THE TRUSTPOWER WAIRAU RIVER HYDRO POWER PROPOSAL

A review of the processing of the resource consent applications

Prepared for

Ministry for the Environment

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Disclaimer

The views expressed are those of the contractor or the people interviewed and quoted and do not necessarily represent government policy.

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1 Summary

The Ministry for the Environment (MfE) has commissioned a review of the processing of resource consent applications made by TrustPower Limited (TPL) to construct and operate a new hydro power scheme on the Wairau River, Marlborough. The applications were processed under the provisions of the Resource Management Act 1991 (RMA) by the Marlborough District Council (MDC), which is a unitary authority under the Local Government Act 2002. The sole focus of the review is on the process employed by MDC to progress these consent applications, not the merit of the subsequent decisions made.

The first step in the review was to scan all the relevant MDC files on the applications, and speak to a number of relevant MDC staff. Two staff members of TPL were then interviewed, followed by interviews with representatives of six submitters, all of whom opposed the applications. These representatives were chosen because of their experience with statutory processes under the RMA.

Some of the criticisms made by these respondents were then put to the MDC for their response, and each of the three hearing commissioners were interviewed separately. This completed the gathering of information for the review.

The applications were lodged in July 2005 and notified in September 2005. The submission period was doubled to 40 days with the agreement of the applicant. There were 1442 submissions on the applications - 1117 were from within the scheme area; 325 from beyond. Five hundred and twenty-seven submitters supported the application, of which 80 wished to be heard. Nine hundred and three submitters opposed the applications, of which 527 said they wanted to be heard.

The applications engendered some strong feelings in the local community, most of them opposed to the proposed power scheme.

In November 2005, the MDC appointed a hearing panel comprising Tony Willy, a former judge who had served on the District Court, Tax Court and Environment Court as chair; Max Barber, an experienced resource management consultant; and Jill Bunting, a second term district councillor and then chair of the council's hearing committee.

The hearing, which commenced on 12 June 2006, was adjourned on 12 December 2006 after 70 hearing days. An interim decision was released on 22 June 2007. The interim decision granted the applications sought by TPL, but did not specify the conditions on which they were granted. The "conditions hearing" took eight days between 12 January 2007 and 12 February 2007. Decisions on the conditions were released on 5 August 2008.

The interim decision was appealed by six parties, two of whom are closely linked. Those appeals have yet to be heard. One appeal – that from the Department of Conservation – has provisionally been settled with TrustPower.

The MDC contracted a local consultant and former council employee to help process the applications.

Submitters interviewed about the consents process made favourable comments about some elements of the processing of the TPL applications by MDC including:

- The consultant contracted by MDC was seen as very helpful and pragmatic. The s42A officer's report was considered a succinct summary of the issues.

- The notification process was seen as satisfactory, although its timing was criticised by some parties.

- A pre-hearing meeting chaired by Tony Willy to set timelines and hearing procedures was seen as very helpful.

- The venue for the hearing, and the rapid availability of transcripts of the hearing, were both praised.

However, there were some strong criticisms raised by submitters interviewed concerning the hearing of the applications. These included:

- At TPL's insistence the applications were notified prior to the "peer review" reports being completed. MDC opposed this, wanting the peer review reports completed first. Early notification is, however, consistent with case law, as an applicant has the right to insist that applications be notified provided certain criteria are met.

- The hearing panel, although acknowledged as intelligent and thorough, did not include technical skills in fields such as aquatic ecology and engineering. Consequently the panel asked many questions, one outcome of which was that the hearing took longer that would have otherwise been necessary. This resulted in extra expense being incurred by some of the participants as many witnesses were recalled, particularly those representing TrustPower, for whom 33 witnesses gave about 90 briefs of evidence.

- Submitters considered that the rules and procedures for the hearing were unclear and appeared to change as the hearing proceeded, with TPL counsel having an undue influence over the procedures. Hearing panel members, however, rejected this view and considered that any changes were signalled by appropriate memoranda.

- TPL's legal team was seen as aggressive and divisive by some submitters. The panel on the other hand saw them as highly competent and professional.

The hearing panel split its decision and decision making into two parts. This followed a meeting with the applicant and the main institutional submitters[1], all of whom agreed to this approach. The first decision was to grant the consents sought, but without conditions.[2] This decision subsequently gave rise to six appeals (two of which are closely linked) being lodged with the Environment Court. A separate hearing on conditions followed, with decisions being released some 13 months after the primary decision. TPL lodged an appeal to some of the conditions of consent.

All the submitters interviewed were critical of this two step process. In particular, they said that the conditions form part of the mitigation package on which consents could be granted, and this had to be a key component of the decision. They also noted that this process added substantially to the time involved in decision making. Some submitters expressed frustration that they could not speak to conditions at the original hearing, as they had originally prepared evidence on this basis.

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[1] These included Forest and Bird, Fish and Game, DoC and Save the Wairau among others.

[2] The panel said on pp325 of their decision: *"It will now be clear that we have granted the applications subject to conditions and it is now necessary to decide how we should go about formulating and drafting the necessary conditions"*.

Members of the hearing panel had a different perspective. They considered that right from the start of the process there was a significant possibility that the applications would be declined, particularly as some were for non-complying activities. Given this, they believed the most expedient way to proceed was to first decide whether the applications would be granted or not. Panel members consequently faced considerable opposition at the later conditions hearing from submitters who contested the primary decision.

The approach of the MDC once the hearing started was also criticised. Unusually, no officer reports were appended to the s42A staff report, and this led to an unsuccessful attempt by TPL to prevent two council staff and two peer reviewers presenting evidence to the panel. Also there were no MDC consents staff present at the conditions hearing. Instead the council predominantly relied on a detailed written memorandum from the s42A reporting officer (who was present at the conditions hearing) that was supplied to the panel prior to the hearing. This memorandum outlined matters of concern about draft conditions proposed by TPL.

In the course of undertaking this review a series of key learnings emerged that have useful application for consent authorities generally regarding the processing of large scale consent applications. These include:

Pre-hearing

- Consent authorities should encourage applicants to supply draft consent applications. This has the advantage that council staff have the opportunity to review and discuss the applications prior to lodgement, and to make sure that as far as possible they are complete when lodged. It also enables working relationships to be developed between an applicant and council staff.

- The matter of whether complex applications should be notified prior to s92(2) RMA "peer review" reports being received is contentious. Both sides of the argument have merit, and both have some support in case law.

- Pre-hearing meetings should be utilised more widely, as they are a potentially valuable means of determining process and identifying the key issues under contention.

Hearing Procedures

- Where there is very strong public interest in a local proposal, consent authorities could consider appointing hearing panels entirely from outside of the local district. While this may appear to delegate important functions away from the community, it means that the commissioners will not be compromised in the local community if a decision is made that attracts strong public opposition.

- As a matter of good practice, officer s42A reports should append all relevant technical information on which the author of the report has relied, or which might be helpful to the hearing panel. This removes any doubt that those technical experts can be called as witnesses should that be sought by the panel.

- In establishing hearing panels consent authorities should explicitly consider the breadth and depth of the issues to be considered and ensure that the mix of skills and experience corresponds to the complexity of the issues raised.

- Commissioners need to ensure that all potential conflicts of interest are declared prior to a hearing commencing.

- For long and complex hearings the rapid provision of transcripts can be very helpful for parties that cannot attend a hearing full time.

- Hearing panels need to explicitly consider the "rules" of conduct for a hearing and to outline these very clearly at the start of the proceedings. If they change for any reason, all parties to the hearing need to be advised accordingly, preferably in writing.

- If evidence is pre-circulated it may well be unnecessary for much of that evidence to then be read to the hearing panel.

- If additional information is sought from an applicant on a particular topic, or further briefs of evidence are given, care needs to be taken to ensure natural justice is met by allowing other parties to provide comment on the additional material provided.

- Substantive decisions on the merits of specific resource consent applications should include conditions if consent is granted, particularly as these form an essential part of the mitigation package associated with the applications.

The RMA

In addition to the learnings identified above, the review also highlighted some areas of potential legislative improvement that could warrant further consideration by MfE. These include:

- The five working day period for consent authorities to return incomplete applications under s88(3) of the RMA is much too short for complex, multi-disciplinary applications such as those for the Wairau hydro scheme. Although this period can be doubled to ten working days under the provisions of s37 of the Act, this is still considered too short for applications of this nature.

- Reassess the powers afforded council hearing panels. This could include, for instance, the ability to require experts to caucus to come to points of agreement, reducing the presentation of repetitive evidence and perhaps allowing some cross-examination.

2 Introduction

In July 2005, TrustPower Limited ("TPL", "the applicant") lodged applications with the Marlborough District Council ("MDC") for resource consents associated with a proposed new power scheme in the Wairau Valley, Marlborough. These were processed using the provisions of the Resource Management Act 1991 ("the RMA", "the Act"). This eventually led to a protracted two stage resource consent hearing process.

The applications were lodged in July 2005 and notified in September 2005. The hearing commenced on 12 June 2006, and was adjourned on 12 December 2006 after 70 hearing days. An interim decision was released some seven months later on 22 June 2007. The interim decision granted the applications sought by TPL, but did not specify the conditions on which they were granted. The "conditions hearing" took a further eight days between 12 January 2007 and 12 February 2007, with decisions on the conditions being released on 5 August 2008. A summary timeline of the hearing process is included as Appendix 1 to this report.

The interim decision was appealed by six parties (two of which are closely related and filed the one appeal document). These appeals have yet to be heard. At the time of writing this report at least one appellant – the Department of Conservation – has reached agreement with TPL and does not intend to pursue its appeal. TPL also lodged an appeal to some of the conditions of the consents granted.

