

**BEFORE AN EXPERT PANEL
TEKAPO POWER SCHEME**

FTAA-2503-1035

UNDER the Fast-track Approvals Act 2024 (**FTAA**)
IN THE MATTER of an application for replacement resource consents in
relation to the Tekapo Power Scheme
BY **GENESIS ENERGY LIMITED**
Applicant

**MEMORANDUM OF LEGAL COMMENTS OF COUNSEL FOR CANTERBURY
REGIONAL COUNCIL
22 August 2025**

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INTRODUCTION

- 1 We act for Canterbury Regional Council (**Council** or **CRC**) in relation to the substantive application (**Application**) for replacement resource consents in relation to the Tekapo Power Scheme (**TPS** or **Scheme**) made by Genesis Energy Limited (**Genesis** or **Applicant**) under the Fast-track Approvals Act 2024 (**FTAA**).
- 2 This memorandum is provided in response to Minute 2 inviting comments on the Application, issued by the Panel on 28 July 2025 pursuant to section 53 of the FTAA.
- 3 This memorandum sets out the legal comments on behalf of the Council, and it should be read alongside the technical section 53 comments provided on behalf of the Council.
- 4 Counsel acknowledges the detailed legal submissions given on behalf of Genesis for the Project Overview Conference dated 22 July 2025. Rather than repeat those submissions, this memorandum seeks to adopt those submissions where relevant, focussing on the remaining areas of disagreement as between Genesis and the Council.
- 5 This memorandum addresses the following matters:
 - (a) Confirmation of the Council's position on the existing environment;
 - (b) Decision making under the FTAA, including the relevance of controlled activity status under the FTAA;
 - (c) The Indigenous Biodiversity Enhancement Programme (**IBEP**) compensation conditions;
 - (d) The other additional conditions sought by the Council and how these fit within the requirements for decision making under the FTAA; and
 - (e) Conclusion and recommendations.

EXISTING ENVIRONMENT

- 6 The existing environment is the starting point for Panel's consideration of the Application and the conditions that should be imposed.
- 7 As identified in the Applicant's legal submissions for the Project Overview Conference, Genesis and the Council agree on the existing

environment in the circumstances of this Application.¹ On that basis, the Council accepts and adopts the summary of this position at paragraphs 25 and 26 of the Applicant's legal submissions.

- 8 The Council reiterates that its position in relation to the existing environment in this case is a consequence of the specific planning framework under both the Canterbury Land and Water Regional Plan (**LWRP**) and the Waitaki Catchment Water Allocation Regional Plan (**WCWARP**), and the nature of this particular scheme.
- 9 Importantly, while the starting point for assessment must be the environment as it currently exists, the Council agrees with Genesis that this position on the existing environment does not exclude consideration of the ongoing effects associated with the operation of the TPS.²
- 10 To the extent that the operation of the TPS is having ongoing adverse effects, this is a matter that requires consideration, including the extent to which measures by way of mitigation, offset or compensation are appropriate to address those effects.
- 11 As Ms Black's planning memorandum addresses, this is consistent with Policy 4.51 of the LWRP³ which requires consideration to be given to reductions in adverse effects on the environment and section 1.2.6 of the LWRP which states:

When resource consents expire for this infrastructure and associated water abstractions and discharges, the activity must be reassessed as if new even when there is no practical alternative to continuing to use the existing infrastructure. In these cases, rather than debating whether the infrastructure should exist at all, a more useful approach is to focus on improving the efficiency, and reducing the environmental effects, of taking and using the water.
- 12 It is also consistent with the approach taken by the Environment Court in the *Alexandra District Flood Action Society Inc and Others v Otago Regional Council*.⁴ In that case, the Environment Court applied the

¹ Legal submissions for Genesis Energy Limited for the project overview conference dated 22 July 2025 at [25].

² Legal submissions for Genesis Energy Limited for the project overview conference dated 22 July 2025 at [27].

³ Acknowledging that this policy only applies to the discharges associated with the TPS.

⁴ *Alexandra Flood Action Society Inc v Otago Regional Council* [2005] ELHNZ 328.

current environment as the existing environment but specifically acknowledged that upon ‘renewing’ a resource consent that:⁵

A regional council may look at "past effects" of the former activity and (subject to reasonableness, efficiency and other tests we come to later) add conditions to control future adverse effects, and in some cases to clean up the effects of past activities by the consent-holder which were not covered before.

