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170412 Puketoi Reply Submissions - Final.doc

IN THE MATTER OF the Resource Management Act 1991
AND
IN THE MATTER OF Applications made to Manawatu-Wanganui (Horizons) Regional Council, Tararua District Council and Palmerston North City Council
BY
Mighty River Power Limited
for Resource Consents to construct, operate and maintain a wind farm containing up to 53 wind turbines and an associated transmission line as part of the Puketoi Wind Farm Proposal
SUBMISSIONS IN REPLY OF COUNSEL FOR APPLICANT
17 APRIL 2012

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Introduction

1.

Mighty River Power Limited ("MRP") replies to matters that were raised during the hearing in Pahiatua between 28 March and 5 April 2012.

2.

The structure of this reply is:

2.1. to identify matters established in evidence which are not disputed;

2.2. to present particular reply submissions in relation to the issues of key concern:

(a)
noise; and

(b)
visual amenity and landscape.

2.3. to address issues raised during the hearing by submitters or by the Commissioners;

2.4. to reply in relation to relevant Part 2 matters; and

2.5. to reply in relation to the question of an appropriate lapse period for the consents.

Matters Established in Evidence

3.

A number of important matters were established by evidence and were either not contested at all or were not the subject of contrary evidence that would displace the conclusions that may be drawn from such evidence.

4.

First of these is the quality of the wind resource. Both as a matter of expert opinion and by way of anecdotal evidence from people who live on this land and are familiar with this environment, the wind at the top of the ridge is significant. Mr Wong Too and Mr Clough provided analysis of this in terms of the value of the resource; in my submission that evidence was not contested.

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5.

The proposed civil engineering for the project (as presented by Mr Mills, Mr Symmans, Mr Schwaderer and Mr Breese) demonstrated how the works could

be undertaken subject to appropriate conditions, including conditions to safeguard the quality of the environment, with particular regard to the karst landscape and the water quality of the catchment.
6.
The relevant ecological issues were fully addressed by Dr Blaschke, Dr Boothroyd and Dr Craig, who reached agreement with their peers on both matters of assessment and appropriate conditions to maintain or enhance the quality of the environment.
7.
The evidence of Mr Philip Brown demonstrated that traffic and transport effects could be appropriately managed to the satisfaction of all relevant road controlling authorities and with proper regard for the interest of both other road users and neighbouring properties. I will address the special circumstances of the Connells below.
8.
The scale of the proposal has been substantially modified through the design process prior to the lodging of the application, resulting in the 53 turbine proposal now before you. I submit that the evidence of Mr Worth and Mr Stephen Brown demonstrates an appropriate consideration of alternatives by the applicant. As well, further amendments have been made in response to the process of consultation, submissions, review by council officers and consultants and through the course of the hearing, including:
8.1. the relocation of turbine 50 to mitigate visual effects;
8.2. the change of tower 99 to a monopole to mitigate visual effects;
8.3. the removal of tower 107 and realignment of the transmission line away from Up Top Ventures; and
8.4. the removal of tower 17 and the further shifting of the transmission line as it passes the McGhie property.
9.
The likely benefits of the proposal include:

9.1. economic benefits, both in a national and a local context; and
9.2. ecological, including pest management and the creation of a protected ecological area.
10.
The adverse effects of the wind farm on the environment have been properly identified and assessed, and have not been disregarded or glossed over. Witnesses called to give evidence in support of the applications were direct and clear in stating the nature and extent of effects of the proposal and the manner in which the adverse effects were proposed to be avoided, remedied or mitigated. I submit there is no gap in scope of the case presented in support. Submissions otherwise, including assertions by some submitters of a lack of consultation, or errors or mis-descriptions in the application material or allegations of any failure to address relevant matters, have not been substantiated and in certain cases the submissions (e.g. by Kevin Low on behalf of Tararua Aokautere Guardians (sub no 54), and by Mr Bruce Gilmour as counsel for the Marshalls (sub no 38)) did not address the particular evidence presented and appear to have been standard submissions unrelated to this particular case.
11.
Notwithstanding legal submissions as to the existence of a permitted baseline and the character of the existing environment, witnesses called for MRP did present full assessments to demonstrate that the effects of the proposal on the environment have been fully assessed. This was a fundamental policy decision by MRP and is a strength of its case.
12.
In relation to all of these matters, MRP did engage with the community. I refer to the large map that showed the entire area and the location of properties where written approvals have been obtained from numerous land owners, both

those who would have turbines or pylons on their properties and others living nearby, pursuant to section 104(3)(a)(ii). The number and extent of the written approvals and submissions in support, together with the clear evidence of many of those submitters who appeared before you and Dr Phillips on behalf of MRP, supports both my submission that MRP did engage with this

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community and that there is a strong measure of public support in this area for the project.
13.
Also important in considering the assessment of effects are the positions finally of entities with interests wider than in relation to a particular property, which provides further evidence of the appropriateness of the approach taken by MRP:
13.1. the Department of Conservation;
13.2. the Queen Elizabeth II Trust;
13.3. the New Zealand Fish and Game Council; and
13.4. the New Zealand Speleological Society.
14.
As well, the New Zealand Transport Agency did not lodge a submission, nor did the Civil Aviation Authority.
15.
As submitted in opening, appropriate conditions should be imposed pursuant to section 108. A great deal of work has been undertaken by experts for both MRP and consent authorities to produce a detailed set of draft conditions. A full set was presented at the end of the hearing as part of MRP's application, with the support of reporting officers and consultants. I submit this demonstrates a sound basis for confidence in the appropriateness of the methods for constructing and operating the wind farm and transmission line.
16.
In my submission, all relevant statutory matters are addressed by the application and it is complete and capable of being assessed under sections 104 and 104B of the Act.
Key Issues
17.
The key issues arising from the likely effects of the proposal appear to be those in relation to:

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(a)
Landscape and visual effects; and
(b)
Noise;
18.
Landscape and visual effects: I start by observing the truism that some people appear to like the appearance of turbines, some have a neutral view of them and some dislike them to varying degrees, all the way to strong antipathy. These preferences are understandable as human reactions, but otherwise in my submission do not assist in terms of assessment under the RMA. Consents are not granted by election or any other process depending on popularity. The matters which are relevant are set out in Parts 2 and 6 of the RMA and have been thoroughly addressed in evidence before you.
19.
The requirement to recognise and provide for the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development has been a key issue in this application. MRP has always approached the project acknowledging that the Puketoi ridgeline requires particular attention. Mr Kemble acknowledged that there are points of

disagreement with certain aspects of the policy framework, but when the statutory planning documents are considered as a whole (which in my submission is the correct approach), they seek outcomes that are aligned with those that will be achieved should the proposal be granted consent and constructed. Equally, however, there is no provision that would prohibit wind turbines on this ridgeline and the relevant statutory and plan provisions should not be interpreted as amounting to a veto.

20.

With respect, the key question is the one posed by Commissioners at the start of the second day of the hearing, and pursued with the landscape experts who gave evidence: Can the outstanding nature of the Puketoi Range be retained if this development occurs? In my submission, the answers that it could from the experts are the best evidence before you and also a reasonable response in terms of the statutory guideline of appropriateness when considered in context, both in the immediate Puketoi area and also when considered in the wider context of Tararua District and the Manawatu-Wanganui Region. I respectfully submit that the approach to the design and layout of the wind

farm will not detract from what makes Puketoi outstanding: its height, linearity and relationship to the wind that gives the area a particular character.

21.

It is important to approach the assessment of this application with the clear understanding that invisibility of wind turbines is not a sustainable objective. They must be tall and in clear air to serve their purpose.

22.

The status of the skyline of the Puketoi range, as identified in the district and regional plans, was the subject of consideration at several points during the hearing. As confirmed towards the end of the hearing, MRP's **appeal** in relation to the schedule of the One Plan does not challenge the inclusion of the skyline in that Schedule, and Mr Stephen Brown and Ms Buckland were clear in their own assessments of this feature. Beyond the procedural and semantic issues that the plan provisions involve, the substantive issue is, in my submission, clearly addressed by the expert evidence. In particular, each of the landscape architects who appeared before you (Stephen Brown, Mary Buckland, Shannon Bray and Frank Boffa) confirmed that turbines standing on the ridge was a better response to this landscape context than turbines set back (so that their apparent height when seen from the east might be reduced such that just the blades may be visible) in terms of maintaining the integrity of the skyline.

23.

In that context, I submit that the evidence demonstrates that the proposed design and layout is consistent with the character of the ridgeline.

24.

We might apprehend from certain material placed before you that Gavin Lister appeared to favour a setback at Waitahora to achieve such a reduction, but we do not have any evidence from him and it in fact appears that Waitahora will be visible from the east. I would also ask that you note the evidence from Mr Symmans, the geotechnical expert here who also worked on Waitahora and who gave supplementary evidence about the different geotechnical and topographic considerations affecting the layout at Waitahora.

25.

MRP is very conscious of the concern expressed by Rangitane o Tamaki Nui a Rua about the location of the turbines on the ridgeline. I understand from their presentation (including the detail of the Cultural Values Assessment

presented by Patrick Parsons) that this concern was one of visual impact, not

cultural impact on any particular site of cultural or spiritual significance.
26.
After further discussions with representatives of Rangitane, they have provided MRP with the following statement of their views:
This is a statement by Rangitane o Tamaki Nui a Rua regarding the proposed Mighty River Power Wind Farm on the Puketoi range.
Following a further site visit on Wednesday 11th April our view remains unchanged with regard to the visual negative impact of the turbines on community, especially those to the east and south east of the site.
We acknowledge the work done by Mighty River Power to mitigate this e.g.

- reducing the number of turbines,
- wider spacing to lessen the "picket fence" view, and
- ensuring the blades are well clear of the ridgeline to reduce the risk of compromising the integrity of the ridge.

We remain committed to working with Mighty River Power to find ways to acknowledge the importance of the ridgeline to Rangitane o Tamaki Nui a Rua.
27.
There has also been some suggestion that Puketoi should be treated in a manner comparable to Waitahora. In that context, while the design response in removing one line of southern turbines has protected the peak known as Puketoi in a similar manner as was achieved at Waitahora, I submit that your particular assessment of Puketoi should not be constrained to "match" Waitahora when it is clear that the circumstances (especially the topography) of the two are substantially different.
28.
There is no place, in my submission, for a 'one size fits all' approach to resource management matters, just as there is no strict doctrine of precedent. In this regard, each proposal must be considered on its merits which, in this instance, are established by the evidence that is before you. As I have noted, the evidence in this case is that setting the turbines back from the ridgeline is not an appropriate response to any visual and landscape concerns.
29.
It is also important to recognise the other adverse effects that a setback would have in terms of other evidence you heard:

29.1. a loss of efficiency in harnessing the wind – Mr Wong Too;
29.2. more geotechnical issues and possibly greater adverse effects on the karst – Mr Symmans;
29.3. the likelihood that relocation would require more excavation, leading to greater issues around dust and sedimentation – Mr Mills;
29.4. the likely increased danger to birds – Dr Craig; and
29.5. less benefit being obtained from otherwise low-use land – wind turbine farm owners.
30.
In relation to clustering and the opinion of Mr Bray that some shifting of turbines along the ridge might create a greater sense of space and "breathing", I ask you to refer to the evidence of Stephen Brown who was very clear on this and the respective benefits of groups versus a more regular approach. It is with respect not apparent what particular "clustering" Mr Bray in fact recommends beyond avoiding some of the clefts that occur in the ridgeline. In my submission if one looks closely at the proposed layout one can see that the "regularity" does in fact pay attention to the landform so that the actual location of each proposed turbine is attuned to detail of the ridgeline. Mr Bray also recognises that his approach would result in at least some reduction in the number of turbines, but he made no attempt to evaluate the relative value of

that loss (which Mr Clough's evidence can assist you with) against the likely gain or other benefit to any viewer who may see the turbines but is unlikely to have handy copies of Mr Bray's analysis. In his supplementary evidence at para 93 Mr Bray frankly acknowledged that such a redesign does not significantly reduce the effects of the proposal on the ONL/F.

31.

Mr Boffa's evidence should be excluded together with the Genesis submission, but I acknowledge with respect your broad discretion in relation to matters of evidence and Mr Boffa's stature as a very experienced landscape expert. His general opinions may assist you but importantly I submit that Mr Boffa's "specific" evidence against Puketoi should carry no weight because:

31.1. the nature of his briefing by a trade competitor raises an issue as to whether that briefing has been properly undertaken;

31.2. on his own admission he did not undertake any detailed assessment of cumulative effects, whether of the Puketoi project itself (see para 13 in his statement) or of cumulative effects with either Castle Hill (see para 25 in his statement) or Waitahora (in answer to questions from Commissioners).

32.

I address Mr Boffa's evidence about cumulative effects further below in relation to his comments about the effects on the Thorneycrofts (sub no 125).

33.

I also submit that the marginal difference between turbine height should not be a significant factor in assessing the effects of the turbines, in the same way that the size of a 220kV or 110kV transmission tower is not a decisive factor in assessing the landscape or visual effects of a transmission line. While these heights can be measured and the differences in absolute terms may seem significant by reference to, for example, the height of a person, the viewing context is generally not at that scale. The relevant viewing distance is at a range of hundreds of metres or even several kilometres, and consequently the ability to judge absolute height depends on both context and available reference points. I refer to the evidence of both Mr Stephen Brown and Mr Boffa in this regard, who started by noting that the turbines or towers will be visible from a distance, whatever their height, and that therefore relative height is not so significant as locating or arranging the structures in a way that is compatible with the landscape.

34.

Visual amenity: Dealing specifically with visual amenity, the topography presents a clear divide between the western and eastern sides of the Puketoi Range. From the west, with one exception, little can be seen of the turbines from relatively close distances, while from the east the turbines will clearly stand atop the ridgeline and be visible for some distance where viewpoints allow. On both sides there are many property owners and occupiers who have given written approval, but there are some who have not. MRP relies on the assessment of Mr Stephen Brown, Ms Buckland and Mr Bray that the effects

on amenity are appropriate in overall terms, given the relatively low population, the character of the area as a working environment and the design and layout which complements the Puketoi landform rather than competes with it (as most witnesses agreed has occurred on the Tararuas)

35.

The one exception is the Marshall property on the western side at 1554 Towai Road. As addressed in more detail below, MRP has recognised the likely effects on them and their property and has proposed screening for the house and its cartilage and also made an offer of compensation.

36.
I note that two other landscape experts have been referred to and material produced by them has been handed up to you, even though the experts have not been called to give evidence in this hearing or answer questions from you. Mr Gavin Lister's opinions in relation to his assessment of the Waitahora project have been quoted. There is no evidence at all that Mr Lister has seen, much less assessed, the detailed circumstances of the proposed wind farm at Puketoi. Similarly, Ms Anne Steven was not called but an early report by her was tabled and selected comments were quoted. There is however no evidence at all that Ms Steven has done any further work since her preliminary assessment. In both cases you must give this quoted material very little if any weight.
37.
Noise: You have the specialist expert evidence of Mr Hegley and Mr Lloyd, who ultimately agreed on almost all matters, including appropriate conditions for standards, monitoring and compliance. It does not appear that Mr Halstead's evidence, if it is to be admitted, adds anything to the wider analysis which those two experts have undertaken other than to confirm that unacceptable cumulative noise effects would not arise if one was to take Puketoi and CHWF into account together.
38.
In relation to the specific issue of whether there is any High Amenity Area in the context of clause 5.3 of NZS 6808, especially given the proximity of the Marshall property close to the predicted 40dB noise contour of the wind farm, I submit that the Standard needs to be read carefully. Clause 5.3.1 indicates that the issue of high amenity may be considered:

5.3.1 … In special circumstances at some noise sensitive locations … A high amenity noise limit should be considered where a plan promotes a higher degree of protection of amenity related to the sound environment of a particular area, for example where evening and night-time noise limits in the plan for general sound sources are more stringent than 40 dB LAeq(15 min) or 40 dBA L10.
5.3.2 A high amenity noise limit should only be applied, and can only be maintained, under wind conditions when low background sound levels are common at a noise sensitive location, while the wind farm is operating.

