

IN THE MATTER of the Resource Management Act 1991
AND
IN THE MATTER of Proposed Manawatu-Wanganui
Regional One Plan

**LEGAL SUBMISSIONS ON BEHALF OF GENESIS ENERGY –
WATER CHAPTERS**

(18 FEBRUARY 2010)

I. INTRODUCTION

1. Genesis Energy has previously presented legal submissions and / or evidence in respect of:
 - (a) The Overall One Plan hearing (1 July 2008).
 - (b) Biodiversity (31 July 2008).
 - (c) Te Ao Māori (11 August 2008).
 - (d) Land (21 October 2008).
 - (e) Infrastructure Energy and Waste and Landscape and Natural Character (16 July 2009)
2. Genesis Energy generates electricity in the Manawatu Wanganui Region via a nationally significant physical resource, the Tongariro Power Scheme ("**TPS**").¹
3. Genesis Energy therefore has a direct and significant interest in ensuring that the water chapters² of the Proposed One Plan are consistent with the Resource Management Act 1991 ("**RMA**").
4. By way of overview, Genesis Energy:
 - (a) Generally supports the policy/plan approach for existing lawful hydro-electricity generation activities. As discussed in the Genesis Energy evidence, there is common ground with Council staff on key aspects of the proposed provisions. However, further changes are required in order to better integrate existing hydro-electricity generation into the allocation regime.
 - (b) Seeks that sources of potential future electricity generation are not unnecessarily restricted.
5. These submissions and the Genesis Energy evidence³ for this hearing address this approach and the rationale for the proposed amendments to the Water Chapters.

¹ Formerly known as TPD.

² Chapters 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 and Lakes, and Artificial Water Courses and Damming; Schedules B, C and D ("**Water Chapters**").

³ **Mr Robert Weir** (General Manager, Production, at Genesis Energy) provides a background to Genesis Energy, overviews the importance of electricity and the generation of electricity from renewable resources, and overviews the implications of the Proposed One Plan for Genesis Energy and the supply of electricity to New Zealand and the importance of the TPS.

Mr Jarrod Bowler (Environmental Manager, Renewable Energy, at Genesis Energy) provides an overview of TPS, details the hydrology of the TPS, and discusses the implications of the Proposed One Plan for Genesis Energy.

Mr Richard Matthews (Partner of Mitchell Partnerships) summarise the Genesis Energy submissions on the water related aspects of the Proposed One Plan, discuss the RMA

6. In relation to the procedural background to this hearing:
- (a) The original Council staff report was released in September 2009 (which made recommendations on the various submissions).
 - (b) The Genesis Energy evidence was lodged with Council in October 2009 which, among other things, proposed amendments to the Water Chapters.
 - (c) The supplementary staff report was released in November 2009 – it supported some of Genesis Energy's proposed amendments.
 - (d) Discussions between Genesis Energy and Council staff took place between November 2009 and February 2010.
 - (e) Genesis Energy has recently lodged supplementary evidence which proposes further amendments arising from discussions with Council staff (along with other refinements).

II. IMPORTANCE OF ELECTRICITY / TPS

7. The Genesis Energy legal submissions on the Overall One Plan (1 July 2008) set out:
- (a) The importance of electricity for New Zealand.⁴
 - (b) The important policy background promoting the use and development of renewable energy generation, including national policy instruments, and section 7(j) of the RMA.⁵
 - (c) The national significance of TPS⁶, as recognised by the Environment Court and superior courts.⁷

8. These themes are directly relevant for the Water Chapters.

III. RMA CONSIDERATIONS

9. The Genesis Energy Overall One Plan legal submissions also set out the RMA framework within which Council must make its decisions on the Proposed One Plan.⁸
10. Key features include:

framework within which to consider the Genesis Energy submissions, and sets out proposed amendments to the water chapters of the Proposed One Plan.

⁴ Paragraph 5 of Overall Plan Legal Submissions.

⁵ Paragraphs 6-16 of Overall Plan Legal Submissions.

⁶ Being a 'physical resource' (structure) - s2 RMA definition of 'natural and physical resource'.

⁷ Paragraphs 17-24 and 30-34 of Overall Plan Legal Submissions.

⁸ Paragraphs 25-29 of Overall Plan Legal Submissions.

- (a) The Proposed One Plan must include objectives and policies which reflect the enabling aspect of section 5.⁹
- (b) The need for Council to demonstrate that the objectives are the most appropriate way to achieve the purpose of the RMA, and that the policies, rules and methods are the most appropriate for achieving the objectives.¹⁰

IV. RECOGNISING EXISTING LAWFUL HYDRO-ELECTRICITY GENERATION

(a) Allocation regime and minimum flows

11. There is common ground with Council staff that existing lawful water allocations for hydro-electricity generation are not to be 'caught' by the minimum flows and core-water allocation framework.
12. This is appropriate given:
 - (a) The Genesis Energy resource consent activities form part of the existing environment.
 - (b) The TPS has been through a comprehensive and robust RMA process which has resulted in robust environmental minimum flow requirements.
 - (c) The national importance of TPS.
 - (d) The RMA principle of non-derogation.¹¹
13. However, Genesis Energy considers the proposed plan can be improved¹² to better reflect this position (as detailed in the evidence of Mr Matthews).¹³
14. While there is common ground on this approach, other provisions of the proposed plan have the potential to adversely affect existing lawful hydro-electricity generation activities. Thus, further changes to the Water Chapter provisions are necessary to provide clear direction that existing lawful hydro-

⁹ Paragraphs 26-27 of Overall Plan Legal Submissions.