- 13 The application of the existing environment is discussed further in Ms Black’s memorandum included as part of the Council’s s53 comments.

DECISION MAKING UNDER THE FTAA

Overview

- 14 This Application is being determined under the FTAA. The purpose of the FTAA is to “facilitate the delivery of infrastructure and development projects with significant regional or national benefits”.⁶
- 15 Decision-making on a substantive application is made under section 81 of the FTAA. Under section 81(1), a panel must decide whether to:
- (a) grant the approval and set any conditions to be imposed on the approval; or
 - (b) decline the approval.
- 16 The Applicant has set out an overview of decision making under the FTAA at paragraphs 31 to 33 of its legal submissions. The Council largely agrees with this overview and does not repeat it here but specifically addresses:
- (a) The relevance of controlled activity status; and
 - (b) The tests in relation to conditions.
- 17 The Council agrees with the Applicant in relation to the matters that the Panel must consider, the criteria the Panel must apply and the sections that the Panel must comply with in making its decision (as set out in paragraph 32(a)-(c) of the Applicant’s legal submissions). However, the Council notes that in addition to those matters, the Panel must also:
- (a) comply with section 83 in setting conditions;⁷ and

⁵ *Alexandra Flood Action Society Inc v Otago Regional Council* [2005] ELHNZ 328 at [68].

⁶ Fast-track Approvals Act 2024 (**FTAA**), s 3.

⁷ FTAA, s 81(2)(d).

- (b) apply the criteria in clauses 18 to 22 of schedule 5 of the FTAA.⁸

Criteria for assessing the resource consent application

- 18 As set out above, substantive decisions under the FTAA are made under section 81(1). Section 81(2) of the FTAA requires that, for the purpose of deciding on the substantive application, the Panel must (among other requirements) apply the applicable clauses of the FTAA that relate to the type of approval sought. For resource consents, the applicable clauses are clauses 17 to 22 of Schedule 5 of the FTAA. In the context of this Application, only clauses 17 and 18 of Schedule 5 are applicable.
- 19 Clause 17 of Schedule 5 sets out the criteria for assessing resource consent applications under the FTAA. Clause 17(1) provides that for the purposes of section 81, when considering a consent application (including conditions in accordance with clauses 18 and 19) the panel must take into account:
- (a) the purpose of the FTAA;
 - (b) the provisions of Parts 2,⁹ 3, 6, and 8 to 10 of the Resource Management Act 1991 (**RMA**) that direct decision making on an application for a resource consent (but excluding section 104D of that Act); and
 - (c) the relevant provisions of any other legislation that directs decision making under the RMA.
- 20 Clause 17(1) requires that the greatest weight must be given to paragraph (a).
- 21 The Applicant's legal submissions explain how the hierarchy prescribed in clause 17(1) should be applied by drawing parallels with caselaw under the Housing Accords and Special Housing Areas Act 2013.¹⁰ The Council agrees with the Applicant's reasoning but, contrary to the Applicant's position, considers that applications for controlled activity consents can be declined under the FTAA (this is discussed further below).

⁸ FTAA, s 81(2)(b) and (3)(a). Although noting that only clause 18 is relevant to this Application.

⁹ Excluding s 8 of the RMA, per sch 5 cl 17(2)(a) of the FTAA.

¹⁰ Legal submissions for Genesis Energy Limited for the project overview conference dated 22 July 2025 at [37]-[40].

- 22 The Council agrees with the Applicant that there is no other relevant legislation that directs decision making under the RMA under paragraph (c) in these circumstances.¹¹

