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The Hon Chris Bishop
Minister Responsible for RMA Reform

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**ELECTRICITY SECTORS PRIORITIES FOR TARGETED CHANGES TO THE RMA**

**Introduction**

This letter has been prepared by the Electricity Sector Environment Group (**ESEG**) in response to the Minister's invitation for views and suggestions on targeted amendments to the RMA that are practicable, in line with the Government's stated policy priorities and would have a real impact in the short term (Minister's letter of 28 March 2024).

The ESEG is made up of New Zealand's principal electricity generators comprising Meridian Energy, Mercury NZ, Contact Energy, Manawa Energy and Genesis Energy.

The ESEG raises three priority amendments to the RMA to the intent invited by the Minister, and specifically with reference to the Government's *Electrify NZ* policy ambition to "turbo charge" renewable power projects to enable New Zealand to double its supply of affordable, clean energy and become a lower emissions economy.

These three priorities have emerged to the forefront of ESEG's consideration after extensive engagement with Ministry officials (both MBIE and MFE) over the past several years, including in the lead up to the enactment of the NBEA, regarding proposals to replace the National Policy Statement – Renewable Electricity Generation 2011 (**NPS-REG**), and more latterly under the term of this Government, in the context of the Fast Track Approvals Bill and the proposed new **NPS-REG 2024** as envisaged by *Electrify NZ*.

It is understood from the Minister's letter that these priorities would be considered for inclusion in the second amendment Bill.

However, faced with a "no time to lose" scenario regarding the urgent case for new REG activity in New Zealand, we invite the Minister to consider any and all of the priorities for targeted RMA amendments to follow, as part of the first Bill instead.

**Priority 1: Section 6 – Matters of National Importance**

Paramount in ESEG's view is the need for targeted amendment to s 6 of the RMA (Matters of National Importance). The changes explained and set out in this section of the letter particularly warrant consideration for the first Bill, as they will provide the legal platform for the equally urgent new NPS-REG, as intended under *Electrify NZ*.

The fundamental problem is that s 6 of the RMA is currently confined to protective considerations directed at a range of natural, cultural and heritage resources that were pertinent to the 1990's. There is no enabling counterpoint in the section and the threat now posed by, for instance climate change and the responses required to address it, are missing.

Following the Supreme Court rulings in *Environmental Defence Society v King Salmon* and *Port Otago Ltd v Environmental Defence Society*, planning and consent authorities throughout New Zealand increasingly place primacy on these protective elements of the broader sustainable management purpose of the RMA, to the effective exclusion of any enabling considerations.

Because of this approach, ESEG members have really struggled to gain traction in district and regional plan processes, when trying to secure directive and enabling objectives and policies that would support future consenting of REG projects (including for the maintenance and upgrading of existing infrastructure).

This practice has reached the point where in almost every situation faced by group members, a proposed enabling plan provision (or consent approval sought for a specific REG project) ends up giving way to the need to protect and preserve the natural, cultural and heritage resources currently covered by s 6.

Most recently the Independent Hearings Panel considering the Otago Regional Policy Statement found as follows (in relation to Part 2 of the RMA, including s6):

> In the absence of express statutory prioritisation of enabling provisions ahead of protective provisions, so called "bespoke" priority provision for REG or electricity transmission infrastructure, or for any other activities, similarly is not appropriate.

ESEG very strongly submits that this anomaly within s 6 of the RMA must and can be readily addressed through targeted amendment. To be clear, the ESEG does not seek an outcome whereby effects on natural, cultural or heritage resources are ignored. This is really and simply about achieving a "level playing field" within section 6 of the RMA, and Part 2 of the RMA more generally.

While part of the problem (as just summarised) is undoubtedly the intolerably weak current NPS REG, without amendment to section 6, ESEG is concerned that a sufficiently enabling new NPS-REG delivering on the *Electrify NZ* policy programme will not ultimately be realised, or would not survive legal challenge on the argument that the protection requirements of s 6 (as it stands) must always prevail (witness, for example, the Court of Appeal decision in *Muaūpoko Tribal Authority v Minister for the Environment*, striking out an enabling provision of the NPSFM directed at the horticulture industry).

