Wind Energy in New Zealand: Regulatory and Policy Lessons to Date

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This article analyses the treatment of wind energy under the Resource Management Act 1991 ("RMA"). It includes an assessment of government policy in respect of alternative energy, and how this has played out in terms of three major amendments to the RMA from 2003–2005, as well as the influence of New Zealand's present position regarding emissions trading under the Kyoto Protocol. Case studies of resource consent applications for large wind energy projects are included. From them, a number of key planning issues are identified that are likely to affect the future regulatory treatment of wind energy in New Zealand.

1. INTRODUCTION

This article is set out in two parts. The first part summarises the political, policy and legislative background respecting the treatment of energy to date under the Resource Management Act 1991, with particular reference to wind energy. The second part applies the lessons learned in part 1 to wind energy projects in New Zealand, most notably wind farm resource consent applications in the Tararua Ranges of the Manawatu region of New Zealand's central North Island. The case studies show how wind energy projects have been treated to date under New Zealand environmental law, and the increasing sophistication of the consents process respecting wind energy.

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2. LEGISLATIVE AND POLITICAL BACKGROUND – ENERGY PROJECTS

Some of the following discussion about RMA legislative history is moot, in the sense that it refers to amendments that were proposed, but not enacted. Those proposals are nonetheless important, as they demonstrate linkages to underlying political forces and policy that helps to explain the regulatory landscape respecting national energy projects in New Zealand.

2.1 Resource Management Act 1991 – "let local government decide"

The RMA is often described as "permissive" or "enabling" legislation.[1] Subject to qualifying presumptions in the Act (including the presumption against subdivision), many major land activities are permitted by the RMA, subject to an assessment of their effects. In theory, the RMA devolves much of the responsibility for decision-making to local authorities, leaving the government to provide direction through a variety of tools, including National Policy Statements and National Environmental Standards. Local governments were given responsibility under the RMA for creating plans that identified issues of local concern, and for formulating objectives, policies and rules to deal with local issues identified in those plans. The resource consent process was implemented in order to provide procedures and associated tools to ensure proper notice of significant projects, public input, and informed decision-making.

New Zealand's climate is conducive to the development of wind energy. In 1993, for example, the Ministry of Commerce considered that wind power would be able to deliver vast amounts of electricity, possibly over 50,000 GWh, at reasonable costs.[2] This would be a substantial contribution, considering that consumption in 1993 was about 30,000 GWh of electricity each year.[3] New Zealand's first commercial wind farm was constructed in 1996 at Hau Nui in the Wairarapa. The general trend since then has been for larger wind farms with increasingly larger turbines.

No special rules were contemplated for assessing wind farms in the 1990s.[4] It was believed that the RMA was procedurally robust in terms of local government access to expertise, local decision-making, and opportunities for

1 Randerson, T (1997), "Resource Management Act 1991", pp 55–121, in Williams D A R (ed), *Environmental and Resource Management Law*, Wellington: Butterworths, at 68.

2 Ministry of Commerce (1993), *Renewable energy opportunities for New Zealand*, Ministry of Commerce, Wellington.

3 Ibid, at 1.

4 Energy Efficiency and Conservation Authority (2001), *Review of New Zealand's wind energy potential to 2015*, EECA, Wellington.

public input, and protection of the environment.[5] That view would change with the cancellation of Meridian Energy's Project Aqua hydropower project, discussed later in this paper.

2.2 Resource Management Amendment Act 2003 – "business as usual"

The first major revisitation of the RMA occurred in 2003. The overall purpose of the 2003 amendments, as first proposed by the National Government in 1999, was to reduce perceived inadequacies in the RMA by resource consent applicants. There had been vociferous objections to the Act, on the basis of perceived delays, costs, and uncertainty in outcome. National's proposed amendments included several streamlining efforts, some of which could have had significant impacts on large energy projects. They included:[6]

- redefining "environment" in the RMA, so as to focus more closely on the biophysical environment and reduce human elements to health, safety, amenity and cultural values
- direct referral to the Environment Court of complex or contentious resource consent applications
- the use of outside environment commissioners to hear cases and make decisions

Extensive consultation was undertaken, involving over 700 submissions. It resulted in the introduction of an Amendment Bill in 1999 by then Environment Minister Hon Simon Upton. The amendments, if enacted, would have provided positive payoffs for power generators. In particular, they would have allowed a power generation company proposing to construct a wind farm to scope out opposition within the local community and/or council, and to decide whether or not to seek a hearing by an independent commissioner rather than a local council body. In the event of significant objections, the amendments as originally proposed would also have allowed for direct referral of a consent application to the Environment Court, thus bypassing costly and uncertain local council hearings. This would have provided considerable flexibility in strategic planning for energy projects, bearing in mind the lengthy delays in getting matters to the Environment Court that were common at that time.

Objections to wind farm resource consents would have been limited in significant ways by the 1999 Amendment Bill. The removal of "economic" and "aesthetic" conditions from the definition of "environment" would have

5 Ibid, at 24.

6 Resource Management Act Amendment Bill, 13 July 1999, Explanatory Note at 2. See also http://www.mfe.govt.nz/management/rma/rma_amend.htm#rmabill (accessed 19 March 2005).

eliminated the ability to object to wind farms on the basis of their economic impacts on adjoining landowners. The removal of the term "aesthetic coherence" from the definition of "amenity values" would have removed barriers against activities perceived to be different, including wind turbines located in a rural landscape. For other reasons, notably the objection by Maori to removal of "aesthetic coherence" because it would diminish protection of cultural heritage, this term, as well as the definition of environment, were left unchanged when the Bill was revised.[7]

The 1999 Amendment Bill stalled after second reading, due in part to a change in government. The new Labour Government announced that it would seek further changes to the Bill in December 2001, resulting in Resource Management Act Amendment Bill No. 2 in March 2003. Amendments in sections 18–23 of the 2003 Amendment Act came into force on 20 May 2003, relating to National Environmental Standards and National Policy Statements. Remaining sections, related to new forms, fees and procedures regulations, commenced on 1 August 2003.[8]

The Labour Government, in coalition with the Green Party, was perceived to have "gutted" the 1999 Bill, or at least to have removed most of the business-friendly clauses, when it was revised from 1999–2003.[9] Of possible concern to wind energy generators was the loss in the revised Bill of direct referrals to the Environment Court for projects with national or regional significance, including energy projects. Also removed was a clause limiting the right of the Environment Court to seek security for costs. Its enactment would no doubt have had a chilling effect on objections.

The 2003 amendments were nonetheless extensive: the 2003 Amendment Act has 114 sections. However, they are largely streamlining and clarification measures. The most significant amendment impacting on energy projects expanded the purpose of National Policy Statements to include "objectives", as well as "policies on matters of national significance". This can be contrasted with the amendment originally proposed in 1999, but abandoned prior to the 2003 Amendment Act. The 1999 Bill provided for much more: methods to implement a National Policy Statement, a requirement for councils to amend their policy statements or plans, and a specification for the time in which an action must be taken. This was unacceptable to the Local Government and Environment Committee reporting back on Bill No. 1, because under the RMA, "methods" can include "rules". By extension, therefore, a National Policy Statement could have included rules. This was unacceptable. The Committee considered that

7 Resource Management Act Amendment Bill No. 1, as reported from the Local Government and Environment Committee, 8 May 2001.

