

**IN THE MATTER** of the Resource Management  
Act 1991

**AND**

**IN THE MATTER** of the Proposed One Plan  
notified by the Manawatu-  
Wanganui Regional Council,  
hearing related to Water -  
Chapters 6, 13, 15, and 16 and  
Schedules B, C, and D

## **SUBMISSIONS ON BEHALF OF MIGHTY RIVER POWER LIMITED**

### **1. INTRODUCTION**

1.1 The topics that I will cover in my submissions are:

- (a) an introduction to Mighty River Power's ("Mighty River Power" or "the Company") general position on the water related Chapters of the Proposed One Plan and the reasons underlying its position;
- (b) Mighty River Power's specific position in relation to the provisions of each Chapter; and
- (c) the evidence that Mighty River Power Limited will call in support of its submissions and further submissions.

1.2 Mighty River Power is a State Owned Enterprise involved in both electricity generation and retail activities throughout the North Island. It is the fourth largest electricity generator in New Zealand and the equal third largest electricity retailer. It has around 400,000 customers largely in the

upper North Island, primarily through its retail arm Mercury Energy. On average the power stations owned by Mighty River Power generate a total of around 5,500 gigawatt hours annually, which is approximately 14% of New Zealand's current electricity requirements in an average year.

- 1.3 Mighty River Power's generation portfolio includes the Waikato Hydro System, geothermal interests at Kawerau, Rotokawa, and Mokai, an active landfill gas recovery generation programme, and the Southdown Power Generation Plant. The bulk of Mighty River Power's electricity generation comes from renewable energy resources, and the bulk of that renewable generation is from hydroelectricity generation schemes in the Waikato Region. It is looking to expand its electricity generation portfolio and is actively considering new hydro development in the Horizons Region.
- 1.4 Mighty River Power wants to ensure that the water related parts of the Proposed One Plan contain explicit recognition of the benefits to be derived from the use and development of renewable energy, and particularly the use of water for renewable energy projects. It also wants to ensure that no unwarranted planning impediments are included in the Proposed One Plan that may unreasonably inhibit the realisation of the benefits to be derived from the use and development of renewable energy.
- 1.5 The Company wants to ensure that the policy recognition and support given to energy and infrastructure in Chapter 3 is not undermined by the policy and rule content, or lack of content, in other chapters of the Proposed One Plan. It is important that the Plan contains a sound and enabling framework to allow the development of electricity generation from renewable energy resources.
- 1.6 It considers that, as currently drafted, the proposed water chapters place unwarranted barriers in the way of the appropriate use and development of renewable energy resources within the region, and particularly hydroelectricity development. The Proposed One Plan does not yet provide a consenting pathway for new hydroelectricity generation

development in the Region, and it is vital that this shortcoming is addressed in the water related chapters of the Proposed One Plan.

- 1.7 In my submission such an approach fails to give effect to the positive statements relating to the benefits to be derived from the use and development of renewable energy resources contained in Chapter 3 This disconnection between regional policy and regional rules is contrary to sound planning practice and contrary to s 67(3)(c) of the Resource Management Act 1991 ("the Act"), which requires a regional plan to give effect to the regional policy statement.
- 1.8 As notified, the Proposed Plan One Plan fails to make appropriate linkage between the recognition of the importance of infrastructure and the need for increased use of renewable energy resources, which is articulated in Chapter 3, and the use of water as a renewable energy resource in the water related Chapters of the Plan. Council officers have relied heavily upon the provisions of Chapter 3 to deal with the concerns raised by the various electricity generators. In my submission the approach adopted by council officers still fails to recognise the importance of the inclusion of a clear linkage between infrastructure and the use of resources, such as water, to operate that infrastructure. Without such a linkage the direction provided in the Regional Policy Statement is of limited value. Mighty River Power seeks amendments to the water related chapters to address the issues of concern to it.

## **2. OVERVIEW OF MIGHTY RIVER POWER'S POSITION**

- 2.1 Mighty River Powers evidence and submissions focus on three key areas:
  - (a) Support for the recognition provided in the Proposed One Plan for allocation of water to existing hydroelectricity generation.
  - (b) Concern about the lack of a clear and specific consenting framework for any new hydroelectricity development in the region, and the associated lack of tangible provisions in the Regional Plan portion of the Proposed One Plan supporting the use and development of renewable energy resources.

