IN THE MATTER of the Resource Management Act 1991

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IN THE MATTER of submissions by TrustPower Limited on the Proposed One Plan – Water Hearing

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LEGAL SUBMISSIONS ON BEHALF OF TRUSTPOWER LIMITED

Introduction

1. These submissions and the evidence to be presented are on behalf of TrustPower Limited in respect of the Water Hearing topic for the Horizons Regional Council's Proposed One Plan ("Proposed Plan").

2. TrustPower's independent planning consultant, Mr Robert Schofield, will present expert evidence to relation to the planning aspects of TrustPower's submissions on provisions covered by the Water Hearing topic.[1] Mr Schofield has prepared two statements of evidence as follows:

   (a) Evidence dated 19 October 2009 which addresses the Officers' Planning and Recommendations Report dated August 2009; and

   (b) Supplementary evidence dated 12 February 2010 regarding the Officers' Supplementary Planning and Recommendations Report dated November 2009.

3. The following introductory statements have been presented at previous hearings for the Proposed Plan and are briefly repeated today so as to provide a context for TrustPower's interest and involvement in the plan's development:

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[1] Mr Schofield will be familiar to this Hearing Panel having already prepared planning evidence which has either been presented or tabled in relation to the hearing topics: Overall Plan, Land, Biodiversity, Te Ao Maori, Energy, Coast and the General Hearing (which covered Landscapes and Natural Character, Administration and Finance and an addendum to the Energy topic). Evidence has also been prepared for TrustPower by other independent experts, being Mr Matiu Park an ecologist at Boffa Miskell in Wellington who prepared two statements of evidence dated 11 July 2008 and 1 December 2008 regarding the Biodiversity provisions; and Mr Stephen Fuller also an ecologist at Boffa Miskell in Wellington who prepared evidence dated 1 December 2008 regarding the Biodiversity provisions.

(a) TrustPower is the fourth largest retailer and fifth largest generator of electricity in New Zealand. Its head office is based in Tauranga in the Bay of Plenty, but it has eighteen hydro electricity generation schemes throughout the country, the Tararua Wind Farm in the Horizons region and the Myponga Wind Farm in Victoria, Australia.[2]

(b) TrustPower is also in the process of obtaining resource consents to develop two new hydroelectric power schemes in New Zealand (being the Wairau HEPS in Blenheim and the Arnold HEPS on the South Island's west coast). As a result of these developments the company has particularly relevant practical experience in terms of the difficulties faced under the RMA in establishing new energy infrastructure which utilises our country's water resources.

(c) In general terms TrustPower has an interest in ensuring the development of regional policy and planning provisions which recognise the value of existing and future potential renewable energy developments in the region. This policy direction is clearly supported by Government initiatives on the importance of renewable energy resources[3] and is reflected in legislation (eg the benefits to be derived from the use and development of renewable energy (s7(j) RMA)). These matters have already been addressed in detail by TrustPower and other electricity generators and are not repeated here.

(d) In addition, it is critical from TrustPower's point of view that the decision making around submissions on the Proposed Plan reflect the importance of the sustainable management of regionally (and nationally) important infrastructure as significant physical resources. The importance of electricity in New Zealand in this context has been confirmed by the Courts.[4]

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2 More detailed evidence regarding TrustPower and its generation portfolio was presented to this Hearing Panel by Mr Kerry Watson, the company's Manager – Environment at the Overall Plan hearing in July 2008.

3 For example the New Zealand Energy Strategy to 2050 and New Zealand Energy Efficiency and Conservation Strategy (both released in 2007) and the development of a National Policy Statement on Renewable Electricity Generation (publicly notified on 6 September 2008 and presently before a Board of Inquiry).