8 For a fuller history, see http://www.mfe.govt.nz/laws/rma/amendments-timeline.html (accessed 19 March 2005).

9 See, e.g., "Dusted-off bill draws criticism", *New Zealand Herald*, 9 October 2002.

a NPS is not regulatory in nature and the Government would not be able to directly enforce rules contained in a NPS.[10] Energy interests were nonetheless promoted. A future NPS would now be able to specify particular objectives, including (for instance) the promotion of alternative energy.

2.3 Resource Management (Energy and Climate Change) Amendment Act 2004 – "renewables have a say"

The underlying policy promoting renewables in the 2004 legislation can be gleaned from cabinet notes of the Ministerial Group on Climate Change. CAB Min (02) 27/3A directed officials to report back by 20 November 2002, on the potential need to provide a stronger mandate to encourage energy efficiency and renewable energy generation. It was driven by a perception that the RMA implicitly, but not explicitly, required councils to have regard to renewable energy when considering proposals. Existing direction equivalent to a National Policy Statement was available from the Energy Efficiency and Conservation Authority (EECA). It was established under the Energy Efficiency and Conservation Act 1999. The strategy produced by EECA is a "strategy produced under another Act", and is thus snared by the RMA[11] as a planning directive for regional and district councils.

However, research conducted in 2003 by external consultants to the Ministry for the Environment[12] indicated that few councils were proactively embracing renewables in their plans. The goal, therefore, was to provide a level playing field whereby wind power and other renewable projects could be given explicit recognition in either sections 6 or 7 of the RMA, so as to balance existing recognition of landscape and amenity values contained therein. The resulting statement of public policy objectives contained in the explanatory note that accompanied the amendment "will require councils, in the development of their plans, to consider national energy objectives so that proposals for renewable energy and energy efficiency do not encounter unnecessary barriers."

The following options were considered:

- non-statutory guidance
- a National Policy Statement
- amendment to explicitly include renewable energy in either section 6 or 7 of the RMA

10 Supra, note 8, at 19.

11 Sections 61, 66 and 74.

12 MWH New Zealand Ltd (2003), *Evaluation of energy efficiency and renewables issues in plans under the Resource Management Act 1991, and other Local Authority initiatives*, Ministry for the Environment, Wellington.

In light of the uncertain timeframes and content of a NPS, and in light of the perceived failure to date in using a soft approach, Cabinet advice was therefore to amend section 7. It considered that amending section 6 ("Matters of national importance") would conflict with the thrust of that section, which is to protect and preserve. It was recognised when making the amendments that the changes would not result in the identification of the specific effects that should be considered, or appropriate responses. Rather, it would afford a stronger mandate to consider these issues when making planning decisions.[13] The 2004 amendments were introduced on 29 July 2003, and came into force on 2 March 2004. The purpose of the amendments, stated in section 3, is as follows:

3 (a) to make explicit provision for all persons exercising functions and powers under the principal Act to have particular regard to
  (i) the efficiency of the end use of energy; and
  (ii) the effects of climate change; and
  (iii) the benefits to be derived from the use and development of renewable energy; and
(b) to require local authorities
  (i) to plan for the effects of climate change; but
  (ii) not to consider the effects on climate change of discharges into air of greenhouse gases

The 2004 Amendment Act is very short (9 sections). It inserted new paragraphs into section 7 of the principal Act, "(ba) the efficiency of the end use of energy", as well as new paragraphs "(i) the effects of climate change", and "(j) the benefits to be derived from the use and development of renewable energy". The three new paragraphs were made additional to the existing list of "other matters" in section 7 that decision-makers are to have particular regard to when making decisions about the use, development and protection of natural and physical resources.

New definitions were provided for "climate change", "greenhouse gas", and "renewable energy". The latter is now defined under the RMA as "energy produced from solar, wind, hydro, geothermal, biomass, tidal, wave, and ocean current sources".

The 2004 amendments elevated regulatory decisions respecting the control of discharges of greenhouse gases from regional councils to national government. The effect of such an amendment, as reported from the Local Government and Environment Committee, would be to "recognise the Government's preference

13 Resource Management (Energy and Climate Change) Amendment Bill, Explanatory Note, at 3.

for national coordination of controls on greenhouse gas emissions". The control tools explicitly mentioned in the Committee report[14] were future National Policy Statements and National Environmental Standards.

The selective hand of national government on the tiller of climate change controls in some areas, but not others, is a potential source of conflict created by the 2004 amendments. The amendments as finally enacted narrowed the meaning of energy efficiency to "the efficiency of the end use of energy". The reason for doing so was to provide certainty that "use" would not extend to the efficiency of converting or tapping the inherent available energy within a primary resource. However, the National Party in its submission picked up on this disparity. It noted that the involvement of the RMA in energy end use would be relegated to an "end of pipe" application, whereby the RMA would be uninvolved in how energy is produced. The National Party argued that the requirement for the end use of energy to be efficient was illogical, on the basis that it would be allowable to waste energy with inefficient wind turbines, but not allowable to waste energy in manufacturing or home use.

2.4 Resource Management Amendment Act 2005 – "what is in the national interest?"

The following analysis includes reference to a number of media reports. They form a necessary part of the research, as the public was excluded from much of the 2004/2005 RMA review. Notwithstanding the 2003 amendments, the Labour Government realised that objections to the RMA were unlikely to go away. The old problems had not been solved. In particular, businesses continued to complain about inefficiencies in decision-making, costs, and uncertain outcomes. Glaring national attention was focused on the RMA as a consequence of the collapse in March 2004 of Meridian Energy's ambitious $1.2-billion Project Aqua hydro diversion scheme in New Zealand's South Island. At the time, Meridian cited a number of reasons for its withdrawal.[15] A great deal of scrutiny, however, was focused on the RMA-related aspects of the project.

The perceived failure of the RMA to deal with large-scale energy projects like Project Aqua would have far-reaching political and policy repercussions. It would result in the Labour Government resiling from the position it held during the 2003 amendment process. At that time, the Government favoured a "business as usual" approach, with central government maintaining a largely devolved stance on environmental matters. Devolution of such control had been a central feature of the RMA since it was first enacted in 1991. The 2003

14 Resource Management (Energy and Climate Change) Amendment Bill, as reported from the Local Government and Environment Committee, at 3.

15 "Project Aqua scrapped", *New Zealand Herald*, 29 March 2004.

amendments were designed to improve the implementation of the RMA, by reducing duplication, uncertainty, and the cost of compliance, and to improve procedural elements, without compromising environmental outcomes or reducing opportunities for public participation. The government's preferred option was to promote best practice by local government, leaving councils making insufficient progress "answerable to their own communities".[16]

Within two days of Meridian's announcement to scrap Project Aqua, however, the Labour Government announced that the RMA would be reviewed.[17] The Energy Minister stated that Project Aqua's cancellation would set back New Zealand's energy production by four years.[18] Not surprisingly, other major infrastructure and energy projects were raised in the context of the review decision. The desire to streamline processes and eliminate delays for a variety of mega-projects was discussed, including a major overhaul of the RMA.[19] Elevating the importance of the national interest in cross-council projects was raised by TransPower, a State Owned Enterprise and national grid operator. It wanted "some explicit recognition in the RMA decision-making process of national-development-type projects, and mechanisms that would allow the national benefit to be balanced against local cost".[20] That view inevitably raised the spectre of a return to the National Government's "think big" policies of the 1970s, which resulted in large national projects without adequate planning.

