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By email: renewable.electricity@mfe.govt.nz

**Submission on Proposed National Policy Statement – Renewable Energy Generation -
Section 49 of the Resource Management Act 1991**

1. The Society's Environmental Law Committee (the Committee) is grateful for the opportunity to comment on the proposed national policy statement:
National Policy Statement for Renewable Electricity Generation, notified on 6 September 2008.

Reason for the Proposed National Policy Statement

2. As part of the New Zealand Energy Strategy to 2050 the Government wishes to have 90% of the country's electricity generated from renewable sources by 2025. To achieve this objective, a significant number of different renewable generation projects will need to be built; many if not all will need to gain consent under the Resource Management Act 1991 (the Act). The Government has expressed concern about the *"particular hurdles renewable projects face under the current resource management framework and how that may threaten the ability of generators to develop the additional renewable generation capacity needed to meet the 2025 target"*¹. The National Policy Statement for Renewable Electricity Generation (the NPS) has been developed in an attempt to address those concerns.
3. A clearer understanding of the nature of the hurdle that concerns the Government is required before the likely effectiveness of the NPS can be assessed. There have been a

¹ Proposed National Policy Statement for Renewable Electricity Generation – Evaluation under Section 32 of the Resource Management Act 1991

significant number of applications lodged for renewable energy projects in New Zealand in recent times (for example Te Apiti, Mihinerangi, Project Hayes, Project Aqua, Unison Networks, Makara Wind Farm, Waireki and Poihipi geothermal). There are others. Most of these applications have been granted, though some with modifications. Project Aqua was withdrawn and was therefore not tested. A substitute project is currently being heard. This raises questions about whether the Government's concern is really in relation to how long the consent process takes and how much it costs, or whether the perceived problem is the scope of considerations required to be taken into account when a consent authority determines whether consent should be granted.

4. The section 32 evaluation fails to demonstrate that applications for renewable electricity generation projects have failed on account of consent authorities being unable (by reason of the statutory considerations) to take account of the national significance of renewable energy generation. Nor is a case presented that future applications are likely to fail for that reason. The evaluation does make the point that the delay inherent in resource consent application preparation, processing, and appeals make the goal of 90% of generation from renewable resources by 2025 very challenging. That point is accepted.
5. The Committee submits that the policies in the NPS do not address the Government's concern nor the objective of the NPS because they do little to address the potential for delay in the consent process. The NPS policies address the substantive decision-making framework.

Substantive Hurdles

6. If the Government's concern is in relation to substantive matters required to be considered under the Act, then an amendment to the Act will be required.
7. An NPS lacks sufficient status to be the decisive factor in determining whether a resource consent should be granted. New electricity generation from renewable resources will continue to face hurdles through the resource consent process. The most significant competing values are the matters contained within Part II of the Act. The NPS does not and cannot alter Part II of the Act.

8. Consent authorities must have regard to an NPS under section 104(b)(i). While this means that direct reference must be made to the NPS when considering an application, the assessment of a proposal remains 'subject to' Part II of the Act.
9. It has been long established by the courts that "*the qualification 'subject to' is a standard drafting method of making clear that the other provisions referred to are to prevail in the event of conflict*": (*EDS v Mangouri County Council* [1989] 3 NZLR 257 (CA)). In the case of any resource consent application, Part II must prevail in the event of competing values with other factors arising under Section 104, such as the provisions of the NPS. In *Paihia District Citizens Association Inc v Northland Regional Council A77/95* (PT), the Court found "*the general direction to have regard to matters in section 104 does not apply where there is a conflict with Part II.*"
10. Part II values will almost inevitably arise in an application for renewable electricity generation. In the case of wind farms, outstanding natural landscapes and features have been important (though not necessarily decisive) factors. It is easy to see that sections 6(c) and (d) will be relevant in hydro projects. The future for marine-based generation is likely to bring section 6(a) into focus.
11. The addition of paragraph (i) and (j) to section 7 of the Act gives renewable electricity generation objectives some support within Part II. However, there remains a tension between the Government's renewable electricity objectives and matters of national importance in section 6. Tension between competing values is inherent to all RMA decision-making. The NPS does not alter this.
12. Section 6 matters must be recognised and provided for. Priority is given to matters of national importance in section 6 over other matters in section 7 and 8: *Ngati Maru Iwi Authority Inc v Auckland City Council* 24/10/2002, Baragwanath J, HC, Auckland AP18-SW01. Matters of national importance "*must be given due emphasis and cannot be just an equal part of a general balancing exercise*": *Harrison v Tasman DC* [1994] NZRMA 193.

