests causing damage (section 54) and the protected wildlife (section 53).

- 5. Under your heading Consultation, there are two points that need to be refuted. Firstly, no authority under the Wildlife Act has been granted retrospectively for 1080 operations, although some permissions have been revoked and new permissions granted prior to the activity commencing. Secondly, under section 57 of the Wildlife Act, all wildlife (other than wildlife in Schedule 5) is deemed to be vested in the Crown, although it is acknowledged that protected wildlife is a taonga for New Zealanders.
- 6. It is not surprising there are very different consultation practices for different circumstances. The extent of appropriate consultation will always be a consideration for any operation, but there is no implication from the Supreme Court's decision which suggests that DOC needs to urgently improve its consultation practices.
- 7. 1080 is one of the most researched toxins in the world and there is already considerable information about its use. The EPA has approved it as a hazardous substance that can be used in New Zealand and the Ministry of Primary Industries has approved it under the Agricultural Compounds and Veterinary Medicines Act 1997. As you are aware 1080 has been investigated by the Parliamentary Commissioner for the Environment. It is appropriate to recognise this information when considering the extent of consultation. This does not mean that consultation does not occur for 1080 operations, but it is appropriate to limit such consultation to the effects of a specific operation in a particular location. Comparing the consultation for shark cage diving undertaken by a commercial tourist operator for its own benefit and being a relatively new activity in New Zealand with the consultation on a very long-standing activity of pest control is not appropriate.
- 8. Under your heading **Health and safety risks to third parties**, it appears that you have misconstrued the position in the Court of Appeal. The issue was one of "safety of the public", which is significantly different from "health and safety". Having said that, when using any hazardous substance including 1080 baited pellets (note that poison dust is a misleading description and suggests an operation similar to crop dusting which is not the case with 1080 pellets), safety issues of those likely to be in the area is considered. Considerable efforts are made to ensure that people are made aware of operations, although exact timing of an operation may be difficult due to weather events. People are not generally, as a matter of course, restricted from going into areas where there is going to be or has been a recent operation, but people are informed so they are able to make their own choices about whether to proceed given their perception of risk to their well-being. They are also informed of sensible measures including not touching or consuming any bait they may come across. Your suggestion that the only advice provided to those using backcountry huts is a "knock on the door" is incorrect.
- 9. In relation to your final substantive paragraph, I reiterate that DOC has taken its legal responsibilities seriously. DOC has reviewed its current authorisations for the use of 1080, including in relation to the Wildlife Act. There is nothing in the Supreme Court's decision on the offence provisions relating to shark cage diving which has direct implications for the authorisations being granted in relation to use of 1080. You claimed

there was "ongoing high rate of kill of endangered kea, mohua and other wildlife". This statement is false. There is hard evidence, gathered over many pest control operations, that point to the benefits to species populations from the use of aerial 1080. The use of 1080 cereal pellets does not result in "deadly poison dust". The risk to humans is a public safety matter, but there is no substantive evidence about the risks you raise.

10. DOC will continue to research other methods to deal with predator pests but at this stage the benefits of using 1080 to native species far outweigh the risks.

Kind regards

Martin Kessick

Deputy Director-General Biodiversity

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