The review that followed was headed by Hon. David Benson-Pope. He was appointed Associate Minister for the Environment in February 2004, and was co-opted on to the Cabinet working group on infrastructure issues, chaired by Finance Minister Michael Cullen. At the time, it was perceived that Benson-Pope would provide a more trenchant review of the RMA, including the possibility of amending it to require councils to take the national interest into consideration when hearing planning applications. To misquote Oscar Wilde, "losing one power project might be regarded as misfortune, losing two would look like carelessness".[21]

The RMA review process is covered in detail by Daya-Winterbottom.[22] His conclusions include the following:

- There was no formal submission process for the review.
- There was an underlying tension in attempting to balance national

16 Supra, note 8, at 3.
17 "Aqua axing puts heat on planning law", *New Zealand Herald*, 31 March 2004.
18 "Aqua axing big setback for energy production: Hodgson", *New Zealand Herald*, 30 March 2004.
19 "Who killed Project Aqua?", *New Zealand Herald*, 3 April 2004.
20 "$1.5 billion power upgrade at risk", *New Zealand Herald*, 4 April 2004.
21 "John Armstrong: avoiding a power vacuum", *New Zealand Herald*, 4 April 2004.
22 Daya-Winterbottom, T, "RMA deja vu: reviewing the Resource Management Act 1991" (2004) *New Zealand Journal of Environmental Law* 8: 209–242.

and local interests, which was a key objective of the review process. In particular, there was a perception that local authorities were being unfairly asked to consider projects of national significance (including energy infrastructure) without guidance from national government on how competing national benefits and local costs were to be weighed.
- A vacuum in policy existed to redress any imbalances, due to the government's failure to date to produce either National Policy Statements or National Environmental Standards.
- During the review, the Labour Government's inclination was to avoid making any changes to the RMA to insert national interests as a purpose of the Act, but rather to become more proactive about producing NPS and NES guidance.

The Resource Management and Electricity Legislation Amendment Bill was tabled in Parliament on 2 December 2004. First reading and referral to the Local Government and Environment Committee occurred on 14 December. A total of 322 submissions were received. The Committee reported back to Parliament in June 2005,[23] and the amendments were passed as a matter of urgency just before Parliament recessed in preparation for a general election in August 2005. Changes to the Electricity Act 1992 had been separated out, and further, final amendments to the RMA Bill occurred by way of Supplementary Order Paper.

The key amendments in the 2005 Amendment Act relevant to wind energy projects include greater opportunities for national government to provide direction, or otherwise become involved in matters of local concern. The 2005 amendments allow for much greater government involvement in local council decision-making, by:

- providing the Minister with broad powers to investigate and make recommendations about a variety of matters, including council performance, and to take action if the Minister perceives that a local authority has failed to act on a Ministerial recommendation
- providing the Minister with the power to direct a regional or district council to provide information, or to change its plan so as to address a resource management issue (e.g. renewable energy) related to its functions under the RMA
- making more explicit reference to National Environmental Standards in various places within the RMA, so as to ensure that they are given priority in local government decision-making
- providing the Minister with much greater discretion as to how to develop

23 Resource Management and Electricity Legislation Amendment Bill, as reported from the Local Government and Environment Committee, 8 June 2005.

a National Policy Statement, including a new ability to fast-track a NPS (with limited opportunity for public input), and to ensure its timely adoption by local councils
- making more explicit the lines of authority from the Minister to regional councils, and from there to district councils.

The purpose of the RMA was not altered by the 2005 Act so as to include matters of "national interest". This portion of the Amendment Bill, which harked back to the 1999 National Party amendments, was dropped. Matters of national interest were nonetheless incorporated into the 2005 amendments, by a complete revision and expansion of the Minister's call-in powers. Notwithstanding the lack of resource consents that had been called in since the RMA was enacted in 1991, the 2005 amendments provide very significant increased powers to the Minister, regarding "proposals of national significance". Such proposals can arise in the context of resource consents, plans, designations, or heritage matters. New Ministerial powers included the power to "intervene". This can occur at the request of an applicant, local authority, or on the Minister's own initiative. Under new section 141A, the Minister's powers are:

(a) to decide not to intervene;
(b) to call in the matter under section 141B;
(c) to make a submission on the matter for the Crown;
(d) to appoint a project co-ordinator for a matter to advise the consent authority on anything relating to the matter;
(e) if the matter involves more than 1 consent authority, to direct the consent authorities to hold a joint hearing on the matter;
(f) if a consent authority appoints 1 or more hearings commissioners for a matter, to appoint 1 additional hearings commissioner for the matter.

The 2005 amendments provide discretion as to how the Minister may call in a particular matter. It may be referred to a board of inquiry, or directly to the Environment Court. These are very significant new powers created by the 2005 Amendment Act. What is "a proposal of national significance"? Under new section 141B, the Minister may have regard to "any relevant factor", including whether the matter:

(a) has aroused widespread public concern or interest regarding its actual or likely effect on the environment, including the global environment; or
(b) involves or is likely to involve significant use of natural and physical resources; or
(c) affects or is likely to affect any structure, feature, place, or area of national significance; or

(d) affects or is likely to affect more than one region or district; or
(e) affects or is likely to affect or is relevant to New Zealand's international obligations to the global environment; or
(f) involves or is likely to involve technology, processes, or methods which are new to New Zealand and which may affect the environment; or
(g) results or is likely to result in or contribute to significant or irreversible changes to the environment, including the global environment; or
(h) is or is likely to be significant in terms of section 8 (Treaty of Waitangi).

Of interest to energy providers are portions of the 2005 proposed amendments that were *not* enacted. In addition to the decisions not to alter the definition of "environment" in the RMA, or to include national interests as part of the RMA's purpose, the following amendments were *not* enacted:

- a requirement that regional councils promote energy infrastructure (including electricity lines and support structures). The Local Government and Environment Committee reporting back on the Bill would only go so far as to change Section 30 of the RMA to provide a regional council responsibility for "the strategic management of the integration of infrastructure with land use policies".[24] According to the Committee, this would result in better clarifying the intent to provide regional councils with an overseeing role in ensuring integrated management of infrastructure with good land use outcomes.
- limiting the right to object, by introducing criteria that would limit the rights to make further submissions, by requiring compulsory attendance at pre-hearing meetings, by expanding the strikeout power of local councils, and by restricting the ability of the Environment Court to re-hear matters to matters of law. The Committee considered that these changes would undermine the right of the public to participate in RMA processes, and make council hearings too inquisitorial.[25] The rights to object arguably have been fortified by the 2005 amendments, by clarifying the right to review notification decisions by the Environment Court, by providing a right of objection under section 357 for persons denied a hearing, by removing compulsory mediation, and by recognising hapu as well as iwi in consultation processes.