4 *Rotokawa Joint Venture Ltd and Mighty River Power Ltd v Waikato Regional Council* (A41/07) at [422]:

> *"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."*

Genesis Power Limited v Franklin District Council [2005] NZRMA 541:

> *"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."*

4. As this Hearing Panel will be aware the aforementioned matters are given express recognition through the General Hearing Panel's Provisional Determination[5] regarding Chapter 3, the provisions of which are stated to provide "*broad policy guidance for managing*" infrastructure and energy (among other activities). Relevant passages from the introductory section to the chapter and Objectives are highlighted below. It is important, in my submission, to ensure that these matters are afforded appropriate weight when formulating the regional plan provisions particularly in light of the mandatory statutory requirement for regional plans to "give effect" to the regional policy statement of which Chapter 3 forms a significant part[6].

> ***"3.1 Scope and Background***
>
> ***Infrastructure and other physical resources of regional or national importance***
>
> *...The establishment, operation, maintenance and upgrading of infrastructure...is critical to the economic wellbeing of the Region and the nation.*
> ...
>
> ***Energy***
>
> *Access to reliable and sustainable energy supplies is essential to the way society function. People and communities rely on energy for transportation, and for everyday activities at home and at work.*
>
> *...The Government has made a commitment to reduce New Zealand's greenhouse gas emissions and to achieve increasingly sustainable energy use. This commitment is expressed by inclusion of sections 7(ba), 7(i) and 7(j) in the RMA in 2004 and in national strategy and policy documents dealing with energy, renewable energy, energy efficiency and conservation and electricity transmission.*
>
> *...Collectively these Government policy instruments seek...an increase in the supply of energy from renewable energy resources.*
>
> *Given these national policy instruments, the presence of significant renewable energy resources with potential for development in the Region, the Regional Council recognises it needs to provide for the development of renewable energy resources and the use renewable energy.*
>
> *The Region has potential for the development of renewable energy facilities, given the areas with high wind speeds, the potential to develop hydroelectricity resources, and some potential for the use of wave energy around the coastline.*

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5 The Council's website states that the Provisional Determination reflects "*the current thinking of the General Hearing Panel to enable other Hearing Panels, officers and submitters to understand the likely form of the provisions...so as to enable an integrated planning instrument at the conclusion of the entire hearing process.*"

6 Refer section 63(3) RMA.

Objective 3-1 Infrastructure and other physical resources of regional or national importance

To have particular regard to the benefits of infrastructure and other physical resources of regional or national importance by enabling their establishment, operation, maintenance or upgrading.

...

Objective 3-1A: Energy

...an increase in the use of renewable energy resources within the Region."

5. In relation to the Water Hearing topic[7] TrustPower is most concerned about the proposed policy framework as it impacts (particularly incrementally) on new infrastructure development, such as:

   (a) The proposed "order of priority" for water allocation (Policy 15.5(b));

   (b) The use of common expiry dates and review clauses (Policy 15.5 and related Policy 11A-5);

   (c) The setting of highly conservative and environmentally focused minimum flows and allocations limits (Schedules B and Ba) combined with the non-complying activity status of water permits outside those limits (Rule 15-6); and

   (d) The restrictions to apply to water use in times of minimum flow (Policy 15-11).

6. In relation to these and other provisions, which Mr Schofield will address in his evidence, TrustPower's overall position (and what is seeks) is for the water management and allocation regime to strike an appropriate balance between competing considerations so as to ensure that the sustainable management purpose of the RMA is achieved.

Legal issues

7. I propose to address you specifically in relation to legal issues which arise from TrustPower's submissions and particular Officer recommendations in respect of the

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[7] These are:
- Chapter 6 – Water
- Chapter 13 - Discharges to Land and Water
- Chapter 15 – Takes, Uses and Diversions of Water and Bores
- Chapter 16 – Structures and Activities Involving Beds of Rivers, Lakes and Artificial Watercourses and Damming
- Schedule B – Surface Water Quantity
- Schedule C – Groundwater Management Zones
- Schedule D - Surface Water Management Zones and Standards

provisions concerning priority in water allocation decisions and the use of common expiry dates and review clauses.

