

17 July 2009

The Board of Inquiry for Proposed National Policy Statement  
for Renewable Energy Generation  
C/- Ministry for the Environment  
23 Kate Sheppard Place  
Thorndon  
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Attn: Josie Beruldsen

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Dear Sir or Madam

### **Supplementary Legal Submissions on behalf of Mighty River Power**

Mighty River Power presented legal submissions and expert evidence to the Board of Inquiry (the Board) on the Proposed National Policy Statement for Renewable Energy Generation (the NPS) on Friday 15 June 2009. At the hearing, Mighty River Power was asked by the Board to provide supplementary legal submissions to address the following issues:

1. Should the NPS address s 7 (ba) of the Resource Management Act 1991 (the RMA) which deals with the efficiency of the end use of energy?
2. Expand on the position taken by Mighty River Power in respect of s 7(j) of the RMA and the *Upland Landscape* case.<sup>1</sup>
3. Is it more appropriate that the NPS is specifically focused on just the issue of renewable energy generation and its associated issues and benefits or should this also be addressed in other National Policy Statements such as the New Zealand Coastal Policy Statement?
4. Expand on the submission made by Mighty River Power to Policy 5 and discuss whether the current definition for "small and community scale distributed renewable energy generation" in the NPS is appropriate.

### **Should the NPS need to address s 7 (ba) of the RMA which deals with the efficiency of the end use of energy?**

In its legal submissions to the Board, Mighty River Power submitted that the Board, when making its decisions on the proposed form of the NPS needed to have regard to Part II of the RMA, in particular ss 7(i) and (j). At the hearing, the Board asked Mighty River Power to consider whether the NPS also needed to address s 7(ba) of the RMA (the efficiency of the end use of energy).

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<sup>1</sup> *Upland Landscape Protection Society Inc v Clutha District Council* (EnvC, C85/2008, 25 July 2008)

Mighty River Power submits that the NPS needs to address all of the matters in Part II of the RMA which deal with renewable energy, including its use and the benefits of doing so. It is a well established legal principle that Part II of the RMA forms the fundamental framework for all resource management decisions and it requires that all the functions, powers and duties under the Act are to be exercised for the purposes of giving effect to Part II<sup>2</sup>

It would not be consistent with the intent, purpose and principles of the RMA if something less than all of the relevant Part II considerations were not addressed by the Board in reaching its decision on the NPS. As an example of this approach in relation to s 7(ba) of the RMA, the Environment Court held in the *Genesis Energy* case<sup>3</sup> that a proposed wind farm was consistent with s 7(ba) as it would efficiently supply electricity directly to the point of demand, thereby reducing the potential for transmission losses which would occur if, alternatively, the wind farm was located some distance from the load demand point.

#### **Expand on the position taken by Mighty River Power in respect of s 7(j) of the RMA and the *Upland Landscape* case<sup>4</sup>**

In the case of *Upland Landscape Protection Society Incorporated v Clutha District Council*<sup>5</sup> decision the Environment Court said, in relation to s 7(j), that<sup>6</sup>:

*"7(j) provides that the Court should have particular regard to the benefits to be derived from the use and development of renewable energy. Without 7(j) benefits of renewable energy could still be raised and debated in general terms under Part 2 and section 104(1)(a). We conclude that the purpose and effect of the insertion of 7(j) is to avoid relitigating on a case by case basis the benefits of renewable energy over those which use non-renewable energy sources (coal, gas etc). If Parliament had intended to require such benefits to be proven in each case there is little point for 7(j). If so any benefits or benefits (if any) were simple drafting solutions. Although no particular benefits are identified nevertheless we must conclude 7(j) prefers renewable over non-renewable energy. Like all criteria of Part 2 the outcome will be influenced by the particular benefits and their magnitude in a particular case."*

Mighty River Power submits that this case establishes the strong precedent to avoid relitigating on a case-by-case basis the benefits of renewable energy as contrasted with those generating activities which use non-renewable energy.

Notwithstanding the *Upland Landscape* case, or more accurately as a consequence of it, this precedent does not mean that the benefits under s 7(j) should not be considered (because they are an already established legal principle) in documents such as the NPS: it would not be appropriate for the NPS to be silent on the point and to 'assume' that these benefits will automatically be considered. This is consistent with the Environment Court's decision in the

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<sup>2</sup> *Royal Forest & Bird Protection Society v Manawatu-Wanganui Regional Council* [A086/95 (PT)].

<sup>3</sup> *Genesis Energy Limited v Franklin District Council* [2005] NZRMA 541.

<sup>4</sup> *Upland Landscape Protection Society Inc v Clutha District Council* (EnvC, C85/2008, 25 July 2008).

<sup>5</sup> [C85/2008, 25 July 2008, Judge Smith presiding].

<sup>6</sup> *Ibid*, at para [233].