- (c) Concern about the lack of appropriate and effective linkages between the water chapters of the Proposed One Plan and the energy and infrastructure chapter in the Regional Policy Statement part of the Plan. Of particular concern is the disjunction between those policies recognising the importance of energy and infrastructure in Chapter 3, and the policies relating to the take and use of water in Chapter 6. It is stating the obvious, but where infrastructure is developed for the purpose of hydroelectricity generation there must be an associated take and use of water. That association needs to be recognised at a policy level in Chapter 6 of the Proposed One Plan if an appropriate balance and integration between related parts of the Plan is to be achieved.

### **Support for allocation of water to existing hydroelectricity generation**

- 2.2 Mighty River Power strongly supports the 'protection' provided in Policy 6-16 for existing water takes associated with hydroelectricity generation. It considers that it is appropriate for such takes to be excluded from the setting of minimum flows and core allocation, on the basis that the takes occur pursuant to resource consents and form part of the existing environment. When granted the consents will have taken into account the relevant planning instruments and the effects on the environment including impact on minimum flow and allocation.
- 2.3 The Company notes that evidence presented on behalf of Fonterra is critical of the approach adopted in Policy 6-16 with respect to existing water takes for hydroelectricity generation. In my submission the evidence provided by Mr Murray explains in a detailed and thorough manner why the Fonterra evidence is unsound and should not be relied upon.
- 2.4 The Company also endorses the approach adopted in Rules 16-5, 16-8 and 16-9 whereby protection is given to water takes for existing hydroelectricity schemes, by providing that they are permitted or controlled activities. However, the Company is of the view that equal recognition and attention needs to be paid in the development of the

Proposed One Plan to potential future hydroelectricity generation development in the region.

**Lack of a clear and specific consenting framework and tangible provisions for new hydroelectricity development**

- 2.5 Mighty River Power made a general submission in opposition to the Proposed One Plan as a whole on the basis that it does not provide a clear allocation framework for takes and uses for hydroelectric activities. The proposed policy and rule framework does not recognise that 'takes' for hydroelectricity generation differ from other takes. A take associated with a dam or diversion for electricity generation is not necessarily consumptive. Except in those cases where water is totally diverted from a catchment, water continues to be available for instream values and downstream users once it has been used for electricity generation.
- 2.6 In my submission the Proposed One Plan needs to be forward looking and contain provisions that recognise that over the next few decades there must be major growth in New Zealand's renewable energy generation portfolio if the aims of Central Government policy are to be achieved and the goals of ensuring security of supply and sustainable management of our resources are to be met.
- 2.7 The allocation philosophy developed in the Plan of a 'core allocation' and a 'supplementary allocation' is unworkable, in its current state, in relation to damming and/or diversion of water for hydroelectricity generation.
- 2.8 It is Mighty River Power's position that it is essential, in order for the purpose and principles of the Act and s 7(j)<sup>1</sup> to be appropriately implemented, that the Proposed One Plan provides a separate and clear consenting framework for new hydroelectricity generation takes.
- 2.9 In my submission, given the different nature of a hydroelectricity 'take' in comparison to other types of take it is inappropriate to treat them in the same manner in a planning and policy sense. To do so fails to recognise

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1. Section 7(j) of the Act requires that particular regard is to be had to the benefits to be derived from the use and development of renewable energy.

the different effects that they have on the environment, and will, in this case, lead to unnecessary regulatory barriers to the development of new hydroelectricity generation in the region.

- 2.10 The way in which the Proposed One Plan deals with potential hydroelectricity generation developments is important given that there are already significant water takes for hydroelectricity generation in the region and there is potential for further development of hydroelectricity generation schemes.
- 2.11 Future takes for hydroelectricity in the Horizons Region are likely to involve the damming and/or diversion of water, and it is a function of Regional Councils to control not only the use of water but also its damming and diversion.<sup>2</sup>
- 2.12 Currently the Proposed One Plan is structured in such a way that any significant new hydroelectricity development will be classified as a non-complying activity. This comes about for the following reasons.
- (a) The core allocation limits for each water management sub-zone in Schedule B range from 5% to around 40% of the specified minimum flow (with the default core allocation set at 10% of MALF). Any hydroelectricity generation proposal would exceed the core allocation for the sub-zone in which it was located. It should be noted however that a hydroelectricity generation development can be designed to meet minimum flow requirements and effects on natural flow variability can potentially be mitigated or offset. Despite any effects it may have a hydroelectricity generation development may nonetheless be considered to be an appropriate use and development of natural and physical resources, in RMA terms, when the national and regional benefits of the development are considered and weighed against the effects. The fact that a hydroelectricity generation development does not fit within core allocation limits, which have primarily been

