

**IN THE MATTER**

of the Resource Management Act 1991

**AND**

**IN THE MATTER**

of the Proposed National Policy Statement  
for Renewable Electricity Generation

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**LEGAL SUBMISSIONS ON BEHALF OF  
GENESIS ENERGY**

**(3 JULY 2009)**

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**MAY IT PLEASE THE BOARD:****I. INTRODUCTION**

1. The original Genesis Energy submission addressed the Proposed National Policy Statement on Renewable Electricity Generation ("**Proposed NPS**").
2. This submission expands on that submission, especially in light of recent case law.

**II. GENESIS ENERGY RENEWABLE ENERGY PORTFOLIO**

3. Within its diverse electricity generation portfolio,<sup>1</sup> Genesis Energy owns and operates 509.6 MW of renewable generation assets:
  - (a) Tongariro Power Scheme (362 MW).
  - (b) Waikaremoana Power Scheme (138 MW).
  - (c) Kourarau Hydro (1MW).
  - (d) Hau Nui Wind Farm (8.6MW).

(See Figure 1)

4. As to future generation, Genesis Energy has a target to build 300 MW of renewable electricity generation comprising wind, hydro and geothermal developments.
5. Here to assist the Board with questioning on the Genesis Energy submissions are three senior Genesis Energy Managers:
  - (a) Mr Richard Pearce.
  - (b) Ms Andrea Marshall.
  - (c) Mr Jarrod Bowler.

**III. RMA FRAMEWORK**

6. The Board may find some assistance with its task in the reports produced by the Boards of Inquiry into the:
  - (a) Current New Zealand Coastal Policy Statement.<sup>2</sup>

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<sup>1</sup> Having a capacity of 2049 MW.

- (b) Waitaki Catchment Water Allocation Regional Plan.<sup>3</sup>
- (c) National Policy Statement on Electricity Transmission.<sup>4</sup>

7. The following statement from the Report of the Board of Inquiry on the Proposed NPS on Electricity Transmission is salutary:

"Clarity is essential. National Policy Statements sit at the top of the Act's plan and policy instrument hierarchy. S.55 requires local authorities to amend their planning documents to give effect to provisions of a National Policy Statement that affect those documents and s.55 (2)b allows such a statement to direct that, "*Specific provisions are to be included without notification for hearing ...*". This underscores the importance of clarity and effectiveness."

- 8. Common denominators for decision-makers under the RMA in relation to policy statements<sup>5</sup>, plans<sup>6</sup> and resource consents<sup>7</sup> include section 5, the Part 2 principles (ss 6-8) and any national policy statement.
- 9. It is the daily task of the Environment Court to evaluate plans and resource consent applications etc. One formulation of the evaluative framework for resource consents is found in the *TPD* case.<sup>8</sup> In relation to plans and policy statements, *Eldamos*<sup>9</sup> and *Long Bay*<sup>10</sup> are illustrative.<sup>11</sup>

#### **IV. ELECTRICITY AND GOVERNMENT POLICY**

##### **National importance of electricity**

- 10. The importance of electricity has been recognised by the Courts.

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<sup>2</sup> See, for example, Department of Conservation, *Report and Recommendations of the Board of Inquiry into the New Zealand Coastal Policy Statement* (February 1994) - pages 11-19.

<sup>3</sup> See, for example, Waitaki Catchment Water Allocation Board, *Waitaki Catchment Water Allocation Regional Plan Section 32 Report* (September 2005) - pages 4-6.

<sup>4</sup> See, for example, *Board of Inquiry Report - Proposed National Policy Statement on Electricity Transmission* - page 2.

<sup>5</sup> Sections 59, 61 (1) and 62(3).

<sup>6</sup> Sections 63(1), 66(1), 67(3), 30 and 32 (regional plans); sections 72, 74(1), 75(3), 31 and 32 (district plans).

<sup>7</sup> Sections 104(1) and 104 (1)(b)(i).

<sup>8</sup> See Appendix 1 to these submissions.

<sup>9</sup> *Eldamos Investments Limited v Gisborne District Council* (W47/05).

<sup>10</sup> *Long Bay-Okura Great Park Society Inc v North Shore City Council* (A78/08).

<sup>11</sup> See Appendix 2 to these submissions.

11. For example, the Environment Court has identified the critical role of electricity in providing for people's well-being:

"Electricity is a vital resource for New Zealand. There can be no sustainable management of natural and physical resources without energy, of which electricity is a major component."<sup>12</sup>

"From a national level, electricity is an essential commodity to New Zealand households (directly they spend in excess of \$2 billion on it) and industry. It provides the basis for our economic prosperity and way of life. Unlike in some other countries, electricity cannot be imported, and for some purposes it has no practical alternatives."<sup>13</sup>

12. In light of increasing demand, the Environment Court has acknowledged the importance of maximising existing generation output from renewable sources, for example:<sup>14</sup>

"Over recent years, New Zealand's demand for electricity has been growing faster than new generation. We were told... that for the year 2005 the growth rate was 2.5%... [It was] ...stressed that because of the potential for electricity shortages combined with the uncertainty surrounding new generation, it is very important that existing generation is at least retained where possible, if not increased."

13. Similarly, the full utilisation of available renewable generation facilities is in the national interest, for example:<sup>15</sup>

“[401] We have found that the TPD makes a significant contribution to the hydro electric production of New Zealand. It is infrastructure, with its “sunk-costs” and existing capacity to produce 360MW - not to mention the re-use of the water down the Waikato River - reflects its contribution to the New Zealand economy...

[402] Clearly, it is in the national interests for the TPD structure to be as fully utilised as possible.”

14. Given increasing electricity demand (projected to grow at ~2% per annum,<sup>16</sup> requiring 100 to 150 MW of new

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<sup>12</sup> *Genesis Power Limited v Franklin District Council* [2005] NZRMA 541 (“**Awhitu**”) at [64].

<sup>13</sup> *Rotokawa Joint Venture Ltd v Waikato Regional Council* (A41/2007) (“**Rotokawa**”) at [422].

<sup>14</sup> *Rotokawa* at [425].

<sup>15</sup> *Ngati Rangī Trust v Manawatu-Wanganui Regional Council* (A67/04) (“**TPD**”) at [402].

<sup>16</sup> It is noted that the section 32 report for the Proposed National Policy Statement for Renewable Electricity Generation states that if New Zealand continues on its current path, electricity demand is projected to grow at around 1.3% per annum, citing the New Zealand Energy Strategy.

generating capacity per annum<sup>17</sup>), the High Court has also recognised the importance of increasing generation capacity:<sup>18</sup>

"[64] This Court recognises the notorious fact that there is an ongoing risk of the demand for electricity not being matched for supply. This past winter and previous winters there have been low levels of stored water in the hydroelectric systems. The Court also takes cognisance of the notorious fact that where supply cannot match demand in electrical systems there has to be a partial shutdown of the distribution networks. For these reasons it is in the public interests for power supply companies to increase generating capacity. The question is not whether generating capacity should be increased but rather by what means and where."

### Government Policy

15. The importance of electricity has also been recognised through government policy (for example, the New Zealand Energy Strategy ("**NZES**") and the New Zealand Energy Efficiency and Conservation Strategy ("**NZEECS**")).
16. Through the NZES, the government has set a target for 90% of New Zealand's electricity to be generated from renewable sources by 2025 (based on an average hydrological year).<sup>19</sup>
17. The NZES<sup>20</sup> and NZEECS<sup>21</sup> include provisions supportive of renewable generation and diversity within the mix of

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<sup>17</sup> It is noted that the section 32 report for the Proposed National Policy Statement for Renewable Electricity Generation states that in order to meet demand growth until 2025, New Zealand will need to increase generation capacity by around 175MW per annum.