39.
The guidance in the commentary in C5.3.1 follows from the provision in the Standard in 5.3.1. While Mr Lloyd properly noted that the monitoring undertaken near the Marshall property appeared to have a high noise floor, making the calculation described in that commentary problematic, in my submission the real issue is the primary one raised by the standard itself rather than the commentary, being whether it could properly be said that the Marshall property could ever be within a high amenity area given the absence of any promotion in the Plan of higher protection from noise.
40.
I appreciate the point posed by Commissioners in questions that the Plan provisions may have been drafted without knowledge of or reference to this approach in the Standard. On the other hand, it is a proposed plan and there has been no suggestion that it may be varied as a consequence of the Standard. On that basis it is reasonable to infer that it does accurately reflect at least the Council's view of the amenity level of the area. In any event, in my submission, it is not necessary for the Plan to contain any such reference: the Standard is clear that the basis for the application of stricter control arises simply where the Plan promotes a higher level of amenity regardless of any Standard. That, as I understand it from Mr Hegley's evidence in answer to questions, was the position in relation to the West Wind proposal where the provisions of the Wellington District Plan did set a night-time noise level in the Rural zone of 35dBA$_{L10}$, so that the Standard's level of 40dBA was clearly different. That does not arise here, where the relevant night-time standard in

the Tararua District Plan is 45dBA.

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Submitters' Issues

41.

A number of specific concerns raised by individual submitters can be addressed individually.

42.

Thorneycroft (sub no 125): these submitters live over 10 kilometres from the nearest wind turbine. Their tabled statement points out that Mr Stephen Brown's original assessment stated that their property rated "High" in terms of potential mitigation. What they did not refer to was the rest of the assessment (which is at page 51 of the Landscape and Visual Assessment accompanying the AEE) which noted that while on clear days they may be able to see the wind farm, the effect on them would be low given the distance. They will also be in the area of Cluster A of the Castle Hill Wind Farm (should that cluster ultimately gain consent) which, on the basis of Mr Boffa's simulation and as acknowledged at the end of para 31 of his statement, will be far more dominant than the distant view of Puketoi.

43.

I note that Mr Boffa ventured the opinion at para 32 of his statement, relying on dicta in the Kuku Mara decision, that the cumulative effect in this location should be based on treating Castle Hill as a starting point and treating Puketoi as the additional effect. I submit that this appears to be more of an argument in support of some notional priority rather than an appropriate approach to an assessment of effects. In my submission, attempting to elevate the dictum in Kuku Mara to a kind of rule rather than treating it as a principle, without regard for the difference in kind or degree of such effects, makes a nonsense of undertaking a thorough assessment of effects in their context. In terms of straws and camels' backs, that is like disregarding the load of bricks underneath the straw: the Thorneycroft's situation will hardly be affected whether Puketoi is constructed or not, but the presence of some or all of Cluster A of Castle Hill will result in significant effects on them.

44.

Up Top Ventures (sub no 98): I understand that the removal of pylon 107 and resulting relocation of the transmission line met this submitter's concerns.

45.

Connell (sub no 131): the Connells face particular effects given the location of their house partly within the road reserve in Makuri on the route of

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construction vehicles for the southern group of turbines at the site entrance on route MCA0. That will be a temporary effect. Once those turbines are built, the effects on the Connells will be the same or similar to that of other houses in the village. MRP has offered, and continues to offer, the Connells compensation of $20,000 (with $5,000 payable on the grant of consent and $15,000 payable prior to commencing construction) which sum has been calculated on the basis of what obtaining temporary accommodation elsewhere would likely cost, but in cash so that they may use that as they see fit.

46.

MRP would accept the imposition of a condition, on an Augier basis, in the following or similar terms:

As compensation for adverse effects of the construction of the Puketoi Wind Farm, the consent holder shall tender to Michael and Angela Connell (or their successors in title, if any, at the time that the tender of funds is required pursuant to this condition) of the property at 2649 Pahiatua - Pongaroa Road, Makuri, RD9 Pahiatua 4989, compensation in the sum of $20,000 inclusive of GST (if any) as follows:

1. $5,000 within one month of the commencement of this consent; and
2. $15,000 at least 6 months prior to the commencement of any construction of wind turbines at the southern end of the Puketoi Wind Farm which uses Pahiatua - Pongaroa Road for access.

For the avoidance of doubt, the Connells (or their successors in title) may receive and use these funds for any purpose they wish.

47.
Woodhouse (sub no 116): Mr Woodhouse and his friends in Pongaroa advanced several matters based on their own views of the Puketoi Proposal and their experience in dealing with Genesis and the Castle Hill project. In my submission these views do not call for a reply.

48.
McGhie (subs nos 94 and 114): the McGhies raised matters of visual amenity and also health effects. In response, MRP has already shifted the line so that it is now located some 550 metres away from them and removed a pylon in order to reduce the degree of visual effect. Shifting it further away raises issues with the neighbouring land owner, Mr Ross and the effect on his property. At the distance now proposed, the transmission line is in my submission sufficiently far away that the visual effects are moderate and

appropriate. In relation to health effects, you have the evidence of Dr Black that there is no impact caused by the proposed lines.

49.
Kirk (sub no 30): Mr Kirk raised issues about the health effects of electricity infrastructure and I submit the concerns are fully addressed by the evidence of Dr Black.

50.
Adams (sub no 28) and Stichbury (sub no 73): The concerns of Mrs Adams, on her and her husband's behalf and on behalf on Mr Stichbury, amount to an attempt to re-litigate the Turitea project which is now consented without demonstrating any manner in which they are or could be directly affected by the Puketoi project. In my submission that should not be treated as a relevant matter in relation to these applications. More relevantly, I submit that the integrated use of transmission infrastructure is efficient and appropriate.