ESEG has encountered this very concern being raised by Ministry Officials in the engagement process to date, to the effect that the proposed NPS-REG 2024 could not direct that new REG projects (or reconsented REG projects) must be approved where any s 6 resources are at stake. That is even where all adverse effects are avoided, remedied, mitigated or offset, and there are no alternative sites where the renewable energy resources required for electricity generation are actually present and available. This is a continuing conversation, but a real

point of current reservation seemingly prevalent within the officials working on the NPS REG 2024.

With this very type of concern in mind, and as far back as 2012, the Technical Advisory Group (**TAG**) appointed by the previous National-led Government proposed (in a reframed s 6 and s 7) to ensure that infrastructure falls within the hierarchy of matters of national importance that need to be provided for under the Act. Specifically, the TAG recommended that s 6 include express reference to:

> The planning, design and functioning of significant infrastructure.

However, the recommendations of that Panel for 'Part 2' RMA reform did not ultimately make their way into the Resource Legislation Amendment Act 2017.

For all of these reasons, and in line with the TAG recommendation, s 6 should be amended by including the following additional matter of national importance (or its equivalent):

> The securing and enabling of nationally and regionally significant infrastructure.

It is noted that this provision would deliver greater alignment between the RMA and the Fast-track Approvals Bill purpose, assisting decision making under that Act in terms of reconciling relative weight and priority between the requirements of each statute.

The reference to "securing" is specifically directed at the need to ensure the existing 'baseline' of electricity generation capacity is "rock solid" within the resource management system, as addressed further below (on the issue of "existing environment").

For completeness, the ESEG would recommend that this proposed amendment be supplemented by a "transfer" into s 6 of the reference to the "benefits of renewable energy" (currently in s 7(j) of the RMA), but reframed to be more directive and targeted towards achieving New Zealand's greenhouse gas emission reduction commitments. Otherwise, the unintended and counterproductive potential arises for an argument that REG specifically (as a specific form of infrastructure), is only catered for in s 7, not s 6 (and so is of some lesser importance, than infrastructure generally).

With this in mind, and to support the principal amendment to s 6, s 7(j) should be repealed and replaced within s 6 as follows (or to equivalent effect):

> The benefits of renewable electricity generation activities in reducing greenhouse gas emissions to enable New Zealand to meet the Target set under s 5Q of the Climate Change Response Act 2002, or an Emissions Reduction Plan.

**Priority 2: Resolution of Conflict**

Throughout the reform process described above, ESEG has consistently raised the need for "conflict" between competing policy direction to be resolved at the very highest level of the planning system.

Otherwise, and again in line with *King Salmon*, the most directive provisions will always be found to prevail (as with the strongly worded protective provisions of the New Zealand Coastal Policy Statement (**NZCPS**), for example).

The Supreme Court in *Port Otago* also stressed the need for conflict between competing policy to be resolved at plan level, rather than leaving consent authorities to grapple with how to

reconcile the frequently “irreconcilable” competing policies of national policy statements (for example as between the NZCPS and the National Policy Statement – Electricity Transmission), and whereby, in virtually every instance, the NZCPS style protective policies are found to prevail.

This factor alone is a principal reason why new or reconsented REG projects risk being defeated under RMA consent processes, as they stand.

Having raised this issue with officials, some concern has been expressed that it would not be lawful under the RMA for one policy instrument (such as the proposed NPS-REG 2024) to direct that it prevails over (for example) the NPS-FM or NPS-IB, even in specific circumstances where every measure has been taken to avoid, remedy or mitigate relevant effects.

Amending s 45A of the RMA as follows would overcome this concern over the legal ability for on NPS to expressly prevail over another:

> (i) Directions as to how conflict with any other National Policy Statement of environmental standard is to be resolved, including as to which of any specific provisions of the respective policy statements or standards should prevail in the event of such conflict.

**Priority 3: Existing Environment**

In order for New Zealand to double its supply of affordable, clean energy as proposed under *Electrify NZ*, it is (in the first instance) essential that the existing baseline of REG capacity is secure.