13. Matters not listed in section 6 can be considered as nationally important on the evidence in particular cases: *Marlborough District Council v NZ Rail Limited* [1995] NZRMA 357 (PT). It may be arguable in some cases that providing new generation capacity using renewable resources is of national importance, but it is at least of national significance. The NPS does not overcome the hurdles for renewable electricity generation that are inherent in the competing values articulated in Part II. It is simply a matter to be considered.
14. To achieve the Government's objective, section 7(j) needs to be repealed and an amendment made to section 6 to include "*the benefits to be derived from the use and development of renewable energy*" as a matter of national importance.
15. The Regulatory Impact Statement rejects the option of amending section 6 to include reference to renewable electricity generation because the section "currently has an environmental preservation and protection emphasis". That is not strictly true (see section 6(d) concerning maintenance and enhancement of public access) but the point is understood. However it is unclear why a reference in section 6 to renewable generation would lead to inconsistent decision-making as the report claims. One only need look to section 5(2), where competing values appear in the same section.

NPS Policies

16. The subject matters of policies 1 to 3 are already considered and provided for through decisions of local authorities and the Environment Court. For example, the court made the following comment in *Upland Landscape Protection Society Inc. v Clutha District Council* EnvC C85/2008 (The *Mahinerangi* case):

"We acknowledge a number of positive effects from the activity including:

- *creation of employment during the construction period*
- *creation of employment managing the wind farm after construction*
- *the provision of renewable power source to meet New Zealand's energy requirements*
- *creation of a further energy source in the South Island, which may enable community and business activities:*

- *...every gigawatt hour which is supplied from a renewable source avoids the need to consider using or commissioning thermal production to supply an increase in demand. Accordingly in practical terms we are satisfied that there is a benefit to the environment as a whole in commissioning new renewable sources rather than thermal."*

17. In the *Mahinerangi* case the Court identified the reversibility of the adverse effects of wind farms as a relevant consideration in favour of granting consent. A condition was imposed to require removal of the turbines if generation ceased for a specified period. That condition was not opposed by the applicant (Trustpower).
18. The Committee's submission is that, in practice, policies 1 to 3 add little that is new or helpful to the deliberative process.
19. Policies 4 and 5 have a different function. These policies make use of the important role an NPS has to play in the formulation of regional and district planning documents. That role was augmented by the Resource Management Amendment Act 2005, especially in relation to section 55. Unlike consent decisions, giving effect to the NPS in planning documents is a mandatory obligation. Subject to the concern we mention below, it is this function that is likely to deliver effectiveness to the NPS.
20. The NPS offers little guidance on how local authorities will resolve the tension between their obligations to examine whether objectives achieve the purpose of the Act (section 32(3)(a)), and the obligation to give effect to policies 4 and 5 of the NPS. Our earlier submission in relation to the competing values in Part II of the Act is relevant here too. In some districts the tension may not be manifest, but in others (for example in relation to landscape values in the Queenstown Lakes District) Plan changes to implement the NPS are likely to be controversial. The NPS underestimates the challenge (and cost) to be borne by local authorities in giving effect to the NPS in their documents.
21. Policy 4 does not require policy statements and plans to be amended to facilitate new generation projects. What is contemplated is facilitation of renewable energy prospecting. Yet the reasons for the NPS do not record a concern that investigations

for new projects have been frustrated, but rather the passage of applications for resource consent for the resultant projects have faced hurdles. Policy 4 does not address that, nor does it require any local authority to do so.

22. Policy 5 excludes offshore wind, tidal, and wave generation projects. No explanation for that exclusion is provided in the NPS. It is surmised that the public nature of the Coastal Marine Area may be behind the exclusion. Tenure arrangements in the Coastal Marine Area are managed under a separate regime. The complexities of that process have been thoroughly explored in marine farming and other coastal development cases. Tenure is a discrete legal issue. Those considerations aside, it is not clear why policy support is excluded for small scale projects in the Coastal Marine Area given the undoubted energy potential of the sea and the research being conducted in that area. If there are social or cultural considerations counting against policy support then it would be beneficial to local authorities to make them explicit.

The Committee trusts these comments are of assistance. If the Board has any questions, please do not hesitate to contact the Acting Committee Secretary, Kim Oelofse, DDI (04) 463 2991 or email kim.oelofse@lawsociety.org.nz in the first instance.

Yours sincerely



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