<sup>18</sup> *Upland Landscape Protection Society Incorporated v Central Otago District Council* (High Court, Dunedin, CIV-2008-412-000302, 16 September 2008, Fogarty J).

<sup>19</sup> New Zealand Energy Strategy - page 22.

<sup>20</sup> The NZES states:

"Achieving the target of generating 90 per cent of electricity by renewable sources by 2025 will require:

- market and regulatory structures to enable investment in a diverse range of renewable generation projects, including small-scale and distributed generation

...

The government is confident sufficient quantities of renewable generation exist and can be developed without unacceptable or adverse environmental effects." [Section 9.3.2]

"[T]he government has stated a clear preference that all new electricity generation be renewable, except to the extent necessary to maintain security of supply. In support of this principle, and providing time for the full introduction of a price on greenhouse gas emissions, the government's view is that there should not be a need for any new baseload fossil fuel generation investment for the next ten years. The government expects all generators, including state-owned enterprises, to take its views into account

renewable options. These policies also include statements that achievement of the target:

- (a) Will not result in unacceptable or adverse environmental effects.
- (b) Will require wind generation.
- (c) May include contributions from wave and tidal technologies.

**V. GENESIS ENERGY EXPERIENCE WITH RESOURCE CONSENT APPLICATION TIME FRAMES**

18. It is understood the Board has sought advice from submitters as to their experience with consenting energy projects under the RMA. The following table reflects the experience of Genesis Energy:

Project Name	Generation Type	Project Generating capacity	Consent Timeline From application	Decision-making Process
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when considering new generation investments, and the government will advise state-owned enterprises that it expects them to follow this guidance." [Section 9.3.3]

- <sup>21</sup> The latest New Zealand Energy Efficiency and Conservation Strategy (released in October 2007) also states:

"Meeting the target will require generating electricity from a diverse range of renewable sources such as wind, geothermal, hydro and biomass. Emerging renewable technologies such as wave, tidal and solar photovoltaic, may also contribute to achieving the target. More distributed generation, including small-scale generation, could also make useful contributions to achieving the target." [Page 68]

			date	
<b>HYDRO</b>				
<b>Tongariro Power Scheme (TPS)</b>	Hydro	360 MW	<b>Ongoing 9 years to date</b>	30 June 2000 - Application Lodged 2000-2001 Council Hearing September – December 2003: Environment Court May 2004 – Environment Court Decision July 2005 - High Court Hearing August 2006 - High Court Decision March 2009 - Court of Appeal Hearing June 2009 - Court of Appeal Decision June 2009 - Leave sought to appeal to Supreme Court
<b>Mangaio (now part of TPS)</b>	Hydro	2MW	<b>4 months</b>	No hearing 16 January 2006 – Applications (regional / district) Lodged 29 March 2006 - District Consents Granted 18 May 2006 - Regional Consents Granted
<b>Waikaremoana</b>	Hydro	140MW	<b>7 months</b>	Council hearing 3 April 1998 – Regional Applications Lodged 13 November 1998 – Regional Consents Granted
<b>WIND</b>				
<b>Hau Nui 1</b>	Wind	3.7MW	<b>2 months</b>	No Council hearing 18 May 1995 – District Application Lodged 26 June 1995 – District Consent Granted
<b>Hau Nui 2</b>	Wind	4.8 MW	<b>5 months</b>	Council hearing 30 January 2002 – District Application Lodged 18 May 2002 – District Consent Granted
<b>Awhitu</b>	Wind	18MW	<b>32 months (2.8 years)</b>	1 April 2004 - Application Lodged June- July 2004: Council Hearing September 2004 - Council Decision May-June 2005: Environment Court Hearing September 2005: Environment Court Substantive Decision December 2005 - Environment Court Conditions Decision December 2005 - High Court Appeal Withdrawn
<b>THERMAL</b>				
<b>Huntly E3P</b>	Thermal (gas)	385 MW	<b>4 months</b>	Council hearing
<b>Project 40</b>	Thermal (gas)	40 MW	<b>7 months</b>	No hearing

Rodney	Thermal (gas)	480 MW	Ongoing – 2 years to date	13 July 2007 - Application Lodged  September - October 2008: Council Hearing December 2009 - Regional Council Decision March 2009 - District Council Decision  Appeals (on some resource consents and plan change / variation)
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## VI. PROPOSED NPS

### A. MATTER OF NATIONAL SIGNIFICANCE / OBJECTIVE

19. Genesis Energy supports the 'Matter of National Significance' and 'Objective' in the Proposed NPS.
20. However, given recent case law, there is a serious question as to whether these and other provisions of the Proposed NPS will be effective in receiving the appropriate weight in decision-making under the RMA.
21. There are several findings from the Courts (Environment Court and High Court) arising from the Unison Te Waka wind farm project that are relevant in this context. An overview of those decisions is provided at Appendix 3 to these submissions.
22. In the recent decision of the Environment Court on the called-in Te Waka wind farm project, it was effectively determined (among other things) that:
  - (a) Section 6 matters trump sections 7(j) (climate change benefits).<sup>22</sup>
  - (b) Despite the wind farm being recognised in a Ministerial call-in as a matter of national significance, little real weight was placed on this consideration (the Court remarking that the legislative directive is only "to have regard to as distinct from (say) to take into account").<sup>23</sup>
23. The concern with the experience from the Te Waka cases is that despite the national significance of renewable energy being recognised and provided for in national policy statement,<sup>24</sup> the operation of Part 2 of the RMA would see such "national significance" only receiving second tier recognition.

<sup>22</sup> See Appendix 3 to these submissions – paragraphs 18-19.

<sup>23</sup> See Appendix 3 to these submissions – paragraphs 20-23.

<sup>24</sup> If and when a national policy statement for renewable electricity generation is issued under section 52 of the RMA.

24. Given the latest Te Waka case post-dates the original Genesis Energy submission on the Proposed NPS, the following additional amendments to the Proposed NPS are sought be Genesis Energy:

**“Matter of national significance and importance**

The matter of national significance and importance to which this national policy statement applies, and in respect of which decision-makers shall recognise and provide for, is the need to develop, upgrade, maintain and operate renewable electricity generation activities throughout New Zealand.”

**“Objective**

To recognise the national significance and importance of ...”.

**“Recognising the national significance and importance of the benefits of renewable electricity generation activities**

**Policy 1**

The benefits of renewable electricity generation activities, at any scale, are of national significance and importance. Decision-makers shall recognise and provide for ~~must have particular regard to~~ the global, national, regional and local benefits relevant to renewable electricity activities....”.

25. The question arises with this type of approach as to the appropriate parameters for such specificity within a policy document.
26. In this context it is helpful to consider the Court of Appeal’s analysis in *Auckland Regional Council v North Shore City Council*:<sup>25</sup>

““Policy” and “policies” must bear their natural and ordinary meaning in the context of the Act. As an appropriate definition Mr Salmon cited what is described in the *Oxford English Dictionary* (2<sup>nd</sup> ed), as “the chief living sense”:

5. A course of action adopted and pursued by a government, party, ruler, statesman, etc: any course of action adopted as advantageous or expedient.