The problem here though is that there is a line of case law under the RMA whereby for consent renewals (i.e. applications to renew resource consents) decision makers are forced to imagine an “*existing environment”* without the REG activity, including the associated infrastructure, in place. To be clear, this concern and approach applies to all consent renewal applications under the RMA, not just those involving electricity generation assets, but is a particular concern for REG assets given their nature and effects, including (in the case of hydro generation) commonly as a long-established part of the environment in question.

This highly artificial approach to assessment puts renewals of existing REG projects at real risk of being refused. This approach also makes the assessment process more complex and resource intensive.

Consenting the pace and scale of REG needed for New Zealand to meet its greenhouse gas emission reduction commitments (domestic and internationally) will be challenging enough, assuming the existing baseline of REG assets is entirely secure. The same applies to the *Electrify NZ* ambition of doubling the supply of affordable clean energy, consistent with a lower emissions economy.

If the existing renewable electricity baseline is at risk, meeting those commitments and the *Electrify NZ* ambition would almost certainly become unachievable.

While part of the solution to this will be for national direction under RMA to provide for consent renewals as (at worst) controlled activities (as addressed below), the more fundamental requirement is to correct this line of case law under the RMA, so that consent authorities must instead consider the effects of a renewal application against an existing environment *with the REG assets in place*.

Amending s104(2A) of the RMA (which deals with renewal applications under s 124, and s 165ZH) as follows, would provide that correction:

(2A) When considering an application affected by section 124 or 165ZH(1)(c), the consent authority must:

(a) Have regard to the value of the investment of the existing consent holder [*per existing text*]; and

(b) Assume an existing environment that includes the activity subject of the application.

While put in general terms so as to apply to all activities, the amendment set out in subsection (b) above could be confined to REG assets specifically.

**NPS-REG 2024**

In summary to this point, ESEG considers that the targeted amendments explained and set out above would provide the necessary basis for the proposed NPS-REG 2024 to deliver on this Government's ambition to unleash investment in renewable electricity generation.

ESEG also agrees that replacement of the current NPS-REG is critical and long overdue.

In addition to the points raised above in this respect, ESEG sees the following elements as essential to the proposed NPS-REG 2024:

- Leveraging off the amendment to s 45A as set out above, that it direct how decision makers should reconcile or resolve conflict where REG activities must necessarily locate in areas with resource values addressed by the protective provisions of s 6 (as they stand).

- Setting activity status at no more stringent than controlled particularly for renewals of existing consents.

- Enabling policy direction in respect of renewal of existing hydro-generation consents, including as to activity status.

- Directing consent duration for REG projects at 35 years (as proposed under the *Electrify NZ* policy), and in addition directing that lapsing dates should be no less than 10 years (to ensure sufficient time for consent implementation including detailed design, baseline environmental studies and procurement).

The issue of consent duration is a particularly significant issue for the electricity generation sector. REG projects involve very substantial capital commitments and represent inter-generational scale investments. Security of consent term to ensure a sufficient return on that scale of investment is critical to funding decisions to proceed with such investments, at Board level.

The ESEG members are increasingly facing a trend across New Zealand where consent terms for projects involving water, air or coastal resources are being reduced below the 35 year maximum currently set under the RMA. While the issue of consent term could also be progressed through the NPS-REG 2024, ESEG urges the Minister to seriously consider a 35 year duration for REG projects, again as proposed under with the *Electrify NZ* policy, but directly in the RMA itself This could be included in either the first or second Bills referred to in the Minister's letter.

**Conclusion**

The ESEG thanks the Minister for the opportunity to set out priorities for targeted changes to the RMA to enable the Government to deliver on its *Electrify NZ* policy programme.

This letter has necessarily been prepared at pace but drawing on the extensive background of engagement with relevant Ministry officials over the past several years, as explained above.

Should it assist, additional evidence to support the case for these amendments (including any future Regulatory Impact Statements regarding the same) can be supplied, ESEG respectfully suggests through further engagement with the Ministry officials involved in this specific reform programme.