Panel discretion to decline Application

- 23 The Applicant has stated that, while on its face section 81(1) does not require the Application to be granted, it considers that the FTAA does not permit the Panel to decline the resource consents. This is on the basis that:¹²
- (a) ss 81(2)(b) and (3)(a) require the panel to apply cl 17(1)(b) of sch 5 of the FTAA, which imports s 104A of the RMA; and
 - (b) it would be contrary to the purpose of the FTAA to provide the panel with scope to decline a controlled activity, when that activity would not be able to be declined under an RMA process.
- 24 While the Council is not suggesting that the Application should be declined in this case, given the very clear regional or national benefits (which must be taken into account under section 81(4)), we caution against the notion that the Panel *must* grant a controlled activity under the FTAA. This is because the relevant RMA provisions that require a controlled activity to be granted are only matters to be taken into account, with clause 17(1) requiring the greatest weight to be given to the purpose of the FTAA.¹³ While clause 17 specifically addresses the interplay of provisions in the RMA that require a panel to decline an application (see subclauses (3) and (4)), it does not address the interplay with RMA provisions requiring an application to be granted.
- 25 While the Council has a slightly different view in terms of the ultimate discretion held by a panel to decline an application for a controlled activity, the Council agrees that in taking into account the provisions of the RMA that direct decision making (as required under clause 17(1)(b)), and in applying section 104B of the RMA, the Panel's consideration of the RMA matters is to be constrained by the matters of control within the relevant planning provisions. On that basis, Ms Black has applied the matters of control in her planning memorandum.

¹¹ Legal submissions for Genesis Energy Limited for the project overview conference dated 22 July 2025 at [36].

¹² Legal submissions for Genesis Energy Limited for the project overview conference dated 22 July 2025 at [31].

¹³ FTAA, sch 5 cl 17(1).

- 26 Further, while the Council takes a different position in relation to how activity status must be applied under the FTAA, the Council agrees with the Applicant that none of the mandatory grounds for decline under section 85 of the FTAA apply to the Application.¹⁴ As such, the Council agrees with the Applicant that the Panel's focus should be on the conditions.¹⁵ The Council has, therefore, focused the remainder of this memorandum on conditions.

THE PROFERRED COMPENSATION AND FLOWS IN THE TAKAPŌ RIVER

- 27 The Council acknowledges that the IBEP compensation conditions have been proffered by the Applicant on an *Augier* basis and that this limits the ability of the Panel to impose changes to these conditions.¹⁶
- 28 Despite this limitation, it remains important for the Panel to assess the adequacy of the IBEP compensation conditions in terms of the adverse impacts of the TPS identified through the evidence. If the Panel finds the IBEP compensation conditions to be inadequate, it may impose additional conditions on the resource consents to address these adverse effects (within the confines of the FTAA and RMA requirements for imposing conditions).
- 29 This is particularly relevant in terms of assessing the question of flows in the Takapō River. As Ms Black identifies, the matters of control include flows in the Takapō River. Rule 15A of the WCWARP reserves control over (among other matters):¹⁷

In respect of flows into the Pūkaki River, the Lower Ōhau River or the Tekapo River (above the confluence with the Forks Stream), adverse effects, including effects on Ngāi Tahu culture, traditions, customary uses and relationships with land and water, unless the environmental flow and level regimes for these rivers have been reviewed after the public notification date of this rule and the outcome of the review has become operative in accordance with clause 20 of Schedule 1 to the Resource Management Act;

- 30 Ms Black addresses this matter further in her planning memorandum identifying that several of the CRC technical experts consider that the diversion of flow from the Takapō River has resulted in ongoing/residual

¹⁴ FTAA, s 85(1)-(2); Legal submissions for Genesis Energy Limited for the project overview conference dated 22 July 2025 at [61(a)-(b)].

¹⁵ Legal submissions for Genesis Energy Limited for the project overview conference dated 22 July 2025 at [62].

¹⁶ Legal submissions for Genesis Energy Limited for the project overview conference dated 22 July 2025 at [28] and [45(b)(i) and (ii)].

¹⁷ Waitaki Catchment Water Allocation Regional Plan, Rule 15A, matter (a).

adverse effects that are not proposed to be mitigated, and so should be offset or compensated.¹⁸

- 31 As such, the Council considers that the compensation proposed by the Applicant, as well as the renewable energy benefits of not providing any flows in the Takapō River, will be relevant considerations for the Panel.
- 32 The Council also specifically acknowledges the Treaty Impact Assessment provided in support of the Application and its acknowledgement that issues in the Waitaki catchment are multi-generational. The Council considers that the question of flows in the Takapō River will likely be an ongoing consideration in future planning and consenting processes.