51.
Kinsgton (sub no 45): the Kingstons would be able to see the nacelle of Turbine 1 above the ridge to the southeast of their house. In terms of the existing environment, they will see a much greater extent of several Waitahora turbines, and their evidence acknowledged that they have reached an agreement with Contact that includes possible acquisition of their property. While MRP cannot rely on Contact's arrangement with the Kingstons, the Kingstons can. Even if Waitahora does not proceed, the degree of effect of the one turbine would be moderate and appropriate.

52.
Rangitane o Tamaki Nui a Rua (sub no 130): Rangitane sought an accidental discovery protocol ("ADP") condition, which is agreed by MRP and the consent authorities and included in the draft conditions. Rangitane also seek to develop their existing relationship with MRP, which MRP is happy to pursue and which need not be part of any decision on these applications. The suggested conditions of consent for the ADP are included in the draft set of conditions. These are in addition to undertakings that MRP has given directly to Rangitane.

53.
Rangitane also raised the issue of the visual effects of the turbines, which has been addressed above.

54.

Abraham Family Trust (sub no LS6): The Trust owns a block of land presently used for forestry. The evidence does not show any direct effect on the Trust or their land. In my submission there is no basis for saying that the future options for the use of their land would be foreclosed.

55.

Bent (sub no 104): Mr Bent presented legal submissions which attempted to suggest that MRP's case was based on issues of viability or profit. MRP accepts that these are matters for the consent holder and not the consent authorities but I submit that no part of MRP's case relied on the viability of the project in the sense of business profitability. However, efficient use of natural and physical resources is a relevant matter pursuant to section 7 and so the issue of making the most appropriate sustainable use of relevant resources is squarely before you. For those reasons the evidence of Mr Worth, Mr Wong Too and Mr Clough is very important in assessing the proposal especially in terms of the relevant Part 2 consdierations. MRP reduced the scale of this proposal from 73 to 53 turbines as part of its own design and constraint assessment. As discussed in Mr Worth's and Mr Clough's evidence, the number of turbines able to be built is highly relevant in terms of finding an appropriate balance between the likely cost of the project (including a substantive transmission line) and the management of its effects. I repeat that the RMA does not require avoidance or minimisation of all effects, and therefore compromise should not be required simply as part of a minimisation process: the over-arching question is whether the grant of consent represents sustainable management of natural and physical resources, encompassing the enabling of people to provide for their well-being while addressing the effects of their activities appropriately.

56.

Marshall (sub no 38): the Marshalls in their submission raised issues about water quality, noise, and landscape and visual amenity. At the hearing it was acknowledged that the effects on water quality appeared to be met by conditions. As submitted above, the expert evidence shows that compliance with NZS 6808 can be achieved, which would be stricter than the existing noise controls in the District Plan. The landscape and visual amenity effects can be mitigated by screening. Notwthstanding the evidence from the Marshalls about their own shelterbelt efforts, MRP's advisors remain

confident, based on similar examples in the area, that adequate screening is feasible. Accompanying these reply submissions are a further letter from Hardwood Management and photographs of existing shelterbelt trees in the area.

57.

Mrs Marshall also presented to you with a copy of "Visual and Noise Effects Reported by Residents Living Close to Manawatu Wind Farms: Preliminary Survey Results" by Dr Robyn Phipps and others. I understand that this paper was the basis of evidence which Dr Phipps presented in relation to the Motorimu wind farm **appeal**. I also understand that this paper was the subject of a thorough review by Ross McComish of J R McComish Consulting Ltd which demonstrated that it was seriously flawed, and that the conclusion of this review has been judicially accepted, notably by the Board of Inquiry into the Turitea Wind Farm Proposal: see the Board's draft report, page 13-21 and fn 63 and page 16-6, fn 8 and its final report, page 16-6, fn 8.

58.

You have been told by me (and had it confirmed by counsel for the Marshalls) that MRP has offered a compensation package to the Marshalls to acquire their property at market value plus 15%, plus a further $50,000.00 as a solatium payment. The Marshalls acknowledged that such an offer had been made but said that it assumed that they would retire on taking up the offer and that the particular circumstances of their property meant that such compensation would not enable them to replace what they have. There is no

such assumption behind the offer: it is simply an offer of compensation. In my submission, an offer based on market value should mean that a comparable property can be acquired: that is of the essence of market value. The additional amounts in the offer are intended to ensure that the Marshalls are fully compensated beyond simply land value. Further I submit that there is no evidence before you of any unusual quality that makes the Marshall property irreplaceable. Although this offer has now expired, I am instructed to advise that MRP remains committed to seeking to mitigate effects on an agreed basis and would be willing to discuss this further with the Marshalls, should they also wish to do so.

59.

The Marshalls' submission ultimately was not that the application should be declined in its entirety but that some varying number of turbines should be

deleted. MRP does not accept that this is a reasonable means of mitigation and I submit it should not be imposed. While acknowledging that the Marshalls are affected, the degree of effect is within the bounds of what may be the subject of control by conditions. MRP proposes appropriate screening, but if the Marshalls consider that unacceptable then the offer of compensation should be a complete means of remedying the effects on them. While they are entitled to refuse that, their refusal should not be allowed to become a veto: numerous cases make it clear that a party relying on a section 6, 7 or 8 matter cannot rely on that as the basis of a veto. To enable the Marshalls to use a s6 or s7 matter in such a way would have the result of turning the consent process into a commercial negotiation and would undermine the purpose of the Resource Management Act 1991.