¹⁰ Sections 32(3), 61 and 66 of the RMA.

¹¹ See, *Aoraki Water Trust v Meridian Energy Limited* [2005] 2 NZLR 268, for example:

"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."

¹² In particular, Policy 6-16(b) and Schedule B.

¹³ Matthews evidence - paragraphs 4.28A-4.29A and Appendix A.

electricity generation activities will continue and not be eroded by the Proposed One Plan allocation regime, as addressed in the evidence of Mr Matthews.¹⁴

(b) Protection of existing hydro-electricity takes

15. There is also common ground with Council staff that existing water allocation for hydro-electricity generation needs to be maintained and protected against water allocation volumes upstream of hydro-electricity generation infrastructure.
16. There is general agreement on the methods to give effect to this approach,¹⁵ as addressed by Messrs Bowler and Matthews.

(c) Provisions restricting existing infrastructure - review / activity status

17. Two aspects of the Proposed One Plan, however, have the potential to inappropriately restrict the TPS operations:
 - (a) Application of common expiry dates and review of existing hydro-electricity consents.
 - (b) Activity status for existing hydro-electricity generation activities.
18. It is inappropriate to apply the common expiry and review provisions to major infrastructure such as TPS:
 - (a) TPS has been through a comprehensive resource consent process resulting in the grant of 35 year consents (commencing on 1 December 2004).
 - (b) Existing lawful hydro-electricity generation is 'protected' within the minimum flow and core-allocation framework.
19. It is acknowledged that section 128(b) of the RMA enables a review of existing resource consents when:

"... a regional plan has been made operative which sets rules relating to the maximum or minimum levels of flows or rates of use of water ... and in the regional council's opinion it is appropriate to review the conditions of the permit in order to enable the levels, flows, rates, or standards set by the rule to be met."
20. However, there is common ground with Council staff that this section will not be triggered for the TPS consents on the Proposed One Plan becoming operative.
21. As to activity status, the Proposed One Plan could, via bundling, treat fresh resource consent applications for TPS as a non-complying activity.¹⁶ That potential uncertainty is clearly

¹⁴ For example, proposed amendments to Policies 6-15(b), 6-17(b), 15-10(b)(iv), 15-11(c), 15-5

¹⁵ Proposed insertion of a footnote to Schedule B – Table B1.

¹⁶ Matthews evidence – paragraph 4.41.

untenable and can be contrasted with the activity status for core-allocation takes.

22. Genesis Energy proposes amendments to the Proposed One Plan such that activities associated with the ongoing operation of TPS would be a controlled activity. This is appropriate as:

- (a) The TPS is a nationally significant physical resource.
- (b) The TPS will continue to operate in the long term. As noted by the Court of Appeal:¹⁷

"[44] I cannot see a credible basis for concluding that an appropriate duration for the consent was only ten years. It is, for instance, inconceivable that the Environment Court considered that the TPD should cease operating at the expiry of its ten-year consent."

"[28] ... It must be daunting to Genesis particularly given the costs involved in requiring Genesis to reapply for consent after ten years and the obvious importance of the TPD to New Zealand's hydro-electric power supply."

- (c) The controlled activity rule, as proposed by Genesis Energy,¹⁸ retains control over matters such as the volume and rate of water abstraction, measures to address adverse effects, and tāngata whenua values (among other things).

V. NEW HYDRO-ELECTRICITY GENERATION

23. Genesis Energy considers the Proposed One Plan should not unnecessarily restrict access to water resources for potential future renewable energy generation as:

- (a) The Manawatu-Wanganui region has an abundance of natural water resources which could be harnessed for hydro-electricity generation.
- (b) Part 2 of the RMA and government policy promote the use and development of renewable resources.

24. Genesis Energy therefore proposes amendments to the Proposed One Plan as set out in the evidence of Mr Matthews.

VI. WATER QUALITY

25. As will be addressed in the evidence, Genesis Energy also proposes amendments to the water quality provisions of the Proposed One Plan to reflect the special attributes of hydro-electricity generation activities.

VII. CONCLUSION

¹⁷ *Ngāti Rangī Trust v Genesis Power Limited* [2009] NZCA 222.

¹⁸ Refer Matthews evidence – paragraph 4.65.

26. The objectives of the Proposed One Plan must be the most appropriate way to achieve the purpose of the RMA.
27. Having regard to their efficiency and effectiveness, the policies, rules and other methods of the Proposed One Plan must be the most appropriate for achieving the objectives.
28. Ultimately, the Proposed One Plan must serve the purpose of the RMA.¹⁹
29. The amendments proposed by Genesis Energy, as detailed in the evidence of Mr Richard Matthews, more fully serve the purpose of the RMA than the notified plan (as recommended to be amended by Council staff).

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(18 February 2010)

¹⁹ Refer *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145 (HC) at 179; *Marlborough Ridge Ltd v Marlborough District Council* [1998] NZRMA 73.