
BEFORE THE BOARD OF INQUIRY

In the matter of a Board of Inquiry appointed under s146 of the Resource Management Act 1991 to consider an application by Mighty River Power Limited for resource consents to construct and operate a Windfarm at Turitea

**MEMORANDUM OF COUNSEL
FOR PALMERSTON NORTH CITY COUNCIL**

Dated: 10th June 2009

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MAY IT PLEASE THE BOARD

Introduction

1. The Palmerston North City Council (PNCC) has considered the rebuttal evidence supplied by the Applicant, Mighty River Power Ltd (MRP).
2. MRP has supplied considerable rebuttal evidence by experts who provided a statement in chief. In addition, MRP has supplied statements of evidence from ten (10) new witnesses. These witnesses fall into the following categories:
 - (a) New witnesses in the same discipline as witnesses who provided a statement in chief. This new evidence is in the nature of peer review/rebuttal reports. For example, MRP calls a new landscape architect and two new social impact analysts;
 - (b) New witnesses who do not appear to rebut any evidence provided by submitters experts e.g. Professor R Sims;
 - (c) New witnesses who expand the primary evidence of an existing expert e.g. civil engineering providing further geotechnical evidence.
3. The nature of the new evidence MRP has supplied is set out in **Attachment 1**. See also the affidavit of Jeff Baker attached.
4. PNCC was not informed prior to 5 June 2009 that these new witnesses were intended to be called. The consequence of this evidence is that there is substantial prejudice to PNCC and no doubt to other submitters.

Background

5. MRP has been working on this project since 2006.
6. MRP filed its application in August 2008.
7. MRP sought a call-in in August 2008.
8. MRP representatives attended a public meeting conducted by PNCC outlining the evidence intended to be called by PNCC on 12 February 2009.
9. MRP were aware of a Council meeting on 18 February 2009 where PNCC outlined the nature of the independent evidence intended to be called by PNCC.
10. Submissions closed on 23 February 2009.
11. The Board of Inquiry issued its directions in early March 2009.
12. It is evident from this background, that MRP has had:
 - (a) More than sufficient time to understand the nature and extent of the effects and issues it is required to address in support of the application;
 - (b) More than sufficient time to comprehend the nature of the submissions and the evidence that it should call in response to those submissions as evidence in chief.

Board of Inquiries Directions

13. The Board of Inquiry set directions in March 2009.
14. The directions included the objective to provide a fair and orderly opportunity for the parties to participate in the process¹.
15. Principles governing the procedures of the Board included fairness, robustness and confidence in the process.

¹ Para 3 – Directions March 2009

16. The timetable was strict and that in itself has placed considerable demands on participants even assuming full compliance with the directions.

17. In relation to Statements of Evidence, paragraph 12 of the Board's directions reads:

"[12] The Board will require written statements of all evidence to be provided to all parties well in advance of the hearing. The statements will be lodged with the Board and circulated sequentially, with Mighty River Power providing its evidence first. All other parties will then provide their evidence. There will then be an opportunity for Mighty River Power to lodge any rebuttal evidence. The timetable for the lodging and circulation of statements of evidence is contained in paragraph [19] of these Directions. It should be clearly understood that only in truly exceptional circumstances will any witness be permitted to give evidence that has not been contained in a statement lodged and circulated in accordance with the timetable." [emphasis added]

18. The directions of the Board follow a familiar format for people engaged in resource management matters including MRP. That is:

- (a) The applicant is required to present all the evidence from experts it relies upon. That is what sequential exchange means. The applicant is advancing the application and is required to present all evidence it considers necessary and relevant in support of the application and to address matters raised in submissions;
- (b) The submitters then have an opportunity to present their evidence in support of their submissions and in response to the applicant's evidence;