60.

Contact (sub no 102): MRP acknowledged the potential for interference effects on downwind turbines from a relatively early stage and does not challenge Contact's status to advance this in their submission.

61.

Contact may be subjected to certain wake effects from the northern most Puketoi turbines when the wind blows from the southeast. There is also a potential turbulence effect on the nearest Waitahora turbine (no 61).

62.

MRP has been in negotiation with Contact to agree the form of a condition to address these effects. Those negotiations involve a great deal of technical analysis and are well advanced but not completed. I anticipate that they will be completed by this Friday 20 April 2012 and seek leave to file a supplementary reply submission with the wording of a condition and the reasons in support of it by then. If agreement with Contact has not been reached in relation to that condition, then I accept that Contact should have the right to address any condition that is put forward by MRP but not agreed with Contact.

63.

Genesis (sub no 122): Genesis is a trade competitor which is not directly affected and the Castle Hill Wind Farm is not part of the existing environment.

64.

The submission by Genesis is invalid pursuant to s308B(2). Genesis admits that it is a trade competitor and has presented no evidence that it is likely to be

directly affected by any effect of Puketoi. The argument advanced by counsel for Genesis attempted to draw some connection between Genesis as a legal person, its interests in the Castle Hill project (which may include some form of interest in land arising from contracts with land owners, but no evidence was provided about that) and effects on such interests said to arise from

proximity to the Puketoi project.
65.
In my submission, that argument does not establish any kind of direct effect. While the definition of "effect" in section 3 is broad, it is important to note that section 308B requires the effect to be "direct". There is no definition in the Act of a "direct effect". I submit that to be a direct effect on the environment, unless the concern is with a spiritual or cultural matter (which plainly could not be the case with Genesis) a direct effect must have some bio-physical quality that can be directly perceived, such as physical presence, noise, dust, traffic, or some other clear effect that is a physical externality of the activity being assessed. An interest (in legal terms a chose in action) is a notional thing which exists in law and can be described in documents but which has no physical presence whatsoever and is not itself affected by physical effects. If the argument for Genesis were correct, every mortgagee in this area would be "affected" by the proposed wind farms and the lengths taken by Parliament in enacting Part 11A of the Act would be rendered nugatory as a trade competitor could simply lodge a caveat against a relevant title and thereby be "affected".
66.
The reality is that Genesis is not directly affected by Puketoi proposal. Section 308B(2) is unequivocal in such circumstances. Genesis is not entitled to make a submission on these applications in terms of section 308B(2).
67.
The test in Queenstown Lakes District Council v Hawthorne [2006] NZRMA 424 (CA) as to what constitutes the existing environment is clear: it includes existing resource consents that are likely to be implemented. There is no existing consent in relation to Castle Hill. The preliminary decision dated 13 April 2012 does not amount to the grant of resource consent and therefore is incapable of commencing pursuant to section 116. Castle Hill does not form part of the existing environment as matters stand today.

Part 2 Assessment
68.
Part 2 of the RMA requires an overarching judgment to be made in the context of the purpose of the RMA defined in section 5.
69.
The matters of national importance require a judgment within that context as to what is appropriate or inappropriate, and not simply in terms of degrees of effect. The section 6 matters do not amount to potential vetoes, although obviously a proposal which is in conflict with one or more matters of national importance must demonstrate how the granting of consent can nonetheless be in accordance with the purpose of the RMA overall. Part 2 of the Act does not turn simply on a landscape or visual issue under section 6(b). This case also raises a number of section 7 matters, including the efficient use and development of natural and physical resources under section 7(b). These matters all go towards the overarching assessment required in terms of the purpose of the Act in section 5.
70.
These matters were within the contemplation of both the Planning Tribunal and the High Court in the NZ Rail case, and the reasoning in those decisions remains highly relevant in cases such as this. To reiterate the most pertinent statements in the Planning Tribunal decision (reported at (1993) 2 NZRMA 449) at pages 465-466 the Tribunal held:
Having regard to the foregoing, it is our judgment that section 6(a) of the Act should be applied in such a way that the preservation of the natural character of the coastal environment is only to give way to suitable or fitting subdivision, use, and development. . . . But this does not mean to say that any suitable or fitting development will qualify. . . . it has to be remembered that it is appropriateness in a national context that is being

considered. It is not, for example, appropriateness in either a regional or local context. . . .
Consequently, the development being considered for the purposes of section 6(a) of the Act would have to be nationally suitable or fitting before preservation of the natural character of the coastal environment could justifiably be set aside.

71.
Also to re-iterate the statements of principle by Greig J in the High Court (reported at [1994] NZRMA 70) in these terms at pages 85-86:
"Inappropriate" has a wider connotation in the sense that in the overall scale there is likely to be a broader range of things, including developments which can be said to be inappropriate, compared to those

which are said to be reasonably necessary. It is, however, a question of inappropriateness to be decided on a case by case basis in the circumstances of the particular case. It is "inappropriate" from the point of view of the preservation of natural character in order to achieve the promotion of sustainable management as a matter of national importance. It is, however, only one of the matters of national importance, and indeed other matters have to be taken into account. It is certainly not the case that preservation of the natural character is to be achieved at all costs. The achievement which is to be promoted is sustainable management and questions of national importance, national value and benefit, and national needs, must all play their part in the overall consideration and decision.
This part of the Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not, I think, a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings and its connotations which I think is intended to allow the application of policy in a general and broad way. Indeed, it is for that purpose that the Planning Tribunal, with special expertise and skills, is established and appointed to oversee and to promote the objectives and the policies and the principles under the Act.