24 Supra, note 24, at 5.
25 Ibid, at 11.

2.5 Climate Change Policies and Emissions Trading

The Climate Change Response Act 2002 put in place a legal framework that would allow New Zealand to ratify the Kyoto Protocol. It included powers for the Minister of Finance to manage and trade New Zealand's holdings of units on the international market, representing the country's target allocation for greenhouse gas emissions during the first commitment period 2008–2012. An associated initiative was the Projects to Reduce Emissions Programme, run in association with the newly established Climate Change Office.[26] The Programme has supported a number of initiatives, including wind farms, by awarding them emissions units, or "carbon credits". To be eligible, a given project would need to deliver verifiable savings of at least 10,000 tonnes of carbon dioxide or its equivalent in other greenhouse gases during the first commitment period of the Kyoto Protocol.

The failure of Project Aqua in 2004 provided powerful political leverage for wind energy. Within three days of its cancellation, the Government announced that renewable energy projects totalling 240 megawatts would be awarded subsidies under the Government's climate change policy.[27] The Government's announcement stated that 94 MW of new wind power had already been signed on, with another 140 MW possible in the form of hydroelectric, geothermal, co-generation and wind. The projects, if successful, would collectively produce about one-third of the generation lost from Project Aqua's cancellation.

Access to subsidies has been critical for the expansion of wind energy in New Zealand. At the time of the Project Aqua cancellation, TrustPower, which constructed New Zealand's first wind farm in the Tararua Ranges, stated that wind farms were still extremely marginal, and the price of power would have to increase before building more. Meridian's Tararua wind farm was only made feasible through the carbon credits it was awarded by the Government.[28] Other energy projects appear to operate on a similar knife edge. At the time of Project Aqua's demise, Meridian Energy warned that it would have needed to produce hydroelectricity from the project for less than 5 cents a kilowatt-hour to be economically viable. When the project was cancelled, costs already had risen to 4.5 cents.[29]

New Zealand's climate change policy promoting emissions trading has had three very significant effects on wind energy projects in New Zealand:

26 See, e.g., http://www.climatechange.govt.nz/plicy-initiatives/projects (accessed 1 September 2005).

27 "Government offers carrots for green energy projects", *New Zealand Herald*, 1 April 2004.

28 "Meridian taking another look at wind after Aqua canning", *New Zealand Herald*, 2 April 2004.

29 "Who killed project aqua?", *New Zealand Herald*, 3 April 2004.

- The marginal returns on projects reported by developers has emphasised the importance of subsidies in getting projects off the ground. They are thus sensitive to an uncertain carbon market, as well as to the argument, "What happens when the subsidies run out?"
- Marginal returns have provided developers with significant leverage that they can exert on local councils. The notion that a plug can be pulled on a project in the event of "any nonsense", suggests that there will be pressure on councils to categorise wind energy in plans as a favoured activity.
- Conflicts of interest may occur in the event that a local council wishes to construct its own wind farm. At the time of writing, Palmerston North City Council is progressing plans to notify a wind farm in which it has a vested interest, to be located in the Turitea hills east of the city.[30]

3. TREATMENT OF WIND ENERGY RESOURCE CONSENTS UNDER THE RMA

The purpose of the following research was to identify key planning issues that have arisen to date in New Zealand in respect of wind energy resource consent applications under the RMA, and how they have been addressed by decision-makers. The research was undertaken using as a primary reference consent applications associated with wind farms in the Tararua Ranges of the central North Island.

The various Tararua Ranges projects offer an opportunity to trace the history of wind farm consent applications, since the first application for a wind farm was lodged in New Zealand in 1996. They demonstrate the maturing of the consent application process, and how various planning issues have played out in practice. The following sources of information were used to analyse the consent applications that follow: planners' reports, media reports, notable submissions, and hearings decisions. The key planning issues arising from the Tararua wind farms are contrasted with the only wind farm application to date that has been fully appealed to the Environment Court: Genesis Energy's Awhitu wind farm located southwest of Auckland. Discussion of that decision is included in order to "flesh out" outstanding planning issues that may impinge on future wind farm consent applications under the RMA.

30 "$300 million wind farm deal signed", *New Zealand Herald*, 30 August 2005. The described project is a partnership between Mighty River Power and Palmerston North City Council.

3.1 Summary of Tararua Wind Farm Resource Consents

Tararua Stage 1 – 1996
Applicant: Tararua Windpower Ltd
Decision-maker: Tararua District Council
Details: Application to construct up to 132 turbines and ancillary activities, to be built in stages. The application (including subdivision) was treated as a non-complying activity in the Rural Zone of the transitional District Plan, and as a discretionary activity in the Rural Management Area of the proposed Plan.
Outcome: Notified; 9/23 submissions in opposition; consent granted (with conditions); no appeal

Tararua Stage 2 – 2001
Applicant: Wind Farm Developments Ltd
Decision-maker: Palmerston North City Council
Details: Tararua Stage 1 was completed in 1998 (48 turbines). Stage 2 involved the construction of 55 turbines. Of these, 39 were constructed under the 1996 consent. A further 16 fell under this Stage 2 consent. Treated as an unrestricted discretionary activity in the Rural Zone of the Palmerston North City District Plan, and Rural Management Zone of the Tararua District Plan.
Outcome: Non-notified; consent granted (with conditions)

Tararua Stage 2 Variation – 2003
Applicant: TrustPower Ltd (successor to Tararua Windpower Ltd)
Decision-maker: Palmerston North City Council
Details: Application to resite 4 of the Stage 2 turbines from TDC territory to PNCC territory.
Outcome: Non-notified; consent granted (with conditions)

Te Apiti – 2003
Applicant: Meridian Energy Ltd
Decision-maker: Tararua District Council
Details: Discretionary activity application for 55 wind turbines and ancillary activities in the Rural Management Zone of the District Plan, 1.7 km north of the existing Tararua wind farm(s), at the southern end of the Ruahine Ranges on the other side of the Manawatu Gorge. The turbines in this application were much larger (106 m) than previous ones.
Outcome: Notified; 7/16 submissions in opposition; consent granted (with conditions); no appeal

Te Rere Hau – 2005
Applicant: New Zealand Windfarms Ltd
Decision-maker: Palmerston North City Council (Independent Hearings Commissioner)
Details: Application for 104 turbines and ancillary activities approximately 1.2 km southwest of the existing Tararua wind farms
Outcome: Notified; 34/65 submissions in opposition; consent granted (with conditions); decision appealed; appeal settled by Consent Order resulting in a reduction to 97 turbines

Tararua Stage 3 – 2005
Applicant: TrustPower Ltd
Decision-maker: Jointly before Palmerston North City Council and Tararua District Council (Joint Hearings Panel)
Details: Application for a 40-turbine extension (plus ancillary buildings and activities) to the existing Tararua wind farm site (i.e. in addition to the existing 103 turbines at that site), involving significantly larger turbines than those pre-existing on the site. Although lodged as an application for a discretionary activity under the Palmerston North District Plan, there was discussion at the hearing as to whether it was more properly an application for a non-complying activity, at least insofar as there may have been non-compliance with two specific rules in the Plan relating to noise standards and the airport protection surface. This issue was resolved during the hearing in favour of treating the application as a whole as a discretionary activity
Outcome: Notified; 230/340 submissions in opposition; consent granted for 31/40 turbines; 9 turbines declined on the basis either that their impact on landscape values and visual amenity would be more than minor, or on the grounds of a potential adverse effect on aviation safety and/or the maintenance of the operational capability of Palmerston North International Airport; no appeal

The following trends are revealed in consents heard from 1996–2005:

- increasing numbers of objectors
- increasing sophistication of the objections
- increasing uncertainty on the part of applicants as to the likelihood of success at hearing, in particular how many turbines may be allowed
- increasing requirement for consultation by applicants.

