

31 October 2008

Board of Inquiry – Proposed National Policy Statement for Renewable
Electricity Generation
C/- Ministry for the Environment
P.O. Box 10362
Wellington 6143

**Proposed National Policy Statement for Renewable Electricity
Generation
Submission of behalf of Te Rūnanga o Ngāi Tahu**

1. Te Rūnanga o Ngāi Tahu

1.1 This submission is made on behalf of Te Rūnanga o Ngāi Tahu (“Te Rūnanga”).

1.2 Te Rūnanga, the tribal representative body of Ngāi Tahu Whānui, is a body corporate established on 24 April 1996 under section 6 of Te Rūnanga o Ngāi Tahu Act 1996 (“the Act”).

1.3 Section 3 of the Act states:

This Act binds the Crown and every person (including any body politic or corporate) whose rights are affected by any provisions of this Act.

1.4 Section 15(1) of the TRoNT Act states:

Te Rūnanga o Ngāi Tahu shall be recognised for all purposes as the representative of Ngāi Tahu Whānui.

2. Collective Voice

2.1 In paragraph 7 of section 6 of the Ngāi Tahu Claims Settlement Act 1998 (“the Settlement Act”) (recording the Crown’s apology) Ngāi Tahu is recognised “as the tāngata whenua of, and as holding rangatiratanga within, the Takiwā of Ngāi Tahu Whānui.”

2.2 It has therefore been clearly affirmed in statute that Te Rūnanga is the sole representative of Ngāi Tahu Whānui, the iwi that is tāngata whenua within the Ngāi Tahu Takiwā.

- 2.3 Te Rūnanga, by virtue of its statutorily recognised position as the representative tribal body of Ngāi Tahu Whānui, makes this submission on behalf of the Ngāi Tahu tribal collective. Te Rūnanga is constituted as the kaitiaki of the tribal interest through its Charter adopted on 21 August 1993.
- 2.4 The attention of the Board of Inquiry is respectfully drawn to the special status of Te Rūnanga. Te Rūnanga notes that this submission should not be treated as a single submission, in the manner customarily adopted by Board of Inquiry, but should be accorded the status and weight due to the tribal collective, Ngāi Tahu Whānui, which it represents.
- 2.5 There are currently over 43,000 members of Ngāi Tahu Whānui whose names are registered on the roll in accordance with section 8 of the Act and this number continues to grow.
- 2.6 Notwithstanding its statutory status as the representative voice of Ngāi Tahu Whānui “for all purposes”, Te Rūnanga accepts and respects the right of individuals and Papatipu Rūnanga to make their own submissions to the Board of Inquiry.

3. **General Approach**

- 3.1 Te Rūnanga o Ngāi Tahu is optimistic that the promulgation of the National Policy Statement for Renewable Electricity Generation (the NPS) will help promote the development of innovative renewable energy generation technologies that will assist New Zealand to reach its target for renewable electricity generation of 90% by 2025.
- 3.2 Te Rūnanga o Ngāi Tahu is acutely aware of the severe environmental consequences of climate change if left unaddressed (including more frequent extreme weather events, erosion and saltwater intrusion from rising sea levels and the emergence of biosecurity threats from the spread of sub-tropical pests and diseases). We recognise the significance of the issue facing local and international environments and economies and are committed to addressing the problems raised by climate change. Accordingly, we are generally supportive of measures designed to reduce New Zealand’s CO² emissions, provided that such measures appropriately recognise and incorporate tangata whenua values.
- 3.3 We have provided specific comment on the objectives and policies contained in the NPS.

4. Objective 1

4.1 Proposed objective 1 reads:

To recognise the national significance of renewable electricity generation by promoting the development, upgrading, maintenance and operation of new and existing renewable electricity generation activities, such that 90 per cent of New Zealand's electricity will be generated from renewable sources by 2025 (based on delivered electricity in an average hydrological year).

- 4.2 Te Rūnanga o Ngāi Tahu is supportive of the intention of Objective 1, to ensure that the national benefits of renewable electricity generation are given appropriate weight and recognition by those charged with making decisions under the Resource Management Act 1991 (the RMA). We do, however, note that, to a considerable extent, this should (and in our view is) already be occurring by virtue of the need for decision-makers to have particular regard to climate change (section 7(i) and the benefits to be derived from the use and development of renewable energy (s7(j)).