FTAA TESTS FOR IMPOSING CONDITIONS

- 33 Given the acknowledged regional and national benefits of the TPS in terms of its contribution to renewable electricity generation within New Zealand and the weight to be placed on the controlled activity status, the focus of the Panel's consideration in relation to this Application is naturally going to be on the conditions.
- 34 The decision-making criteria for the Panel contain specific provisions relating to conditions, specifically, the Panel must:
- (a) comply with section 83 of the FTAA in setting conditions;¹⁹ and
 - (b) apply clauses 17 to 22 of Schedule 5 of the FTAA, which import certain provisions of the RMA (noting that only clauses 17 and 18 are relevant to this Application).²⁰
- 35 The Council generally agrees with the Applicant's summary of the law applying to the Panel in imposing conditions as set out in paragraphs 61 to 65 of the Applicant's legal submissions but disagrees that conditions should be focused on significant effects.

Conditions should not only be focused on significant effects

¹⁸ Planning comment of Susannah Black dated 22 August 2025 at [44].

¹⁹ FTAA, s 81(2)(d).

²⁰ FTAA, s 81(2)(b) and (3)(a). Clauses 19-22 of Schedule 5 of the FTAA are not relevant as the Application does not concern standard freshwater fisheries, aquaculture or a coastal permit.

- 36 The Applicant's submissions state that "conditions should be focused on significant effects".²¹
- 37 While counsel for the Council acknowledge that this may not be alleging that *only* significant effects should be considered, the Council wished to clarify its position for the Panel given it apprehends that Genesis may contend that some of the conditions sought by the Council are not related to significant effects of the Application or are not justified in the context of the FTAA process. In particular, the Council submits that the Panel is not restricted to only considering significant impacts when determining whether to impose conditions under the FTAA.
- 38 Section 85 of the FTAA, which the Applicant relies on to suggest the focus should be on significant effects, relates to when a Panel must or may decline a consent. It does not affect the conditions that a Panel may impose. There is nothing else in the FTAA to suggest that only significant effects should be considered when deciding what conditions to impose. Specifically:
- (a) The FTAA includes provisions relating to decision-making and, in particular, setting conditions.²² There is no need to resort to section 85 of the FTAA for guidance on how the Panel should consider conditions.
 - (b) The relevant FTAA provisions²³ require the Panel to take into account certain RMA provisions when considering the Application and conditions (noting the greatest weight is to be given to the purpose of the FTAA).²⁴ The imported RMA provisions do not require the Panel to consider only significant impacts. Section 108AA of the RMA allows conditions to be imposed on resource consents where they are directly connected to an adverse effect of

²¹ Legal submissions for Genesis Energy Limited for the project overview conference dated 22 July 2025 at [64(a)].

²² See the 'Decision making under the FTAA' section of this memorandum.

²³ FTAA, sch 5 cls 17(1)(b) and 18.

²⁴ Counsel notes for completeness that there is some discrepancy between clauses 17 and 18 of Schedule 5. Clause 17(1) requires the panel to take into account each of the stated matters, with the greatest weight given to paragraph (a) being the purpose of the FTAA. It explicitly states that it applies to conditions. In contrast clause 18 simply refers to relevant RMA provisions when setting conditions. In order to reconcile the two provisions, the Council has applied clause 18 as being subject to clause 17 (i.e. that the weighting exercise must be undertaken).

the activity on the environment (among other possible conditions). This is not limited to 'significant' effects/impacts.

- (c) The purpose of the FTAA (which is to be given the greatest weight²⁵) does not support restricting a Panel's consideration of effects to only those that are significant. Imposing appropriate conditions on activities allows them to occur (where consent may otherwise have been declined) and this facilitates the delivery of infrastructure and development projects with significant regional or national benefits per the purpose of the FTAA.²⁶
- (d) While section 83 contains specific directions to ensure conditions must be no more onerous than necessary to address the reason for which it is set, this does not import a different test as to the effects for which a condition can be set.

