

BEFORE THE KAIPARA DISTRICT COUNCIL

IN THE MATTER of the Resource Management Act 1991 ("RMA")

AND

IN THE MATTER of a resource consent application by Tararua Wind Power Limited under section 88 of the RMA for the Kaiwaikawe Wind Farm

MEMORANDUM OF COUNSEL FOR TARARUA WIND POWER LTD

2 March 2022

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MAY IT PLEASE THE PANEL:

1. INTRODUCTION

- 1.1. The purpose of this Memorandum of Counsel is to update the Hearing Panel on discussions that have been occurring between representatives of Tararua Wind Power Limited (“TWP”) and the Director-General of Conservation (“DoC”). Whilst the discussions have been held on a confidential basis, we are pleased to advise the Panel that the parties have reached an agreement such that DoC has amended its position and is no longer in opposition to the grant of resource consent to the Kaiwaikawe Wind Farm (“KWF”). TWP and DoC have also reached agreement on a (limited) number of changes to the TWP condition set dated 21 January 2022. For the avoidance of doubt, DoC is no longer seeking the imposition of its 21 January 2022 condition set (or any earlier version).
- 1.2. Attached and marked as Annexure **A** is a letter co-signed by DoC and TWP addressing the agreement reached between the two parties.
- 1.3. TWP has also engaged with the relevant s42A officers (Dr Bennett and Mr Daly) on the changes to the consent conditions. The officers advise that the changes are acceptable.
- 1.4. The remainder of this Memorandum sets out a brief summary of the final set of proffered conditions of consent. The full set of conditions are attached as Annexure A to our submissions in reply dated 2 March 2022. In many respects our submissions in reply have been overtaken by the TWP/DoC agreement and we respectfully recommend that our submissions be read with that in mind. Our submissions in reply necessarily canvass some matters raised during the January 2022 hearing, evidence, and submissions. However, many of those matters are no longer contested.

2. FINAL PROFFERED CONDITIONS OF CONSENT - OVERVIEW

- 2.1. There are several changes to the proffered set of conditions from the 21 January 2022 TWP set. These changes are the result of:
 - (a) The agreement reached with DoC;
 - (b) TWP’s agreement with DoC that the extensive conditions dealing with the Long-tailed bat are no longer necessary and have therefore been deleted;
 - (c) Further submissions of counsel for KDC dated 21 January 2022;

(d) an opportunity to correct some typographical errors and now that the proffered conditions have been finalised, improvement to the numbering system to remove the complexity of the previous numbering system.

2.2. We address these changes in further detail (other than typographical and numbering changes) below.

3. CONDITION CHANGES AGREED WITH DOC

3.1. The changes to conditions agreed to by TWP and DoC are as follows.

Conditions 79(c) and 80(c) Australasian Bittern Monitoring and Management Plan

3.2. Conditions 79(c) and 80(c) relate to the requirement to create or enhance 2 hectares of wetland habitat, together with predator control, for Australasian Bittern. Previously, the creation or enhancement was to take place within the Project Site, however the words “*within the Project Site*” have been deleted so that the creation or enhancement sites does not necessarily need to be within the Project Site (recognising that the Project Site is approximately 2,000 ha and so candidate sites away from the wind farm may still be feasible) if there are more appropriate locations. The selected site(s) are to be identified in the final draft Australasian Bittern Monitoring and Management Plan and are subject to the Expert Panel comment prior to filing with KDC for certification.

Condition 98 and 99 - Australasian Bittern Management Fund

3.3. Through the recent discussions with DoC, TWP has agreed to significantly increase its funding of the Australasian Bittern Management Fund from **\$250,000** to **\$640,000**. This represents a significant contribution which will deliver meaningful and substantial initiatives aimed at the promotion and enhancement of the population of the Australasian Bittern.

3.4. While the purpose of the Fund has remained the same, the initiatives and programmes have been more targeted and are now limited to those of DoC or iwi. Defining a more limited class of recipients has not prejudiced any particular party. It is submitted that the Fund is of such a scale, and when coupled with other measures such as the creation/enhancement of wetland habitat (and predator control) that the grant of consent contributes positively to the conservation of the Australasian Bittern (and other species also).