- (c) There is an opportunity for rebuttal evidence by the experts for the applicant who provided statements of evidence in chief.
- 19. The Board's timetable provides for sequential exchange and then requires expert caucusing and notification of cross examination within a tight timeframe. All directions assume that submitters have an appreciation of the evidence they are expected to address on the first date the applicant presents its evidence in chief.
- 20. The statements from new witnesses are supplementary statements, not statements in rebuttal. These are not provided for in the Board's directions.
- 21. If new witnesses are allowed to produce evidence at a time after the submitters have submitted their evidence, then there are three obvious complications:
 - (a) The submitter's experts are not in a position to respond to that new evidence;
 - (b) The submitters are placed in a difficulty in advising the Board as to whether or not the new evidence should be the subject of cross examination;
 - (c) Experts are unable to caucus in accordance with the direction as they are having to address new evidence from new witnesses.
- 22. This prejudice is made more acute when the timetable is a tight one, as is the case here. In fact, there is no prospect of that prejudice being remedied in the time available and the experts for PNCC have made themselves available for the scheduled hearing in which case an adjournment seems inappropriate and unjustifiable.
- 23. Furthermore, preparation for the hearing by Counsel is made intolerably difficult with the cumulative effect of the new evidence. It is impossible to coordinate one's experts and prepare rebuttal to

rebuttal and organize new witnesses if necessary as well as planning cross examination and submissions based on the evidence already exchanged. This is not a case of minor non compliance or limited new evidence. It is an order of magnitude of new evidence that frustrates the whole purpose of the directions.

24. MRP has known since 2005 that the proposal involves a water supply area and that the protection of water quality is essential. Yet, we now have:

(a) A new geotechnical expert employed who did not provide evidence in chief by the same firm as Mr Levy who provided evidence in chief;

(b) Two new engineers employed by BECA which is the same firm as Mr Levy. One of those witnesses has provided nothing more than an introduction saying he is waiting on further information!

Furthermore, as noted in the evidence for PNCC some of the management plans have not been finalized and therefore not incorporated in conditions despite the direction of the Board in paragraph 20 that the evidence of chief include the latest version of the proposed consent conditions by 1 May 2009. The submitters are dealing with a moveable feast. This seems to mirror problems that arose in relation to a recent application by Contact Energy in the Waikato.

25. Dwyer ECJ has said on a number of occasions in matters where Counsel has appeared, including the Motorimu case, that he was concerned about peer review evidence or 'make weight' evidence in particular disciplines. The following is a quote from a minute at paragraph 3:

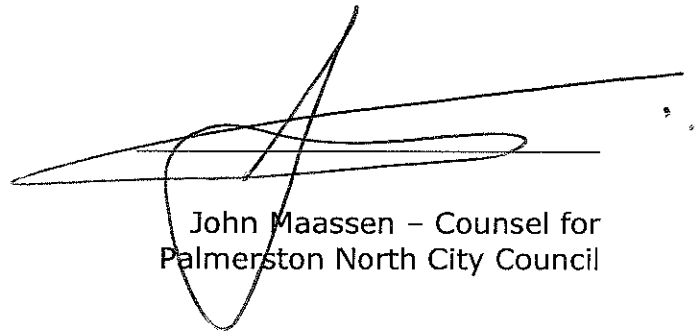
"The Court queries the need for peer review witnesses. At best they can simply repeat and confirm the accuracy of evidence already given by a principal witness. At worst they

might be regarded as an attempt to usurp a function of the Court i.e. the assessment of the accuracy and reliability of a particular witness evidence.”

26. Judge Dwyer considered that that practice should be discouraged. He was talking about peer review evidence in respect of the same discipline but provided as evidence in chief. The situation is even worse where additional peer review experts are added to the applicant’s line up as so called ‘rebuttal evidence’. MRP has called an additional landscape architect called Mr Coombs. In relation to engineering and water quality, there are effectively 3 new peer reviewers and, in relation to social impact, 2 new peer reviewers. One has to question the competence of experts whose evidence requires corroboration from peers.
27. It appears also that MRP is not undertaking caucusing as contemplated by the directions but is seeking caucusing with only some parties’ experts at any one time as opposed to the collective experts in a particular discipline and including experts who are new experts. Thus, for example, MRP planned a landscape caucusing with PNCC’s expert Mr Anstey alone. That caucusing was to include Mr Coombs whose new evidence was only available on Monday this week to Mr Anstey. The caucusing was scheduled for this Thursday. Counsel has cancelled that caucusing because:
 - (a) of the inappropriately short time to consider Mr Coombs evidence;
 - (b) to ensure there was no implicit acceptance of Mr Coombs entitlement to give evidence;
 - (c) non comprehensive caucusing is not contemplated by the directions.