TPL said that the hearing was relatively costly for them compared with similar resource consent hearings, such as those for the upgraded Arnold River hydro power scheme and the Kaiwara and Mahingerangi wind farms. They budgeted $5,000 per hearing day for their costs alone (which do not include the costs incurred by MDC and subsequently charged to TPL). Their actual costs were about $22,000 per day. The total cost of the hearing to TPL (again excluding MDC costs) was budgeted at $1.2 million; actual costs were $3.2 million. Additionally, MDC processing costs charged to TPL exceeded $2 million.

It is against this background that this report sets out to determine "what went well and what did not go well" with this consent process and that could usefully be applied to the processing of large scale consent applications generally.

3 The Brief

This review was commissioned by the Ministry for the Environment (MfE) and has been undertaken by Dr Brent Cowie (the contractor).

MfE is the government ministry responsible for administering the RMA. The functions of the Minister for the Environment, listed under s24 of the RMA, include:

The monitoring of the relationship between the functions, duties and powers of central and local government….; and

The monitoring and investigation, in such manner as the Minister thinks fit, of any matter of environmental significance.

The brief for the project comprised the following tasks:

1. Review relevant MDC files relating to the applications lodged by TrustPower Ltd. to construct, operate and maintain a 72 Mw hydro electric power scheme in the Wairau Valley. The objective of the file review was to gain an understanding of the RMA administrative process undertaken by MDC to progress the TrustPower applications from receipt through to the issue of consent.

2. Undertake structured interviews with representatives from TrustPower, MDC consents staff, the MDC hearing panel and a targeted range of statutory agencies (e.g. Nelson/Marlborough Conservancy of Department of Conservation, Nelson/Marlborough office of Fish and Game). The purpose of the interviews was to augment information derived from the file review, clarify any process ambiguities identified and explore the conduct of the applicant and the consent authority during the process.

3. Based on the information derived from the file review and structured interviews prepare a report that:

    - documents the resource consent process associated with the TrustPower applications;
    - compares and contrasts this process with the statutory consents process set out in the RMA, including documenting any identifiable gaps or inconsistencies; and
    - identifies and documents key challenges and learnings associated with processing the TrustPower applications.

The brief focuses solely on administrative process and does not involve any review of the merits of the decisions made. Although many of the parties interviewed during the course of undertaking this review commented on this matter, none of the comments made are included within this report.

3.1 Author's Notes

There are several stages in the consenting process prescribed in Part 6 of the Act that were not tested during the Wairau process and are therefore not discussed further in this report. In particular it was always presumed by both the applicant and the consent authority that all the applications would be publicly notified, so the provisions of sections 93 and 94 of the Act (which relate to notification) are of little relevance to this review.

Further information was sought from the applicant early in 2006 under the provisions of s92 of the Act once the peer review reports were completed. The need for further information was not contested by the applicant, and no submitter made any particular comment on this matter, so it is not discussed further here.

In a number of instances reference is made to the plan or the proposed plan. This is the (now operative) Wairau Awatere Resource Management Plan which sets a flow regime for the Wairau River. A minimum flow of 8 cubic metres per second (m^3/s) is set for the river at the Tuamarina gauging site; below this no water is able to be taken. There is then a "B" allocation block from 8 to 30 m^3/s. Above this water can be taken but is subject to flow sharing. Takes above the Branch River confluence (as proposed by TPL) are non-complying activities.

In places throughout the report quotes are used. Those from written reports or correspondence are verbatim (except that reference to named persons is generally changed). Those quoting oral interviews are not necessarily verbatim but reflect

accurately what respondents said (records of interviews were read back to them to check for accuracy).

The statutory point of reference in this report is the RMA prior to the passing of the Resource Management (Simplifying and Streamlining) Amendment Act 2009.

4 Methodology

Consistent with the brief the consultant undertook the following tasks:

In January 2009, all the 60 plus MDC files associated with the Wairau process were reviewed, and comprehensive notes taken. MDC staff were then interviewed including Hans Versteegh, Manager - Resource Management and Regulatory; Peter Constantine, the Council's Principal Planner; Louise Walker, the officer responsible for administering the hearing process; and Vallyn Wadsworth, the council's hydrologist (who kindly took the contractor on a site visit). An interview was also conducted with Stephen Wilkes of Abel Properties Limited, the consultant who was contracted by MDC to help process the initial applications. Mr Wilkes is a former MDC consents staff member, and has 14 years relevant experience.

The next step, undertaken in mid-February, was to interview Peter Lilley and Kerry Watson of TPL about the process. This was a face to face interview held at TPL's head office in Tauranga.

Face to face interviews were then conducted with representatives of the following organisations in early March:

- Stephen Wynne-Jones and Rod Witte from the Department of Conservation (DoC), Nelson. Mr Wynne-Jones is a planner with the Department and Mr Witte is a senior manager. Mr Witte formerly held a senior management role at Nelson City Council, part of which involved oversight of all consent processing, and previously worked for the MDC.
- Neil Deans, Manager, Nelson-Marlborough Fish and Game Council, Nelson. Additional written comment was provided by their solicitor, Maree Baker, of Anderson Lloyd Law.
- Ms Debs Martin, Conservation Officer, Royal Forest and Bird Protection Society, Nelson.
- Nigel McFadden, solicitor of Nelson who represented Ormond Aquaculture and New Zealand Clearwater Crayfish.
- Robin Blackmore, a committee member of "Save the Wairau". Mr Blackmore previously worked for DoC and has experience of statutory processes under the RMA.
- Roger Winter of the Marlborough Freshwater Anglers Club. Mr Winter was formerly an elected councilor at the MDC and the chair of their hearing committee.

Many other participants to the process could have been interviewed. However those chosen all have extensive experience relating to RMA consent processes, and could draw from that experience to offer comment on the Wairau process.

The interviews undertaken were semi structured. In essence, participants were asked open questions about those stages of the process in which they were involved, and asked to comment on them. The general structure of the interview is set out in Appendix 2 of this report.

A number of criticisms of the hearing process emerged from these interviews. In response MfE wrote to the MDC asking for comment. A meeting was held with representatives of MDC in July 2009 to discuss the issues raised and was followed up by a written response from the council.

Following this the hearing panel members were interviewed separately in Christchurch and Blenheim. Again the questions asked were very open, with comment sought. There was strong agreement between the panel members on the issues raised by other parties.

The views expressed by the MDC and hearing panel members in response to these issues have been incorporated into this report.

5 The Environmental Setting

A hydro power scheme has existed in the Wairau Valley since about 1973. The Branch River, a tributary of the Wairau on its left (southern bank) about 80km inland is dammed several kilometres upstream of its natural confluence with the Wairau. Water is passed through a power station, into a canal and headpond (known as Lake Argyle) and then along another canal to a further power station before being discharged to the Wairau River.

TPL purchased the Branch Scheme from Marlborough Electric in 1998 after government legislation forced the separation of power generation assets from power distribution assets. Marlborough Electric then ran the scheme under contract for several years. This was a time when TPL purchased a number of smaller hydro-electric power (HEP) schemes around the country (another nearby example being the Arnold Power Scheme on the West Coast), and they found the Branch Scheme to be amongst the most reliable.

Prior to TPL purchasing the Branch Scheme, Marlborough Electric had initiated a study that looked at taking and diverting water from the Wairau River to the Argyle headpond. This would have added about 30 gigawatt hours (GwH) to the 55 GwH generated by the Branch Scheme. TPL reviewed this proposal and decided it was not economic at that time. It did however “spark the idea” of taking water from the Wairau River straight into the second (lower) power station of the Branch Scheme. TPL undertook a scoping study of that proposal which was completed in 2002. At the same time they reviewed some of the (former) Ministry of Works and Development ideas about possible further power development in the Wairau Valley. At this time an irrigation company was formed in the Wairau Valley, given which TPL “did some numbers” and launched the proposed scheme publicly at the end of 2002.

Several years of intensive investigations followed prior to the first tranche of consent applications being lodged with the MDC in July 2005. As the MDC is a unitary authority with both regional and territorial authority functions, it was the sole consent authority for all the applications. Evaluation of the work undertaken by TPL as part of the Assessment of Environmental Effects (AEE) that accompanied the resource consent applications was beyond the scope of this project to review. However, most of this work was undertaken by external contractors, many of whom are nationally recognised in their fields of expertise.

In simple terms TPL propose to divert up to 40 cubic metres per second of water from the Wairau River to a canal about 2km upstream of the Branch River. The water will then be passed through the (upgraded) lower power station on the Branch River, and then along a canal totaling about 45.5km in length. Five other power stations are proposed to be constructed on the canal, with the canal itself crossing several ephemeral and permanent watercourses and criss-crossing a major faultline. Head is generated for each power

station by the canal following the contours of the valley, with the proposed route very largely to the south of the State Highway along the south bank of the Wairau. Water is returned to the Wairau River some 49km downstream of the point of take.

For most of its length the canal is on private land. TPL has purchased properties, or successfully negotiated access agreements with all but two landowners. One of these owns a property on which the lowest headpond, power station and discharge tailrace is proposed to be built. Later this year the Environment Court is scheduled to consider whether appeals on the merits of the proposal will be heard given the landowners refusal to enter into a either a purchase or access agreement with TPL.

Several interview respondents were involved in early consultation undertaken by TPL prior to resource consent applications being lodged. While they said this demonstrated good faith, they observed that TPL took the line that this was a fairly firm proposal and were not prepared to negotiate the substantial mitigation that was sought by some of those interviewed. Further additional consultation carried out prior to applications being lodged was described as being little more than a description of the proposal.