- 39 Further, the wording of section 85(3) of the FTAA itself supports the Panel considering adverse impacts that are less than significant. This is because in considering section 85(3), a Panel must first identify adverse effects under subsection (a), before considering whether any adverse impacts are sufficiently significant for the purposes of subsection (b).
- 40 For completeness it is acknowledged that in taking the purpose of the Act into account and undertaking the associated weighting exercise required by clause 17 of Schedule 5, that section 81(4) specifically requires the Panel to consider the extent of the project's regional or national benefits. As is addressed below, CRC does not consider any of the additional conditions it seeks impinge on this (although this would like be a factor to consider if the Panel were minded to impose any flow requirements in relation to the Takapō River).

Conditions proposed by Council

- 41 As per the planning comments provided by Ms Black (relying on the technical advice), the Council is seeking additional conditions (as recommended by experts) relating to:²⁷
 - (a) the collection and sharing of water level data;

²⁵ FTAA, sch 5 cl 17(1).

²⁶ FTAA, s 3.

²⁷ Planning comment of Susannah Black dated 22 August 2025 at [114]-[116].

- (b) lake water quality monitoring; and
 - (c) additional conditions in relation to native fish in the fish salvage conditions.
- 42 The Council has also suggested changes in relation to the IBEP conditions proffered by the Applicant and other minor changes to conditions.²⁸
- 43 The Council acknowledges that the IBEP conditions have been proffered by the Applicant on an *Augier* basis. While this limits the Panel's ability to require changes to these conditions, the Council has provided suggested changes in relation to the IBEP conditions to assist the Panel in determining whether the compensation proposed by way of the IBEP conditions is sufficient. If not, it is open to the Panel to impose additional conditions on the resource consents (noting that these will be constrained by the matters of control).
- 44 Below we apply the FTAA decision making criteria in relating to setting conditions to the conditions proposed by the Council, specifically we consider:
- (a) The purpose the FTAA;²⁹
 - (b) The imported provisions of the RMA;³⁰
 - (c) Whether the conditions are no more than onerous than necessary under section 83 of the FTAA;³¹ and
 - (d) Conclude as to conditions taking into account the relevant factors and giving the purpose of the FTAA the most weight.³²

Purpose of the FTAA

- 45 The conditions proposed by the Council (either amendments or additions) are consistent with the purpose of the FTAA.

²⁸ Planning comment of Susannah Black dated 22 August 2025 at [117]-[119].

²⁹ FTAA, sch 5 cl 17(1)(a).

³⁰ FTAA, sch 5 cls 17(1)(b) and 18.

³¹ FTAA, s 83.

³² FTAA, sch 5 cl 17(1).

- 46 The Council acknowledges the significant national and regional benefits of the Scheme, as set out in the Applicant's submissions,³³ as per the FTAA definition.³⁴
- 47 The conditions proposed by the Council either relate to the collection and sharing of data, are minor or are amendments to *Augier* conditions proffered by the Applicant (which the Council acknowledges cannot be changed by the Panel). The additional conditions sought by the Council do not limit the Applicant's ability to carry out the activities for which approvals are sought, which preserves the electricity-generating capacity of the Scheme and its significant national and regional benefits (see also discuss below about the conditions being no more onerous than necessary). This aligns the purpose of the FTAA.

Relevant RMA provisions

- 48 The relevant RMA provisions to be taken into account by the Panel in making its decision under the FTAA include, in relation to conditions, sections 104A(b) and 108–108A of the RMA.³⁵
- 49 We note that the RMA requirements for conditions do not apply to those that are proffered by the Applicant. As such, we do not consider the IBEP conditions preferred by the Applicant on an *Augier* basis further in this section. Similarly, the minor changes proposed by the Council are unlikely to change the intent of the conditions offered by the Applicant and are not considered further.
- 50 Section 104A(b) of the RMA provides that, for controlled activities, only conditions relating to matters over which control is reserved may be imposed. The matters of control relevant to the Application are discussed above. The conditions proposed by Council in relation to the collection and sharing of water level and lake water quality monitoring fall within matters of control under both the WCWARP and the LWRP (which reserve control over the "[c]ollection, recording, monitoring and provision of information concerning the exercise of consent").³⁶ The

³³ Legal submissions for Genesis Energy Limited for the project overview conference dated 22 July 2025 at [14]–[17].

³⁴ FTAA, s 3 and 81(4).

³⁵ FTAA, sch 5 cls 17(1)(b) and 18.