Priority Provision - Policy 15-5(b)

8. As stated by Mr Schofield TrustPower opposes the priority for water allocation in Policy 15.5(b)[8] which reads (pink version):

"*...At the time of **consent review or expiry** the Regional Council will **allocate water resources**...in a manner which ...*

*(b) allows takes in the following **order of priority**:*

(i) takes permitted under Rule 15-1 of this Plan and takes for the purpose of fire-fighting

(ia) resource consents for takes or portions of takes for public water supplies which are predominantly for domestic use, that are due for review or that are expiring

(ii) current resource consents that are due for review, taking into account records of past actual water usage

(iii) current resource consents that are expiring and have been reapplied for at least 6 months prior to the expiry date for that consent, taking into account records of past actual water usage

(iv) new resource consent applications for essential takes, being takes providing for the reasonable need for domestic or stock drinking water ~~use~~, hospitals, ~~and freezing works~~ other facilities providing medical treatment, marae, schools or other education facilities, defence facilities or correction facilities

(v) all other new resource consent applications based on the date of lodgement of the application." (emphasis added)

9. The policy attempts to rank or prioritise the order in which resource consents (whether on review, renewal or for new takes) involving the same resource would be considered on their merits (ie priority in time).

(a) Within the categories for existing consents (ie clauses (ia), (ii) and (iii)), takes for public water supplies are given priority over all other types of activities;

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[8] Refer paragraph 7.10 of primary evidence.

(b) Within the categories for new takes (ie clauses (iv) and (v)), those deemed to be 'essential takes' are given priority over all other types of activities; and

(c) All existing consents are generally prioritised above applications for new water allocations.

10. Policy 15-5(b) seeks to displace the legislative intent of the RMA to deal with competing applications on a first in first served basis and is otherwise inconsistent with the priority renewal provisions of the RMA (refer ss124A-C).

First in first served approach

11. It is TrustPower's position that the first in first served approach to water allocation is a valid approach which is supported by relevant caselaw.[9] In this respect TrustPower agrees with the summary of the law regarding the first in first served test set out in Meridian Energy's legal submission (paragraphs 24 to 28) which I do not propose to repeat, except to note the following points:

(a) When the High Court considered this issue in the *Aoraki Water Trust* decision[10] (that case concerning the issue of derogation of grant and to which TrustPower was a party to the proceedings), the High Court looked at the *Fleetwing Farms* decision and agreed with counsel for Meridian Energy that the Court of Appeal's adoption of the first come, first served approach where there is competition for the same resource would be pointless unless it meant that the first permit in time of grant also had priority in terms of the right to use the resource. It considered that this conclusion was reinforced by the observation in *Fleetwing Farms* that if another applicant applies for a similar resource consent while the first application remains undecided, the consent authority is not justified in comparing one against the other or failing to give a timely decision on the first on its merits and without regard to the other.

(b) The test of entitlement to priority of hearing has been confirmed by the Court of Appeal (in the *Central Plains* cases) as the first to file a complete application.

12. In cases involving applications lodged at different times but for or involving the same resource there is no doubt at all, I submit, that the first "complete" application in time must be considered first on its merits.

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[9] In particular the Court of Appeal decisions in *Fleetwing Farms Limited v Marlborough District Council* [1997] NZRMA 385, *Central Plans Water rust v Ngai Tahu Properties Limited* [2008] NZRMA 200 and *Central Plains Water Trust v Synlait Limited* [2009] NZCA 609.

[10] *Aoraki Water Trust v Meridian Energy Limited* [2005] 2 NZLR 268.

Priority renewal under the RMA

13. In terms of Policy 15-5(b) prioritising the consideration of the renewal of all existing consents over new water allocations, this matter is already governed by the priority renewal provisions of the RMA which, I submit, represent a legitimate statutory exception to the first in first served approach (refer ss124A-C which are set out in full in the Attachment to these submissions).