The analysis that follows highlights the most important planning issues that have arisen during the various Tararua consent hearings. In general, it tracks the procedure used in New Zealand for assessing resource consents under section 104 of the RMA, which states (in part):

When considering an application for resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to –

(a) any actual and potential effects on the environment of allowing the activity; and
(b) any relevant provisions of –
  i) a national policy statement
  ii) a New Zealand coastal policy statement
  iii) a regional policy statement or proposed regional policy statement
  iv) a plan or proposed plan; and
(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

3.2. Key District and Regional Plan Provisions Respecting Tararua Wind Farms

In the Palmerston North District Plan (operative November 2000), all of the wind farms to date have been located in the Rural Zone. District Plan Rule 9.9.2 states that (emphasis added):

*Sawmills, Rural Industries and **Wind Farms** are Discretionary Activities (Unrestricted).*

The rule further states that:

In determining whether to grant consent and what conditions if any to impose, Council will in addition to the City View objectives in Section 2 and the Rural Zone objectives and policies, assess any application in terms of the following further policies:

(a) To avoid, remedy or mitigate adverse visual effects of any proposed building, structure or storage areas for products and waste, on the surrounding rural environment, and on the landscape values of adjoining areas.
(b) To avoid, remedy or mitigate the effects of noise and other environmental disturbance, on the amenity of the surrounding area.
(c) To avoid, remedy or mitigate the risk of contamination posed by hazardous substances.
(d) To avoid, remedy or mitigate the adverse effects on the safe and efficient operation of the roading network from the traffic movements generated by activities.
(e) To ensure the provision of adequate on-site parking, loading, manoeuvring and access space to avoid this taking place on roads.

> Explanation
> *All industrial activities in the rural areas, because of the lack of services, have the potential to create adverse effects on the rural environment. Their usually "one-off" location also increases their visual impact as does outdoor storage of goods and waste. A Discretionary Activity consent process gives the Council the opportunity to assess any adverse effects to ensure that those effects are avoided, remedied or mitigated.* ***In the case of wind farms, the largely unknown effects of the activity mean that it is essential that it be examined on a case by case basis.***

The Tararua District Plan contains no specific rules or performance standards (including noise) for wind farms. The wind farms to date have been located in the Rural Management Area, where they are listed as discretionary activities. The key objectives and policies for the zone emphasise the maintenance of rural character, while achieving sustainable rural land use and efficient use of resources. Similar objectives and policies are found in the Palmerston North District Plan.

The Palmerston North District Plan does not schedule the Tararuas as an outstanding natural landscape or natural feature. The ridgeline is identified as a Category B significant natural feature and landscape in the Tararua District Plan.[31] The Manawatu-Wanganui Regional Policy Statement identifies the Tararua Ranges as an outstanding natural landscape. Policy 8.3 states the intention:

> To protect, from inappropriate subdivision, use and development, the specific values associated with the following features which are both outstanding and regionally significant:
> p. the skyline of the Tararua Ranges, specifically:
> i. its scenic qualities provided by its prominence throughout much of the region and its backdrop vista in contrast to the region's plains.

The explanation states in part:

> The values and attributes of the Ranges which contribute to its significance, and are to be protected, are listed in Policy 8.3. The skyline is defined as the boundary between land and sky at the crest of the highest points along the ridge. The skyline of the Tararua Ranges is the land/sky boundary as viewed at sufficient distance from the foothills so as to see the contrast between the solid nature of the land at the crest at the highest points along the range and the sky.

31 For comparison, the Ruahine location for Te Apiti was not listed in the Tararua District Plan.

3.3 Assessment of Environmental Effects

The Tararua 1 application dealt primarily with a "presence/absence" decision. Consequently, visual impact was the most important consideration. The Hearings Committee accepted that the proposed wind farm would have a significant visual impact that could not be avoided. It was not prepared to decline the application on this basis, however, primarily because only three objections were received about unacceptable visual intrusion. Notwithstanding that the site was located in an outstanding natural landscape within the (then) proposed Regional Policy Statement, the Committee further noted that the site was not listed in the Tararua District Plan(s). The Committee also viewed with favour the mitigation measures proposed by the applicant, including a lattice structure for the towers, colour concealment, and vegetative cover for ancillary buildings.

Arguably the most comprehensive canvassing to date of environmental effects for wind farms occurred during the Tararua 3 consent hearing. Working from over 340 submissions, the Hearings Panel was in a position to summarise all of the current environmental effects identified with wind farms in the Tararuas. They are:

- noise effects
- visual and landscape effects
- ecological effects
- earthworks
- traffic effects
- social and community effects
- cultural effects
- effects in relation to future subdivision and development of adjacent lands
- transmission line effects
- livestock and land use effects
- effects on airspace
- other potential adverse effects
- positive effects.

3.4 Noise

The current standard for assessing wind turbine noise effects in New Zealand is NZS 6808:1998 "Acoustics: the assessment and measurement of sound from wind turbine generators". As "another standard" it is referenced in the noise rules of the Palmerston North District Plan.

In the Te Rere Hau application, the question was raised about the extent to which there should be a requirement to internalise all of the noise effects of a wind farm. Some submitters called for specific noise limits at the geographical

boundary of the proposed wind farm, which would have restricted the number of turbines. However, the current New Zealand view (entrenched in various New Zealand noise standards) is that it is inappropriate to require residential-type noise limits at the boundary of an allotment in rural areas.[32]

The consent applications to date indicate that noise can be a nettlesome issue for decision-makers. Ambient wind in and of itself may produce noise in the 35 dBA range. Exacerbations to ambient sound may also occur due to micro-climate differences (e.g. by wind blowing through the needles of nearby pine trees). Consequently, there will likely be arguments as to what comprises an acceptable noise limit at a "notional boundary".[33] One methodology proposed at the Te Rere Hau hearings was a limit of 40 dBA or background + 5, whichever is the greater. The actual answer is likely to be site specific, involving an unavoidable measure of subjectivity and the necessity for expert evidence.

The issue of internalisation of noise in the Te Rere Hau application raised an interesting corollary issue of future noise effects. Some nearby submitters contemplated future subdivision of their land. This would likely be precluded by a "no go" noise contour immediately adjacent to the proposed turbines. Counsel for theses submitters argued that inhibiting rural residential development of nearby land would result in the undesirable development of such land into areas further away from existing development, in addition to a "no go" area. *Winstone Aggregates*[34] was raised in this regard. One of its key findings, in relation to the effects of industrial and other activities in a rural environment, is that "in every case activities should internalise their effects unless it is shown, on a case by case basis, that they cannot reasonably do so".[35] In addition to the rural noise boundary issues discussed above, the Hearings Commissioner distinguished this case on the basis that *Winstone* applies to the possible establishment of *permitted* activities. Since any future subdivision at the Te Rere Hau site would almost certainly proceed (as a minimum) as a controlled activity consent, the case was considered to be of limited applicability.