5. Policy 1

5.1 Proposed policy 1 reads:

The benefits of renewable electricity generation activities, at any scale, are of national significance. Decision-makers must have particular regard to the national, regional and local benefits relevant to renewable electricity generation activities. These benefits may include, but are not limited to:

- i. maintaining or increasing electricity generation capacity while avoiding, reducing or displacing greenhouse gas emissions*
- ii. maintaining or increasing security of electricity supply at local, regional and national levels by diversifying the type and/or location of electricity generation.*

- 5.2 Although the Ministry for the Environment has sought to emphasise in its section 32 evaluation that the benefits of renewable electricity generation are subordinate to sections 5 and 6¹ of the RMA, we do not consider that this message is adequately reflected in the wording of the NPS itself.

- 5.3 While Te Rūnanga o Ngāi Tahu is generally supportive of the intention of proposed policy 1, we are concerned that it implies the national, regional and local benefits of renewable electricity generation may

¹ For example, on page 32 it is stated that: "In this regard it is noted that the objective works within the existing statutory framework of the RMA and decision-makers' regard to the Objective (and entire NPS) will be subject to consideration against the matters included in Part II of the RMA."

outweigh the purpose of the RMA contained in section 5 (especially the need to avoid, remedy or mitigate adverse effects) or the matters of national importance contained in section 6. If the desired outcome was that greater weight than at present be attributed to the benefits of renewable energy during decision-making processes, then in Te Rūnanga's view, the appropriate course of action would have been to amend the RMA by elevating sections 7(i) and (j) to section 6 matters of national significance.

- 5.4 As the NPS is presently worded, there is the potential for adverse effects to be discounted in favour of promoting the national benefits of renewable electricity generation. Such an interpretation is contrary to the purpose and principles of the RMA and accordingly, we seek that the proposed NPS be amended so as to clarify that the benefits of renewable electricity generation do not supersede higher ranking Part 2 matters.
- 5.5 In order to ensure, firstly, that the adverse effects of a renewable generation activity are avoided, remedied or mitigated, and secondly, that adequate recognition is attributed to the national benefits of renewable electricity generation, it is necessary to insert an additional policy into the NPS such as:

Nothing in this NPS affects either:

- i. The underlying requirement for all decisions to promote the sustainable management of natural and physical resources; or
- ii. The section 7 status of "the effects of climate change" and "the benefits to be derived from the use and development of renewable energy".

- 5.6 Although it may be argued that such a policy is unnecessary as it merely states the standard legal position, it will serve as a useful reminder to decision-makers as to how the matters of the NPS are placed or contextualised within Part 2 of the RMA.

6. Policy 2

- 6.1 Proposed policy 2 reads:

When considering measures to avoid, remedy or mitigate the adverse environmental effects of renewable electricity generation activities, consent authorities must have particular regard to the constraints imposed on achieving those measures by:

- i. *the nature and location of the renewable energy source*

- ii. *logistical or technical practicalities associated with developing, operating or maintaining the proposed renewable electricity generation activity*
- iii. *the nature and location of existing renewable electricity generation activities*
- iv. *the location of existing structures and infrastructure including, but not limited to, roads, navigation and telecommunication structures and facilities, the local electricity distribution network, and the national grid.*

6.2 Te Rūnanga o Ngāi Tahu is particularly concerned with proposed policy 2. Contrary to the Ministry for the Environment's assessment of the policy (pages 37-39 of the section 32 evaluation) the inclusion of this policy in the NPS favours renewable electricity generation activities at the expense of the natural and physical environment.

6.3 Proposed policy 2 potentially goes beyond the permissible scope of a national policy statement. The purpose of a national policy statement is "...to state objectives and policies for matters of national significance that are relevant to achieving the purpose of this Act" (section 45(1)). Significantly, the purpose of a national policy statement does not extend to providing policy guidance about how the purpose of the Act (in this case, section 5(2)(c)) is to be interpreted in particular situations.

6.4 In this context, it is relevant to refer to the following well known statement made by Justice Greig in *New Zealand Rail v Marlborough District Council* [1993] 2 NZLR 641:

This part of the Act expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not, I think a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings and its connotations which I think is intended to allow the application of policy in a general and broad way. Indeed, it is for that purpose that the Planning Tribunal, with special expertise and skills, is established and appointed to oversee and to promote the objectives and the policies and the principles under the Act.

6.5 In our view, proposed policy 2 is seeking to do precisely what the High Court advised against in the *NZ Rail* case. It is seeking to "...extract a precise and unique meaning from the words used." The result of such an interpretation is likely to be that decision-makers will allow renewable energy generation proposals to proceed, notwithstanding that they will result in the occurrence of more than minor effects on the environment.

