

**BEFORE THE BOARD OF INQUIRY**

**IN THE MATTER** of the Resource Management Act 1991

**AND**

**IN THE MATTER** of resource consent applications by  
Mighty River Power Limited to  
Palmerston North City Council, Tararua  
District Council and Horizons Regional  
Council for the Turitea Wind Farm  
Project

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**MEMORANDUM OF COUNSEL FOR MIGHTY RIVER POWER LIMITED  
REGARDING SECTION 42A REPORTS AND IMPACT ON SCHEDULED  
DATES OF HEARING**

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## **MAY IT PLEASE THE BOARD:**

### **1. INTRODUCTION**

- 1.1 This Memorandum of Counsel relates to the reports commissioned by the Board pursuant to section 42A of the Resource Management Act 1991 (*RMA*), and the processes by which Mighty River Power Limited (*Mighty River Power*) may reasonably respond to them.

### **2. BACKGROUND AND CONTEXT**

- 2.1 Mighty River Power filed its applications for resource consent for the Turitea Wind Farm in August 2008. These applications were called-in by the Minister for the Environment, referred to a Board of Inquiry in December 2008, and notified in January 2009.
- 2.2 The Board set the evidence timetable in March 2009, requiring Mighty River Power to provide its evidence in chief by 1 May 2009. Submitter evidence was to be provided on 22 May 2009 (the evidence from the Tararua-Aokautere Guardians was received on 25 May 2009), and Mighty River Power provided rebuttal evidence on 5 June 2009, although one rebuttal brief (from Mr Andrew Watson) was delayed by a week waiting for information from the Palmerston North City Council.

### **3. THE NEED FOR SECTION 42A REPORTS**

- 3.1 On 4 June 2009, Mighty River Power became aware (informally) that the Board would commission experts to prepare reports pursuant to section 42A, to address issues identified in the earlier section 42A report prepared by Helen Anderson of URS Corporation (provided to Mighty River Power on 25 May 2009).
- 3.2 Representatives of Mighty River Power met with the Turitea Wind Farm Co-ordinator, and Ministry for the Environment staff, on 9 June 2009 to discuss the need for such reports. The matters raised in the report provided by Ms Anderson had been addressed in Mighty River Power's rebuttal evidence, where thought appropriate. A number of the 'gaps' Ms Anderson identified were not considered matters that Mighty River Power was required to address in its evidence and that these issues would fall for legal submission.

3.3 However, Mighty River Power was informed that the experts had already been engaged by the Board and were preparing their reports which would be provided by 25 June 2009, and circulated to all submitters by **29 June 2009**, in accordance with section 42A RMA. In fact, it received copies of the reports on 26 June 2009.

#### **4. PREJUDICE TO MIGHTY RIVER POWER**

4.1 Having reviewed these section 42A reports, Mighty River Power submits that the provision of these reports within 5 working days of the commencement of the hearing, and with no opportunity to adequately respond to the substantive matters addressed by that time, raises very real issues of prejudice and thus natural justice. As the applicant, required to present its evidence (and be subject to cross-examination) first during the hearing, it is the only party likely to be subject to such prejudice and natural justice issues, as others have time to respond as they wish.

4.2 Where evidence has been required to be pre-circulated, and is to be taken as read, Mighty River Power's witnesses do not have the proper opportunity to respond to any matters covered in the section 42A reports that require their further evidence. This is unlike the usual course of a local body hearing, where evidence is generally not pre-circulated, and witnesses are able to address and respond to the matters raised in any section 42A report in their evidence at hearing.

4.3 Mighty River Power submits that it is critical that it be given the opportunity to adequately respond to the section 42A reports. As an example, some of the reports are submitted to be fundamentally flawed, do not consider relevant evidence provided Mighty River Power, or have only considered that evidence in a cursory way. Given the number of such issues, and that responses are required **from some 15 of its 28 current experts** (as outlined further below), it is not possible for these responses to be completed and provided prior to 6 July 2009 (even if Mighty River Power is formally granted an opportunity to do so).

4.4 Further, Mighty River Power does not as yet have the warrant to cross examine the authors of the section 42A reports, despite those reports having the status of evidence before the Board, but as it considers it critical

that it does have this opportunity, it has included the authors of all the section 42A reports in its Notice to Cross-examine dated 26 June 2009.