In addition to the noise issues discussed above, the Te Rere Hau application stands for the proposition that mitigation of noise effects can be demonstrated if an applicant adduces evidence that a turbine model has been redesigned so as to reduce the noise associated with previous versions of the turbine. Other types of evidence likely to find favour with a decision-maker are voluntary mitigation measures – for instance, relocating turbines, or mechanically modifying them so as to avoid operations in certain wind conditions.

32 Malcolm Hunt, Hunt & Associates, Wellington: personal communication.

33 "The notional boundary is a boundary defined as a line 20 m from the facade of any rural dwelling or the legal boundary where this is closer to the dwellings." This definition comes from NZS 6801:1991 which is referenced in NZS 6808:1998.

34 *Winstone Aggregates v Matamata-Piako District Council* W055/04, 9 NZED 687.

35 Ibid, at para 72.

3.5 Landscape Effects/Cumulative Landscape Effects

A key question that has come to vex decision-makers and public submitters in the Tararuas is: "When is enough, enough?" At what point does visual saturation occur, such that the effects of further turbines cannot be adequately mitigated? The cumulative effects of wind farms, adduced by expert planning testimony in the Tararua 3 application, include:

- the spread of wind farms along the horizon
- the intensity of wind farms in any one location
- the progressive incursion of wind-farm development down hill slopes.

Te Rere Hau is the most comprehensive of the Tararua applications to date in addressing landscape effects. They were assessed in terms of the existing Tararua wind farm very close to the proposed site, and the existing Te Apiti wind farm on the other side of the Manawatu Gorge. The mitigating factors argued by one of the applicant's planners included:

- a relatively small geographical envelope
- an undulating landscape preventing a uniform mass grouping, particularly as viewed from adjacent properties
- an extensive landscape capable of absorbing visual impact when viewed from a distance.

The methodology used to assess the application (as an unlimited discretionary activity) by Council's planner included:

- determining a baseline character of the existing landscape
- determining whether the existing landscape would be able to assimilate the change, or be eroded
- considering whether any proposed mitigation measures would effectively overcome adverse effects.

The planner for the objectors argued for a more holistic approach, whereby the Tararua Ranges should be viewed as a distinct landscape unit with a consistency of landform, land use and texture. Consequently, any further development should demonstrate "aesthetic coherence" so as to maintain the style of any adjoining development. With specific reference to the Tararuas, a distinction was drawn between the fewer, larger, slower-moving Te Apiti turbines located on the north side of the Manawatu Gorge, and the smaller, busier, more numerous turbines located on the other side. The Te Apiti turbines could be viewed as "sentinels" or "protectors" of the more numerous, smaller

Tararua versions. On this basis, any further development on the Tararua side would require turbines of a similar size, blade arrangement, and spacing. This interesting argument suggested that it was the way that turbines contrast with the landscape so as to make them positive elements that is important, even to the extent of a preferred location so as to be *conspicuous* on the Tararua skyline, rather than inconspicuous. Any attempt to "march" turbines down-slope into adjoining property would thus be unacceptable.

The Hearings Commissioner was not inclined to accept this argument. In granting consent for all of the Te Rere Hau turbines, he found that the cumulative effects would be no more than minor. In making that decision, reference was made to Policy 8.3 of the Regional Policy Statement, which refers to the protection of the "skyline" of the Tararua Ranges. Consequently, siting turbines down-slope was consistent with the RPS, notwithstanding the view of the objectors' planner. The Commissioner's decision also emphasised the distinction between "appropriate" and "inappropriate" subdivision in Policy 8.3, in his Part II assessment (see below).

3.6 Transmission Lines

In the Te Rere Hau consent hearing, concern was raised that there would be an upgrade of the existing 11-kV transmission line to 33 kV, producing various adverse effects. Counsel for the applicant argued that in the event such upgrade occurred, no imposition of conditions could occur because 33-kV transmission lines were permitted in the Palmerston North District Plan. Case law did not support the imposition of conditions on a consent involving permitted activities. Further, counsel for the applicant argued that section 104(2) allowed a decision-maker to disregard an adverse effect of an activity if the plan permits an activity with that effect.

As a result, the Tararua wind-farm applications have not so far addressed the issue of power lines that has vexed companies like TransPower in other contexts. TransPower faced huge opposition in the Waikato in 2005 to a $500-million power line it wanted to build to Auckland. In response to that opposition, it was reported that TransPower strongly supported the 2005 RMA amendments providing extra call-in powers to the Environment Minister, and limiting appeal rights of boards' decisions.[36]

3.7 Airspace

Airways Corporation's submission during the Tararua 1 hearings indicated that a number of turbines would need to be repositioned in order to avoid compromising flight approaches to Palmerston North Airport. In some cases

36 "Transpower backs plan to reduce appeal rights", *New Zealand Herald*, 11 March 2005.

the clearance level between ground level and the flight zone was a razor-thin 8 metres. The Hearings Committee would no doubt have been mindful of the Ansett fatal airplane crash in the same vicinity in 1995, due to low flight in fog conditions. Nonetheless, the Committtee was not prepared to set any restrictive conditions for consent unless Airways produced more substantive evidence of adverse effects. A similar result occurred in the Te Apiti hearings, in response to a submission by Palmerston North Airport Ltd to relocate or remove up to nine turbines. More evidence would be required. The Civil Aviation Authority was consulted, but made no formal recommendation to restrict the height or location of any turbines.

Following the Te Apiti results, Palmerston North Airport Ltd adduced extensive expert evidence during the Tararua 3 hearings. It indicated that a number of turbines would compromise flight safety related to instrument flight approaches to Palmerston North Airport. The Hearings Panel made special reference to provisions of the Palmerston North District Plan that recognised the Airport as a significant regional resource, and the crucial importance of the maintenance of a safe and effective transport system for the City. The Panel declined 9 of 31 turbines on the basis that their effect on airspace would be more than minor.

3.8 Spurious Environmental Effects

Objectors to the Te Rere Hau and Tararua 3 projects raised concerns about the following environmental effects for which supporting data were equivocal, or lacking:

- flicker effects on humans and animals
- adverse effects from turbine infrasound
- bird strike.

Objections on the basis of adverse effects on animals were fuelled by the success with which this argument was raised during the 2005 Awhitu consent hearing (discussed below). That application was declined by Franklin District Council in part because of concern that flicker and other effects on a nearby equestrian centre could not be avoided or mitigated.

With respect, there is a great deal of spurious data available on the World Wide Web about these matters. It is difficult to reconcile this information with the intuitive sense standing below a turbine that they are unlikely to be a significant threat to birds or livestock. Consequently, any claims in these areas should be viewed with considerable scepticism until proven otherwise.[37] Science is rife

37 See, e.g., Stewart, G, Pullin A and Coles, C (2004), *Effects of wind turbines on bird abundance*, University of Birmingham, Syst Rev 4. The most comprehensive review to date,

with case studies of initial, poorly conducted research that nonetheless becomes entrenched and distorted in the published literature.