14. Under this framework, the consent authority is required to determine certain renewal applications prior to new applications for the same resource in circumstances where the new application was lodged before the renewal. Clause (iii) of Policy 15-5(b) seeks to subrogate the application of these RMA provisions by:

    (a) Narrowing the time limit by which existing consent holders must lodge their any renewal application (ie the Proposed Plan requires such applications to be made at least 6 months prior to the expiry date whereas the RMA allows for applications to be made up to 3 months before expiry, refer s124C(5)); and

    (b) Excluding reference to express statutory criteria (ie the Proposed Plan identifies the records of past actual water usage as being the only relevant factor to consider whereas the RMA provides for consideration of the efficiency of the use of the resource, the use of industry good practice and the consent holder's compliance record – refer s124B(4)).

15. If Council had intended to exclude the application of the priority renewal provisions from the Proposed Plan it could have done so by express wording. I submit that as it has not done so the Council should not seek to develop water allocation policy inconsistent with the process provided for under these provisions.

Priority other than in time

16. If the policy is in fact intended by the drafters to express a preference for certain types of activities (as opposed to priority in time) and/or the Hearing Panel is minded to re-draft the provision in that form, Mr Schofield's evidence suggests that "*in some cases, the purpose of the Act may be best served through providing water to a small range of users*" and that the policy "*should also take into account the value of investments made by existing consent holders*".

17. In terms of the types of water uses which ought to be given preference, TrustPower is concerned that public water supply and the takes deemed to be 'essential' are the only water uses which are recognised as being of value within the policy. I submit that these types of activities have no particular status in terms of Part 2 of the RMA,

that is they are not listed in sections 5 to 8. Other water uses, particularly those for renewable energy electricity generation which are reflected as a particular matter in Part 2, are also important and should be appropriately recognised in any priority provision for water allocation.

Consent Expiry Dates and Review Clauses – Policy 15-5

18. In terms of the use of common expiry dates TrustPower supports the approach whereby consents for infrastructure projects involving large scale investments should be recognised as situations where consent reviews are more appropriate than the use of common expiry dates. Mr Schofield's evidence acknowledges that this approach would be consistent with Environment Waikato's Regional Plan (Variation 6) which does not require water uses for or associated with hydroelectricity generation to be subject to common expiry dates.

19. In terms of Policy 15-5 (and related Policy 11A-5 regarding consent durations), despite specific guidance being given to justify longer (in increments of 10 years only), the presumption is in favour of a 10 year term applying to water permits. The related consent duration policy reads:

"Policy ~~2-2~~ 11A-5: Consent durations

...

(b) Resource consent^ ~~expiry dates~~ durations for applications required under sections 13, 14 and 15 of the RMA will generally be set to the ~~closest~~ next common catchment expiry ~~or review date to the~~ date identified in ~~(a)~~ Table 11A.1. The dates listed in Table 11A.1 show the initial expiry or review dates for consents within the catchment. Future dates for expiry or review of consents within that catchment shall occur again every 10 years thereafter. Consents granted within three years prior to the relevant common catchment expiry date may be granted with a duration to align with the second common expiry date (that is the number of years up to the next expiry date plus 10 years). Dates may also be extended in 10 year increments where a term longer than 10 years can be granted after considering the following criteria:*

(i) the extent to which an activity is carried out in accordance with a recognised code of practice, environmental standard or good practice guideline
(ii) the most appropriate balance between environmental protection and investment by the applicant
(iii) the provision of s128 review opportunities to enable matters of contention to be periodically reviewed in light of monitoring and compliance information
(iv) whether the activity is infrastructure^; water, sewage or stormwater treatment plants and facilities; or publicly accessible solid waste facilities including landfills*, transfer stations and resource recovery facilities.*

For a consent which is granted for a duration longer than 10 years, review of the consent shall occur, as a minimum, on the review date in Table 11A.1 and every 10 years thereafter until consent expiry. Extra review dates may be set in accordance with Policy 11A-6."