- 3.5. The Australasian Bittern Management Fund is a relevant matter under s104(1)(ab) of the Resource Management Act 1991 which the Panel must have regard to. Evidence before the Panel in the January 2022 hearing confirmed the existing threats to Australasian Bittern from pests and habitat loss, limiting funding to the local environment, and the benefit to be derived from initiatives and programmes for which the Fund could be used for. The Fund is now scaled so as to make an even more meaningful contribution to those matters.

Conditions 86(b), 88(a), 91(c), and 93(b)

- 3.6. Given the significant increase in the quantum of the Australasian Bittern Management Fund, TWP and DoC have agreed that it is appropriate for the Expert Panel and the KDC to take into account any initiatives and programmes undertaken as part of the Australasian Bittern Management Fund when considering whether any of the additional habitat creation / enhancement measures or predator control measures identified in the Australasian Bittern Monitoring and Management Plan should be implemented under conditions 86(b) and 88(a). Similarly, condition 91(c) and condition 93(b) have been amended to provide for the same consideration by the Expert Panel and the Resource Consents respectively when considering an Australasian Bittern injury or mortality investigation report.
- 3.7. Specifying this as a relevant consideration is entirely appropriate and reasonable, and the amendments do not fetter the discretion afforded to or otherwise hinder the Expert Panel or Resource Consents Manager.

Conditions 107 and 111

- 3.8. It has also been agreed with DoC that the minimum period of carcass monitoring be amended to immediately following the date any wind turbine first generates electricity and continue for a period of three years. Previously the minimum period was five years. Importantly, the three-year period is a minimum period and the Resource Consents Manager can still determine an alternative date. Condition 111 provides that on the third anniversary of electricity being generated a bird collision monitoring review report is required to be prepared and under condition 111(b) that report is to consider whether the monitoring needs to continue. The report is to be provided to the Expert Panel for review and comment (condition 112) before being provided to the Resource Consents Manager who can then determine (under condition 114(b)) if monitoring is to continue.

- 3.9. The adjustment of the minimum period of monitoring has, in part, facilitated the increase in funding to the Bittern Management Fund. That is a pragmatic use of funds and has been proffered on that basis.
- 3.10. It was Mr Fuller's initial advice that no collision monitoring at this site was warranted. Mr Fuller's advice has been obtained and he supports the new minimum period. Mr Fuller advises that post-construction bird monitoring is not required for every wind farm and of the 18 constructed wind farms for which he holds information, seven did not require post-construction monitoring, and four only require informal staff reporting of carcasses. Where post-construction mortality monitoring is required the default duration, both nationally and in international guidance, has been three years coupled with a review. Mr Fuller has confirmed three years is the default as it typically takes three years of observation to obtain a statistically robust sample of collision mortalities which can be considered representative of the site.
- 3.11. Of the seven New Zealand wind farms that required post construction monitoring; one windfarm was required to monitor for two years (Mahinerangi); five windfarms required three years of monitoring (White Hills, West Wind, Te Uku, Turitea, Harapaki); and one site required 10 years with a review to potentially stop monitoring at five years (Waipipi).
- 3.12. Waipipi Wind Farm is the only wind farm requiring more than three years of monitoring. This is because it was the first wind farm to be built in the coastal environment, the first to be built within a known migratory flyway, with small birds such as wrybill potentially affected, and with predicted levels of annual mortality requiring offsetting.
- 3.13. Dr Bennett has no objection to the change.

Conditions relating to Long-tailed bats

- 3.14. TWP agrees with DoC that as a result of the baseline surveys confirming the absence of Long-tailed bats, conditions relating to long-tailed bats are no longer required. We set out in our submissions in reply the reasons why Mr Mackay's recommendation to retain the previous suite of Long-tailed bats is unnecessary and not appropriate.