72.
Another case which involved competing considerations affecting matters of national importance was Judges Bay Residents Association v Auckland Regional Council A72/98, 24/6/98. This case dealt with the resource consents required for the expansion of the Fergusson Container Terminal in the Port of Auckland. In particular, I refer to Part IX of the decision, containing the Court's discussion of Part II matters, and Part XI containing the Court's judgment for the purpose of the Act.

73.
In Part IX, (paragraphs [404-436]), the Court went through the various matters in ss 6 and 7 of the Act which were relevant to its consideration of the appeals. It noted in particular that the proposal would have an impact on the natural character of the coastal environmental and on matters of public access to and along the coastal marine area. It also noted that there was no contest that the proposal was an efficient use and development of natural and physical resources.

74.
Then, in Part XI (paragraphs [441]-[457]) the Court considered the exercise of its discretion under s105(1) (as the structure of the consenting provisions in the RMA at that time required). At paragraph [444], the Court noted that the effects of allowing the activity would include the loss of open public harbour

water of an area of about 11 hectares. This would be cumulative on previous considerable losses of over 220 hectares. The Court noted that the harbour is highly valued by the public of Auckland and that the further loss of harbour space would be permanent and would be an adverse effect which could not itself be avoided, remedied or mitigated. On the positive side, the Court noted two remedial measures, being the provision of a public boardwalk and allowing use by people in parts of the port to the west of Queens Wharf that would no longer be required for cargo handling activities.

75.

At paragraph [445] the Court noted that views of the Waitemata Harbour are much valued and that the proposed extension would have adverse visual and landscape effects that would, from some vantage points, be more than minor, even after being remedied or mitigated to the extent practicable by good design and planting.

76.

At paragraph [448] the Court found that continuing growth of container cargoes required additional handling capacity and that a sound case had been made through the expansion of the terminal as opposed to any other options.

77.

Turning then to s5, the Court found that while the proposed expansion of the terminal would enable the community to provide for their economic welfare, it would also involve the loss of open public harbour and adverse visual and landscape effects which would not be consistent with protecting natural and physical resources or with sustaining the potential of those resources, as there would be degradation of the highly valued Waitemata Harbour. The Court concluded as follows:

[456] The ultimate judgment therefore involves making a comparison of conflicting considerations of the first significance and importance. In doing so, we recognise that any development of the commercial port of the scale needed to meet the growth of container cargoes generated by the economic activity of the Auckland region would unavoidably involve loss of open public harbour, and development which would have visual and landscape effects that cannot be entirely screened from view. Selection of a site in a locality already committed to port facilities and other urban infrastructure would reduce the adverse effects compared with those that might be caused if the additional container handling capacity were developed elsewhere. That is why the otherwise adverse environmental effects do not involve conflict with the various policy and planning instruments.

[457] In our opinion, that provides the key to resolving the conflict between the competing factors in this case. We remind ourselves that promoting the sustainable management of natural and physical resources is a single purpose. In general the Act contains no preference for managing use and development of resources for enabling communities to provide for their economic wellbeing over protection of resources for enabling communities to provide for their social and cultural wellbeing, sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations, and avoiding, remedying adverse effects on the environment. However, in the context of the present application it is our judgment that the loss of public open harbour, and the adverse visual effects, to the extent that is unavoidable, should yield to managing the resources for the development and use of the container terminal expansion, in compliance with the proposed conditions including the provision and maintenance of the public boardwalk and screen planting. In short, we judge that the purpose of the Act would be better served by granting the consents sought, and by attaching the proposed conditions, rather than by refusing them.

78.

More recently and in relation to a more comparable proposal, the Environment Court considered a proposed wind farm along the ridgeline which included Mt

Cass in North Canterbury in Mainpower v Hurunui DC [2011] NZEnvC 384. The decision includes a discussion of whether development on an outstanding natural feature can be appropriate at paras [347] – [353], the types of amenity that may be affected at paras [354] – [374], and Part 2 matters and the exercise of discretion whether to grant consent at paras [454] – [482] including the following passages which in my submission are particularly apposite to the present case:

[352] Addressing solely the effects on the outstanding natural feature we find that a wind farm (and the works that it would now entail, and conditions which would be imposed, including a proposed covenant in perpetuity over land identified as Mt Cass Conservation Management Area) on this farmland is not inappropriate. We do so taking into account that much of the most characteristic and distinctive section of the feature is excluded from development, that the area is to be protected for the future, that the vegetation and pavement will be managed for protection (including pest and weed management which we are confident will enhance natural aspects), and that cultural aspects have been protected.

. . .

[362] The evidence from the landscape architects was that while the turbines would be evident and noticeable they would not cause an adverse visual effect such that the proposal should be turned down. We heard from persons directly affected (predominately farmers). They were not so much concerned with views from dwellings, rather the change in landscape and visual amenity presently enjoyed as their workplace is outside. Some likened this – quite sincerely, to the "industrialisation" of the landscape.

[363] A wind farm must be located in an exposed area. The Mt Cass turbines would be clearly visible over a wide area and there will inevitably be mixed perceptions of their effect on visual amenity. While these views are not in the main from private dwelling houses, for many persons, particularly those living and working in the lee of the mountain, the change to the landscape will be adverse and very likely negatively impact on their appreciation of the landscape. These effects are not determinative but rather matters to be taken into consideration under Part 2 of the Act.

. . .