- 6.6 Consideration should also be given to how decision-makers should interpret proposed policy 2 when assessing whether the effects of an application for a non-complying activity will be minor (pursuant to section 104D of the Act). Decision-makers should not be entitled to put to one side those adverse effects for which there are deemed to be constraints surrounding their ability to be avoided, remedied or mitigated. The NPS provides no guidance in respect of this issue. In other words, is it intended that it should be easier for renewable energy proposals to pass the minor effects limb of the non-complying activity threshold test by discounting the severity of the effects pursuant to proposed policy 2?
- 6.7 Proposed policy 2 also changes the context in which the phrase “have particular regard to” is used. The purpose of the phrase as used in section 7 is to draw a decision-maker’s attention to a series of relevant matters that may be affected by a proposal and which may trigger a need for adverse effects to be avoided, remedied or mitigated. By contrast, proposed policy 2 uses the phrase to achieve precisely the opposite outcome; being to draw a decision-maker’s attention to a series of reasons about why an adverse effect may not need to be avoided, remedied or mitigated. Te Rūnanga o Ngāi Tahu considers this wording inappropriate and requiring change.
- 6.8 In respect of proposed policy 2(i), Te Rūnanga o Ngāi Tahu considers that it will result in the “nature and location of the renewable energy source” becoming a default exemption to the need to avoid, remedy or mitigate adverse effects on the environment. It is likely that proposed policy 2(i) will lead decision-makers to provide for activities with severe adverse environmental effects simply on the basis that “the nature and location of the renewable energy source” makes it too difficult or expensive to avoid and/or mitigate them.
- 6.9 In order to get a sense of the likelihood for proposed policy 2(i) to undermine the duty to avoid, remedy or mitigate adverse effects, it is necessary to examine the scope of the phrase “the nature and location of the renewable energy source”. This statement is very broad and has the potential to bring a plethora of reasons against avoiding or mitigating an adverse effect in to decision making. It is likely that consent applicants for renewable electricity generation projects will argue that their ability to avoid or mitigate the actual and potential adverse effects is “constrained” by factors such as:
- The need to optimise the efficiency with which the energy is harnessed, therefore making an intensive development necessary;
 - The already modified or degraded nature of the existing environment, therefore making it acceptable to modify it even

further, notwithstanding that it may still retain significant environmental or cultural attributes; and in this respect, I refer to the situation in the lower Waitaki where, notwithstanding the area's immense cultural significance as a cultural landscape to Ngāi Tahu, the decision on Meridian's North Bank Tunnel application discounted the significance of the landscape because of the modification that energy development had already caused. We said at the time of the hearing that this was a double jeopardy that could be likened to benefiting from the proceeds of crime. Accordingly, I ask the question, if this phenomenon (i.e., discounting the significance of the effects because of the degraded nature of the environment), is already occurring, then why the need for proposed policy 2?

- The proximity of the renewable energy source to a local community, therefore making it impossible to avoid the adverse visual and amenity effects of the proposal (rather than finding an alternative location); and
- The lack of scientific certainty about either the state of the existing environment and/or the likelihood of the occurrence of adverse effects, therefore making it necessary to take a risk in terms of environmental effects.

6.10 It is also conceivable that proposed policy 2(i) could create the potential for an applicant to claim (and a decision-maker to conclude) that, because of the nature and location of the renewable energy source, the costs associated with avoiding or mitigating adverse effects are unreasonable in the circumstances. This is unacceptable to Te Rūnanga. We strongly believe that there should be no lessening of the standard required in order to obtain consent for large scale energy generation proposals. Ngāi Tahu has already been forced to accept major modification (and in some cases destruction) of its ancestral rivers, lakes, wetlands and cultural landscapes - all in the name of so called progress, why should Ngāi Tahu be placed in a situation where it's asked to sacrifice even more.

6.11 The potential scope of proposed policy 2(ii), (iii) and (iv) is also of concern. These provisions are likely to raise considerations such as the proximity of the renewable energy source to transmission lines and/or the national grid, thus making it uneconomic (and unnecessary) to consider alternative locations that may be more suitable from an environmental or cultural point of view.

6.12 In respect of proposed policy 2(iii), Te Rūnanga o Ngāi Tahu does not accept that there should be any preference given to existing renewable energy operations undergoing the renewal of their resource consents. The renewal process provides a valuable opportunity for existing

operations to be refined so as to comply, as far as reasonably practicable, with modern day environmental standards. The NPS should not seek to water down this process.