The definition “a course of action” is also given by other dictionaries, such as *Chambers*. It may be accepted as appropriate in the present context. The word “policy” is very old... A familiar modern usage in this country is “New Zealand’s anti-nuclear policy”. Often, as in the Resource Management Act, the word has governmental or administrative connotations. The name of our “police” comes from the same source.

It is obvious that in ordinary present day speech a policy may be either flexible or inflexible, either broad or narrow. Honesty is said to be the best policy. Most people would prefer to take some discretion in implementing it, but if applied remorselessly it

<sup>25</sup> [1995] NZRMA 424 at 430.

would cease to be a policy. Counsel for the defendants are on unsound ground in suggesting that, in everyday New Zealand speech or in parliamentary drafting or in etymology, policy cannot include something highly specific. We can find nothing in the Resource Management Act adequate to remove the challenged provisions from the permissible scope of "policies". In our opinion they all fall within that term and are intra vires the regional council."

27. The conclusion, therefore is that there is some latitude as to the level of specificity appropriate within a national policy statement.

## **B. POLICY 1 - BENEFITS OF RENEWABLE ELECTRICITY GENERATION**

28. Policy 1 of the Proposed NPS requires decision-makers to have particular regard to the following national, regional and local benefits relevant to renewable electricity generation:

- "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."

29. While Policy 1 refers to "national, regional and local benefits", it is also appropriate to recognise global benefits in light of the nature of greenhouse gas emissions.

30. There are also a number of further benefits relevant to renewable electricity generation.

31. For example, the Ministry of Economic Development's Electricity Generation Reference Group Report on scoping a National Policy Statement on Electricity Generation identified the following additional benefits:

- (a) Improved security of supply from adding to New Zealand's generating base.
- (b) Reducing transmission losses and dependence on the national grid through locating electricity generation close to electricity demand centres.
- (c) Reliability of the generation and its fuel including insulation from major external production cost variability.

- (d) Development benefits in the form of industry development, including research, manufacturing, installation and distribution, and maintenance of facilities.
32. The Environment Court has also identified the following additional benefits in relation to wind farms:<sup>26</sup>
- (a) Does not involve permanent long term alteration of the environment;
  - (b) Does not utilise any finite resource, other than the site itself;
  - (c) Involves minimal displacement of other productive uses of the land;
  - (d) Uses the wind resource without affecting that resource in any meaningful way.
33. While Policy 1 states "benefits may include, but are not limited to" those benefits specified, there is a risk that decision-makers will fail to have particular regard, or give appropriate weight to such further benefits if not provided for in the national policy statement. This issue was raised in the section 32 report for the Proposed NPS:<sup>27</sup>
- "Policy 1 may set too narrow a list of benefits, and despite its non-exclusivity, this could be misinterpreted as sending a signal that other benefits recognised in the decisions of the Environment Court are somehow less important."
34. Also, the absence of permanent long term alteration to the environment (identified as a benefit by the Environment Court) is currently addressed by Policy 3 of the Proposed NPS. It is appropriate to refer to this benefit in Policy 1 of the Proposed NPS as opposed to a separate policy (as discussed in relation to Policy 3).
35. The relief Genesis Energy seeks is set out at Policy 1 of Appendix 4.

### **C. POLICY 3 - REVERSIBILITY OF EFFECTS**

36. Policy 3 of the Proposed NPS requires decision-makers to have particular regard to the relative degree of reversibility of the adverse environmental effects associated with proposed generation technologies.

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<sup>26</sup> *Upland Landscape Protection Society Inc v Clutha District Council*, Environment Court, Christchurch, C85/2008, 25 July 2008, Judge Smith.

<sup>27</sup> Section 32 report for the Proposed NPS at p 35.

37. Policy 3 introduces an implicit hierarchy between types of renewable electricity generation through consideration of the relative degree of reversibility of adverse effects. This policy has the effect of favouring wind, marine and biomass generation, for which adverse effects are generally reversible. In contrast, the policy effectively penalises hydro and geothermal generation, which tend to involve long term effects (at different scales) on freshwater ecosystems and geothermal systems respectively.
38. Introducing an implicit hierarchy amounts to picking "renewable energy winners" which would have substantial adverse economic effects when compared with an approach which allows participants to identify least-cost generation options. Prescribing preferred forms of renewable energy through an NPS would ignore key factors which are relevant in identifying least-cost generation options, including:
- (a) Cost escalation paths.
  - (b) Access to technical expertise.
  - (c) Supply logistics.
  - (d) System operation factors.
  - (e) "Portfolio effects" associated with achieving an efficient mix of generation sources.
39. All of these factors can change over time, and unlike a dynamic approach, an NPS that picks 'renewable energy winners' would be unable to respond to such changes in a timely fashion.
40. As illustrated by a review of the background to the statutory framework for energy,<sup>28</sup> Government policy does not discriminate between different forms of renewable energy. Furthermore, all forms of renewable energy have benefits in terms of avoiding, remedying or mitigating adverse effects on climate change.
41. The former Minister of Energy stressed that commercial decisions outside the control of Government will determine the contribution from various types of renewable energy:<sup>29</sup>

"Modelling done to support the Energy Strategy suggests that a mix of all renewable generation types will make up the renewables portion.

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<sup>28</sup> For example, the Resource Management (Energy and Climate Change) Amendment Act 2004, proposed carbon tax policy, Projects to Reduce Emissions scheme, Negotiated Greenhouse Agreements scheme, New Zealand Emissions Trading Scheme Framework, New Zealand Energy Strategy and New Zealand Energy Efficiency and Conservation Strategy.

<sup>29</sup> Hon David Parker "Wind Energy in a sustainable New Zealand" Address to the New Zealand Wind Energy Association Conference, Wellington, 8 April 2008.

The actual proportion of geothermal to wind to hydro – and other sources – will depend on commercial decisions outside the control of government, and will themselves be subject to a range of factors."

42. The potential for Policy 3 to act as a barrier for relatively non-reversible renewable electricity generation technologies was raised in the section 32 report for the Proposed NPS:

"Focusing decision-makers' attention on the relative reversibility of effects associated with particular generation technologies could prove prejudicial against those technologies with functionally irreversible effects, such as hydro-generation. This risks inconsistency with the Objective of the proposed NPS."<sup>30</sup>

"[I]t may establish a marginal preference for the development of those forms of renewable electricity generation that have relatively more reversible effects, that is wind, marine and geothermal generation. So this policy could be argued to establish regulatory bias against new hydro-generation development."<sup>31</sup>

"Policy requiring decision-makers to have regard to the relative 'reversibility' of effects of different technology types could discourage investment in relatively 'non-reversible' renewable generation technologies such as hydro generation."<sup>32</sup>

43. The objective of the Proposed NPS is to promote new and existing renewable electricity generation activities. While it is appropriate for the reversibility of adverse effects from renewable electricity generation technologies to be acknowledged as a relevant consideration, it is inconsistent with the objective of the Proposed NPS to include a policy which could effectively act as a barrier to some types of renewable electricity generation technologies on the basis of the irreversibility of adverse effects.
44. Moreover, the irreversible components of a renewable energy development can and do include features agreed by way of mitigation or have the effect of mitigating potential adverse effects. Genesis Energy's experience with the Otamangakau trout fishery is a case in point.
45. Genesis Energy seeks:
- (a) The deletion of Policy 3 from the Proposed NPS.