- 4.5 Mighty River Power formally seeks Directions from the Board that it will make all seven section 42A experts (including Ms Helen Anderson) available for cross examination at the Inquiry Hearing.
- 4.6 Finally, if the hearing is to proceed as scheduled, the provision of these section 42A reports means that Mighty River Power would be forced to re-order the presentation of its case, to allow certain experts the greatest opportunity to consider and respond as necessary.
- 4.7 Potentially 11 of the witnesses Mighty River Power may have otherwise been able to call **within the first 8 days of hearing** would need to be re-ordered to later in the case.
- 4.8 Mighty River Power's proposed witness sequence (with those witnesses that would need to respond to issues raised in the section 42A report indicated by an \*) are as follows (availability and the progress of the hearing will influence this sequence):

- Doug Heffernan
- Gavin Williamson
- Mark Henry \*
- Chris James \*
- Scott Vaughan \*
- Tony Parsons \*
- Gavin Alexander \*
- Graham Levy \*
- Brian Coffey \*
- Andrew Watson \*
- Allan Wyatt \*
- Stephen Brown \*
- Richard Galloway \*
- Philip Wong-Too

- Jason Hills
- Brent Layton
- Paul Baker
- Emanuel Kalafatelis
- Peter Philips
- Nevil Hegley \*
- Chris Day \*
- David Black
- Ralph Sims
- Willie Shaw
- John Craig
- Rod Clough \*
- Chris Shaw
- Greg Pollock \*

4.9 Mighty River Power is vitally concerned about the level of potential prejudice to its case, and natural justice issues arising, from provision of the section 42A reports. Accordingly, Nicholas Davidson QC is now part of its legal team and has been instructed specifically to advise on the issue, and is counsel to this memorandum.

4.10 Mighty River Power will respond separately on the issue of the Directions made on Friday relating to the intended rebuttal evidence of Mr Brad Coombs excluded by Order. Mighty River Power will address the Board on the implications of that Order at the commencement of the Hearing and reserves its position.

## **5. RELIEF SOUGHT BY MIGHTY RIVER POWER**

5.1 The relief Mighty River Power submits would be the most appropriate in the circumstances would be for adjournment of the hearing until 27 July 2009, and for Mighty River Power to be given the opportunity to prepare supplementary evidence for exchange on 20 July 2009, to respond to any matters raised within the section 42A reports.

- 5.2 The alternative outlined below is much less satisfactory. Vacating the first eight scheduled sitting days avoids the need for Mighty River Power's witnesses to be recalled later in the hearing (thereby extending the length of hearing time that will be required), and for there to be any constraints on potential areas of cross-examination before relevant Mighty River Power witnesses have had an opportunity to adequately address the issues raised in the section 42A reports.
- 5.3 The cross examination notices indicate that further hearing time will be necessary beyond the present five weeks allowed. Our discussions with the Turitea Wind Farm Co-ordinator indicate more hearing time will be required in October or beyond as no further hearing time is available in September.
- 5.4 Adjourning the hearing will not unduly extend the length of time before the hearing can be completed.

#### **Alternative**

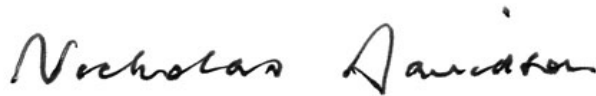
- 5.5 In the event that the relief sought is not granted, then as an alternative, Mighty River Power submits that it must be given the opportunity to prepare supplementary evidence to respond to any matters raised within the section 42A reports, for presentation **later in the hearing**. This may mean that Mighty River Power has to recall many of its witnesses given that under the present Board Directions many of those witnesses will give evidence first.
- 5.6 In the event that the hearing is not adjourned, and Mighty River Power's witnesses need to be recalled, it seeks clear directions from the Board that any further cross examination of Mighty River Power's witnesses (once recalled) must be limited to the new issues raised by their supplementary evidence.
- 5.7 In the event that the Board decides to grant the opportunity for supplementary evidence to be filed by other parties, then recognising Mighty River Power's rebuttal right, it seeks directions that ensure that any supplementary evidence of other parties is exchanged ahead of Mighty River Power's supplementary evidence.
- 5.8 This alternative means many witnesses may have to appear twice, submitted unsatisfactory in the factual presentations of the issues.

### **Further alternative**

5.9 A third but also unsatisfactory option would be to call some witnesses out of order that are not affected by the section 42A reports. However, it is unlikely those experts would fill all of the first 8 scheduled hearing days without resulting in a serious prejudice to the effective presentation and running of Mighty River Power's case.

### **Cross-examination of authors of section 42A reports**

5.10 Finally, Mighty River Power requests the opportunity to cross examine the authors of all the reports commissioned pursuant to section 42A of the RMA at the hearing including Ms Helen Anderson of URS who authored the original section 42A report.



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Nicholas Davidson QC

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K R Price

**Counsel for Mighty River Power Limited**

**30 June 2009**