- 6.13 The Environment Court has already developed a definition of the “existing environment”, which helps to ensure that existing energy generation operations are not unreasonably penalised as a result of the past effects on the environment. For example, in *Contact Energy Limited v Waikato Regional Council* (A004/00) the Environment Court said:

We hold that consideration is to be given to the effects on the environment as it actually exists now, including the effects of past abstraction of geothermal fluid from the system, whether by Contact or anyone else. In considering the effects in the future of allowing the proposed abstraction, we hold that we have to consider the environment as it is likely to be from time to time, taking into account further effects of past extraction, and effects of further abstraction authorised by existing consents held by Contact or by others... [paragraph 38]

- 6.14 In this way, the Environment Court sought to ensure that the historical effects on the environment of abstracting geothermal fluid were not taken into account when assessing whether or not to grant a new consent for future abstraction. This is sufficient to ensure that there is a level playing field for both applicants for new energy generation activities and applicants seeking to renew their consents for existing energy generation operations.

- 6.15 Proposed policy 2 introduces four prescribed considerations, which are intended to influence a decision-maker’s determination as to whether, in the circumstances, it is reasonable to avoid, remedy or mitigate an adverse effect on the environment. This approach is likely to result in the prescribed considerations being given greater weight than competing considerations relating to the scale and degree of the adverse effect in question. Such an outcome would be contrary to the need to weigh all relevant factors when applying section 5(2)(c); as discussed by the Environment Court in *Winstone Aggregates Limited v Papakura District Council* (A049/02):

The application of section 5(2)(c), therefore must necessarily involve a consideration of all aspects of a proposal within the broader context of sustainable management dependent upon the factual matrix of each circumstance. This calls for an assessment to be made in terms of the scale and degree of those effects and their significance or proportion in the final outcome. It is a pragmatic approach to sustainable management, and also one that is designed to achieve an outcome that is fair and reasonable in each particular circumstance. [paragraph 43]

- 6.16 Proposed policy 2 should either be removed altogether or amended to better reflect the ongoing need when applying section 5(2)(c) to renewable energy generation proposals to take into account all potentially relevant considerations, especially those relating to the scale and degree of the effects on the environment.
- 6.17 Te Rūnanga o Ngāi Tahu is not opposed to the promotion of renewable electricity generation, provided it does not occur at the unreasonable expense of the local environment. Such development would clearly not be in keeping with the promotion of sustainable management of natural and physical resources. Accordingly, proposed policy 2 goes too far towards promoting the national benefits of renewable electricity generation over the need to avoid and mitigate the localised adverse environmental effects. Te Rūnanga considers that policy 2 will detract from the explicit and overarching duty to avoid, remedy or mitigate the adverse effects of a proposed activity. In doing so, proposed policy 2 risks undermining the achievement of the purpose of the RMA.

In addition, it is the experience of Te Rūnanga that, even under the existing system (i.e., with no NPS), numerous large scale renewable energy proposals with significantly more than minor effects on the environment, have successfully managed to obtain resource consent (for example, NBTC and Project Hayes windfarm – although it is acknowledged that both consents are the subject of Environment Court appeals). In this context, I note that Ngāi Tahu has adopted a reasonable approach in that it did not lodge an appeal against the Project Hayes windfarm and has withdrawn its appeal against the North Bank Tunnel proposal. We have not sought to unreasonably delay the development of large scale renewable electricity generation.

7. **Proposed Policy 3**

7.1 Proposed policy 3 reads:

When considering proposals to develop new renewable electricity generation activities, decision-makers must have particular regard to the relative degree of reversibility of the adverse environmental effects associated with proposed generation technologies.

- 7.2 Te Rūnanga o Ngāi Tahu strongly supports the incorporation of proposed policy 3 into the NPS. In order for an energy generation proposal to be genuinely renewable, it must also be reversible. An electricity generation project cannot be referred to as renewable unless, at the end of its lifespan, it is capable of being dismantled and the environment returned to its original state.