6 Possible Call In of the Applications

At some stage in 2005, senior officials of the MDC informally raised with the Minister for the Environment and senior officials the possibility of the TPL applications being "called in" by the Minister under s141B of the RMA. No record of this exchange or any associated correspondence was sighted during the course of this review. MfE officials advise that no formal written request was made to the Minister for the applications to be called in.

TPL commented that they were aware of this approach by MDC but were neutral or slightly opposed to the Government "calling in" the applications. This was because TPL viewed the scheme as a predominantly local rather than national matter – it was designed to supply power to Blenheim and the irrigation scheme was local. They also commented that from their perspective "call in" runs the risk of a local issue being ramped up into a national campaign, quoting opposition to the proposed raising of Lake Manapouri in the late 1970's as an example.

7 Receipt of the Applications

Section 88 of the Act outlines the procedure for the receipt of resource consent applications. In particular, s88(3) allows a consent authority to return an application, along with reasons, if they consider the application to be incomplete. This has to occur within five working days, although this timeframe can be doubled under the provisions of s37 provided certain matters have been taken into account. These include consideration of the interests of affected parties and the duty to avoid unreasonable delay.

Representatives of both Save the Wairau and the Marlborough Freshwater Anglers Club were critical of the MDC receiving the applications, saying that subsequent work, particularly the s92 peer review reports, showed them to be incomplete.

The main application was a 167 page document which was accompanied by 11 supporting technical documents, many of which were lengthy and very detailed, and four appendices. Realistically it was impossible for the MDC to assess whether the application was "complete" within 10 working days. Many of the accompanying technical reports

would need to have been peer reviewed by competent experts, some of which would have to have been contracted externally.

However, MDC were asked by TPL to look at and comment on draft applications some time before they were lodged. MDC refused to do so for reasons not specified.[3] TPL commented that MDC are the only consent authority they have dealt with to date that has refused to make comment on draft applications.

7.1 Lessons Learnt

There is one key lesson for consent authorities generally regarding the process of receiving applications:

- Any concern about the completeness of applications when lodged can largely be overcome by consent authorities viewing and commenting on "draft applications". This is common practice. While some concerns have been raised that councils cannot charge applicants for reviewing draft applications, arrangements are sometimes entered into with applicants regarding payment for such work.

In addition to this lesson there is also a legislative requirement associated with the receipt of applications that could warrant further consideration by MfE:

- The five working day period for consent authorities to return incomplete applications under s88(3) of the RMA is much too short for complex, multi-disciplinary applications such as those for the Wairau hydro scheme. Although this period can be doubled to ten working days under the provisions of s37 of the Act, this is still considered too short for applications of this nature.

8 Processing of the Applications

Section 34A of the Act allows a consent authority to contract out certain functions, including the processing of resource consent applications.

In the case of the TPL applications, MDC contracted out the processing function to a local planning consultant familiar with the council's consent processes.

The submitters interviewed commented favourably on the choice of consultant to undertake this function, and considered that this appointment certainly helped expedite the early processing of the applications. They also commented favourably on the s42A officer's report that they prepared on the applications. Two typical comments made in relation to processing the applications were:

- *"It was really good that MDC did contract – the consultant was a good point of contact and gave us lots of clarification. He was very good and straight up and down. But he did have a massive workload*". (Forest and Bird)

- *"We had no problem with that – we knew that would be a long complicated process and to delegate made sense. The consultant made a very good effort to keep commissioners informed and to provide advice, and was also pragmatic, and responsive to requests*". (Freshwater Anglers Club)

[3] MDC contest that they were asked to review draft applications; TPL assert that they did ask.

Section 42A of the Act allows a local authority to commission an "officer's report" on resource consent applications. They are required to be sent to the applicant, and all submitters, at least five working days prior to the hearing commencing. In this instance the consultant contracted by MDC prepared the s42A report, which generally received favourable comment such as:

- *"It was very brief but did have a good summary of submitter's concerns. The report was neutral and quite superficial – it did not deal, for instance, with the s104D "gateway tests" for non-complying activities, but suggested adverse effects could be mitigated by way of conditions". (DoC)*

- The Freshwater Anglers Club commented that "*it was very helpful for us as it was set out so lay people could understand it and reflected the information available".* In a similar vein "Save the Wairau" said that the report was *"good and easily understandable*."

The chair of the hearing panel passed comment that the council's consultant was "*wearing two hats" (*as both the reporting officer and as an administrative assistant to the panel) but ran the hearing extremely well and helped to persuade some submitters not to present irrelevant material.

9 Commissioning of Reports

9.1 RMA Framework

Section 92 of the Act allows further information to be requested about a resource consent application. Some of the other matters covered in s92 are addressed in Section 10 of this report.

Section 92(2) allows a consent authority to "commission any person to prepare a report on any matter relating to an application". However, three pre-requisites apply – the consent authority considers that the activity may have significant adverse environmental effects; the applicant is notified of the decision; and the applicant does not refuse to agree to reports being commissioned. Such reports are commonly called peer review reports, and are referenced as such in the following sections.

9.2 Actions Taken by MDC

In early July 2005 MDC asked the National Institute of Water and Atmospheric Research (NIWA) to provide costings and the like for a review of the TPL applications. A similar letter was sent to Kingett Mitchell Limited (KML).[4]

At some stage Damwatch, a subsidiary of Meridian Energy, were contracted by MDC to carry out a peer review of engineering and safety aspects of the applications.[5] In their interview TPL respondents commented that they had no concerns about Damwatch acting in that role. The company is industry recognised and TPL had used most of the competitors in their own work, so the only other company which could have fulfilled the same peer review role was Opus International Consultants. TPL talked with Damwatch about the work and worked alongside them during the peer review process.

[4] This letter was not sighted on the MDC files.

[5] Similarly, this correspondence was not sighted on the MDC files.

MDC wrote to TPL on 2 August 2005 asking if they had any issue with NIWA and/or KML undertaking the technical reviews. There is no written record of TPL objecting to the reviews being undertaken, or who undertook them. In their interview TPL advised that they commented verbally to MDC that both NIWA and KML had tendered to carry out work for the AAE but had missed out, and TPL expressed concern that they were being used in a peer review role. No record of such comment was found on the MDC files.

Regardless of this, there appears to have been some tension between TPL and its consultants and the peer reviewers from NIWA and KML appointed by the MDC. This particularly manifested itself in two subsequent challenges by TPL to the peer reviews.

9.2.1 "Caucusing" of the Peer Reviews

On 9 December 2005, lead counsel for TPL e-mailed MDC's counsel formally requesting that TPL experts "caucus" with MDC's independent reviewers prior to the release of their reports. Reasons given were that TPL experts *"could comment on assumptions that may be mistaken, agree on certain matters, agree further appropriate actions and avoid needless debate through the substantive hearing process".* Possible opposition to costs was also raised if this did not occur: *"We would also find it extremely surprising for there to be no substantial caucusing prior to the release of the reports".* Accordingly, TPL formally sought an opportunity for caucusing.

MDC's counsel replied on 13 December 2005, stating that the reports were already finalised, that the reviewers had been in close touch with TPL experts during the process, and that the council was exercising its rights under s92(2) to release the reports. In their opinion it was not possible to revisit this matter.

Lead counsel for TPL responded on 13 December 2005 saying that "*we find it remarkable, and contrary to accepted practice, that peer review reports have been concluded without any caucusing whatsoever with the relevant expert consultants for the applicant".* The response also asserted that *"the s92 process is not an adversarial process and ought not be allowed to degenerate into one"* and threatened to raise the matter with the hearing panel chair.

There is an e-mail from NIWA dated 14 December 2005 on MDC files outlining how NIWA staff had been in contact with TPL experts while undertaking peer reviews, and saying that discussion was useful and desirable. The e-mail indicates that NIWA would have "no problem" with a meeting with TPL and MDC to discuss review issues prior to the reviews being made public.

Formal papers were lodged by counsel acting on behalf of TPL and MDC and were put before the chair of the hearing panel. In a decision dated 21 December 2005 the chair decided that this was an administrative issue for the council and not one that came under the hearing panel's jurisdiction. The matter was taken no further, and the peer review reports were released without a formal peer review by TPL.

9.3 Challenge to Reports Being Presented at the Hearing

There was a challenge mounted by TPL at the hearing to the admissibility of five pieces of evidence prepared by officers of the MDC or their peer reviewers. These included reports by the MDC's hydrologist and freshwater biologist, a report on avifauna by NIWA, and a groundwater report by KML.

The background to this challenge was that the original s42A report contained no appended technical reports. In the words of hearing panel chair:

> *"The spin off from this was that we did not know what the stance was of the technical people at the MDC. We asked MDC's consultant to submit an amended s42 report that covered this, but he pointed out that he did not know the technical material and this would have to be filtered through him which was not satisfactory. So we granted him leave to attach evidence from the relevant council experts. TPL objected to this but we overruled them and allowed reports to be submitted from officers and peer reviewers."*

This legal argument took about two days before the hearing panel decided that evidence could be presented. The hearing panel's decision was strongly opposed by TPL.

9.4 Views of Respondents

Asked why they had mounted these challenges, TPL respondents made the following comments:

- *"Early on there were some fairly sweeping statements from NIWA that caused us concern, and a lot of animosity rose from that.*[6] *There was a feeling from our point of view that they did not adopt the peer review role but rather were inclined to re-invent the wheel."*

- *"Following the site visits with the peer review reporters there were some quite strong differences. We were concerned that these were more about methods than they were results, particularly in relation to groundwater. There did not seem to be any point in going our separate ways. We would still push to caucus with the peer reviewers as it can be a way to ease the process. We would also like to see the s42A report before it goes out."*

Not surprisingly, the submitters took a different view. Their views were well summarised by DoC:

> "*It is not for TPL to determine who is heard and who is not. There is a great deal of expertise in the council in people like their hydrologist and their river engineer. This was not in the s42A report, although it is common practice for council staff to comment and that is a very useful approach*."