20. The concern held by TrustPower, which I share, is that this policy effectively imposes a prescriptive approach to the setting of consent terms at the expense of a proper assessment on the merits in each individual case. It also fails to have appropriate regard to the investment certainty that entities such as electricity generation companies require when investing significant resources in the development and operation of power schemes.

21. In my submission the position of TrustPower is reinforced by the decision of the High Court in *Genesis Power Limited v Manawatu-Wanganui Regional Council*[11] (recently upheld by the Court of Appeal[12]). That case concerned the renewal of resource consents associated with the Tongariro Power Development Scheme operated by Genesis. Against a background of Maori concerns the Environment Court imposed a 10 year term in order to provide for "*a meeting of minds between the parties on what is a difficult and complex issue*". Genesis appealed to the High Court.

22. In considering the grounds of appeal, the High Court reviewed various cases regarding this issue, and in particular, whether it is more appropriate to impose a limited duration of consent as opposed to a review provision enabling conditions to be revisited to address potential uncertainties as might arise during the implementation of the consent.

23. Of relevance in this matter is the High Court's conclusion on the issue of whether the Environment Court misconstrued the consent review process. The Court said:

> "*In a situation where adverse effects on the Maori respondents have been identified, but appropriate measures to mitigate them have not,* ***to limit the resource consents to 10 years is indeed to wield a blunt instrument****.*
>
> *I am not aware of the cost to Genesis on the one hand, and to affected Maori on the other hand, of the resource consent process through the Regional Councils' joint hearing, and on to the Environment Court. I am very concerned that the Environment Court's decision visits those costs on the parties all over again in a decade's time*".

24. The common expiry dates approach, it is submitted, is just the sort of "blunt instrument" that the High Court refers to and is opposed by TrustPower.

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11 [2006] NZRMA 536.

12 [2009] NZCA 222.

Review of consents

25. It is appropriate at this point that I address the issue of review of consents, a matter expressly provided for in Policy 15-5(b). A residual concern for TrustPower is that the Policy appears intended to enable the Council through a consent review to reduce the consented allocation for the purposes of granting that resource to another user.

26. In my submission there is no express statutory power for such an approach which would amount to a derogation of the existing consent holder's rights contrary to established case law principles. As confirmed in the *Aoraki Water Trust* case any proposal to affect existing resource consents must follow the relevant RMA processes carefully prescribed by Parliament:

> *"[52]... where Parliament has conferred power on a consent authority to interfere with an existing grant, it has acted expressly and for very limited purposes. Among those provisions are: the power to include in a regional plan a rule relating to maximum or minimum levels of flows or rates of use of water even though it may affect the exercise of existing consents (s68(7)); a power to review conditions of resource consent when a regional plan setting rules relating to maximum or minimal levels or flows or rates of use of water or minimum standards of water quality has been made operative and in the regional council's opinion, it is appropriate to review the permit conditions in order to enable the levels, flows, rates or standards set by the rule to be met (s128(1)(b)); a power to change or cancel a resource consent if, in the Environment Court's opinion, information made available to the consent authority by the applicant contains inaccuracies which materially influences the decision to grant the consent (s314(1)(f); and a power to apportion water where a regional council considers that there is a serious temporary shortage on its region or any part of its region (s329(1)."*

27. This position is reinforced by the restriction in section 30(4) of the RMA, relating to the establishment of rules in plans which allocate a natural resource, that such rules "*may not, during the term of an existing resource consent, allocate the amount of a resource that as already been allocated to the consent.*" It would be a perverse outcome for the Council to overcome this statutory bar through a consent review conducted in accordance with Policy 15-5(b).

Conclusion

28. While TrustPower generally supports the intention of the Proposed Plan and acknowledges the substantial progress made on a number of the infrastructure and energy provisions, it is concerned that particular aspects of the policy direction in the Water related chapters do not satisfactorily recognise and provide for the regional and national benefits of renewable energy generation, consistent with sections 5 and 7 of the RMA and government policy on renewable electricity generation. More particularly, plan provisions which actually or potentially affect investment certainty in significant assets do not promote the sustainable management of those physical

resources, and fail to allow communities to provide for their social and economic well-being, and therefore are contrary to Part 2 of the RMA.

