Before Hearing Commissioners at Waikato Regional Council

I mua i te kaikōmihana ki te kaunihera o te rohe o Waikato

Under the Resource Management Act 1991
In the matter of Proposed Plan Change 1 to the Waikato Regional Plan and in the matter of Hearing Block 2

Between

Genesis Energy Limited

Submitter 74052

And

Waikato Regional Council

Consent Authority

Legal submissions of behalf of Genesis Energy Limited

13 June 2019

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May It Please the Hearing Panel:

<u>Summary</u>

1. Genesis Energy Limited (**Genesis** - submitter 74052) owns and operates the Tongariro Power Scheme (**TPS**) and the Huntly Power Station (**HPS**) within the Waikato Region, which are reliant on freshwater resources. The operation of the HPS includes discharges to the Waikato River as a result of onsite processes.[1]

2. Genesis seeks that Policy 10 is retained as notified. PC1 must give effect to the Waikato Regional Policy Statement (**RPS**) which requires provision for regionally significant infrastructure and regionally significant industry. The concern of other submitters that "provide for" sets an unqualified direction to decision makers and creates a presumption that consent will be granted is not supported by case law.

3. In respect of Policy 11, Genesis does not support an effects hierarchy being applied to the consideration of point source discharges, nor a requirement to offset residual adverse effects. The RMA is not a "no effects" statute, and the consent process enables consideration of the most appropriate response in the relevant circumstances.

4. The term referenced in PC1 is 'offset' but this has a specific meaning and is most widely used in the context of indigenous biodiversity. The definition of 'offset' in PC1 is more akin to environmental compensation, and Genesis submits the term should accordingly be changed from 'offset' to 'environmental compensation'.

5. Genesis supports the retention of the reference to 25 years in Policy 13 as this removes any uncertainty or debate as to what "a longer consent duration" actually means. Genesis opposes other submitters' relief that limit longer consent durations including through common catchment expiry dates. Applicants investing in regionally significant infrastructure and industry should be afforded the necessary certainty that they will receive longer consent durations if the proposal is consistent with achieving the water quality objectives for PC1.

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[1] Evidence in Chief of Mr Richard Matthews, dated 3 May 2019 at [24] – [25].

6. Genesis opposes point source discharge allocation as part of PC1. Any endeavours to do so this late in the process is arguably outside of the scope of PC1.

7. The evidence of Mr Matthews on behalf of Genesis is qualified in its support of the relevant policies for the Block 2 hearings, because it is dependent on the content of Table 3.11-1. Genesis' position is that a number of the additional attributes sought by submitters are not within scope of PC1.[2] This will be addressed as part of the Block 3 hearings.

<u>Introduction</u>

8. The HPS is operated under a comprehensive suite of resource consents that were granted in 2012 and expire in 2037. While Genesis has signalled its intention to phase out the use of coal completely by 2030, the future of the HPS includes the opportunity to utilise other fuels and technologies for electricity generation.[3]

9. Genesis supports the intent of Plan Change 1 (**PC1**) in giving effect to Te Ture Whaimana o Te Awa o Waikato, the Vision and Strategy for the Waikato River, and National Policy Statement for Freshwater Management 2014 as updated in 2017. This is through the reduction and management of diffuse and point source discharges of nitrogen, phosphorus, sediment and microbial pathogens.

10. Within this context Genesis wants to ensure that the operation of existing regionally significant infrastructure such as the HPS is recognised and provided for in the objectives and policies of PC1.[4]

11. In particular, Genesis is concerned by some of the amendments proposed in the section 42A Report and by submitters in relation to point source discharges including the definitions of regionally significant infrastructure, regionally significant industry, and offsetting; the application of an effects hierarchy; proposed amendments relating to consent duration and common catchment expiry dates; and the

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[2] As per Genesis' earlier memorandum to the Hearing Panel dated 28 March 2019

[3] Evidence in Chief of Mr Richard Matthews, dated 3 May 2019 at [26].

[4] Evidence in Chief of Mr Richard Matthews, dated 3 May 2019 at [27].

proposed allocation of point source discharges within PC1 itself. We address the legal issues and relevant case law arising from these proposed amendments below.