*Upland Landscape case*<sup>7</sup> which is focused on the consideration of (and the desire to avoid relitigating) the benefits comparison from the use of renewable and non renewable resources.

**Is it more appropriate that the NPS is specifically focused on just the issue of renewable energy generation and its associated issues and benefits or should this also be addressed in other National Policy Statements such as the New Zealand Coastal Policy Statement?**

The singular focus of this NPS does not negate the need for other national documents such as the New Zealand Coastal Policy Statement (NZCPS) and the National Policy Statement for Freshwater Management (NPS-FW) to positively support the use and development of renewable energy resources.

The key to successful achievement of the targets that are essential to New Zealand's development, such as those identified in the New Zealand Energy Strategy includes the integration of all of the applicable National Policy Statements. The NZCPS, along with the proposed NPS-FW, will play a major role in enabling or restricting the development and operation of renewable electricity generation in New Zealand. In addition, the existing National Policy Statement for Electricity Transmission will also influence the development of renewable electricity generation projects.

Under s 104 of the RMA all national policy statements relevant to any decision making process are to be considered together and are to be given equal priority. Therefore, it is important that the various national policy statements work in an integrated manner in order to achieve sustainable use outcomes and to support the development of renewable energy resources.

Unfortunately, the various national policy statements are currently in conflict with each other. For example, the NZCPS promotes the protection of the 'coastal environment' which includes all of the coastal marine area and a section of the land adjacent to the coast from "inappropriate use and development". This blanket protection precludes the use of the 'coastal environment' for renewable electricity generation, notwithstanding that the generation of electricity is intended to be enabled by the development of this NPS.

Blanket protection of resources such as the coastal environment, is inappropriate and is inconsistent with Part II of the RMA. An assessment of the potential resources which may provide generation 'fuel' for renewable electricity indicates that approximately half of the potential wind energy resource lie within the coastal environment: as well, all of the potential marine, tidal or wave, generation resources.

The NZCPS severely limits the opportunities for the development of these potential renewable energy resources is extremely limited by the NZCPS. However, the NZCPS is required to be

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<sup>7</sup> *Upland Landscape Protection Society Inc v Clutha District Council* (EnvC, C85/2008, 25 July 2008)

given equal consideration with this NPS and the tension between the two plans produces a regulatory stalemate.

In respect of the NPS-FW, Mighty River Power submits that the NPS as currently drafted offers no support towards achieving the Government's targets around maintaining security of electricity supply and building New Zealand's electricity generation capacity up in order to deliver a 90% renewable generation profile by 2025 as promoted in the New Zealand Energy Strategy. In addition, the NPS-FW does not promote the development of hydro electricity generation as any form of priority for the use of the nation's fresh water resources, even though such non abstractive use leaves the water still available for other abstractive or in-stream use following its generation use. Freshwater resources are consistently use for hydro generation throughout the country, a point which is not recognised under the NPS-FW.

If national policy statements are to be used to inform and guide the use and development of renewable energy generation within New Zealand, then all of these statements must work in an integrated manner.

**Expand on the submission made to Policy 5 and discuss whether the definition for "small and community scale distributed renewable electricity generation" in the NPS is appropriate.**

Mighty River Power supported Policy 5 as it recognised the importance of allowing renewable electricity generation to occur at small and community levels as well as providing for the development of renewable electricity resources at the local level. It is not obvious why the decision has been made to exclude any offshore wind, tidal or wave generation from Policy 5.

Under the RMA, 'renewable energy' is defined as meaning energy produced from solar, wind, hydro, geothermal biomass, tidal, wave and ocean current sources. The definition in the NPS specifically excludes offshore wind, tidal and wave generation from renewable energy resources. The two are inconsistent.

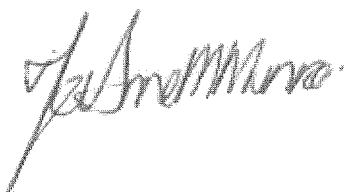
Mighty River Power submits that this exclusion means that every renewable electricity generation project (no matter how large) which is off shore must be treated in the same manner. This approach will discourage investigation of marine based renewable electricity generation. It is difficult to see the justification for this in an NPS where the objective is to enable the use and development of renewable energy resources in order to achieve long term targets in respect of increased generation and the security of supply of electricity.

The exclusion of offshore wind, tidal and wave generation from small and community scale generation limits the ability of some coastal communities (for example, Raglan and Kawhai) to effectively generate their own electricity. New Zealand has a large number of small coastal communities which have the potential to generate electricity from tidal and wave resources and, in particular wind. Again the NPS is inconsistent with Part II of the RMA to exclude the

development of certain resources for electricity generation when the excluded resources may represent the predominant or only practical resource available.

Please contact the writer if you have any further queries.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Jo-Anne Munro'. The signature is written in a cursive style with a long, sweeping underline.

**Jo-Anne Munro**

Environmental Legal Advisor - Policy Planning