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<sup>30</sup> Section 32 report for the Proposed NPS at p 41.

<sup>31</sup> Section 32 report for the Proposed NPS at p 42.

<sup>32</sup> Section 32 report for the Proposed NPS at p 54.

- (b) The inclusion of an additional benefit in Policy 1 as set out at Policy 1 of Appendix 4.

**D. NEW POLICY 5 – IDENTIFYING BENEFITS OF RENEWABLE ELECTRICITY GENERATION IN POLICY STATEMENTS AND PLANS**

46. While Policy 1 of the Proposed NPS is useful in promoting recognition of the benefits of renewable electricity generation in RMA decision-making, it is also appropriate for the Proposed NPS to require amendments to local authority policy statements and plans to identify the benefits in Policy 1.
47. In particular, identifying the benefits of renewable electricity generation in objectives and policies will provide a firm foundation for rules which promote renewable electricity generation. Furthermore, reference to the benefits of renewable electricity generation in assessment criteria for any renewable electricity generation resource consent applications will ensure decision-makers give effect to the Proposed NPS.
48. The relief Genesis Energy seeks is set out at Policy 5 of Appendix 4.
49. While this may seem an unduly conservative approach, the experience from the Te Waka cases<sup>33</sup> in relation to decision-makers having the jurisdiction under Part 2 to effectively override the provisions of an operative plan means that such perceived conservatism is appropriate.

**E. NEW POLICY 6 – PROTECTING RENEWABLE ELECTRICITY GENERATION ACTIVITIES FROM REVERSE SENSITIVITY EFFECTS**

50. The Environment Court has expressly recognised that full utilisation of generation facilities is in the national interest.<sup>34</sup> Similarly, the section 32 report for the Proposed NPS notes:<sup>35</sup>

"If existing generation capacity is not maintained, the new generation capacity required to make up for the resultant shortfall would be considerably more expensive to develop than the alternative of optimising the efficiency with which existing capacity is used. There are also economic benefits to optimising the potential returns from existing investment, and as such there is a logical desire amongst generators to enhance the use of existing

<sup>33</sup> See Appendix 3 to these submissions – paragraphs 11-13 and 24-25.

<sup>34</sup> *Ngati Rangi Trust v Manawatu-Wanganui Regional Council* (A67/04) at [402].

<sup>35</sup> Section 32 report for the Proposed NPS at p 13.

infrastructure and resources for renewable electricity generation."

51. Protection from reverse sensitivity effects is a key aspect of ensuring full utilisation of existing renewable generation facilities, and will delay the need for additional electricity generation plant to meet any corresponding shortfall in supply.
52. Furthermore, a policy in the Proposed NPS addressing reverse sensitivity effects would serve to protect new renewable electricity generation activities, thereby maximising the benefits identified in Policy 1.
53. The relief Genesis Energy seeks is set out at Policy 6 of Appendix 4.

#### **F. NEW POLICY 7 – GIVE EFFECT TO THE NATIONAL POLICY STATEMENT**

54. Sections 67(3) and 75(3) require plans to "give effect to" any NPS.
55. Any conflict as between the Proposed NPS<sup>36</sup> and another NPS, such as the NZCPS<sup>37</sup> could create a situation where it would be practically impossible to "give effect to" both instruments.
56. It is, therefore important for the effective and efficient administration of the RMA for the Proposed NPS not to be rendered ineffective by another NPS. Inconsistencies between such instruments would lead to uncertainty and increased administration costs.
57. Another source of potential 'tension' is the Proposed National Policy Statement for Freshwater Management and Proposed National Environmental Standard on Ecological Flows and Water Levels.

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<sup>36</sup> For example, the Objective of the Proposed NPS for Renewable Electricity Generation:

"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)."

<sup>37</sup> For example, Objective 3 of the Proposed NZCPS:

"The natural character of the coastal environment is preserved, through the protection or restoration of natural landscapes, features, processes and indigenous biological diversity."

58. The following issues arise in relation to the Proposed NPS for Freshwater Management:

- (a) The Proposed NPS for Freshwater Management fails to expressly recognise physical resources (section 5 of the Resource Management Act 1991 ("RMA")) and the value of investments dependent on the use of fresh water (section 104(2A) of the RMA). The NPS also requires mandatory consideration of, and consent conditions for, industry good practice and technology but without express regard for the age of existing infrastructure.

The section 32 report for the Proposed NPS recognises renewing consents for existing renewable electricity generation activities is problematic (for example renewing consents for the Tongariro Power Scheme)<sup>38</sup> and that this frustrates the objective of the Proposed NPS.<sup>39</sup> If existing generation capacity is not maintained, new generation capacity required to make up the consequential shortfall would be considerably more expensive than optimising existing capacity. There would also be increased consumption of resources and/or effects on the environment.

- (b) Objective 7<sup>40</sup> of the Proposed NPS for Freshwater Management seeks to increase benefits from the use of fresh water. However, the meaning of "increase benefits" in that context is unclear, and there is a lack of certainty that the benefits of renewable electricity generation identified in Policy 1 of the Proposed NPS will be recognised through the Proposed NPS for Freshwater Management. It is therefore important that increased benefits under the Proposed NPS for Freshwater Management accord with, and are not antagonistic to, the benefits of renewable electricity generation under the Proposed NPS.

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<sup>38</sup> Section 32 report for the Proposed NPS at p 13.

<sup>39</sup> Section 32 report for the Proposed NPS at pp 13 and 20.

<sup>40</sup> **"Objective 7 – Efficient use of fresh water**

To ensure that allocated fresh water is used efficiently particularly in terms of the following:

- (a) avoiding wastage:  
 (b) avoiding excessive contamination:  
 (c) facilitating opportunities to increase benefits from the use of fresh water."

- (c) Policy 2(c)(iii)(A)<sup>41</sup> and Policy 3(b)(i)<sup>42</sup> of the Proposed NPS for Freshwater Management require consent conditions for protection against degradation of freshwater quality. In contrast, the underlying philosophy of the Proposed NPS is that some local adverse effects are appropriate if they are outweighed by the national, regional and local benefits of renewable electricity generation.
59. Issues also arise with the Proposed NES on Ecological Flows and Water Levels. For example, it sets interim limits on water bodies, and provides that any activity which breaches such limits would require resource consent as a non-complying activity. This will act as a barrier for re-consenting existing renewable electricity generation activities, in circumstances where thorough assessments using appropriate methods have been undertaken. Interim limits also have the potential to restrict existing renewable electricity generation activities in the context of a review of resource consent conditions under sections 128 to 132 of the RMA.
60. The section 32 report for the Proposed NPS recognises that such re-consenting difficulties are inconsistent with the

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<sup>41</sup> "Policy 2

Every regional council must –

...

- (c) By no later than 40 working days following the date a regional policy statement or change notified pursuant to Policy 1 is made operative, every regional council must notify a proposed regional plan, change or variation to include rules to achieve the following:

...

- (iii) Require that all discharge permits affecting Freshwater Resources granted after the date of commencement of this National Policy Statement include conditions for –
- (A) Protection against degradation of the quality of fresh water of Freshwater Resources (including through the management of activities giving rise to stormwater discharges); and..."

<sup>42</sup>"Policy 3

By no later than 40 working days following the date a regional policy statement or change notified pursuant to Policy 1 is made operative, every territorial authority must notify a proposed district plan, change or variation in order that as soon as practicable thereafter every district plan –

...