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2 Section 30(1)(e) of the Act.

set to deal with consumptive uses of water, is not a good reason for classifying it as non-complying.

- (b) The Proposed One Plan's provisions for supplementary allocations are of no assistance in the context of a new hydroelectricity generation development. Supplementary flows are not consistently available as they can only be taken when flow levels are above median flow.
- (c) In the case of takes and uses of water for new hydroelectricity generation developments it is highly probably that Rule 15-6 will apply, because the take will exceed the core allocation and/or water will be taken below minimum flow limits, and none of the exclusions provided in the Rule will apply. Rule 15-6 classifies takes and uses as non-complying activities.

2.13 In my submission a planning framework that results in the default classification of the take and use of water for new hydroelectricity generation development is inappropriate and is contrary to the purpose and principles of the Act. Mighty River Power accepts that new hydroelectricity development will have an effect on the environment and that a robust assessment of those effects is appropriate.

2.14 Accordingly it seeks amendments to specify new hydroelectricity development as a discretionary activity. This classification links in to other amendments that Mighty River Power is seeking and creates a consenting framework that recognises the potential for new hydro development and acknowledges that takes of water for this purpose needs to be assessed in the light of the importance of electricity generation as a whole, and renewable electricity generation in particular. It is also the case that the effects of water takes for hydroelectricity generation are not the same as those associated with other takes and this should be recognised and provided for in the provision of the Proposed One Plan.

2.15 In my submission it is appropriate and necessary, if s 67(3)(c) of the Act is to be complied with,<sup>3</sup> that tangible provisions are included in both the Regional Policy Statement and Regional Plan portions of the Plan giving effect to the policy direction contained in Chapter 3 of the Proposed One Plan, which deals with energy and infrastructure. In order to address this issue Mighty River Power requested in its submission that a new section should be added to Chapter 6 of the Proposed One Plan to provide a policy framework for the allocation of water to hydroelectricity. It stated that the policy framework needed to recognise and provide for:

- (a) The allocation of water to hydroelectricity generation (both consumptive and non-consumptive).
- (b) The recognition that water allocated to hydroelectricity generation, including water stored for future generation, should be protected so that the volume of water available for generation is not reduced by the granting of subsequent consents (the concept of non-derogation).<sup>4</sup>
- (c) The recognition of electricity generation by hydroelectricity generation schemes as an essential activity in relation to the take and use of water.

2.16 It also sought the inclusion of new policies in Chapter 6 to provide direction on the matters to be considered in relation to any future application to dam or divert water for hydroelectricity generation including:

- (a) requiring that adverse effects on the values specified in Schedule D (as notified) are avoided, remedied or mitigated where practicable;

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3. Section 67(3)(c) of the Act requires that a regional plan must give effect to a regional policy statement.

4. See *Aoraki Water Trust v Meridian Energy Limited* [2005] NZRMA 251 (HC).

- (b) ensuring that the activity will not obstruct fish passage or inhibit trout or indigenous fish from completing their life cycle where it would otherwise occur in the absence of the activity;
- (c) ensuring that the adverse effects of flooding or erosion are avoided, remedied, or mitigated; and
- (d) ensuring that changes in catchment and sediment transport processes have no significant adverse effects on water quality, habitat, and flow regimes in perennial streams.

2.17 It also stated that in its view policies were needed to recognise that:

- (a) the use of water for hydroelectricity generation is a regionally and nationally significant activity; and
- (b) there are potential benefits associated with the use of water for hydroelectricity generation including the ability to store water for future electricity generation, and the fact that water used for hydroelectricity generation can subsequently be made available for consumptive takes.