There was also adverse comment about a lack of clarity about the role of the reporting officers, and what submitters perceived as the detached approach of the MDC:

- DoC said that there was a lack of clarity about the role of the reporting officers and the officers were not used efficiently at the hearing.

- Fish and Game said *"MDC called no experts and there was no detailed appraisal carried out as part of the s42A report. Rather it was left to the parties to slug it out. The MDC contribution was poor compared with best practice".*

- Forest and Bird said *"we rely on local authorities such as MDC to do a proper process and in that sense we don't think the council did a good job. It should be a*

[6] An example being that the effects of the scheme on sediment transport had not been studied. TPL asserted that the design of the intake would not affect sediment transport.

matter of course that all the peer review reports form part of the council's reporting role".

9.5 Views of the Panel and the MDC

Members of the hearing panel made the following comments on this matter:

- *The initial s42A report was not passed to us as the council's final report. It would have been preferable if the technical reports had been appended, but I understand the report writers considered that they did not have all the necessary information from TPL. The challenge was made to their being admitted as evidence and it had to be dealt with and all parties had to have their say.* (Max Barber)

- *In retrospect it would have been good if the technical reports had been attached to the S42A report. I knew from other hearings that there was a lot of information about the river out there and it would have been good to have had that. For example, a hydrologist's report would have been helpful.* (Jill Bunting)

The MDC also provided written comment on this matter. In particular they indicated that they had spoken to the consultant involved in preparing the report and confirmed:

> *"… that it was his intention when writing the s42A report to have some of the contributors to that report at the hearing to address those matters in the report in which they had expertise and had made a contribution. The consultant advises that TrustPower challenged those persons whose views they had a disagreement with".*

MDC also noted that TPL strongly contested many of their costs incurred during the processing of the Wairau applications. In particular it observed that:

> *"At every stage TrustPower resisted meeting costs which were invoiced and at every stage challenged the reasonableness of Council's charging for these costs. Council was in a very difficult position in that TrustPower was requiring significant Council resources to be devoted to its application and was then refusing to meet the costs."*[7]

Members of the panel also expressed some frustration at the refusal of TPL to work towards agreement on some evidential matters (such as hydrology). Tony Willy said:

> *"At the first pre-hearing we asked that the experts "hot tub" to determine what is agreed and what is disagreed. But TPL would not agree to this. It would have saved months. I think some of it started to go wrong at that time. The parties did this for the conditions, which was helpful and we did get some agreement later in the process."*

In discussing this matter Tony Willy also commented about the very limited powers granted hearing panels to direct procedures. This is a matter discussed further in Section 13.2 of this report.

[7] TrustPower did pay all costs invoiced, except the $384,000 for the employment of an *amicus curiae*, which were met half by TPL and half by MDC.

9.6 Comment

While the s42A report was regarded as helpful by respondents, no supporting reports were appended to it. Such reports, be they internal staff reports or supporting memoranda quoted in the text, or peer review reports by external consultants, are very commonly attached to the s42A report. It is then clear that a hearing panel can ask those who provided those reports to attend the hearing and speak to them if required. MDC did not do this. This led to TPL challenging the right of some witnesses called by the MDC to present their evidence. The hearing panel rejected this challenge.

9.7 Lesson Learnt

There is one key lesson for consent authorities generally associated with the process of reporting on applications:

- As a matter of good practice, s42A officer reports should append all relevant technical information on which the author of the report has relied, or which might be helpful to the hearing panel. This removes any doubt that those technical experts can be called as witnesses should that be sought by the panel.

10 Notification of the Applications

Following pressure from TPL the applications were publicly notified on 7 September 2005. The submission period was doubled to 40 days by agreement with the applicant and closed on 3 November 2005. There were 1442 submissions on the applications - 1117 were from within the scheme area; 325 from beyond. Five hundred and twenty-seven submitters supported the application, of which 80 wished to be heard. Nine hundred and three submitters opposed the applications, of which 527 said they wanted to be heard.

There were no significant criticisms made of the notification process. Some of the institutional respondents commented favourably about being sent the applications by the MDC prior to notification.

Concerns were however raised by several parties interviewed that the applications were notified prior to the s92 technical reviews being completed. These parties included Fish and Game, Save the Wairau and the Freshwater Anglers Club. Concerns expressed include:

- Fish and Game said that *"the additional consents sought in March 2006 vindicated some of their concerns about the completeness of the applications"* and that *"they were appalled that the applications were notified prior to the MDC receiving the technical advice."* They indicated that they would like to see *"a pre-notification process for an application of this type".*

- "Save the Wairau" said that because the technical reviews had not been completed, even by the time that submissions closed, it meant that many local landowners struggled to assess the effects of the applications on their properties.

- The chairman of "Save the Wairau" wrote to the MDC Mayor on 11 August 2005 expressing concern that the applications might be notified before all the technical reviews were completed. The Mayor wrote back on the 17 August 2005 saying that *"in summary, there is no perfect process for more complicated applications*

such as the TrustPower application. While it is council staff preference to notify post technical assessment, TrustPower have opted for the other alternative provided by s91 of the Act".

The MDC initially took the same view. Their consultant wrote to TPL on 2 August 2005 saying that *"we are firmly of the opinion that independent technical reviews are required to be completed prior to the notification of the applications. It is recognised that the technical review process may mean a delay in the public notification of the application. However we believe that a simpler and more complete public notification process will result from the completion of such reviews".*

In response TPL considered that waiting for those reviews prior to notification was not *vires*. Section 91(1) of the Act allows a consent authority to delay notification only if it has determined that other resource consents are required for the proposed activity, and that these consents are necessary to better understand the proposal and should be applied for before proceeding further. Accordingly TPL sought the prompt notification of the applications and MDC acceded to this request.

In the end, two tranches of consent applications were made by TPL. The second application, made in March 2006, related to the taking of groundwater when it became apparent following the peer review reports that the proposed canal would capture some considerable volume (up to perhaps 4 m^3/s) of groundwater. TPL asserted that this application was made only *"out of an abundance of caution".*

10.1 Comment

While there was criticism that the applications were notified prior to the s92 peer reviews being completed, this is what is provided for by the RMA. There is existing case law that indicates that the power of the consent authority under s91 is subservient to the requirement in s21 of the Act that a consent authority act expeditiously to process consents.[8] However, this needs to be contrasted with further case law that suggests that good resource management practice requires, in general, that all necessary resource consents are indentified from the outset and applications made so that they can also be considered together.[9]

There is some merit in both sides of this matter. First, an applicant who has provided comprehensive consent applications should be able to seek notification as soon as reasonably possible. Delaying notification until s92 peer review reports are completed could add several months to the process pre-hearing. Conversely, if the peer review reports help parties understand a complex application, there may be justifiable grounds to delay notification until they are completed.

The Wairau HEP proposal led to strong opposition from sections of the Marlborough community. It appears that attempting to delay the process, and so make it more costly for the applicant, was one of the tactics employed by the opponents of the scheme. In this case TPL exercised its right to have the applications notified as soon as possible, but perhaps in retrospect this was not the most appropriate approach in the circumstances.

[8] Waitakere CC v Kitewaho Bush Reserve Co Ltd. Randerson J HC Auckland AP23/02, 9 NZED 418.
[9] AffCo v Far North DC A006/94. NZRMA 224, 3 NZTP 289.

11 Establishment of the Hearing Panel

11.1 RMA Requirements

Section 34A of the RMA allows a local authority to delegate to a hearings commissioner (who may or may not be a member of the local authority) a very wide range of functions, duties or powers. These typically include hearing and deciding notified resource consent applications, and hearing and deciding submissions on district or regional plans. The only exceptions to this power of delegation are the approval of a policy statement or plan, or the power of delegation itself.

Sections 39 to 42 of the Act outline the powers and duties of hearing panels. Some of these sections are relevant to other discussions in this report, so are not outlined here.

Section 39 (1) allows consent authorities to establish hearing panels for a range of purposes, including hearing resource consent applications and submissions on policy statements and plans.

Section 39 (2) requires that a hearing be in public and without necessary formality. This is discussed more in Section 13 of this report.

Sections 39A to 39C deal with the accreditation process for hearing commissioners. All three commissioners appointed by the MDC were accredited.

Sections 41 sets out some of the procedures that may be used at commissioner hearings, and confers some limited powers to hearing panels. Those of relevance to the current discussion include directing the order of business, requiring pre-circulation of evidence, and requiring a party to provide further information during the course of a hearing.

11.2 Actions Taken by the MDC

At an early stage in the processing of the applications, MDC officers approached Tony Willy to chair the hearing.

Tony Willy wrote to MDC on 14 August 2005, apparently in response to being offered the role of chairing the hearing, to confirm his availability. He indicated that either three or five commissioners would be appropriate, and that four *"may prove awkward"*. He also said that *"it may be better to have the experts available to give evidence rather than have them as members of the panel. This will give greater flexibility and save unnecessary expense"*. He also considered that given the new powers under the Act the hearing should be recorded, and sought a pre-hearing conference to discuss matters like dates for exchange of evidence. He said that he had no view on the applications and at that time declared no conflicts.

The other panel members, Max Barber and Jill Bunting, indicated that they were first approached by MDC in about September 2005.

On 16 January 2006, Tony Willy advised MDC that his wife would in future have some 6ha of vineyard irrigated by the Marlborough Water Augmentation Group by way of the Southern Valleys Scheme[10] and that he also used a small volume of this water for irrigation of ornamental trees. He considered that this should be drawn to the council's attention, but did not see that he had a conflict of interest. He also indicated that he would

[10] This scheme takes water from the Wairau River below the point where water would be returned by the proposed TPL scheme.

tell the main parties at their meeting on 25 January 2006 (this subsequently occurred and no issues were raised).