Policy 10

Regionally significant infrastructure and industry

12. Ms Marr for the Auckland/Waikato and Eastern Region Fish and Game Councils (**Fish and Game**) argues that Policy 10 sets an unqualified direction to decision makers to 'provide for' regionally significant infrastructure and regionally significant industry when deciding resource consents for point source discharges.[5] She is of the view that "provide for" creates a presumption that the discharges will be granted consent provided they use the Best Practicable Option under Policy 11.[6] Fish and Game has sought the deletion of Policy 10 in its entirety,[7] and Ms Marr has sought Policies 10 and 12 be combined.[8]

13. Genesis submits PC1 must include policies providing for regionally significant infrastructure and regionally significant industry as PC1 must give effect to the RPS including the following implementation methods:[9]

   (a) 4.4.1 – regional plans should provide for regionally significant industry…by:

      (i) Identifying appropriate provisions…to enable the operation and development of regionally significant industry, which for new development is consistent with Policy 6.14 and Table 6-2;

   (b) 6.6.1 – regional… plans shall include provisions that give effect to Policy 6.6. This policy provides:

[5] Evidence in Chief of Ms Helen Marr, dated 3 May 2019 at [5.8].

[6] Evidence in Chief of Ms Helen Marr, dated 3 May 2019 at [5.10].

[7] Evidence in Chief of Ms Helen Marr, dated 3 May 2019 at [5.7].

[8] Evidence in Chief of Ms Helen Marr, dated 3 May 2019 at [5.19].

[9] Resource Management Act 1991, s 67(3)(c).

(i) Management of the built environment ensures particular regard is given to that the effectiveness and efficiency of existing and planned regionally significant infrastructure is protected, and the benefits that can be gained from the development and use of regionally significant infrastructure and energy resources, recognising and providing for the particular benefits of renewable electricity generation, electricity transmission, and municipal water supply.[10]

14. Regionally significant infrastructure is defined in the RPS as including infrastructure for the generation and/or conveyance of electricity that is fed into the national grid or a network (as defined in the Electricity Industry Act 2010).[11] Regionally significant industry is defined in the RPS as being "an economic activity based on the use of natural and physical resources in the region and is identified in regional or district plans, which has been shown to have benefits that are significant at a regional or national scale. These may include social, economic or cultural benefits".[12] The HPS fits within the ambit of both of these definitions.[13]

15. There is useful case law that demonstrates Ms Marr's concern (that there is an "unqualified direction" and a "presumption" that consent will be granted) is misplaced.

16. In *Equus Trust v Christchurch City Council* the High Court found that 'provide for' when used in relevant planning documents, is fulfilled by enabling submitters an opportunity to pursue industrial zoning for their land and to support that by the evidence necessary.[14] This did not mean that the Panel must zone the land as industrial.[15]

17. The Environment Court has acknowledged that whilst 'recognise and provide for' was definitive language, it did not mean '*give absolute*

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[10] Waikato Regional Policy Statement, 6.6.

[11] Waikato Regional Policy Statement, G-9.

[12] Waikato Regional Policy Statement, G-9.

[13] Rebuttal Evidence of Mr Richard Matthews, dated 10 May 2019 at [62].

[14] *Equus Trust v Christchurch City Council* [2017] NZHC 224 at [47].

[15] *Equus Trust v Christchurch City Council* [2017] NZHC 224 at [68].

precedence to' in the context of section 6 of the Resource Management Act 1991 (**RMA**).[16] Part II issues of the RMA are not given absolute predominance over all other considerations due to the words 'recognise and provide for', but they are given the weight accorded to them by the language used in the Act.[17]

18. To have regard to specific words of the policies in isolation is also counter to the approach of the Supreme Court in *King Salmon* and the Court of Appeal in *Powell* and *Rattray*.[18]

19. Mr Matthews for Genesis considers that the use of 'provide for' is intended to give guidance as to how consent applications should be considered,[19] and decisions on resource consents will still be made in accordance with the provisions of s 104 of the RMA.[20] As identified by Mr Matthews, Policy 10 does not enable point source discharges to have an "easy ride" through the consent process, as the overarching direction and requirements of the Vision and Strategy are to improve the quality of the Waikato River and these must be adhered to.[21] Consistency must also be shown with the other provisions of PC1 and each application must demonstrate how the effects of each activity are being avoided, remedied, or mitigated (or potentially compensated for).[22]

20. Ms Kissick for the Director-General of Conservation has also recommended changes to Policy 10, but these fail to provide for regionally significant industry and infrastructure and so are not supported by Genesis.[23]

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16 *Radco Trading Ltd v Auckland City Council* 2004 WL 424183 (EnvC) at [27].