Part 2 matters

[454] Opposition to MainPower's application to build a wind farm at Mt Cass centred on a number of key concerns. In summary these were:

• the effects of constructing a wind farm on a geomorphic ridge of regional significance containing significant indigenous vegetation and significant habitats of indigenous fauna;
• the loss of the amenity of the existing rural landscape and the values it supports (including tourism, recreation and viticulture industry); and
• the noise from the wind farm and its potential effects, including on the health and wellbeing of the McLachlans' child.

Section 6

[455] In our consideration as to whether we should grant consent for the wind farm (or not), we are required to recognise and provide for the matters of national importance listed under s6 of the Act.

[456] For Mt Cass, of the six matters listed in section 6, there are three that are relevant:

(b) The protection of outstanding natural features and landscapes from inappropriate ... use and development;
(c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna; and
(e) The relationship of Maori and their culture and traditions with their ancestral lands ...

[457] While we have found the ridge and escarpment between Mt Cass Peak and Totara Peak to be an outstanding natural feature, we have also

found that the siting of the proposed wind farm on this outstanding natural feature would not be inappropriate. We have reached this finding having taking into account that there is little disturbance of the most characteristic and distinctive sections of the feature. This area is to be protected for the future and the vegetation associated with the limestone pavement will be protected and enhanced.

. . .

[481] Decisions on wind farms often come down to weighing up the (primarily) national level benefits and adverse effects at the local level. This particular wind farm proposal clearly demonstrates benefits at both

levels. While there are undeniable adverse effects on the landscape, visual character and local amenity, when viewed overall the outcomes for the environment are positive; that is to say better outcomes for the local ecosystem in addition to the regional, national and global positives of renewable generation. The wind farm enables the creation and funding of the Mt Cass Conservation Management Area for the restoration of a significant limestone ecosystem. The walkway will make this important site more accessible for both recreation and education purposes.

[482] Taking all these matters into consideration we are satisfied that the purpose of the Act would be best served by granting consent.

79.

In my submission, these decisions indicate the correct approach to be taken in addressing an application where there are two significantly distinct levels at which the issues must be addressed:

79.1. The effects on the local environment; and

79.2. The effects on the wider environment (as defined in s2) which are also the subject of national policy.

80.

For that purpose, it is important to acknowledge what all the landscape experts who actually assessed this proposal agree on:

80.1. that the Puketoi Range is an appropriate place for a wind farm;

80.2. that the outstanding character of the Puketoi Range is at a district level, rather than a national one; and

80.3. that however they are arranged, these turbines will be visible to anyone who can see the Puketoi ridgeline.

81.

In the present case, it is relevant to bear in mind that here there are competing considerations of the landscape recognised as having district significance, and the opportunity to provide for renewable energy generation which has a national significance in terms of the NPS REG. In the sense used in section 6(b), the appropriateness or acceptability of the proposal is to be assessed where the ONL/F status does not amount a kind of veto (NZ Rail), the competing matters are of the first degree (Judges Bay) but within Part 2 it is

accepted that the RMA envisages that a proposal can have a significant effect and the proposal remains appropriate (Mainpower). I refer back to my submissions in opening that the Act does not impose a “no more than minor effects” test on the consideration of applications under section 104B: Upland Protection Society v Clutha DC (Decision C85/08).

Lapse periods and term of consents

82.

The issue of what the appropriate lapse period should be arose on a number of occasions. Particular aspects of that issue included whether a longer lapse period might amount to a lock-up of the resource and the creation of uncertainty among affected persons and the wider community.

83.

I submit that there is no lock-up in cases such as this as there can be no allocation of wind. The situation is not comparable to the position on a geothermal field, or in relation to water takes from river flow where lock-up can be a real issue in relation to sustainable allocation of a limited resource. In relation to wind, land access is and will remain critical factor, but upwind or downwind opportunities remain (subject to managing interference effects).

84.

Mr Clough presented his expert opinion that it is better to have consented opportunities available for development than to require the consenting process (which can take months or even years) to occur only after a decision on undertaking development has been made.

85.

In relation to uncertainty and the views expressed in cases such as Katz and Waitahora, I respectfully submit that notwithstanding the consideration that must be given to the statutory default period, consideration must also be given to the scale of a particular project and the factors that affect the lead time for them, as explained by Mr Worth. I would also draw attention to the fact that a degree of uncertainty will always exist given the right of an applicant to apply at any time, the absence of planning direction that limits the location of applications and the ability to apply for extensions of the lapse date.

86.

MRP does seek lapse periods of 10 years in respect of all consents. For those consents which would relate to construction, terms of 14 years are sought. For

all other consents relating to the ongoing existence and operation of the wind farm and transmission line, MRP seeks unlimited terms for all other consents within the scope of sections 123(a) and (b) and 35 year terms for all consents within the scope of section 123(c) and (d).

87.

In my submission, these periods are supported by the evidence. No evidence has been advanced which would show that these periods are inappropriate.

Conclusion

88.

For the foregoing reasons, in my submission there is no reason or set of reasons why the consents sought by MRP should not be granted. Considered overall in terms of its effects on the environment and the guidance from all relevant statutory planning documents, and in terms of the considerations of Part 2 of the RMA to which these matters are subject, I submit that the purpose of the RMA would be better achieved by granting these consents than by refusing them.

89.

The consents should be subject to the conditions agreed among the officers, consultants and experts forming part of the application and already presented to you, including the terms and lapse dates as submitted above.

90.

On behalf of MRP and as counsel I again wish to thank all participants for their involvement and assistance in this hearing process.

Dated at Auckland this 17th day of April 2012

_____

David Kirkpatrick
Counsel for the Applican