- (b) Includes rules to require that all relevant land-use and subdivision consents granted after the commencement of this National Policy Statement include conditions for –
- (i) Protection against degradation of the quality of fresh water of Freshwater Resources (including through the management of activities giving rise to stormwater discharges); and..."

objective of the Proposed NPS.<sup>43</sup> If existing generation capacity is not maintained, new generation capacity required to make up the resultant shortfall would be considerably more expensive than optimising existing capacity.

61. Genesis Energy therefore seeks the inclusion of a new policy as set out at Policy 7 of Appendix 4.

## **VII. ADDITIONAL ISSUES**

### **A. NATIONAL BENEFITS VS LOCAL ADVERSE EFFECTS**

62. A common refrain in energy cases is the dichotomy between national benefits and local adverse effects.
63. Also common, and frustrating, has been the lack of national guidance in resolving this tension. That is why Genesis Energy has actively participated with the promulgation of policies and plans at all levels, especially at the national level.
64. Genesis Energy considers that an NPS for Renewable Electricity Generation is long overdue. Much unnecessary time and expense has been incurred in various hearings rehearsing the same arguments. Indeed, Genesis Energy had hoped the *Awhitu* case, being the first wind farm development to be heard by the Environment Court, would have provided a clear enunciation of, for example:
- (a) Climate change benefits (detailed and agreed in a 13 page statement of agreed facts);
  - (b) The methodology for assessing what is “appropriate development” under sections 6(a) or (b) of the RMA in the context of wind farms; and
  - (c) The fact that all renewable energy developments have climate change benefits.
65. Unfortunately, these issues have continued to play out in subsequent cases.
66. Genesis Energy therefore strongly supports the Proposed NPS, as improved by the proposed amendments. Not because every proposal should automatically receive consent. Rather, to avoid unnecessary time and expense on debating the same issues during the consenting process.

### **B. ‘THREATS’ TO IMPLEMENTATION OF CONSENTED PROJECTS**

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<sup>43</sup> Section 32 report for the Proposed NPS at pp 13 and 20.

67. A related reason underpinning the need for national guidance, and avoiding ad hoc rehearsals of the same arguments, is the real effect delay has on actually implementing operative consents.
68. For example, while Genesis Energy was ultimately successful in securing consent for its Awhitu wind farm, the delay in reaching that point meant that the company missed critical international procurement windows.

### **C. CALL-IN A PANACEA?**

69. One solution to consenting delays is the potential use of the call-in mechanism. So, too would a direct referral regime as proposed in the Resource Management (Simplifying and Streamlining) Amendment Bill.
70. Genesis Energy supports call-ins being available in appropriate cases. But, not all applications will necessarily be amenable to call-in, for example:
  - (a) Such a consenting path was not available for the Rodney Project as a proposed plan variation was involved.
  - (b) There may be a very strong local community desire to have a local authority hearing at first instance.

### **D. EXISTING INFRASTRUCTURE CONSENTING REGIME**

71. The question often arises as to whether there should be a different consenting path as between 'green field' and existing developments.
72. At present, applications for consents to replace those which are about to expire are considered essentially as fresh applications. The experience of Genesis Energy is that section 104(2A) makes little difference in this context.
73. There is an opportunity for the Proposed NPS to address the differences between these types of developments. For example, it could include provisions which recognise that in circumstances where a new application is made to replace a consent that is due to expire and such consent was considered and granted under the RMA, then:
  - (a) The focus of the new application should be to determine the adequacy and effectiveness of the existing consent conditions in avoiding, remedying or mitigating adverse effects on the environment; and

- (b) The activity status on the new application should be a 'controlled activity', unless the plan or proposed plan provides a less stringent activity status.

#### **E. "GO / NO-GO AREAS"**

74. Policy 4 is not expressed as clearly as it could be.
75. To the extent that the policy is limited to having plans include objectives and policies etc which are supportive of industry attempts to identify and assess potential sites or sources for the generation of renewable energy, it is laudable.
76. However, to the extent the policy effectively encourages local authorities to engage in planning for "go / no go" areas, Genesis Energy does not support such an approach.
77. A clearer and more effective way in which to achieve the former approach would be, for example, to require local authorities to provide for the following types of activities as permitted or controlled activities:
- (a) Wind anemometers  $\leq$  80 metres.
  - (b) Geothermal slim hole drilling ( $\leq$  6 inches diameter) to a depth of  $\leq$  3000m for the purpose of sampling and proving the key parameters of an inferred reservoir.
  - (c) Water level and / or rain gauge monitoring equipment and associated telemetry equipment located within river beds and / or on land.
78. The actual location and nature of any renewable generation development is a decision appropriately made by an applicant. Especially, as credible applicants will invest the resources to undertake the necessary studies to 'prove' the resource, configure an actual commercial proposal, comprehensively assess the potential effects of the proposal, and navigate the consenting process.
79. By contrast, local authorities, on behalf of their communities, do not have the same incentives. Indeed, it is illustrative to compare the experience of local authorities with aquaculture planning.

#### **F. WATER REGIME**

80. As the Board is aware, there is superior Court authority confirming the principles against the derogation of resource consents (in the context of hydro generation)<sup>44</sup> and

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<sup>44</sup> *Aoraki Water Trust v Meridian Energy Limited* [2005] NZRMA 251(HC) ("**Aoraki**").

confirming the appropriateness of first in first served (in the context of wind and hydro generation<sup>45</sup>):

[*Aoraki*<sup>46</sup>]

“Where there were competing claims for use of the same resource where the grant of consent to one applicant necessarily excluded the grant of consent to another applicant, the grant of the first consent conferred an exclusive right to use the resource on the first person to be granted consent.”

“The grant of consent created a right to use the resource which could not subsequently be eroded by the grant of other consents unless expressly allowed by statute, and the consent holder could legitimately expect the consent authority to recognise that a substantive benefit had been conferred by the grant of consent. The principle of non-derogation of grant therefore applied in the public law context where full allocation of a resource had taken place.”

[*Central Plains Water Trust v Ngai Tahu Properties Limited*<sup>47</sup>]

“[58] The high policy of ensuring sustainable management is expressed in Part 2 of the RMA and must weigh heavily in assessing what priority regime accords with Parliament’s policy.

[59] There is an obvious public interest that the law should not frustrate a proposed development in the course of undergoing the statutory processes. At least where the whole resource being sought is the subject of an application, there should be no risk of a major development being trumped or significantly interfered with by later smaller, simpler inconsistent proposals that are able to be made comprehensively without needing to proceed in stages.”

81. Given the importance of these principles to renewable electricity proposals, there is a real case for encapsulating such principles in the Proposed NPS.



**Paul F Majurey**

Counsel for Genesis Energy  
(3 July 2009)

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<sup>45</sup> For example, *Unison Networks Limited v Hawkes Bay Wind Farm Limited* [2007] NZRMA 340 (HC).

<sup>46</sup> *Aoraki* at page 252 (as summarised in the case head note).

<sup>47</sup> [2008] NZCA 71.

## APPENDIX 1

### EXTRACTS FROM *TPD DECISION*<sup>48</sup>

"[64] The cardinal and pivotal matter for us to bear in mind in weighing and evaluating the evidence and exercising our discretion, is the Act's single purpose as set out in section 5.

**"5. Purpose**

- (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
- (2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—
  - (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
  - (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
  - (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment."