On 8 September 2006, the Environment Committee of the MDC appointed a hearing panel comprising Tony Willy (chair), Max Barber and Cr Jill Bunting for the applications. Extracts from the paper to that Committee are in Appendix 3 of this report.

- Tony Willy is a qualified lawyer and barrister whose practices included resource management. He has been appointed to each of the District Court, the Tax Court and the Land Valuation Court. He was an Alternate Environment Court Judge for about eight years until his retirement from the bench around 2002. Prior to being appointed to chair the hearing of the TPL applications, Tony Willy was a sole commissioner for approximately a dozen resource consent applications to the MDC.

- Max Barber is a Christchurch based resource management consultant. He has a MA in geography, an MA in regional planning from England, a diploma in town planning and is a full member of the NZ Planning Institute. He worked for the Canterbury Regional Council and its predecessors prior to 1995. He has been a hearings commissioner since 1997. Previous commissioner work for the MDC included being on panels that heard and decided on applications for two substantial local irrigation schemes taking water from the Wairau River.

- Jill Bunting is a second term elected member of the MDC. At the time of her appointment she was chair of the hearings committee; she is now chair of the planning committee. She participated in approximately 30 consent hearings, all as chair, prior to her appointment to the hearing panel for the Wairau consent applications.

11.3 Views of Those Interviewed

There was a general consensus among those interviewed that the hearing panel, while intelligent and competent in legal and planning matters, did not have the breadth of technical skills to understand fully the hydrological, engineering and ecological aspects of the applications. Interview respondents saw this as a key factor in why the original hearing took so long, as detailed technical explanations were frequently sought from witnesses, particularly those representing TPL. Typical comments made by respondents included:

- "*We were not sure if the panel had the expertise required to assess the effects of the applications, particularly regarding s6 matters such as natural character and ecology. Some of the core issues were not understood."* (Forest and Bird)

- "*The panel did not see the wider picture and the inter-relationships between the issues that were raised. There was a lack of technical expertise on the panel*". (DoC)

- "*We had reservations about their competence. There was no one with hydrology, avifauna or fisheries expertise on the panel. The nature of the questions asked reinforced the view that they did not understand the technical aspects of the case". (Save the Wairau)*

- *The panel was intelligent but was out of its depth technically. They struggled to separate the methodology used in a study from the results of that study.* (TPL)

Respondents gave some examples of how they considered that the lack of technical expertise on the panel contributed to the length of the hearing. For example, TPL said that questions directed at one of their early witnesses indicated that the panel lacked technical expertise in engineering in particular. As a result of this, TPL said that they redrafted all their evidence and presented it in a very non-technical way.

11.4 Views of the Panel

These criticisms were put to members of the hearing panel. Their responses included:

- *"MDC suggested to me that an expert be appointed to the panel as many of the residents in the Wairau valley appeared to be very unhappy with the proposal and there were a range of water, aquatic ecology, avifauna, engineering matters and social questions to be addressed. Having considered the matter we concluded that there would be about 7 or 8 main areas of debate and that no one additional person on the panel could help greatly. Judges often hear matters about which they know little, and provided experts went along with code (of conduct for professional witnesses) a competent panel should be able to assess the evidence. This is the position that the council ultimately adopted".* (Tony Willy)

- *"The panel recognised that the evidence was complex. We asked a lot of questions to satisfy ourselves that we understood the evidence given. I am not sure whether we would have been better served by additional expertise on the panel – we did commission reports on electricity industry and pest control, and we considered doing so for economics. We did not consider that there was a need for additional engineering or hydrological evidence as we believed it was fulsome. We took the task seriously – if we did not understand an issue we would have worked through it or asked for additional assistance".* (Max Barber)

- "*The difficulty would have been isolating which technical expert would have been required, as under that assumption, the panel would have required several additional skill sets given the wide range of matters covered during the hearing. In retrospect, having an ecologist on the panel may have been helpful although I believe we were able to do that subject justice with the evidence presented*". (Jill Bunting)

11.5 Comment

The competencies of a hearing panel are important in allowing that panel to appraise complex resource consent applications. Most respondents were critical of the panel's technical abilities to readily understand some of the complex engineering and ecological evidence placed before them. Respondents considered that this contributed substantially to the length of the initial hearing. For example, one hearing participant estimated that 33 TPL witnesses gave about 90 briefs of evidence. This was certainly a factor that led to the average direct hearing cost to TPL being around $22,000 per day versus the $5,000 per day they would normally set aside for an "average" resource consent hearing.

All members of the panel implicitly recognised that they lacked some technical expertise. Their response was this was why they asked so many questions and asked for additional further briefs of evidence on predator control and the electricity industry. The panel also referred to the primary decision, which they considered comprehensively addressed all the technical evidence.

Some of this criticism about the lack of technical skills on the hearing panel could perhaps rest with the MDC and their appointment of the panel. The report prepared by MDC to

establish the panel[11] suggested three names with little analysis apart from saying that there would be complex legal matters to deal with and therefore legal expertise was necessary. Comment was made that technically skilled people could have been appointed to help the panel. This would have involved, for instance, contracting in people with expertise in matters such as aquatic ecology or engineering to assist the panel with the technical evidence provided, or alternatively requesting that further expert reports be commissioned.[12]

By way of comparison, the following examples of similar consent processes illustrate the approach of the nearby West Coast and Canterbury Regional Councils to balancing the skill mix of hearing panels:

1. TPL sought, and in November 2008 were granted, resource consents for an upgraded HEP scheme on the Arnold River on the West Coast. As with the Wairau the proposal was to take water from the river along a canal and discharge it back into the river further downstream. Many of the effects of that scheme were similar to those assessed as part of the Wairau – such as the effects of residual flows on fishery and recreational values. Similarly the engineering evidence was complex, involving construction of a canal including flumes, a head pond, power station, regulation pond and discharge back to the river via a constructed kayaking course. The consent authorities (West Coast Regional and Grey District Councils) appointed a panel comprising a former chairman of the regional council, an engineer with extensive experience in river engineering, and an aquatic ecologist.

2. Similarly the West Coast and Buller District Councils appointed a hearing panel comprising an engineer, an aquatic ecologist and a local representative (with a district planning background) to hear and decide applications for a proposed new HEP scheme on the Mohikinui River north of Granity. That proposal involves damming the entire river and the formation of a lake some 14km long.

3. The proposed Central Plains Water Scheme in Canterbury involves substantial takes from the braided Waimakariri and Rakaia Rivers, conveying that water via canals to a 280 million cubic metre storage reservoir, and then distributing that water over a 60,000 ha command area on the Canterbury Plains. As with the proposed Wairau Scheme there is very strong opposition from local communities, particularly the township of Coalgate. The Canterbury Regional and Selwyn District Councils established a hearing panel comprising a very experienced RMA lawyer as chair along with an engineer, an ecologist and a planner. Each member has been assigned work in accordance with their particular area of expertise.

4. The Canterbury Regional Council appointed a hearing panel comprising a retired Environment Court judge as chair, an engineer and an aquatic ecologist to hear resource consent applications from Meridian Energy for a new power scheme and irrigation scheme on the north side of the lower Waitaki River.

What is perhaps most important here is the issue of perception. The applicant and the institutional submitters interviewed all perceived that the hearing panel lacked some of the technical skills to understand and evaluate fully the applications, and they were generally critical of this. This criticism from submitters became more strident when the panel made

[11] See Appendix 3.

[12] A current example is the Central Plains water hearings, where the panel has contracted independent expert reports on the potential effects of the proposed irrigation scheme on groundwater quality and on water quality in degraded Lake Ellesmere.

its initial decision to grant the applications. The panel, on the other hand, considered they were sufficiently competent to objectively evaluate all the evidence.

11.5.1 Alleged Conflict of Interest

In January 2008, just prior to the conditions hearing, there was an allegation made to the media by a representative of "Save the Wairau" that Tony Willy had an undisclosed conflict of interest. This related to his shares in a company called "Ecodyne Limited", which existed to "develop environmentally benign forms of power generation". The article alleged that because of the shareholding in Ecodyne Tony Willy "might have had reason not to act with the scrupulous fairness that his position demands".

Ecodyne Limited has no association whatsoever with TPL, and this allegation of conflict of interest was totally unfounded. Further, as noted in Section 11.2, he had quite properly publicly declared a potential conflict in relation to his wife's use of water from the Southern Valleys Irrigation Scheme.

11.6 Lessons Learnt

There are two key lessons for consent authorities generally associated with the process of appointing hearing panels:

- Wherever possible hearing panels should be composed of individuals with the range of skills relevant to the circumstances.

- Commissioners need to ensure that all potential conflicts of interest are declared prior to a hearing commencing. This matter is well covered in Module 6 of MfE's "Making Good Decisions" programme.

In addition to these lessons, there are also a couple of issues associated with the appointment process that could warrant further consideration by MfE:

- As the skill mix of a hearing panel has a pronounced bearing on the outcome of a hearing, options could be explored to ensure that consent authorities more explicitly consider the mix of skills required.

- Ensure that an Environmental Protection Authority has access to a range of technically competent independent commissioners.

12 Pre-hearing Meeting

The legal framework for conducting pre-hearing meetings is prescribed in considerable detail in s99 of the Act. Sections 41B and 41C of the Act outline what directions may be given by a consent authority prior to a hearing commencing.