³⁶ WCWARP, Rule 15A(c); and LWRP, Rule 5.125A(3).

changes recommended in relation to fish salvage fall within matter of control (b) of Rule 15A of the WCWAP.

51 In relation to sections 108-108A of the RMA, the Council agrees with the criteria for valid conditions set out in paragraph 62(a)-(c) of the Applicant's legal submissions. In relation to the conditions proposed by the Council:

- (a) The conditions have a resource management purpose and are not for an ulterior purpose. Section 108 of the RMA expressly contemplates conditions requiring a consent holder supply information relating to the exercise of the resource consent, including the making and recording of measurements and providing these at specified times.³⁷
- (b) The conditions fairly and reasonably relate to the proposal as they seek collection and sharing of information relevant to the effect that the TPS is having on the environment. The data collected and shared is directly connected to the adverse effects of the TPS on the environment.³⁸ In relation to fish salvage, these amendments are mitigation for the adverse effects of the TPS on native fish.
- (c) The conditions are not so unreasonable that no reasonable decision maker could have imposed them. These conditions are reasonable conditions to allow the Council further information about the effects of the TPS for the environment, as a lack of information is a current difficulty identified by many of the experts. In relation to fish salvage the conditions formalise what Genesis proposes via an advice note.

52 Overall, the conditions proposed by the Council meet the requirements of the relevant RMA provisions imported into the Panel's consideration of the Application under the FTAA.

No more onerous than necessary – section 83

53 Section 83 of the FTAA provides that:

When exercising a discretion to set a condition under this Act, the panel must not set a condition that is more onerous than necessary to

³⁷ RMA, s 108(3) and (4)(a)-(g).

³⁸ RMA, s 108(1)(b).

address the reason for which it is set in accordance with the provision of this Act that confers the discretion.

- 54 The conditions proposed by the Council (as addressed in the planning comment of Ms Black):³⁹
- (a) In the case of the groundwater monitoring, require the sharing of data with the Council that the Applicant already routinely collects as part of their dam safety programme;
 - (b) In the case of water quality monitoring, less frequent monitoring is proposed, even where experts consider that more frequent monitoring would be useful, to align the frequency used by the Council for similar monitoring;
 - (c) While there may be initial set up costs for some monitoring requirements, the ongoing provision of data should not be onerous given the ability to use telemetry to provide data to CRC;
 - (d) In the case of fish salvage, the amendments to the conditions simply require consideration to be given to native fish salvage, when sports fish are being salvaged as per the Sport Fish Salvage Management Plan.
- 55 For these reasons, the conditions proposed by the Council are no more onerous than required under section 83.
- 56 The minor changes proposed by the Council are unlikely to change the intent of the conditions that they amend. As such, provided the Applicant has not suggested conditions that are more onerous than necessary, section 83 should be met.

Conclusion as to Council's proposed conditions and weighting

- 57 Overall, the conditions proposed by the Council are broadly consistent with the purpose of the FTAA, comply with the RMA requirements imported by the FTAA decision making provisions (subject to the greatest weight being put on the FTAA purpose)⁴⁰ and are no more onerous than necessary for the purposes of section 83 of the FTAA.
- 58 Taking into account the matters listed in clause 17(1) of Schedule 5, and giving the greatest weight to the purpose of the FTAA, the Council

³⁹ Planning comment of Susannah Black dated 22 August 2025 at [115].

⁴⁰ FTAA, sch 5 cl 17(1) and 18.

submits that its proposed conditions are appropriate and should be included by the Panel in the conditions it imposes on the resource consents sought by the Applicant (subject to the previously outlined limitations regarding Augier conditions).

CONCLUSION AND RECOMMENDATIONS

- 59 The Council does not oppose the granting of the Application but considers that the conditions imposed must be carefully considered by the Panel.
- 60 The conditions proposed by the Council fit within the FTAA and RMA decision making requirements and are consistent with the overall purpose of the FTAA “to facilitate the delivery of infrastructure and development projects with significant regional or national benefits”.
- 61 Allowing the Application subject to the addition of the conditions proposed by the Council will meet the purpose of the FTAA, while also ensuring that the environmental effects of the TPS are appropriately addressed and monitored into the future.

Dated this 22nd day of August 2025



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Lucy de Latour
Counsel for Canterbury Regional Council