In the Awhitu consent decision, the decision-makers referred to the 1991 British Horse Society's guidelines. These recommend a 1:3 rule for pylon height separation distance from equestrian activities. Where does this information come from? On what sound scientific studies is it based? The Awhitu decision also refers to evidence presented at the hearing about low frequency noise. This was obtained from the WHO and US EPA, indicating that it does not produce adverse health effects. Again, on what sound scientific studies is this conclusion based? The ability of local councils in New Zealand to adopt technical information by reference has been facilitated by the 2005 amendments to the RMA. Caution and diligence are recommended in the exercise of these new powers.

3.9 Consideration of Part II Matters

A key issue in wind-farm consent hearings is the extent to which an attempt will be made to balance, or otherwise offset, the protections of section 6 in Part II of the RMA, with matters that a decision-maker is to have regard to in section 7. Arguments about the importance attached to competing interests under Part II of the RMA arose in the Te Rere Hau and Tararua 3 applications. Both hearings took place following 2004 changes to section 7 of the RMA.

Those opposing wind farms stressed obligations under section 6(b) in relation to outstanding natural features and landscapes, and section 7(c) in relation to maintaining and enhancing amenity values. These were raised to offset the requirement for decision-makers to now have regard to section 7(i) and 7(j), the effects of climate change and the benefits to be derived from the use of renewable energy. At the Tararua 3 consent hearing, it was argued that a local council should not overemphasise a regard for issues of renewable energy generation against other issues of amenity value and environmental quality enunciated in Part II of the Act. Indeed, the Hearings Committee was prepared to scrutinise sections 7 (i) and (j) more fully in this instance. In particular, it was prepared to consider Council advice that benefits under section 7 should be argued on the facts specific to a proposal. On this basis, objectors to wind farms may now be able to ask councils to scrutinise the precise extent to which a particular proposal has the potential to substitute for future energy generation from non-renewable sources and thereby contribute to managing climate change.

it analysed 124 published articles and found weak correlations between wind turbines and bird abundance, and little in the way of proven cause and effect.

At the Te Rere Hau hearing, protection from "inappropriate subdivision" in section 6(b) of the Act and "inappropriate development" in the Regional Policy Statement were distinguished from protection from *all* development. By making this distinction, the Hearings Commissioner felt less constrained in considering the effects of *any* further wind-farm development upon the skyline of the Tararua Ranges, which were otherwise identified as an outstanding natural landscape in the Regional Policy Statement.

3.10 Other Matters, Including Positive Effects

There are presently no National Policy Statements or National Environmental Standards relevant to wind energy. In seeking a resource consent, it is now however possible to request that decision-makers have regard to the Government's commitment to the Kyoto Protocol under section 104(1)(c) of the RMA ("any other matter the consent authority considers relevant and reasonably necessary to determine the application"). The documents considered in Tararua wind-farm applications to date include:

- Energy Policy Framework (2000)
- National Energy Efficiency and Conservation Strategy (2001)
- Climate Change Response Act (2002).

All of them have been central in wind-farm decision-making. Collectively, these documents refer to international commitments for greenhouse gas reductions, national targets, emissions trading in carbon credits, and environmental threats to future generations that will require proactive and immediate steps in order to mitigate the adverse effects of global warming. In this context, wind energy has consistently been seen as a small but significant contribution that is to be encouraged and promoted.

3.11 Additional Issues Addressed by the Genesis Power Awhitu Wind Farm Consent

Genesis Energy was refused resource consent by Franklin District Council in February 2005 for a 19-wind-turbine operation located southwest of Auckland. Information from this decision is included here for comparison, as it is the only wind-farm decision to date that has been appealed fully to the Environment Court. Key distinguishing features of Franklin District Council's decision to decline the consent application, obtained from the hearings decision document, include:

- 237/262 submissions were in opposition to the proposal
- siting of turbines close to (within 80 m in one case) actively used property

boundaries produced scale- and siting-adjacent adverse visual effects which couldn't be avoided or mitigated (including shadow and flicker effects, acknowledged by the applicant's planner, who also acknowledged moderate-to-high impacts on several properties)
- the application produced distant adverse visual effects, including visibility impacts over a wide area and visibility impacts at a nearby beach, resulting in loss of natural character at the beach
- the application would produce injury and safety concerns, and impacts upon the commercial viability of a nearby equestrian centre that could not be adequately mitigated
- the application had a number of potential adverse effects upon matters relevant to Maori. In particular, there was insufficient evidence to refute a finding that it would compromise significant historic and cultural values at a site long associated with Maori (as shown by an Auckland Regional Council report). More information and consultation would therefore be required
- the application was inconsistent with portions of the Franklin District Plan related to matters of significance to Maori and the coastal environment. It was also inconsistent with the Auckland Regional Policy Statement related to matters of significance to Maori and the coastal environment. Further, it was inconsistent with the New Zealand Coastal Policy Statement related to visual effects and characteristics of special significance to Maori.

In summary, the advantages of renewable energy were trumped by the needs of local people, including matters related to community, social, economic and cultural well-being. Under Part II of the RMA, the advantages from the project from section 7 (i) and (j) were offset by other section 7 matters, including 7(c) (amenity values) and (f) (quality of the environment). It was also offset by the protection to be afforded to matters of national importance in section 6(a) (preservation of natural character), and by section 8 (Treaty of Waitangi).

The decision by Franklin District Council to refuse consent to Genesis Energy for its Awhitu wind farm was overturned on appeal (hereafter "the Awhitu decision").[38] Prior to the appeal being heard, Genesis agreed to remove one turbine and reposition two others. The changes resulted in Franklin District Council no longer opposing the proposal.[39]

The Awhitu decision is noteworthy in the way that the Environment Court made subordinate to the overall purpose of the RMA any competitive tradeoffs

38 *Genesis Power Ltd and EECA v Franklin District Council* [2005] NZRMA 541, A148/05.
39 Ibid, at para 42.

that might be attempted among sections 6, 7 and 8. In the Awhitu case, the benefits of the proposal, when seen in a *national* context, outweighed the site-specific effects, and the effects on the local area. The Environment Court held that preservation of natural character is subordinate to the primary purpose of the promotion of sustainable management in the RMA.[40] It quoted[41] from *New Zealand Rail*:[42]

> It is certainly not the case that preservation of the natural character is to be achieved at all costs. The achievement which is to be promoted is sustainable management ... and questions of national importance, national value and benefit, and national needs, must all play their part in the overall consideration and decision.

The Court held that the positive effects of the proposal were not site specific and must therefore be seen "in the wider context of Part II of the Act, and in a national context".[43]

4. CONCLUSIONS

With all of the current wind energy development occurring in New Zealand, the best that can be hoped for in a review such as this is an opportunity to take the current "regulatory pulse" of the wind energy landscape. It is a rapidly maturing area of resource management law that will no doubt attract its own jurisprudence. Because it is such an active and "big ticket" area of resource management in New Zealand, the lessons learned are likely to provide useful benchmarking and best practice for other countries.