17 *Radco Trading Ltd v Auckland City Council* 2004 WL 424183 (EnvC) at [27].

18 *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [129], *Powell v Dunedin City Council* [2004] 3 NZLR 721 (CA) at [30-35] and *J Rattray & Son Ltd v Christchurch City Council* (1984) 10 NZTPA 59 (CA) at 61.

19 Rebuttal Evidence of Mr Richard Matthews, dated 10 May 2019 at [33].

20 Rebuttal Evidence of Mr Richard Matthews, dated 10 May 2019 at [27].

21 Evidence in Chief of Mr Richard Matthews, dated 3 May 2019 at [60].

22 Rebuttal Evidence of Mr Richard Matthews, dated 10 May 2019 at [29].

23 Rebuttal Evidence of Mr Richard Matthews, dated 10 May 2019 at [65].

21. Genesis submits that Policy 10 must be retained as notified so as to appropriately give effect to the RPS. If the Panel decides to include specific industries in the definition of regionally significant industry then Genesis submits that the definition should explicitly include the HPS.[24]

Policy 11

Effects hierarchy

22. Genesis does not support the amendments to Policy 11 proposed in the section 42A Report and sought by Fish and Game. These result in an effects hierarchy being applied to the consideration of point source discharges which requires avoidance of adverse effects before any other consideration. Mr Matthews highlights that the resource consent process will determine what effects can be reasonably avoided, and what effects can be remedied or mitigated.[25] Mr Matthews also does not agree with an explicit requirement to offset residual effects, which is sought by submitters including Fish and Game.[26]

23. The RMA is not a “no effects” statute.[27] This means that some level of effect is acceptable and not all adverse effects arising from a proposal must be mitigated. Further, any mitigation which is required should be proportionate to the scale and severity of the effect.[28]

24. For example, in *Royal Forest and Bird Protection Society of New Zealand v Buller District Council*, the protection of some rare and threatened plant species from the effects of a mining operation was found to require logistics and consequent costs which would, on balance, be too great.[29] The High Court upheld the Environment Court’s decision in this regard, noting that there is nothing in the RMA

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[24] Rebuttal Evidence of Mr Richard Matthews, dated 10 May 2019 at [61].

[25] Evidence in Chief of Mr Richard Matthews, dated 3 May 2019 at [69].

[26] Rebuttal Evidence of Mr Richard Matthews, dated 10 May 2019 at [39].

[27] *Day v Manawatu- Wanganui Regional Council* [2012] NZEnvC 182 at [3-72]; *Re Meridian Energy Ltd* [2013] NZEnvC 59.

[28] *Day v Manawatu- Wanganui Regional Council* [2012] NZEnvC 182 at [3-72]; *Re Meridian Energy Ltd* [2013] NZEnvC 59.

[29] *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2013] NZHC 1346, [2013] NZRMA 293.

"which prevents a consent authority from making a proportionate decision assessing the cost of a particular proposed condition".[30]

Offsets and environmental compensation

25. Compensation and offsets are not synonyms.[31] Both are referred to in the RMA, and consent authorities must have regard to any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment.[32]

26. The issue under PC1 is the term referenced is "offset" but the definition is more akin to environmental compensation.[33]

27. Some submitters such as Fish and Game state that if offsets are to be provided, the definition must include that an offset is "measurable" and "demonstrated through robust and appropriate methodology".[34]

28. Genesis submits that rather than changing the definition, the term used and defined in PC1 should be changed from 'offset' to 'environmental compensation'.

29. As discussed by Mr Matthews, offset has a specific meaning and is most widely used in the context of indigenous biodiversity. In that context, to be considered as an offset, the measure employed should achieve "no net loss".[35]

30. Instead the focus of Policy 11 should be about providing meaningful options for point source discharge activities, one of which is environmental compensation.[36] The current definition in PC1 reflects

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[30] *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2013] NZHC 1346, [2013] NZRMA 293.

[31] *Royal Forest & Bird Protection Soc of New Zealand Inc v Buller DC* [2013] NZHC 1346, [2013] NZRMA 293.