- 7.3 Te Rūnanga o Ngāi Tahu hopes that one of the outcomes of the NPS (and the New Zealand Energy Strategy) is that a more strategic approach is taken to the development of innovative ways of renewably generating electricity. In doing this, a strong emphasis must be placed on the development of reversible forms of renewable electricity generation such as solar, wind, tidal, wave and ocean current. Te Rūnanga hopes that, until such time as these reversible forms of renewable electricity generation are ready for large scale uptake, we don't push the panic button and proceed with less sustainable forms of development. The idiom more haste, less speed has some relevance in this context.
- 7.4 To date, Te Rūnanga o Ngāi Tahu has favoured wind generation over hydro electricity generation. Our involvement in resource consent processes such as the North Bank Tunnel Concept on the lower Waitaki River and the Project Hayes Windfarm has provided us with opportunities to research and document the potential effects of these activities on Ngāi Tahu values and sites of significance. The effects of hydro generation activities on Ngāi Tahu values and sites are clearly more significant than wind farms in these examples.
- 7.5 In respect to hydro-electricity generation, Ngāi Tahu has long held the view that, although the water itself might be renewable, the rivers themselves are not. In fact, for the reasons outlined below, almost all of Ngāi Tahu's experiences with hydro electricity generation to date have been negative:
- Wāhi tapu and wāhi taonga areas have been inundated and lost. As a result named and active associations are broken and Ngāi Tahu's cultural relationship with the area is weakened and damaged;
 - Previously valuable mahinga kai areas have been similarly destroyed, and in many instances access to existing resources has been adversely affected;
 - Fish movement within river systems has been disrupted; both of juveniles into the system and of mature adults trying to leave the system to breed. The success of recent attempts to mitigate these effects on fish passage is unknown;
 - Newly created lake systems are typically adopted enthusiastically by recreational users who then develop these areas as recreational fisheries and boating areas. This results in the further diminution of Ngāi Tahu's interests and the erosion of the tribe's access to these areas;
 - The character and cultural landscape of the area is irrevocably altered;

- The minimum flows are not considered adequate for the maintenance of the river's mauri;
- Dams have interrupted the continuity of flow from the mountains to the sea, which conflicts with the Ngāi Tahu philosophy of Ki Uta Ki Tai; and
- Dams trap sediment and coarser materials needed to replenish the eroding coastal environment.

7.6 No where are the adverse cultural effects of hydro electricity generation more acutely apparent than within Ngāi Tahu's very own ancestral river, the Waitaki. The Waitaki River to which all Ngāi Tahu whānui whakapapa has been permanently modified (and degraded) by the development and operation of the upper and mid Waitaki power stations. This trend is likely to continue should resource consents for the proposed North Bank Tunnel Concept in the lower Waitaki River be granted. The outcome for Ngāi Tahu is that its relationship with the Waitaki River is severely and irreversibly eroded.

[David Higgins to provide a narrative of his perceptions of the impacts of hydro electricity generation on the Waitaki River.]

7.7 If the effect of proposed policy 3 is to prove prejudicial against those technologies with functionally irreversible effects (such as hydro electricity generation), then that is acceptable to Te Rūnanga o Ngāi Tahu. Development of renewable electricity generation should take place in a more environmentally benign manner.

8. Policy 4

8.1 Proposed policy 4 reads:

By 13 March 2012, local authorities are to notify, in accordance with Schedule 1 of the Act, a plan change, proposed plan or variation to introduce objectives, policies and, where appropriate, methods, into policy statements and plans to enable activities associated with:

- i. the identification and assessment by generators of potential sites and energy sources for renewable electricity generation*
- ii. research-scale investigation into emerging renewable electricity generation technologies and methods.*

8.2 Te Rūnanga o Ngāi Tahu supports proposed policy 4 on the basis that it will promote a planned and strategic approach to the exploration of renewable electricity generation opportunities. Having said this, the proposed policy (and the resulting plan changes) must not result in a

lessening of the ability to assess the effects of exploration and investigation activities on the environment. It should not be assumed that simply because generators are merely exploring renewable electricity opportunities that the adverse effects will necessarily be less than minor. There will still be a need for each case to be considered on its own merits.

9. **Policy 5**

9.1 Proposed policy 5 reads:

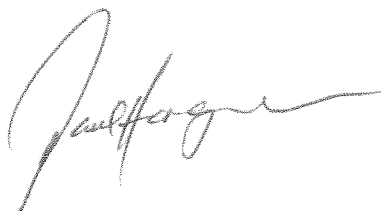
By 13 March 2012, local authorities are to notify, in accordance with Schedule 1 of the Act, a plan change, proposed plan or variation to introduce objectives, policies and, where appropriate, methods, into policy statements and plans to enable activities associated with the development and operation of small and community-scale distributed renewable electricity generation.

9.2 Te Rūnanga o Ngāi Tahu supports proposed policy 5, provided that it does not result in a lessening of the ability to assess the effects of small scale generation activities on the environment.

10. **Conclusion**

10.1 The most important thing for Te Rūnanga o Ngāi Tahu is that the promotion of renewable electricity generation does not in any way weaken the duty to avoid, remedy or mitigate the adverse effects on the environment. In order to ensure the achievement of this requirement, the proposed NPS should be amended to reinforce the fact that it in no way elevates the national benefits of renewable electricity generation further up the Part 2 hierarchy of considerations.

Te Rūnanga o Ngāi Tahu wishes to be heard in support of its submission.



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Toitū Te Whenua
Te Runanga o Ngai Tahu