

30 October 2008

The Chairperson
Board of Inquiry

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Submission on the proposed national policy statement for renewable electricity generation – In accordance with section 49 of the Resource Management Act 1991

1 Introduction

- 1.1 This is a submission on the (following) proposed national policy statement for renewable electricity generation (the 'proposal') that was publicly notified on 6 September 2008.
- 1.2 Kensington Swan's Energy and Climate Change teams work closely with many major companies involved in the energy industry, all at different stages of production of electricity.
- 1.3 We often advise our clients how legislation will impact the way they run their business and how to best comply with legislative changes. Thus we would like to make this submission to register our concerns at some of the aspects of the proposal.

2 Summary

- 2.1 The specific provisions of the proposal that our submission relates to are Polices 1, 2, 3 and 5 and the definition section of the proposal.
- 2.2 Kensington Swan opposes the proposal in its current form as it is our opinion that s 7(j) of the Resource Management Act 1991 (the 'RMA') makes much of the proposal unnecessary.
- 2.3 The proposal also does not achieve its aim of promoting consistent decision-making from local authorities, and hence its overall objective, as the guidance lacks clarity. The aims and objective of the proposal would be better served by drafting a national policy statement which gave specific guidance to s 7(j) of the RMA.

3 Issues with the proposal

Necessary

- 3.1 Kensington Swan opposes the approval of the proposal in its current form as we do not believe that it is necessary. Section 7(j) of the RMA already requires the local authorities to have 'particular regard' to the benefits to be derived from the use and development of renewable energy.
- 3.2 The government considers the proposal to be necessary in order to enable consistent decision-making from local authorities when considering RMA applications. However, the proposal provides no clear guidance as to how local authorities are to consider RMA applications consistently with each other.

Clarity

- 3.3 Policy 1 simply reiterates s 7(j) of the RMA by emphasising the national significance of renewable electricity generation. Policy 2 reemphasises this by stating that local authorities must consider the practical constraints associated with renewable electricity generation. It is unclear as to what this adds to s 7(j) of the RMA and, therefore, Policy 1. If the purpose of Policy 2 is to signal that local authorities do not have to be so strict in avoiding, mitigating or remedying any adverse environmental effects, then Policy 2 should specify this out clearly.
- 3.4 As the exact meaning is not clear, consistent decision-making will not be promoted by these policies.
- 3.5 Policy 3 requires the local authorities to have regard to the 'relative degree of reversibility' of any adverse effects associated with the generation of renewable electricity. 'Relative degree of reversibility' is a very broad term. Such a term enables a high degree of discretion and judgment in the decision-making process. While the local authorities should have a high degree of autonomy and flexibility in their decision-making, this policy will not promote consistent decision-making by local authorities as it is not clear what 'relative degree of reversibility' means. Further guidance needs to be provided on this term, including, the threshold standard for 'relative degree'.

Definitions

- 3.6 As mentioned above the definition section of the proposal needs to include a definition of 'relative degree of reversibility'. We submit that the definition should be changed to read 'relative degree of reversibility means adverse effects which can be either fully or substantially reversed within a reasonable time of the occurrence of each adverse effect.'
- 3.7 The definition of 'Renewable electricity generation' is also not satisfactory as it is currently a finite list of types of renewable electricity generation. In order to allow for the discovery and development of new renewable electricity sources the definition should read 'means generation of electricity from sources which occur naturally and replenish naturally, including solar, wind, hydro, geothermal, biomass, tidal, wave or ocean current sources.'

Cost to local authorities

- 3.8 The majority of costs of implementing the proposal will fall on local authorities. Policy 5 seeks to address the disproportionately high consenting costs associated with small and community-scale renewable electricity generation projects with limited environmental effects. In doing so, the aim is to remove regulatory barriers that are currently acting to prevent small-scale developers from entering into the renewable electricity generation market. However, there is nothing to prevent local authorities from passing on the costs of implementing the proposal to the consent applicants. This will not result in the removal of the regulatory barriers and may only increase them.
- 3.9 Further, as much of the proposal simply reiterates s 7(j) of the RMA it is unreasonable for the local authorities to bear the majority of the costs of implementation. If this proposal is to be approved then we submit that it should be accompanied by funding from the government to ensure its immediate and smooth implementation.

4 Guidance on section 7(j) of the Resource Management Act 1991

- 4.1 The preamble of the proposal states that its purpose is to 'enable the sustainable management of renewable electricity generation' under the RMA. The focus of the proposal is to emphasise that the need to 'develop, upgrade, maintain and operate renewable electricity generation' is a matter of national significance. However, the proposal itself does not meet its purpose as, for the reasons discussed above, it is unclear and too general to enable to sustainable management of renewable electricity.
- 4.2 We submit that this purpose and focus of the proposal would be better achieved by drafting a national policy statement which provides guidance on s 7(j) of the RMA. As mentioned above, it is Kensington Swan's position that s 7(j) of the RMA makes much of the proposal unnecessary because the national significance of the benefits of renewable electricity generation is already emphasised in this section. Further, by narrowing the focus of the proposal the guidance it contains will be clearer and more useful to local authorities.
- 4.3 In order to promote consistent decision-making between local authorities any national policy statement would need to focus on the s 7 test of 'particular regard'. The commentary on this section of the RMA states:
- This provision imposes a high test and creates a duty to be on inquiry. Merely passive action or inquiry by a consent authority, not amounting to consultation, does not meet the test. The matters in s 7 must be recognised as "important to the particular decision and therefore to be considered and carefully weighed in coming to a conclusion": *Gill v Rotorua* (1993) 2 NZRMA (PT).
- The proposal could affirm this statement.
- 4.4 There is also conflicting case law surrounding the distinction between 'regard' and having 'particular regard'. One line of thought suggests that while to 'have particular regard' requires consideration of matters, no absolute requirements are set. Whereas the other line of thought suggests that there is no difference between the two phrases.
- 4.5 It would be extremely helpful to the decision-making process if the local authorities were provided with some clear guidance as what 'particular regard' means by indicating the threshold level of this test and what matters it requires local authorities to consider.
- 4.6 By adopting this method for the proposal the national significance of renewable electricity generation can be emphasised as well as providing clear guidance on how to manage RMA applications in light of the NZ Energy Strategy.
- 4.7 We are happy to discuss our submission with the Board further, if it does so require.

Yours faithfully
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