[32] Resource Management Act 1991, s 104(1)(ab).

[33] Evidence in Chief of Mr Richard Matthews, dated 3 May 2019 at [77] – [86].

[34] Legal Submissions on behalf of the Auckland/Waikato and Eastern Region Fish and Game Councils, dated 22 May 2019 at [9.21].

[35] Evidence in Chief of Mr Richard Matthews, dated 3 May 2019 at [77] – [78].

[36] Rebuttal Evidence of Mr Richard Matthews, dated 10 May 2019 at [41].

this – being an action that reduces residual adverse effects of a specific contaminant on water quality.[37]

31. Mr Mathews considers the version of Policy 11 in the s42A report will lead to considerable resources being spent debating the merits of offsetting the effects of point source discharges, because it will become a default requirement irrespective of whether the effects of the activity have been appropriately mitigated.[38] Instead Mr Matthews considers an environmental compensation measure should only be utilised once the Best Practicable Option (**BPO**) requirements have been met, and to lessen any significant residual effect.[39]

Policy 12

32. Mr Matthews does not support the section 42A report's recommendation to delete clause (d) from Policy 12. This clause provides appropriate recognition that while it may be possible from an engineering perspective to utilise treatment technology, there may be a diminishing return of investment and greater environmental improvements could be achieved by other means.[40]

Policy 13

Consent duration

33. In the section 42A Report it is recommended to remove the reference to a consent term exceeding 25 years, and instead refer to a "longer consent duration". Genesis supports the retention of the reference to 25 years. As noted by Mr Matthews, this removes any uncertainty or debate as to what "a longer consent duration" actually means, and it only applies to those activities that will achieve consistency with achieving the water quality attribute states of PC1.[41] Further, consents with a longer consent duration are typically accompanied by review

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[37] Rebuttal Evidence of Mr Richard Matthews, dated 10 May 2019 at [41].

[38] Evidence in Chief of Mr Richard Matthews, dated 3 May 2019 at [72].

[39] Evidence in Chief of Mr Richard Matthews, dated 3 May 2019 at [74].

[40] Evidence in Chief of Mr Richard Matthews, dated 3 May 2019 at [90].

[41] Evidence in Chief of Mr Richard Matthews, dated 3 May 2019 at [95].

conditions requiring technology assessments/BPO updates at regular intervals.[42]

34. Ms Marr on behalf of Fish and Game has recommended changes to Policy 13 to consider the risks of a longer consent duration including where future regional plan changes or regional plans are likely to provide a comprehensive approach to allocation of both point and non-point source discharges.[43]

35. Genesis disagrees with these proposed amendments because they are too uncertain. As identified by Mr Matthews, it is inappropriate to speculate on whether future plan changes will occur and what the consent will be. Any future plan changes on allocation should include the necessary consequential amendments to the policies in PC1 that are required.[44]

36. Applicants investing in regionally significant infrastructure and industry should be afforded the necessary certainty that they will receive longer consent durations if the proposal is consistent with achieving the water quality objectives for PC1. If not, the Council already has the option of either declining the application or granting a shorter duration.[45]

37. In relation to consent duration, the High Court has adopted the approach of asking how long would really be needed to achieve the relevant environmental improvements weighed against the need of the applicant for security of investment.[46] Instead of imposing a shorter term on the consent, the Court has held that conditions can be imposed to deal appropriately with environmental concerns whilst also protecting

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[42] Evidence in Chief of Mr Richard Matthews, dated 3 May 2019 at [103]- [106].

[43] Evidence in Chief of Ms Helen Marr, dated 3 May 2019 at [5.19].

[44] Rebuttal Evidence of Mr Richard Matthews, dated 10 May 2019 at [47].

[45] Rebuttal Evidence of Mr Richard Matthews, dated 10 May 2019 at [48].