[65] The proper application of section 5 involves an overall broad judgement of whether or not a proposal promotes the sustainable management of natural and physical resources.<sup>19</sup> Such a judgement allows for comparison of conflicting considerations and the scale or degree of them, and their relative significance in the final outcome.<sup>20</sup>

[66] In *North Shore City Council v Auckland Regional Council* the Environment Court held that where, on some issues, a proposal is found to promote one or more of the aspects of sustainable management, and on others is found not to attain, or to attain fully, one or more of the aspects described in sub-sections 5(a), (b), or (c), it would be wrong to conclude that the latter overrides the former with no judgement of scale or proportion.<sup>21</sup>

[67] The remaining sections in Part II, subsequent to section 5, inform and assist the purpose of the Act. We may accord such weight as we think fit to any competing considerations under Part II, bearing in mind the purpose of the Act. We agree with Mr Cowper, that these subsequent sections must not be allowed to obscure the sustainable management purpose of the Act. Rather, they should be approached as factors in the overall balancing exercise to be conducted by the Court.<sup>22</sup>

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<sup>48</sup> *Ngati Rangī Trust v Manawatu-Wanganui Regional Council and Genesis Power Ltd* (A67/04).

[69] Where Part II matters compete amongst themselves, we must have regard to the statutory hierarchy as between sections 6, 7 and 8 as part of the balancing exercise. However, notwithstanding their importance, all of those sections are subordinate to the primary purpose of the Act. The High Court laid down this principal in *NZ Rail*, in relation to section 6(a). The Court stated:

"A recognition and provision for the preservation of the natural character of the coastal environment in the words of s 6(a) is to achieve the purpose of the Act, that is to say to promote the sustainable management of natural and physical resources. That means that the preservation of natural character is subordinate to the primary purpose of the promotion of sustainable management. It is not an end or an objective on its own but is accessory to the principal purpose."<sup>23</sup>

The Court went on to state that:

"It is certainly not the case that preservation of the natural character is to be achieved at all costs. The achievement which is to be promoted is sustainable management . . .<sup>24</sup> and questions of national importance, national value and benefit, and national needs, must all play their part in the overall consideration and decision."

[70] As Mr Cowper pointed out, the High Court recently reiterated this principle in *Auckland Volcanic Cones Society Incorporated v Transit New Zealand*.<sup>25</sup> In that case, the Court held that, while section 6 matters are to be recognised and provided for, this is in the context of achieving the purpose of the Act as is set out in section 5.

[71] The Environment Court stated in *Minister of Conservation v Western Bay of Plenty District Council*,<sup>26</sup> in a passage cited with approval in *Mighty River Power v Waikato Regional Council*.<sup>27</sup>

"In weighing the evidence of the witnesses on all sides, we have borne constantly in mind the Act's single purpose of promoting the sustainable management of natural and physical resources. Section 6 matters, nationally important by prescription as they are, plainly need to be recognised and provided for in conjunction with the many other considerations contemplated by the legislation in the district planning process . . . The sections subsequent to section 5 are designed more fully to inform and assist a body such as the Council in following through and applying Parliament's intents in achieving the Act's purpose for its district. Expressed in the reverse context, those sections are not intended to be applied as a series of competing considerations liable to undermine the achievement of the purpose laid down in section 5."

[72] We thus propose to consider the relevant evidential matters, make decisions on the facts, and then apply a balancing and weighting process to determine what best achieves the single purpose of the Act. In so doing, we are mindful of the fact that while adverse effects may involve

Part II matters, it is still nonetheless proper for such effects to be mitigated, as opposed to being avoided or remedied under section 5(2)(c). As the Environment Court said in *Kemp v Queenstown Lakes District Council*:<sup>28</sup>

"[S]ome of the possible adverse effects related to national importance can be avoided or perhaps mitigated under section 5(2)(c). For example, the effects on the significant habitat for wrybills, banded dotterel and black fronted tern is only a potential effect and may be controlled by application of a monitoring condition with a review of the resource consent if the risk of harm is shown to exist and be significant."

<sup>19</sup> *Aquamarine Limited v Southland Regional Council* 3 NZED1 (C126/97) at 141; recently endorsed in *Independent News v Manukau City Council* A103/03.

<sup>20</sup> *North Shore City Council v Auckland Regional Council* [1997], NZRMA 59 at 93; *NZ Rail Ltd v Marlborough District Council* [1994] NZRMA 70 HC at 72.

<sup>21</sup> *Aquamarine Limited* at 141.

<sup>22</sup> Cowper, opening submissions for Mighty River Power, paragraph 4.6.

<sup>23</sup> *NZ Rail Ltd v Marlborough District Council* (1994) NZRMA 70 HC at 85.

<sup>24</sup> *NZ Rail Ltd* at 86.

<sup>25</sup> [2003] 7 NZRMA 316.

<sup>26</sup> A71/01

<sup>27</sup> A146/01 at pages 20-21.

<sup>28</sup> [2000] 7 NZRMA 289 at 323.]

## APPENDIX 2

### EXTRACTS FROM *ELDAMOS*<sup>49</sup> AND *LONG BAY*<sup>50</sup> DECISIONS

#### Eldamos

- "A. An **objective** in a district plan is to be evaluated by the extent to which:
- 1 it is the most appropriate way to achieve the purpose of the Act (s32(3)(a)); and
  - 2 it assists the territorial authority to carry out its functions in order to achieve the purpose of the Act (s72); and
  - 3 it is in accordance with the provisions of Part 2 (s74(1)).
- B. A **policy, rule, or other method** in a district plan is to be evaluated by whether:
- 1 it is the most appropriate way to achieve the objectives of the plan (s32(3)(b)); and
  - 2 it assists the territorial authority to carry out its functions in order to achieve the purpose of the Act (s72);
  - 3 it is in accordance with the provisions of Part 2 (s74(1)); and
  - 4 (if a rule) it achieves the objectives and policies of the plan (s76(1)(b))." [Emphasis added]

#### Long Bay

- "A. General requirements
1. A district plan (change) should be designed to **accord with**, and assist the territorial authority **to carry out** - its functions [as described in section 31 of the Act] so as to achieve, the purpose of the Act. [Sections 72 and 74(1)]
  2. When preparing its district plan (change) the territorial authority **must give effect to** any national policy statement or New Zealand Coastal Policy Statement. [Section 75(3)(a) and (b)]
  3. When preparing its district plan (change) the territorial authority shall:
    - (a) **have regard to** any proposed regional policy statement; [Section 74(2)]
    - (b) **not be inconsistent with** any operative regional policy statement. [Section 75(3)(c)]

<sup>49</sup> *Eldamos Investments Limited v Gisborne District Council* (W47/05) at paragraph [128].

<sup>50</sup> *Long Bay-Okura Great Park Society Incorporated v North Shore City Council* (A78/08) at paragraph [34].