29. I therefore urge the Committee to give serious consideration to the manner in which the Proposed Plan addresses natural and physical resource use and development issues for entities such as TrustPower, particularly given the region's potential renewable energy resources.

Dated 18 February 2010

Lara Burkhardt
Counsel for TrustPower Limited

Attachment

Priority Renewal Provisions

Section 124A - When sections 124B and 124C apply and when they do not apply

(1) Sections 124B and 124C apply to an application affected by section 124 if, when the application is made, the relevant plan has not allocated any of the natural resources used for the activity.

(2) Sections 124B and 124C also apply to an application affected by section 124 as follows:

(a) they apply if, when the application is made,

(i) the relevant plan has allocated some or all of the natural resources used for the activity to the same type of activity; and

(ii) the relevant plan does not expressly say that sections 124A to 124C do not apply; and

(b) they apply to the extent to which the amount of the resource sought by a person described in section 124B(1)(a) and (b) is equal to or smaller than the amount of the resource that

(i) is allocated to the same type of activity; and

(ii) is left after the deduction of every amount allocated to every other existing resource consent.

(3) Sections 124B and 124C do not apply to an application affected by section 124 if, when the application is made, the relevant plan expressly says that sections 124A to 124C do not apply.

Section 124B - Applications by existing holders of resource consents

(1) This section applies when

(a) a person holds an existing resource consent to undertake an activity under any of sections 12, 13, 14, and 15 using a natural resource; and

(b) the person makes an application affected by section 124; and

(c) the consent authority receives 1 or more other applications for a resource consent that

(i) are to undertake an activity using some or all of the natural resource to which the existing consent relates; and

(ii) could not be fully exercised until the expiry of the existing consent.

(2) The application described in subsection (1)(b) is entitled to priority over every application described in subsection (1)(c).

(3) The consent authority must determine the application described in subsection (1)(b) before it determines any application described in subsection (1)(c).

(4) The consent authority must determine an application described in subsection (1)(b) by applying all the relevant provisions of this Act and the following criteria:

(a) the efficiency of the person's use of the resource; and

(b) the use of industry good practice by the person; and

(c) if the person has been served with an enforcement order not later cancelled under section 321, or has been convicted of an offence under section 338,

(i) how many enforcement orders were served or convictions entered; and

(ii) how serious the enforcement orders or convictions were; and

(iii) how recently the enforcement orders were served or the convictions entered.

Section 124C - Applications by persons who are not existing holders of resource consents

(1) This section applies when

(a) a person makes an application for a resource consent to undertake an activity under any of sections 12, 13, 14, and 15 using a natural resource; and

(b) the person does not hold an existing consent for the same activity using some or all of the same natural resource; and

(c) a consent granted as a result of the application could not be fully exercised until the expiry of the consent described in section 124B(1)(a); and

(d) the person makes the application more than 3 months before the expiry of the consent described in section 124B(1)(a).

(2) The consent authority must

(a) hold the application without processing it; and

(b) notify the holder of the existing consent

(i) that the application has been received; and

(ii) that the holder may make an application affected by section 124.

(3) If the holder of the existing consent notifies the consent authority in writing that the holder does not propose to make an application affected by section 124, the consent authority must process and determine the application described in subsection (1)(a).

(4) If the holder of the existing consent does not make an application affected by section 124 more than 3 months before the expiry of the consent, the consent authority must process and determine the application described in subsection (1)(a).

(5) If the holder of the existing consent makes an application affected by section 124 more than 3 months before the expiry of the consent, the consent authority must hold the application described in subsection (1)(a) until the determination of the holder's application and any appeal.

(6) If the result of the determination of the holder's application and any appeal is that the holder's application affected by section 124 is granted, the application described in subsection (1)(a) lapses to the extent to which the use of the resource has been granted to the holder.