[46] *Te Rangatiratanga o Ngati Rangitihi Inc v Bay of Plenty RC* (2010) 16 ELRNZ 312 (HC); adopting the approach in *Genesis Power Ltd*; *Crest Energy Kaipara Ltd v Northland RC* [2011] NZEnvC 26, [2011] NZRMA 420.

the investment of the applicant and thus contributing to the national and regional economy, an objective within the purpose of the Act.[47]

Common catchment expiry dates

38. Genesis opposes the use of common catchment expiry dates in PC1.

39. The Director-General of Conservation submitted that common catchment expiry dates should be included in PC1 because it is an effective way of dealing with cumulative effects of discharges within a sub-catchment.[48]

40. Common catchment expiry dates fail to recognise existing, or incentivise new, investments by consent holders to better manage discharges. The value of the investment of the existing consent holder is a factor that is to be considered by the consent authority when considering an application by an existing consent holder who is applying for a new consent for the same activity.[49]

41. Mr Matthews emphasises it would be inequitable to give the same or similar consent duration to all applicants because Policy 13 provides the strong incentive of the increased likelihood of a long consent duration where the application conforms with the requirements and direction of PC1.[50] Common catchment expiry dates would not reflect the significant investment that is made, and will continue to be made, by companies to achieve contaminant reductions for their discharges.[51]

42. Further, as discussed by Mr Matthews, common catchment expiry dates would be difficult to achieve in practice and would require an extensive transition period to bring all the consents into a common catchment date.[52] Furthermore, new complete applications must still

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[47] *Te Rangatiratanga o Ngati Rangitihi Inc v Bay of Plenty RC* (2010) 16 ELRNZ 312 (HC); adopting the approach in *Genesis Power Ltd*; *Crest Energy Kaipara Ltd v Northland RC* [2011] NZEnvC 26, [2011] NZRMA 420.

[48] Evidence in Chief of Ms Deborah Kissick, dated 3 May 2019 at [221].

[49] Resource Management Act 1991, s 104(2)(A).

[50] Rebuttal Evidence of Mr Richard Matthews, dated 10 May 2019 at [72].

[51] Rebuttal Evidence of Mr Richard Matthews, dated 10 May 2019 at [71] – [73].

[52] Rebuttal Evidence of Mr Richard Matthews, dated 10 May 2019 at [71].

be assessed and determined in the order in which they are received (i.e. first in, first served).

General

Point source allocation decisions

43. Ms Marr, for Fish and Game, seeks that PC1 sets out how much of the contaminant load is to be allocated to diffuse discharges from farming, and how much to point source discharges.[53]

44. No specific allocation framework has been proposed in Fish and Game's submission, or in the evidence. The promulgation of plans and any changes to them is a participatory process, and one of the underlying purposes of the notification, submission and further submission process is to ensure that all people are sufficiently informed about what is proposed.[54]

45. PC1 did not include a regime for point source allocation, and Genesis is not aware of any specific relief establishing an allocation framework for point source discharges. Ms Marr acknowledges that it is a challenge to provide a comprehensive contamination allocation framework.[55] Any endeavours to do so this late in the process are arguably outside of scope of PC1.

Relationship between policies, the four contaminants, and Table 3.11-1

46. Ms Kissick on behalf of the Director-General of Conservation has sought the removal of reference to the four contaminants from the policies and rule framework.[56] However, as highlighted by Mr Matthews there is no analysis of what the effects of removing reference to the

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53 Evidence in Chief of Ms Helen Marr, dated 3 May 2019 at [5.1] - [5.5].

54 *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 at [55] – [56].

55 Evidence in Chief of Ms Helen Marr, dated 3 May 2019 at [5.5]

56 Evidence in Chief of Ms Deborah Kissick, dated 3 May 2019 at [33].

four contaminants from the policies is, and what the implications are if the amendments sought by other submitters to Table 3.11-1 proceed.[57]

47. The evidence of Mr Matthews on behalf of Genesis is qualified in its support of the relevant policies for the Block 2 hearings, because it is dependent on the content of Table 3.11-1. Genesis' position is that a number of the additional attributes sought by submitters are not within scope of PC1.[58]

48. The fact that the point source discharge policies do not reference other attributes/contaminants (just the four contaminants) signals that the policy framework for PC1 was not designed to address these.

49. We appreciate Genesis will have the opportunity to make legal submissions on the joint witness statement and/or the amended Table 3.11-1, including any implications they may have for other provisions of PC1, as part of legal submissions to be presented at the Block 3 hearings.[59]

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[57] Rebuttal Evidence of Mr Richard Matthews, dated 10 May 2019 at [52].

[58] As per Genesis' earlier memorandum to the Hearing Panel dated 28 March 2019

[59] Minute from the Hearing Panel regarding Expert Conferencing Table 3.11-1 dated 31 May 2019