4. In relation to regional plans:
  - (a) the district plan (change) must **not be inconsistent with an** operative regional plan for any matter specified in section 30(1) [or a water conservation order]; [Section 75(5)] and
  - (b) **must have regard to** any proposed regional plan on any matter of regional significance etc; [Section 74(2)(a)]
5. When preparing its district plan (change) the territorial authority must also:
  - **have regard to** any relevant management plans and strategies under other Acts, and to any relevant entry in the Historic Places Register and to various fisheries regulations; and to consistency with plans and proposed plans of adjacent territorial authorities; [Section 74(2)(b)]
  - **take into account any** relevant planning document recognised by an iwi authority; and
  - not have regard to trade competition; [Section 74(3)]
6. The district plan (change) must be prepared **in accordance with any** regulation (there are none at present); [Section 74(1)]
7. The formal requirement that a district plan (change) must also state its objectives, policies and the rules (if any) and may state other matters. [Section 75(2)]
- B. Objectives [the section 32 test for objectives]
8. Each proposed objective in a district plan (change) is **to be evaluated** by the extent to which it is the most appropriate way to achieve the purpose of the Act. [Section 32(3)(a)]
- C. Policies and methods (including rules) [the section 32 test for policies and rules]
9. The policies are to **implement** the objectives, and the rules (if any) are to **implement** the policies; [Section 75(1)(b) and (c); (also section 76(1))]
10. Each proposed policy or method (including each rule) is to be examined, **having regard to its efficiency and effectiveness**, as to whether it is the most appropriate method for achieving the objectives of the district plan **taking into account**: [Section 32(3)(a)]
  - (a) the benefits and costs of the proposed policies and methods (including rules); and
  - (b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods. [Section 32(4)]

D. Rules

11. In making a rule the territorial authority must **have regard to** the actual or potential effect of activities on the environment. [Section 76(3)]

...."

[Footnotes omitted]

## APPENDIX 3

### OVERVIEW OF TE WAKA WIND FARM PROJECT

#### INTRODUCTION

1. The Te Waka project is Stage 2 of Unison's overall wind farm development proposal for the Titiokura and Te Waka ranges, located near the village of Te Pohue and some 35km north-west of Napier city.
2. The Stage 1 Unison Project, named Titiokura, comprises 15 (3 MW) turbines and a substation on the north side of State Highway 5 in the Titiokura Range. Resource consent was granted for Titiokura by both the Hastings District Council ("**Council**") and, on appeal, by the Environment Court.

#### TE WAKA (37 TURBINE) PROPOSAL - FIRST ENVIRONMENT COURT DECISION

3. The Stage 2 project, named Te Waka, originally involved 37 (3 MW) turbines on the south side of SH 5 in the Te Waka Range.
4. Resource consent was granted for this proposal by the Council in 2006. However, that decision was overturned by the Environment Court (Judge Thompson's division) on appeal in 2007.
5. The Court's main reasons for declining consent were in relation to landscape and Maori issues.
6. By way of background to those findings, the public participation process leading to the promulgation of the **operative** Hastings District Plan expressly considered the location and extent of the areas classified as outstanding natural landscapes throughout the district.
7. For the Te Waka and Titiokura ranges, the **notified** version of the plan proposed an extensive outstanding natural landscape area classified as "ONF 7". This area encompassed part of the Te Waka wind farm application site.
8. During the public submission process, the extent of the ONF 7 classification was strongly opposed. After hearing expert and lay evidence and submissions on proposed ONF 7, (including as to landscape and Maori issues), Council decided to substantially reduce the extent of ONF 7 because Council:

- Did not accept that the Te Waka site and surrounding areas are outstanding natural landscapes for the purposes of section 6(b) of the RMA; and
  - Did accept that the Te Waka site and surrounding areas have very good potential for wind farms.
9. As this decision was not appealed to the Environment Court, despite the opportunity for submitters to do so, the **operative** district plan contains no outstanding landscape classification over the Te Waka site.
10. In reliance on the operative plan, and the various favourable assessments of the level of potential environmental effects, Unison made a resource application for the Te Waka (37 turbine) project.
11. It was common ground at the first Environment Court hearing that the Te Waka site is not identified in the operative district plan, or any other statutory instrument, as an outstanding natural landscape. Nonetheless, Judge Thompson's division effectively overrode the operative plan by reinstating the full ONF 7 classification as follows:
- "[108] ... the area identified in the original isthmus report (and in the proposed district plan as notified) as ONF7 is an outstanding natural feature or landscape."
12. On that basis, the Court decided that the Te Waka (37 turbine) proposal was located in an outstanding natural landscape and as such would cause significant landscape effects. In other words, the appeal against the council's decision to grant consent for the wind farm was used by opponents as a collateral (back door) challenge to the operative plan notwithstanding they did not appeal the Council's original plan decision some several years before the Te Waka appeal.
13. While Unison appealed the decision of Judge Thompson's division to the High Court, Potter J upheld that decision and effectively determined that regardless of the provisions of an operative plan, the Environment Court is entitled to make findings on Part 2 Matters even if that effectively overrides the operative plan.

#### **CALL-IN OF TE WAKA (34 TURBINE) PROPOSAL AND SECOND ENVIRONMENT COURT DECISION**

14. Unison subsequently decided to:

- Amend its Te Waka proposal by reducing the number of turbines from 37 to 34 in order to assuage concerns over landscape and Maori issues (with a consequent loss of enough renewable wind energy to generate the equivalent electricity for some 3,000 homes per annum); and
  - Seek that the amended proposal be called-in by the Minister for the Environment under the RMA.
15. On 22 January 2008, the (then) Minister for the Environment issued his direction to call in the Te Waka wind farm application and directed that the application be heard by the Environment Court. The Ministerial direction to recognise the wind farm application as a matter of national significance relevant to New Zealand's international obligations to the global environment was not challenged in any court of competent jurisdiction.
16. The second Environment Court hearing (by Principal Environment Judge Bollard's division) was held over two weeks in December 2008 and the Court's decision to decline resource consent was notified on 23 February 2009. There were several 'themes' within the decision, some of which are addressed below.

#### **Wind farm benefits**

17. While there was a challenge to there being benefits from the proposed wind farm, the Court made positive findings for Unison in relation to:
- National benefits (including efficiency, security of supply, climate change, greenhouse gas emission reductions and economic benefits).
  - Renewable energy benefits.
  - The assessment of alternatives confirming the Te Waka site as a very good wind resource.
  - Minor traffic effects.
  - Minor geotechnical and earthworks effects.
  - Minor ecological effects.

### Climate Change Considerations only a Section 7 "Other Matter"

18. In undertaking its overall evaluation of the Te Waka project under Part 2 of the RMA, the Environment Court stated:

"[156] The benefits to be derived from the use and level of renewable energy is a matter to which **particular regard** is to be paid under s.7(j), along with kaitiakitanga (from the Maori perspective) under s.7(a). However, we are required as well to **recognise and provide for** Maori values under s.6(e) as a matter of national importance, **against the fact that no provision is contained in s.6 in relation to the use and development of renewable energy and the country's needs...**". [Emphasis added]

19. Thus, in effectively taking a hierarchical approach to Part 2, the Environment Court effectively determined that any section 6 matter, for example a local landscape such as the Te Waka site (not recognised as such in the operative plan), trumps climate change considerations.

### Weighting for Proposals of National Significance Under The RMA

20. In making its decision on the called-in application, the Court was directed<sup>51</sup> under the RMA to "have regard to" the following substantive sets of considerations:

- The Minister's reasons for calling-in the Te Waka wind farm application under section 141B.
- The section 104 considerations.<sup>52</sup>

21. As noted, the Minister called-in the application because of its national significance.

22. The Environment Court decided:

"[155] Under s.150AA(6)(b) we are required to "have regard to the Minister's reasons for calling the matter in under section 141b", and that we have anxiously done. **The legislative directive, however, is to have regard to as distinct from (say) to take into account, etc.**" [Emphasis added]

23. However, the Court did not, with respect, address the fact that under section 150AA(6)(c), the legislative directive in relation to section 104 (and therefore Part 2) is exactly the same - to "have regard to".