A pre-hearing meeting, chaired by Tony Willy, took place in Blenheim on 25 January 2006. Those present included representatives of the applicant, Fish and Game, Forest and Bird, DoC, Save the Wairau and the MDC. A minute, signed by all parties present, was issued after the meeting, which detailed the following matters:

- The timetable for response to the s92 further information requests by TPL, the s42A officer's report, expert reviews of the s92 further information and briefs of expert evidence.

- That part of the hearing would be held in Nelson if there were sufficient parties residing there.[13]

- That the panel would carry out a site visit accompanied by the s42A reporting officer.

- Procedures for the hearing.[14]

12.1 Views of Respondents

All the participants at the pre-hearing meeting were generally satisfied with the process and its outcomes at that time. While some criticism was voiced, this was generally in regard to what happened after the meeting rather than the meeting itself. An example is that TPL did not meet some of the agreed deadlines for exchange of evidence.

12.2 Lessons Learnt

There are two key lessons for consent authorities generally associated with the process of considering and organising pre-hearing meetings:

- Use of a pre-hearing meeting to determine and agree on procedural matters can be a very useful way to progress the hearing of complex applications such as the TPL Wairau proposal. Such meetings can, for example, determine dates for exchange of evidence and reports, and determine general hearing procedures.

- Council officers and/or hearing panels do not always explicitly consider using such a pre-hearing process in relation to matters such as timelines, pre-circulation of evidence or the like. It is a mechanism that should be used more frequently for complex hearings, particularly as pre-circulation of evidence can considerably reduce the hearing time.

13 The First Hearing

13.1 RMA Requirements

Section 39 of the Act specifies a number of procedures relating to the conduct of a hearing of a resource consent application. In essence, when determining an appropriate procedure for a hearing the consent authority is required to avoid unnecessary formality, recognise tikanga Māori as appropriate, not allow any person other than a member of the hearing panel to question a witness (although questions can be put through the chair) and not permit cross examination.

Section 41 of the Act gives a hearing panel some of the powers of a Board of Inquiry.

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[13] This did not occur. The views of submitters were canvassed by MDC and there was insufficient demand to support part of the hearing being held in Nelson.

[14] These are detailed in section 13.2 of this report.

13.2 What the Hearing Panel Did

13.2.1 Location and Timetabling

The initial hearing to consider the merits of the applications commenced on 12 June 2006 and lasted 70 days. It was held at Vintiner's Retreat on the outskirts of Blenheim. At the insistence of the hearing panel all the proceedings were recorded, with transcripts available the next day. Hearing days usually commenced at 9.30am and finished between 4.00pm and 4.30pm. The hearing panel sat on a slightly raised platform throughout the first stage of the hearing on the merits of the applications.

Hearing days were not continuous. Rather they proceeded in blocks, with time away being due to the venue and/or commissioners or witnesses being unavailable.

13.2.2 Hearing Procedures

The procedures for the hearing were laid out as follows in the minute of the pre-hearing meeting:

"*The order of the hearing will be as follows:*

a) *The applicant will open its case and call all of its evidence, with leave reserved to call rebuttal evidence in reply to any new evidence not previously circulated by submitters. However, it is acknowledged that TrustPower will not have had the expert assessment of the parties until shortly before the hearing. Accordingly nothing in this timetable should be seen as an undertaking that TrustPower will not seek leave to produce further evidence in reply.*

b) *The other parties will each open its case and call its evidence in the order chosen by them.*

c) *Each party shall have a right to make closing submissions and the Applicant shall have the final right of reply.*

d) *Time will be allowed at the conclusion of the evidence for the making of final submissions."*

In another section, the commitment was made that *"all submitters bound by this minute agree that the time for writing the decision will be extended from 15 days to one calendar month from the conclusion of the hearing".*[15]

13.3 Views of Respondents and the Panel

13.3.1 Location and Timetabling

Respondents commented very favourably on the hearing venue and the availability of transcripts overnight.

- *The transcript was really good – fast turnaround and great service – we got it the next day. It was really helpful for witnesses who could not be there.* (DoC)

[15] The actual time taken was just over six calendar months.

- *The venue was great – all the physical aspects were good and there was lots of room. The transcripts were excellent and were good when we could not attend.* (Forest and Bird)

These comments were, however, offset against some criticism that ongoing rulings from the hearing panel were not always readily available, so if someone was unable to attend the hearing it was hard to keep up with what was going on. This comment was made particularly by respondents from Fish and Game and Forest and Bird, the latter commenting that *"it would have been useful to have heard directions via memos"*. However, this was something that the hearing panel members themselves considered they had done. Due to the length of the hearing it is possible that some of these memoranda were overlooked by parties who were not present all the time and who were relying on the transcripts for their information.

Views were mixed as to whether the hearing was run efficiently. Adverse comment was made about short sitting days, and the panel often returning late from breaks. Although evidence was pre-circulated, some of this was read *"which made for a long, arguably inefficient hearing"* (Fish and Game). Criticism was also made of the blocks of time when the hearing did not proceed as the venue was already booked.[16]

In relation to the pre-circulated evidence being read, panel members commented that they wanted the main substance of this evidence recorded on the transcript, as they relied on that in arriving at their decision. They also noted that some pre-circulated evidence was taken as read.

Respondents noted that when they were given a time for a submission or submissions to be heard, that these timeframes were followed quite rigorously by the panel.

13.3.2 Hearing Procedures

One of the stronger criticisms made by respondents was that the rules of the hearing process were not clearly specified, and those that had being laid down were not always followed. A procedural matter that attracted particularly strong comment was the decision made by the panel quite early on that the hearing would be a two stage process - with the first stage focused on whether the consents would be granted or declined, and the second on appropriate consent conditions if the decision reached in the first stage was to grant the consents sought.

Some of the typical comments made about hearing procedures were:

- Regarding dealing with the evidence on a topic basis "*I think this was ok until the rebuttal of rebuttal of rebuttal occurred – it would have worked if they had stuck to the original format and not had several excursions back to various topics".* (Fish and Game)

- *It was a user unfriendly process. Examples included undue formality, a lack of respect for participants, an overly legalistic and adversarial process and play it by ear procedures".* (Counsel for Ormond Aquaculture and NZ Clearwater Crayfish)

- *I could not believe what I was hearing – TPL's lead counsel would present evidence – then supplementary, rebuttal, further rebuttal and rebuttal of rebuttal –*

[16] This is almost inevitable for such a long hearing.

it was back and forward with their lead counsel having the final say. It was very difficult to follow and I do not recall any rules being set regarding supplementary and rebuttal. They seemed to make it up as they went along. (Freshwater Anglers Club)

A number of respondents interviewed also made comments that they regarded the case run by lead counsel for TPL to be very aggressive and/or divisive, and that this led to some antagonism. The panel members, however, had a very different perspective as reflected in the following observations:

- *"I have never seen such a difficult case more professionally presented. TPL's lead counsel was very professional, and so was his junior".* (Tony Willy)

- Max Barber said that he found TPL's lead counsel to be very competent and even handed and would not call him aggressive.

- Jill Bunting also said she found TPL's lead counsel to be very competent and "*the best she had come across".* She said he had to listen to a good deal of quite rude comment and that he did sometimes get exasperated, but certainly not aggressive.

13.4 Comment

While there were clearly some very good aspects of the hearing process – particularly the venue and the ready availability of transcripts – respondents were critical of the lack of clarity about the rules and procedures for the hearing. All the submitters interviewed had the perception that hearing procedures were changed during the process, and that the lead counsel for TPL had an undue influence over the procedures.

There is perhaps good reason for this. An applicant is (more or less) compelled to be present for an entire hearing. Submitters are not, nor often can they afford to be, represented by legal counsel during lengthy hearings. Indeed, both Forest and Bird and Fish and Game commented that they relied partly on lawyers for DoC to keep them abreast of what was taking place in the hearing.

The hearing panel also took a significant step towards trying to be fair to those parties who could not be present at the hearing all the time, as reflected in the following comments from the panel chair:

> *"It became very clear once the hearing started that in the absence of cross-examination the community groups and some institutional submitters – such as Forest and Bird – were at a strong disadvantage. For example, a TPL expert would discuss hydrology but community groups did not get chance to comment until some months later, and this was a problem.*
>
> *We convened a meeting to discuss this. As cross-examination is not allowed we asked TPL if they would agree to us accepting written questions from other parties to better understand their evidence, to which they agreed. The questions had to be asked through the committee. We thought this was fair to other groups that would otherwise be disadvantaged."*

None of the submitters interviewed commented on this process.

The panel members considered that any changes made in procedure were made clear by way of memoranda. Certainly there were a number of these issued during the hearing process. However, because some of the parties were not present, they may not have

picked up on the significance of some of these memoranda. This is highlighted in the following comments from Forest and Bird and Fish and Game:

- *"The ground shifted all the time for this process. The procedures for the hearing were not clear, with all sorts of memoranda going on. The lawyers acting for TPL were not supportive of the process being workable for community groups – Forest and Bird was having to seek input from other lawyers present as to what was going on. We think a panel can set clear rules and be accessible and clear and not overly formal – the public should not need a lawyer. Forest and Bird felt intimidated by the process – it was difficult to remain fully engaged if you were not legally represented and we were alienated from the process, which felt more like an Environment Court hearing. TPL had lots of opportunities which others didn't.*"

- *"Lots of TPL witnesses gave repeated evidence – it was very hard for us to service – we do not know how it affected the decision. Only TPL were there for the full time. Fish and Game often had no opportunity to comment on questions asked by the committee"*

Submitters also commented that the hearing was unduly formal, and that it was neither a normal council hearing process nor one closely akin to an Environment Court hearing. Two such comments were:

- *The chair said early on that it would run like a de novo Environment Court hearing – e.g. transcripts, presentation of evidence. The committee had a raised dais and it was set up very formally and was such a process.* (Forest and Bird)

- *The panel was guilty of trying to marry the Environment Court process and usual council process. It was not clear what the rules for the hearing were.* (DoC)

When interviewed, members of the hearing panel acknowledged that they endeavoured to keep the hearing procedures relatively formal, but that this was a decision that they made for good reasons:

- Tony Willy said that the panel was aware of the criticism, and that some of the submitters wanted the hearing to be less formal. But the panel considered that as it was a quasi judicial process they had to run a fair and orderly hearing for the benefit of the people giving evidence.