4. CONDITION CHANGES IN RESPONSE TO COUNSEL FOR KDC

- 4.1. In his 21 January Further Submissions, counsel for KDC submitted that the condition relating to the Australasian Bittern Monitoring and Management Plan (now conditions 79(d) and 80(d)) need a clear performance standard so that the council certifier knows what the management plan is required to achieve. Mr Bangma elaborated that this would

be achieved by the insertion of the words “*a more than minor*” which reflects Policy 4.4.1. Those suggestions have been adopted in condition 79(d) and 80(d), along a consequential change to conditions 86(b).

- 4.2. Having now provided our submissions in reply and updated the Panel on successful discussions with DoC, TWP invites the Panel to close the hearing.

TARARUA WIND POWER LIMITED by its solicitors,
ChanceryGreen:



Jason R Welsh

2 March 2022

Annexure A

PROPOSED KAIWAIKAWE WIND FARM: JOINT STATEMENT OF POSITION OF TARARUA WIND POWER LIMITED AND THE DIRECTOR-GENERAL OF CONSERVATION

Introduction

Tararua Wind Power Limited (“TWP”) and representatives of the Director-General have engaged in a series of discussions over an extended period regarding the Director-General’s concerns with respect to Australasian bittern/matuku. Those discussions have continued since the adjournment of the Kaiwaikawe Wind Farm (“KWF”) hearing. We are pleased to jointly update the Hearings Panel as to the outcome of the discussions as they relate to amended resource consent conditions for the KWF.

TWP and the Director-General have reached an agreement. The detailed terms of the agreement, and principles governing the ongoing relationship between the parties with respect to the KWF, are to be recorded in a Memorandum of Understanding between TWP and the Director-General. The terms of the Memorandum of Understanding will be confidential to the parties, however there are aspects of the agreement that may have a consequence on the Hearing Panel’s decision, and if it is minded to grant consent, the conditions of consent.

Revised position of the Director General

The Director General records that she no longer opposes the grant of consent to KWF on the basis of the agreement reached with TWP, and the imposition of amended Australasian bittern/matuku conditions of consent proffered by TWP (a copy of those conditions is attached to this letter). The amended consent conditions relate to:

- **Conditions 79(c) and 80(c):** deletion the words “*within the Project Site*” so that the location of the 2 hectares of wetland creation or enhancement may not necessarily be within the KWF Project Site.
- **Conditions 86(b), 88(a), 91(c) and 93(b):** Given the additional funding commitment to the Australasian Bittern Management Fund and the consequential habitat enhancement and predator control initiatives that may be possible, conditions 86(b), 88(a), 91(c) ad 93(b) have been amended so that initiatives undertaken as part of the Australasian Bittern Management Fund can be taken into consideration when determining if additional habitat creation /

enhancement measures or predator control measures identified in the Australasian Bittern Monitoring and Management Plan should be implemented.

- **Condition 98:** amendment to condition 98 so that the Australasian Bittern Management Fund will provide investment initiatives and programmes by *“the Department of Conservation or iwi”*. This wording replaces the earlier references to *“individuals, community groups, iwi or other entities”*.
- **Condition 99:** The Australasian Bittern Management Fund will be increased from \$250,000 to \$640,000. TWP records that it is specifically proffering this condition.
- **Conditions 107 and 111:** The period required to undertake collision monitoring is to be amended from 5 years to 3 years.

It is noted at this stage that changes recommended by counsel for Kaipara District Council and section 42A officers to conditions 79(d), 80(d) and 86(b) by inserting reference to *“more than minor effects”* have been incorporated into the amended final conditions of consent.

Conclusion

This letter acknowledges the extensive efforts that both parties have undertaken to ensure that a positive outcome for New Zealand (including with respect to Australasian bittern/matuku and associated values) is achieved.

**SIGNED by MERCURY ENERGY LIMITED/
TARARUA WIND POWER:**



Signature of authorised signatory

PHIL GIBSON

Name of authorised signatory

GM Operations

Position of authorised signatory

**SIGNED by DEPARTMENT OF
CONSERVATION:**



Signature of authorised signatory

Sue Reed-Thomas

Name of authorised signatory

Director - Operations NNI

Position of authorised signatory