The Awhitu Environment Court decision has sent a rather blunt message in respect of wind energy projects in New Zealand: wind is going to form a significant part of New Zealand's energy future. The key legislative and policy tools available to those in support of wind energy projects now include:

- increased Ministerial powers to promote renewables quickly in National Policy Statements, National Environmental Standards, plans, and planning decisions
- elevation of the importance of renewable energy by its inclusion as a matter decision-makers are to have regard to in section 7, and as a matter of "national significance", if so identified by the Minister in broad new powers afforded by the 2005 RMA amendments

40 Ibid, at para 218.
41 Ibid, at para 56.
42 *NZ Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC), at para 86.
43 Supra, note 39, at para 62.

- elevation of the importance of renewable energy by the Environment Court, as a matter of national importance, when assessing sections 6, 7 and 8 under the overall section 5 purpose of the RMA[44]
- in general, a narrowing of policy differences between the two major political parties respecting large energy projects that has occurred in the last few years; amendments to the RMA under the Labour Government from 2003–2005 have supported to a considerable degree the changes sought in the late 1990s by the predecessor National Government.

In addition, the Awhitu wind farm Environment Court decision stands for the following propositions, of particular significance to practitioners:

- wind is a part of the natural character of the location of many proposed wind projects; the use and development of wind in these locations may therefore be an "appropriate" use under section 6 of the RMA[45]
- an appeal to a wind-farm consent will fail if noise objections are a central element of it, but where no expert evidence is adduced[46]
- a "de minimus" argument respecting wind farms will fail under section 7 (i.e. that the quantity of electricity produced by any one proposal is minimal).[47] Although the Awhitu project would contribute only 0.8% towards New Zealand's energy target, the Environment Court soundly rejected a de minimus objection because "climate change is a silent but insidious threat that scientists tell us threatens to improperly deprive future generations of their ability to meet their needs".[48]

Objectors may be able to take some comfort from the fact that none of the Tararua wind energy consent decisions have so far squarely addressed the issue of approval to construct turbines on outstanding landscapes, or on land of special significance to Maori. The Tararua wind-farm decisions, for example, skirt around issues of outstanding *skyline*, while the Environment Court found on the facts that the Awhitu wind farm location was neither truly outstanding, nor especially significant to Maori. For comparison, a proposed wind farm at

44 Supra, note 39.

45 Supra, note 39, at para 83.

46 Citing in support, at para 120, *McIntyre v Christchurch City Council* [1996] NZRMA 289, at 294.

47 Supra, note 39, at para 224.

48 The Environment Court quoted with approval para 227 from the National Board of Inquiry into the Stratford Power Station in 1995, which found that although an emission from a proposed power station may be small by world standards, to ignore it would be to ignore cumulative effects of all such power stations around the world.

Baring Head was declined in 1995 by Lower Hutt City Council.[49] The site was identified in the Regional Policy Statement as having outstanding landscape and geological significance, as well as being of cultural signficance to Maori.

Further comfort for objectors may be found in the way that expert evidence, if money can be found to support it, may have a substantial impact on outcome. Also, the consultation strategies being developed by wind developers suggest that they are becoming more proactive about seeking common ground, considering compromises, and finding win-win solutions.[50] Meridian Energy is presently advocating a "project shaping" strategy that aims to produce a fully developed project that is effectively "debugged" before public notification, involving the identification of stakeholders, and meaningful consultation.[51]

A number of unresolved issues remain. One of these is the extent to which a firmer hand on the tiller of environmental decision-making by whatever political party is in power will actually be required. The success with which Palmerston North and Tararua District Councils have been processing wind-farm consents to date indicates that a "business as usual" approach is working, whereby applications are processed on a case-by-case basis. Recent research by the author on public attitudes to wind farms in the Tararuas (in preparation) supports this view: there is little public interest at present in councils becoming more proactive in creating (for example), wind-farm-related zoning in their district plans. The Awhitu Environment Court appeal was heard within six months, also suggesting that the RMA is "working" procedurally. The new opportunity to seek direct referral to the Environment Court via the 2005 call-in powers provides further options for strategic planning under the Act.

Will there be further changes to the RMA and New Zealand's climate change policies that could affect renewables? The answer in the short term is "yes". In terms of legislation, it is interesting to note that the Green Party did not support the 2005 RMA amendments, in part because it didn't believe that the Act was "broken", merely that it wasn't being fully used by national government (e.g. by more proactively preparing National Policy Statements). One of the National Party's 2005 election pledges was to "urgently introduce a substantive Resource Management Amendment Bill".[52] Careful scrutiny of National's objections to the existing RMA, however, show that its concerns are arguably satisfied by the 2005 amendments.

49 Supra, note 5, at 24.

50 See, e.g., "Wind farm expansion avoids Environment Court", *New Zealand Herald*, 3 August 2005, where agreement by TrustPower to create monitoring and control stations was a major factor in quelling opposition.

51 Little, R (2005), *Wind energy presentation by Meridian Energy to the Environmental Institute of Australia and New Zealand*, Wellington, 13 September 2005.

52 "National's plan for energy", retrieved 12 September 05 from http://www.national.org.nz/files/Energy.pdf.

Of more compelling interest is the positioning of renewables when New Zealand revisits its obligations under the Kyoto Protocol. The government is presently undertaking an extensive review of its policies, fuelled in part by a significant miscalculation in credits that left it in April 2005 with a 36 million tonne CO_2 shortfall in its Kyoto obligations, amounting to $500 million at market prices.[53] At present, carbon credits are sold on a fledgling carbon market for projects that reduce greenhouse gases, but would not be commercially viable. There has been grumbling about projects like the White Hills wind farm, which has been described as a business-as-usual commercial venture.[54] If it turns out that Meridian Energy's $10-million award for credits associated with this project are unnecessary, those credits would represent another form of subsidy for wind energy.

Even if New Zealand were to resile from its Kyoto commitments, the specific advantages of renewables identified by the Environment Court in the Awhitu decision would ensure their continued favour under the RMA. These include the positive effects of wind energy on security of supply, reduction in dependence on the national grid (i.e. less distance to travel), reduction in transmission losses, and the comparative reliability of wind compared to rainfall (and hence, hydropower).[55] New Zealand Windfarms expected to offer shares to the public and list on the alternative stock exchange from October 2005. [56] That sort of move should further mainstream wind technologies and help to insulate them from policy shocks, and from the current uncertainty over future governmental policy over infrastructure.[57] Added to this, many landowners are approaching electricity companies such as Unison and Meridian Energy, in hopes of creating a purchase/lease agreement for wind farms on their land.[58] For all of these reasons, wind is likely to remain a substantial force in New Zealand's foreseeable energy future.

53 Ministry for the Environment (2005), *Projected balance of units during the first commitment period of the Kyoto Protocol* (retrieved 16 June 2005 from www.mfe.govt.nz).

54 "Ralph Matthes: wind generation no panacea", *New Zealand Herald*, 20 June 2005.

55 Supra, note 39, at para 222. All of these were positive section 7 wind energy benefits considered by the Environment Court.

56 "Cash for wind farm wanted", *New Zealand Herald*, 6 Sept 2005.

57 See, e.g., Potter, N, McAuley, I, and Clover, D (2005), *Future currents: electricity scenarios for New Zealand 2005–2050*, Parliamentary Commissioner for the Environment, Wellington.

58 "Farmers inviting power companies", *Manawatu Standard*, 13 August 2005.