- Max Barber said that he did not agree with the criticism, and that Tony Willy had to be satisfied that the law was met and ran the hearing accordingly.

- *"When we came back for the conditions hearing - in a smaller venue with limited separation between ourselves, the media, the applicant's team and submitters, it became clear that the more formal situation had worked better. There were a number of angry, emotive and at times intimidating people there and at times it got nasty - towards Tony in particular."* (Jill Bunting)

Some procedures were set down in the minute from the pre-hearing meeting. Much of that minute is quite clear. What is not very clear is what the words "*nothing in this timetable should be seen as an undertaking that TrustPower will not seek leave to produce further evidence in reply"* actually mean. It appears that the applicant sought to interpret this liberally, and that this was allowed by the hearing panel.

What non-TPL respondents say happened next went like this:

- Initially TPL were asked to provide extra information on technical matters by the panel.

- TPL then started introducing rebuttal evidence when their experts were criticised.

- In response to this other parties sought leave to introduce rebuttal, which TPL then sought to rebut. This continued to the point where submitters generally felt the process got somewhat out of control, with some TPL witnesses providing four or five briefs of evidence.

It should be noted in this context, however, that TPL witnesses were not the only ones that gave multiple briefs. For example, a planner from DoC gave three briefs of evidence. Equally, some individual submitters gave up to three briefs of evidence for a number of different parties who made submissions.

All members of the panel were very much aware that every submitter had to be given the opportunity to speak. Tony Willy commented that he "*was probably too generous with the submitters"*, but acknowledged that this was necessary in order to run a transparently fair process.

Clearly there are differing views between the panel and some submitters as to how clear the rules of procedure for the hearing were. Members of the hearing panel were adamant that they were trying to seek as much information as possible on which to make their decision, and that any changes in procedure were clearly signaled in memoranda. Some submitters found the process confusing. Somewhere between these disparate views probably lies the truth.

Members of the hearing panel also expressed some considerable exasperation about their lack of powers to run an efficient hearing process. They could not, for instance, compel expert witnesses to try to come to agreed positions on evidence. Equally, individuals could appear several times for different parties saying much the same thing and had to read their evidence each time, non-experts could give evidence on matters on which they had no expertise (canal stability was cited as an example), and submitters could call other non-submitters to give evidence on their behalf. All this added to the length of the hearing.

Tony Willy also said that in his view that council hearings should allow for cross-examination of witnesses, and that appeals to the Environment Court should only be on points of law. He considered that this would greatly reduce the costs of the RMA consent process for major applicants, as the evidence would not have to be heard fully twice.

13.5 Lessons Learnt

There are five key lessons for consent authorities generally associated with the process of hearing complex resource consent applications:

- For long and complex hearings the rapid provision of transcripts can be very helpful for parties that cannot attend a hearing full time.

- Hearing panels need to explicitly consider the "rules" of conduct for a hearing and to outline these clearly at the start of the proceedings. If they change for any

reason all parties to the hearing need to be advised accordingly, preferably in writing.

- If additional information is sought from an applicant on a particular topic, or further briefs of evidence are given, care has to be taken to ensure natural justice is met by allowing other parties to provide comment on the additional material provided.

- Where there is very strong public interest in a local proposal, consideration should be given to appointing hearing panels entirely from outside of the local district. While this may appear to delegate important functions away from the community, it means that the commissioners will not be compromised if a decision is made that many members of the local community are opposed to. It may also help ensure that there is no perception of any bias among members of the hearing panel.

- Similarly, where there is very strong local interest in a major proposal, it may be better for it to be heard and decided by the proposed Environmental Protection Authority (EPA). This has the advantage of distancing the decision makers from strongly held local views.

14 The Decisions

14.1 The Interim Decision

In June 2007, just over a year after the initial hearing commenced and six months after that hearing stage was completed, the panel released its 326 page interim decision. It was prepared on a topic by topic basis, under headings such as "natural character", "river hydrology and morphology", "aquatic ecology" and recreation". On each of these topics the panel found the applications by TPL would cause effects that were "no more than minor", thereby passing one of the threshold tests for a non-complying activity. In relation to the other test for non-complying activities under s104D, the hearing panel found that the activities for which consent was sought were consistent with the proposed district plan. It also ruled that the setting of consent conditions would be the subject of a separate hearing. The proposed TPL conditions were annexed to the decision.

The primary decision was appealed by six parties (two of whom are closely associated and filed the same appeal). In August 2009, DoC announced it had reached agreement with TPL on its grounds of appeal. The other appeals are still live, and the Environment Court is due to consider these in November 2009. Two particular appeals – those of Fish and Game and Save the Wairau – strongly question the evidential basis for the decision.

14.2 Views of Respondents

Many respondents were critical about the separation of the hearing into these two stages. Particular comments made by respondents interviewed include:

- Regarding the two stage process "*the announcement was too late for evidence to address it effectively. All our briefs were prepared on the basis that the experts were addressing the whole application – merits and conditions. To turn around part way into the process and say that the detail of conditions would be addressed later, and not to look at whether or not a condition could mitigate a particular effect completely changes the relevant test. It was unfair".* (Fish and Game)

- *We were not able to comment on conditions at the original hearing. We think it is a circular argument that you can mitigate effects so it's ok to grant consent – but there is no analysis of what the conditions would look like and how they would work. It was not till the conditions hearing where problems were raised as to how you implement the interim decision to ensure effects are no more than minor – and you just can't do so.* (DoC)

- *The conditions form part of the mitigation package – the TPL package was given but we could not comment on it. The interim decision is really muddled as to what consents are granted and what effects are mitigated. It must have been very unclear to TPL as to what they had to mitigate by way of conditions.* (DoC)

- *At first we did not understand what the two stage process meant. Early on it sounded like a good idea but it turned out to be a real nightmare – you can't separate the conditions because they are fundamental to the decision. We had over a year in between the two hearings – and people tried to relitigate the decision at the conditions hearing. It is not a process we would recommend and nothing was gained from it*. (TPL)

14.3 Views of the Panel

The hearing panel all pointed out that the "two stage" decision-making process was agreed with TPL and the main institutional submitters[17] after a meeting convened early in the hearing process. Panel members commented that:

- *"We considered it was the simplest way to proceed. During the course of the first part of the hearing we realised that to grant or decline was the first decision. We had to concentrate on that, particularly as there seemed a reasonable chance that the applications would be turned down, so detailed evidence on conditions would have been a waste of time. We also wanted to raise issues about conditions should we decide to grant the applications. I still consider in the circumstances this was appropriate and would do it again. All the commissioners agreed".* (Max Barber)

- *"The problem was the sheer volume of evidence – it was not worth going on to conditions if we could not decide the merits. We had seen draft conditions from TPL and DoC, which were there in the background, including provisions for adaptive management. TPL thought it was a good idea at first but did not think that the hearing would go on so long. We did hear a great deal of evidence that was largely superfluous".* (Jill Bunting)

- *"This is not an unusual procedure in the courts, but we needed to embark on it with great care. All the commissioners felt that TPL had a big hurdle to get over regarding the non-complying status of the applications. We knew that if we granted consents, the conditions would be more critical than the grant itself and would need a great deal of expert evidence"*. (Tony Willy)

[17] These included Forest and Bird, Fish and Game, DoC and Save the Wairau. No party indicated any discomfort with this approach.

14.4 Comment

14.4.1 Making an Interim Decision

The decision by the hearing panel to take a two step approach to the decision, with the first decision being to grant or decline and the second stage, if needed, to discuss conditions, was widely criticised (noting that this process was agreed to by the applicant and all the institutional submitters). It also led to a substantial delay in the time taken to grant the applications, with about a year between the release of the interim decision and the decisions on conditions. This was a significant factor in the full hearing process taking as long as it did.

The Making Good Decisions programme developed by MfE to help train hearing commissioners outlines a 10 step process for decision making. The essence of this process generally includes consideration of the following questions:

- What are the adverse effects of the activities for which consent is sought?
- Are any of those adverse effects so compelling that the applications should not be granted (or to put it more colloquially “are there any show stoppers”?).
- If the answer to the above is no, to what extent can conditions be imposed that will avoid or mitigate the adverse effects of the activities for which consent is sought?
- How do the applications sit with the provisions of Part 2 of the Act and the statutory planning framework?
- In light of the above points, and taking account of the positive effects of the applications, what is the panel’s broad overall judgment about whether to grant or decline the applications?

In other words the conditions form a key part of the mitigation package usually offered by the applicant, and discussed by the applicant and submitters at the hearing. Officer reports usually include draft conditions for a hearing panel to consider.

While the two step decision-making process is not usually applied at council consent hearings, it is not unusual for commissioners to signal their intentions by way of minutes. These can take various forms. Quite commonly they outline procedures for reconvened hearings after an adjournment, or include requests for further information from an applicant. Minutes have also occasionally been used by commissioners to signal their views concerning specific aspects of an application or their intentions regarding a decision on an application.

14.5 Lessons Learnt

There are three key lessons regarding the decision-making process that are of relevance to consent authorities generally:

- Substantive decisions on the merits of granting or declining resource consent applications should include conditions if the consents are granted, as these form an essential part of the mitigation package associated with the applications.