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<sup>51</sup> By section 150AA(6)(a) of the RMA.

<sup>52</sup> The effect of section 150AA(6)(c) of the RMA.

## Relationship Between an Operative Plan and Part 2 of The RMA

24. The various court decisions on the Te Waka project confirm that the public cannot safely place reliance on the provisions of an operative plan. This is reinforced by the clear pause taken by the Principal Environment Judge before effectively overriding the operative plan:

"[125] ... we would add that we do not arrive at this conclusion without a measure of anxiety, having regard to the district plan with its background of change as to the limits of ONF 7."

25. This position is to be contrasted with the following statement of the Chief Justice in the Supreme Court case of *Westfield (New Zealand) Limited v North Shore City Council*:

"[10] The district plan is key to the Act's purpose of enabling "people and communities to provide for their social, economic, and cultural well being". It is arrived at through a participatory process, including through appeal to the Environment Court. The plan has legislative status. People and communities can order their lives under it with some assurance. A local authority is required by s 84 of the act to observe and enforce the observance of the policy statement or plan adopted by it. A district plan is a frame within which resource consent has to be assessed."

## APPENDIX 4

### NPS PROVISIONS SOUGHT BY GENESIS ENERGY

#### Proposed National Policy Statement for Renewable Electricity Generation

##### Preamble

This national policy statement sets out an objective and policies to enable the sustainable management of renewable electricity generation under the Resource Management Act 1991 ('the Act').

New Zealand's energy demand has been growing steadily and is forecast to continue to grow. In October 2007 the government adopted the New Zealand Energy Strategy, which states that New Zealand must confront two major energy challenges as it meets growing energy demand. The first is to respond to the risks of climate change by reducing greenhouse gas emissions caused by the production and use of energy. The second is to deliver clean, secure, affordable energy while treating the environment responsibly.

The contribution of renewable electricity generation, regardless of scale, towards addressing the effects of climate change plays a vital role in the wellbeing of New Zealand, its people and the environment. In considering the risks and opportunities associated with various electricity futures, the government has determined that 90 per cent of electricity generated in New Zealand should be derived from renewable energy sources by 2025 (based on delivered electricity in an average hydrological year).

Development that increases renewable electricity generation capacity can, however, have environmental effects that span local, regional and national scales, often with adverse effects manifesting locally and positive effects manifesting nationally. In some instances the benefits of renewable electricity generation can compete with matters of national importance as set out in section 6 of the Act, and with matters to which decision-makers are required to have particular regard under section 7 of the Act. In particular, the natural resources from which electricity is generated can coincide with areas of significant natural character, significant amenity values, historic heritage, outstanding natural features and landscapes, significant indigenous vegetation and significant habitats of indigenous fauna. Adopting a nationally consistent approach to balancing the competing values associated with the development of New Zealand's renewable energy resources will provide greater certainty to decision-makers, applicants, and the wider community.

##### Title

This national policy statement may be cited as the National Policy Statement for Renewable Electricity Generation.

##### Commencement

This national policy statement comes into force on the day after which it is notified in the Gazette.

**Matter of national significance**

The matter of national significance and importance to which this national policy statement applies, and in respect of which decision-makers shall recognise and provide for, is the need to develop, upgrade, maintain and operate renewable electricity generation activities throughout New Zealand.”

**Objective**

To recognise the national significance and importance 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).

**Recognising the national significance and importance of the benefits of renewable electricity generation activities****Policy 1**

The benefits of renewable electricity generation activities, at any scale, are of national significance and importance. Decision-makers shall recognise and provide for ~~must have particular regard to~~ the global, national, regional and local benefits relevant to renewable electricity 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;
- iii. the relative degree of reversibility of adverse environmental effects associated with proposed generation technologies;
- iv. reducing transmission losses and dependence on the national grid through locating electricity generation close to electricity demand centres;
- v. reliability of generation including insulation from major external production cost variability;
- vi. development benefits in the form of industry development, including research, manufacturing, installation and distribution, and maintenance of facilities;
- vii. the extent to which the renewable electricity generation activity does not utilise finite resources;
- viii. the extent to which the renewable electricity generation activity involves minimal displacement of other productive uses of land; and
- ix. the extent to which the renewable electricity generation activity uses an energy resource without affecting that resource in any meaningful way.

**Acknowledging the practical constraints associated with the development, upgrading, maintenance and operation of new and existing renewable electricity generation activities****Policy 2**

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.

**~~Having regard to the relative reversibility of adverse effects associated with particular generation types~~**

**~~Policy 3~~**

~~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.~~

**Enabling identification of renewable electricity generation possibilities**

**Policy 43**

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.

**Supporting small and community-scale renewable electricity generation**

**Policy 54**

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.

**Identifying benefits of renewable electricity generation in policy statement and plans**

**Policy 5**

In accordance with section 55(2A)(b) of the Act, and within two years of approval of this national policy statement, local authorities are to process under clause 16 of Schedule 1 of the Act a plan change or review to introduce objectives, policies and assessment criteria identifying the benefits listed in policy 1 of this national policy statement."

**Protecting renewable electricity generation activities from reverse sensitivity effects**

**Policy 6**

Decision-makers must manage new third party activities to ensure that the reasonable operation and maintenance needs of consented and existing renewable electricity generation activities are not compromised.

**Giving effect to the national policy statement despite any other national policy statement**

**Policy 7**

In decisions involving renewable sources of energy, decision-makers must give effect to the provisions of this national policy statement, despite the provisions of any other national policy statement.

**Interpretation**

In this national policy statement, unless the context otherwise requires:

“**Act**” means the Resource Management Act 1991.

“**Application**” means any application for resource consent or consents or application under section 127 of the Act. Applicant has the corresponding meaning.

**“Decision-makers”** means all persons exercising functions and powers under the Act.

**“Local electricity distribution network”** means the system of electricity conveyance that connects individual electricity users with the national grid and electricity generation facilities. **“National grid”** means the assets used or owned by Transpower NZ Limited.

**“Renewable electricity generation”** means generation of electricity from solar, wind, hydro, geothermal, biomass, tidal, wave, or ocean currents resources.

**“Renewable electricity generation activities”** means the construction, operation and maintenance of structures associated with the generation of renewable electricity. This includes small and community-scale distributed renewable generation activities and the system of electricity conveyance required to convey electricity to the local electricity distribution network and/or the national grid.

**“Small and community-scale distributed renewable electricity generation”** means renewable electricity generation projects with an installed electricity generation capacity of less than four megawatts and excludes offshore wind, tidal and wave generation.

#### **Explanatory note**

*This note is not part of the national policy statement but is intended to indicate its general effect.*

This national policy statement comes into force on the day after which it is notified in the Gazette. It provides that renewable electricity generation is a matter of national significance under the Resource Management Act 1991.

This national policy statement is to be applied by all persons exercising powers and functions under the Act. The objective and policies are intended to guide applicants and decision-makers when making applications for resource consent, in making decisions on the notification and determination of resource consent applications, in drafting policy statements and plans that relate to renewable electricity generation activities, and when exercising other powers under the Act.

The national policy statement requires local authorities to give effect to its provisions in plans made under the Resource Management Act 1991 by initiating a plan change, proposed plan or variation by 13 March 2012.