Conclusion

28. It is hard to believe that MRP has arranged all of these new experts in the space of the last 2 weeks. Whatever the strategy behind this new situation, the consequence of it is that it seriously undermines the directions of the Board and prejudices PNCC.
29. PNCC gives notice that:
- (a) it does not accept the evidence of the new experts (other than Mr Shaw's which is largely factual) may be called;
 - (b) it is not in a position to respond to that evidence or deal with it; and
 - (c) it seeks a direction disallowing the evidence challenged.



John Maassen – Counsel for
Palmerston North City Council

Attachment 1

(a) **Anthony Parsons (civil engineering/water quality)** – Mr Parsons is a civil engineer who provides rebuttal evidence to comment on and respond to the primary evidence relating to **civil engineering, designing, construction and environmental management** matters. In particular, he comments on the evidence of Christopher David James and Graham John Levy who presented evidence on behalf of MRP. Specifically he addresses the following matters:

- (i) Civil engineering and construction effects;
- (ii) Water quality, earthworks, erosion and sediment control for the project;
- (iii) Construction environment management plan.

I note that Mr Parsons does not comment on any evidence provided by submitters.

(b) **Brad Coombs (landscape – POP issues)** – Mr Coombs is a senior landscape architect with ISTHMUS Group Ltd in Tauranga. Mr Coombs comments on and responds to matters raised in the evidence of Phillip Hindrup, HRC regarding the identification of the Tararua ranges as an Outstanding Natural Features and Landscapes (ONFL) in the POP. In particular, he addresses:

- (i) Relevant assessment criteria for determining ONFL;
- (ii) The process undertaken for identification of ONFLs in the POP;
- (iii) The specific provisions relating to the skyline of the Tararua Ranges (and the proposed Turitea Windfarm site in particular) under the POP.

Mr Coombs notes he has reviewed some of the evidence presented in support of TAG, PNCC, HRC and MRP. However,

he has been asked to review and present the work that he has undertaken in relation to MRPs submissions on the POP.

I note that reference is made throughout the evidence to Mr Anstey's S.42A Report provided to HRC.

(c) **Christopher Shaw (contract between MRP & PNCC)** – Mr Shaw is employed as commercial manager, generation development projects for MRP. Mr Shaw is providing rebuttal evidence in response to the evidence of Mr Naylor, Mr Baker and Mr Taylor for PNCC regarding the contract (the contract for development of the Turitea Windfarm and subsequent variation to that) between MRP and PNCC. Specifically he addresses the following matters:

- (i) Issues relating to development of turbines on private land;
- (ii) Provisions of the contract relating to water quality effects;
- (iii) The contractual requirements regarding development of the ecopark.

Mr Shaw attaches to his evidence a redacted version of the contract.

(d) **Gavin Alexander (geotechnical)** – Mr Alexander is a civil engineer with BECA. Mr Alexander provides evidence expanding on the geotechnical work embodied in the evidence of Christopher James in order to respond to geotechnical issues raised in the evidence of Dr Allan Palmer, in particular:

- (i) Presentation of the preliminary geotechnical investigations and assessment carried out for the project;
- (ii) Description of geotechnical considerations for the windfarm project generally, in particular relating the recommendations from his earlier work to the currently proposed scheme;

- (iii) Description of the ongoing geotechnical work to be carried out during design and construction of the Turitea Windfarm;
 - (iv) Direct responses to the evidence of Dr Allan Palmer.
- (e) **Andrew Watson (water quality)** – Mr Watson has a BE (Civil) degree and a masters of engineering science (water engineering) degree. He is employed as technical director, water supply with BECA Infrastructure Ltd which is part of the BECA group of companies. In the late 1990s Mr Watson was the project manager and design leader on the design of the \$4m upgrading of the Turitea Water Treatment Plant. He is providing rebuttal evidence to comment on and respond to the potential impacts on the supply of drinking water to the city of Palmerston North. In particular he comments on the evidence of Chris Taylor on behalf of PNCC. Specifically he addresses the following matters:

- (i) Raw water quality and how this could be impacted by the TWF development;
- (ii) Turitea Water Treatment Plant process and how the quality of its treated water could be impacted by the TWF development;
- (iii) PNCC's public health risk management plan;
- (iv) Protection of sources of drinking water;
- (v) Water quality management from the catchment;
- (vi) Risks to the public health protection provided by the Turitea Water Treatment Plant.

Mr Watson's rebuttal evidence has not been provided in full as he is apparently waiting on the receipt of outstanding information requested from PNCC. It is anticipated his brief will be filed in the week commencing 8 June 2009.

- (f) **Deborah Burns (social impact)** – Ms Burns has a bachelor degree in psychology and extended study of English grammar with a post graduate qualification in teaching English as a

second language. She has directed and operated a consultancy company based on market research and public consultation. Ms Burns rebuttal evidence comments on and responds to a potential social impact of the TWF. In particular comments on the social impact assessment of James Baines. Her evidence should be read in conjunction with that of Mr Baines for PNCC and Mr Kalafatelis and Dr Phillips for MRP.

- (g) **Paul Baker (energy)** – Mr Baker is managing consultant for Energy Link, who is provider of forecasting, modelling, consulting and professional training services to the electricity market. Mr Baker has been engaged to express an opinion on the evidence presented by Molly Melhuish and Bryan Leyland.

- (h) **Peter Phillips (social impact)** - Mr Phillips is managing director of Dialogue Consultants Ltd and holds a doctorate of philosophy. Mr Phillips evidence comments on and responds to social impact matters, in particular comments on the evidence of James Baines, Mr Anstey and Mr Baker where there evidence relates to social science methods in relation to the interpretation of qualitative information. Specifically he addresses the following matters:
 - (i) Bench marking the assessment;
 - (ii) Social aspects of effects;
 - (iii) Ad hoc versus objective measures;
 - (iv) Submissions over time;
 - (v) Undue focus on opinion;
 - (vi) Inappropriate interpretation of citizens panel results;
 - (vii) The (alleged) tipping point;
 - (viii) Standards of objectivity;
 - (ix) Evidence of Mr Anstey related to social matters and focus groups.;

- (x) Inappropriate generalisation of focus group discourse in the evidence of Mr Anstey;
 - (xi) Inappropriate imputation of motive in evidence of Mr Baker.
- (i) **Ralph Sims (energy)** – Mr Sims is a professor of sustainable energy and director of the central for energy research at Massey University and is currently based with the renewable energy unit of the international energy agency, Paris as a Senior Energy Analysis. He holds a BSc Ag Hons and MSc Ag Eng and is a chartered engineer and fellow of the Institute of Agricultural Engineering. Mr Sims evidence is in response to Mr Baker, Jeff Baker and Molly Melhuish. He addresses climate change issues in the Manawatu and globally.
- (j) **Scott Vaughan (geotechnical)** – Mr Vaughan is a civil engineer and managing director of Riley Consultants Ltd. He was engaged by MRP in early May 2009 to undertake an independent peer review of the civil and geotechnical aspects of the resource consent application. He has met with the BECA team responsible for the geotechnical and civil engineering inputs and has been assisted by Don Tait, Riley director who was engineer to the contract for the construction of the stage 3, Tararua Windfarm and principle design engineer for the lower Turitea dam upgrade. Prior to the Board of Inquiry he plans to undertake a detailed site inspection with the BECA geotechnical engineer. His evidence addressed the following documents and information:
- (i) Preliminary geotechnical report;
 - (ii) Construction effects report;
 - (iii) Evidence of Chris James (BECA);
 - (iv) Evidence of Graham Levy (BECA);
 - (v) Rebuttal evidence of Gavin Alexander (BECA);

- (vi) Rebuttal evidence of Tony Parsons;
- (vii) Draft construction and environmental management plan.