- A two stage hearing process comprising separate merit and conditions hearings has the potential to substantially lengthen the decision-making process and to potentially increase costs to all parties to the proceedings.

- The use of commissioner's minutes can be a very useful way of progressing decisions, particularly in directing how adjourned hearings will be run once the hearing is reconvened (e.g. what further evidence is to be provided, who can speak to that evidence).

15 The Conditions Hearing and Decision

The conditions hearing commenced in January 2008, took eight hearing days and was completed in February 2008. The final decision on conditions was released in August 2008.

Most respondents interviewed made a contribution to the conditions hearing. The main reason offered was that they were trying to make the primary decision more acceptable by ensuring conditions were imposed to mitigate adverse effects. However, some respondents did not, saying that any decision on conditions would not meet their main concern that the primary decision to grant the consents sought was, in their view, wrong.

None of the MDC consents staff attended the conditions hearing[18]. Instead, the council predominantly relied on a detailed written memorandum from the s42A reporting officer that was supplied to the panel prior to the hearing. The reporting officer was present at the hearing. His memorandum outlined matters of concern about draft conditions proposed by TPL.

The lack of any comment by MDC consents staff on draft conditions at the conditions hearing attracted some adverse comment. For example:

> *If the panel can't go back to the staff they can't give expert advice. Council staff had no input to the conditions hearing – MDC's river engineer was present only because of (MDC owned) Southern Valleys Irrigation. The panel asked him questions that should have been asked of the council's hydrologist at the original hearing. The flow fluctuation at Tuamarina due to hydro peaking (from the existing Branch Scheme) only came out at the conditions hearing. This is where the non-derogation condition came from.* (DoC)

A member of the hearing panel also made the following observation:

> *"There were no draft conditions presented by MDC staff. Rather this was done through the council's consultant. I think that the staff should have been more upfront. Only on one occasion was an officer present during our discussions on conditions – this was MDC's principal planner at the last stage as we had a question about implementation. The final draft of the conditions was also referred to him to check for clarity, effectiveness and enforceability".* (Max Barber)

Asked for comment about this criticism the MDC made the following response:

> *"Council is aware that it has a responsibility to administer the conditions of any consent. The process that was followed in this case may have lacked a degree of*

[18] However, the council's river engineer was present, but only on behalf of a council managed irrigation scheme.

transparency but was necessitated by the sheer volume of the conditions that were to become part of the consent. The Hearings Committee first worked up the conditions that they wanted to run with. The conditions were then run past Council staff, both technical and from compliance to review and improve upon them. They were then given back to the Hearings Committee who then heard from all the other parties and finalised them as part of the final decision".

15.1 Comment

The conditions imposed by the hearing panel are the responsibility of MDC to administer and enforce, and so it is strongly in the council's interest that the panel "get it right". It is common practice for council consents staff to provide written comment on draft conditions of consent, and to have robust and visible input into the conditions being proposed. This is commonly done as part of the s42A officer's report.

A common practice in adjourned hearings is to ask the applicant and officers to come back to a hearing panel with areas of agreement and disagreement on draft conditions. This has the advantage of focusing commissioners on areas of substantial disagreement.

15.2 Lesson Learnt

There is one key lesson for consent authorities generally regarding the process of deciding consent conditions:

- Council consents staff should be present at a hearing to present their comments on the conditions proposed by the applicant and the other parties. These comments should be made in writing.

16 Conclusion

This review of the Wairau HEP consent application process has highlighted a substantial number of both positive and adverse comments about the process and how it was run and administered.

In general terms, the process used by the MDC up until the hearing commenced attracted favourable comment. The hearing process itself, and particularly the splitting of the decision into firstly, whether or not to grant the applications, and secondly, the conditions on which consents were granted, received much adverse comment.

However, there are several sides to these views, and none are necessarily "right" or "wrong". The Wairau applications were very strongly opposed by many in the Marlborough community, and opponents used the hearing process as much as possible to express their views. The hearing panel had to fully hear and consider all the evidence from those who wanted to make submissions. This contributed to the hearing process being very protracted, and caused some considerable frustration among those representing TrustPower.

Any process such as this could have undoubtedly been handled in different ways, some of which may have been better. The ability to retrospectively review this process has, however, allowed a range of relevant lessons to be drawn that can usefully assist consent authorities and hearing panels improve the way in which they handle complex resource consent applications in future.

Appendix 1 – Timeline for Processing the Applications

The major dates of interest for the processing of the applications are listed below. Each of these steps is discussed in more detail in the main part of this report:

- Early 2005: TPL request MDC to review draft consent applications. MDC refuse.

- Unknown Date 2005. Representatives of MDC raise with the Minister for the Environment the possibility of the TPL applications being "called in" under s141 of the RMA.

- June/July 2005. MDC contacts the National Institute of Water and Atmospheric Research (NIWA) and Kingett Mitchell Limited (KML) asking them to provide costings to undertake a s92 RMA review of the TPL applications. At some stage Damwatch, a subsidiary of Meridian Energy Limited, was also approached to undertake an engineering feasibility assessment.

- 14 July 2005: TPL lodge consent applications for the proposed scheme, along with a 167 page application document, maps and 12 volumes comprising the associated AEE.

- By 14 August 2005. Former Alternate Environment Court Judge AAP (Tony) Willy is approached by MDC to chair the hearing.

- August 2005. NIWA, KML and Damwatch are commissioned to prepare peer review reports on aspects of the applications.

- 7 September 2005. Following pressure from TPL the applications were publicly notified. The submission period, which with the agreement of the applicant was doubled to 40 days because of the complexity of the applications, closed on 3 November 2005. Concerns were raised by several parties that the applications were notified prior to the technical reviews being completed.

- 8 September 2005. An agenda item to the Environment Committee of the MDC established a hearing panel comprising Judge Willy, Mr Max Barber, a resource management consultant, and Councillor Jill Bunting, a hearing panel chair at the MDC.

- December 2005: TPL counsel challenge the release of peer review reports without prior "caucusing" with TPL experts. MDC counsel oppose this proposal. The matter is eventually put before Tony Willy, who says it is a jurisdictional issue for council officers and not one he can rule on.

- 25 January 2006. A pre-hearing meeting, chaired by Tony Willy, and attended by the applicant and the main institutional submitters, agrees to a timetable leading up to the commencement of the hearing. Dates are set for matters such as the pre-circulation of evidence and the circulation of the s42A report.

- March 2005: TPL lodge further consent applications associated with the potential taking of groundwater into the canal.

- 12 June 2006. The hearing commences.

- 12 December 2006. After 70 hearing days the hearing is adjourned.

- 22 June 2007. The “interim decision” to grant the consents sought is released. No conditions are imposed. Five parties appeal the interim decision.

- 12 January 2008. The conditions hearing commences. It is adjourned after eight hearing days on 12 February 2008.

- 5 August 2008. The decisions on conditions are released.

Appendix 2 – Interview Questions

This appendix includes the main interview questions

The following are the matters I would like to discuss in my interview with you re the Wairau Consent process. They are very open and are intended to act primarily as prompts, rather than all being matters that you may want to discuss. Please do not confine yourself to these prompts if there are other matters that you wish to raise.

Preliminary

Tell me a bit about the organisation that you represent (Freshwater Anglers Club and Save the Wairau only)

When did you first learn about the TPL Wairau applications? To what extent was your organisation consulted by TPL prior to applications being lodged?

Process up Until the Hearing Commenced

What comments do you have about the process administered by the MDC up until the time that the hearing commenced?

What is your overall view of the process administered by the MDC up until the hearing commenced?

The First Hearing

What comments do you have about the first hearing stage?

The Conditions Hearing

What comments do you have on the conditions hearing?

What is your overall view of the conditions hearing?

Final Comments

Are there any other comments that you wish to make?

Appendix 3 – The MDC Report Establishing the Hearing Panel

The following quotes are directly from the paper to the MDC that established the hearing panel for the Wairau consent applications.

It is anticipated that a hearing is likely to take 2-3 weeks. This though is dependent on how many submissions are made and how many submitters wish to speak to their submissions.

Hearings Panel

The new resource management legislation makes some important changes in the manner in which hearings are to be conducted and will have particular impact in respect of the TrustPower application. The new legislation provides much greater power for the hearings committee or panel to be involved prior to the actual hearing to determine if further information is required prior to a hearing and also whether, in more complex cases, submissions need to be pre-circulated prior to the actual date of the hearing.

Given the legislative change it is important that a panel be appointed to enable it to carry out functions now enabled by legislation.

It will require a panel with expertise in both a legal and technical manner. It should also involve representation from the local community.

It is suggested that the panel could consist of:

- *Chairperson – Mr A A P Willy. Mr Willy has a legal background which will be required to ensure correct legal process is followed and this application will, being a non-complying activity, require a stringent review of whether the application is able to surmount the legal tests for a non-complying activity.*

- *Council representative – it is suggested Councilor Jill Bunting fulfils this role as Councilor Bunting is a hearings chair.*

- *Mr Max Barber – has already been appointed as a commissioner for hearings generally. He comes with a strong policy background and strategic perspective and has heard a number of complex water applications, including the SVIS irrigation scheme.*

While Messrs Willy and Barber are already on the approved list of independent commissioners staff consider it prudent to reconfirm them as commissioners for the TrustPower application U050729.

The panel will likely appoint technical experts to assist them with a range of specialist advice.

Recommended

That pursuant to s34A of the Resource Management Act 1991 the following are appointed as the panel for the TrustPower Limited application (U050729) hearing:

Mr A A P Willy (chair), Councilor J Bunting and Mr M Barber.