2.18 Mighty River Power also sought addition of new policies and rules and the amendment of existing policies and rules in Chapters 15 and 16 of the Proposed One Plan to ensure that future takes, uses, dams and diversions of water for hydroelectricity generation are to be treated as discretionary activities, including those cases where water is removed from a lake, section of river or water body on a permanent or partial basis but flows are maintained downstream of the discharge site.

2.19 It also sought the amendment of Schedule B (as notified) to exclude takes and uses of water for hydroelectricity activities from the core allocation and minimum flow requirements.

2.20 Mighty River Power notes that in their latest recommendations council officers have suggested that substantial elements of policy should be moved from Chapter 6 to Chapters 15 and 16. In principle the Company has no objection to the relocation of policies in that way. However, as I

will mention in a little more detail shortly it does have concerns about the potential lack of jurisdictional scope for some of the new provisions and relocations that have been recommended by council officers.

### **Linkage between the water chapters and energy and infrastructure chapter**

- 2.21 In my submission there is presently a lack of an appropriate and effective linkage between the water chapters in the Proposed One Plan and the energy and infrastructure chapter (Chapter 3) contained in the Regional Policy Statement part of the Plan.
- 2.22 In his evidence, at paragraphs 11 to 16, Mr Peterson comments on evidence he provided in relation to Chapter 3 of the Proposed One Plan. While the content of that Chapter is outside the jurisdiction of the currently convened Hearing Panel, it is important that consideration is given to the overall integration of all the parts of the Proposed One Plan in the final decisions that are made it.
- 2.23 Accordingly, I submit that it is proper for Mr Peterson to draw your attention to the issues raised in his earlier evidence where decisions made in respect of it are relevant to the matters you are considering in the context of the water hearing. In my submission the Regional Policy Statement part of the Proposed One Plan cannot be considered in isolation, on a chapter by chapter basis, if the integrated management of natural and physical resources is to be achieved. The same applies to the Chapters making up the Regional Plan part of the Proposed One Plan. I am sure that you appreciate the importance of concluding the plan hearing process with a well integrated document resulting from the various Hearing Panels' decisions, and that at the appropriate stage a 'cross-check' for consistency and effective integration between chapters will occur.
- 2.24 In response to issues raised at the hearing on Chapter 3, potential changes to the definition of "operation" to exclude water abstraction, discharge of contaminants, and occupation of the Coastal Marine Area have been signalled in Mr Gilliland's "End of Hearing Statement" (dated 4 August 2009).

- 2.25 As will be evident, the use of water is an essential part of the operation of infrastructure associated with hydroelectricity generation and any changes made to Chapter 3 that exclude policy provision for such use, should, in my submission, be a matter that you take into account when considering the content of the water related chapters of the Proposed One Plan. This is an issue of particular concern to Mighty River Power.
- 2.26 Because the Proposed One Plan is an integrated document, Mighty River Power has made submissions looking to the whole of the Plan and how the various parts integrate. Consequently, as he explains at paragraph 16 of his evidence, Mr Peterson has drafted his recommendations on the water chapters in light of his earlier recommendations on the content of Chapter 3.
- 2.27 In his evidence, at paragraphs 5.13 – 5.24, Mr Collins addresses an important aspect of the integration of matters addressed in Chapter 3 with those in Chapter 6. As you are aware Table 6.2 lists a range of Water Management Values and Purposes. The Table has a significant impact upon the application of Schedule Ba. Presently the Table does not include recognition of the potential value of the Region's rivers for hydroelectricity generation in the "Water Uses" category. Activities presently included are "Water Supply", "Industrial Abstraction", "Irrigation" and "Stockwater". In a forward looking Plan the omission of likely future uses such as hydroelectricity generation cannot be justified.
- 2.28 As Mr Collins explains in his evidence council officers have declined Mighty River Power's request that hydroelectricity generation be included in the list of Water Management Values and Purposes because they are concerned about promoting hydroelectricity generation ahead of other sectors. As the Plan is currently written it can be argued that hydroelectricity generation is relegated behind the other listed sectors on the basis that it is not mentioned.
- 2.29 Mr Collins has suggested following alternative ways of addressing this issue:
- (a) Including the flowing statement at the start of Schedule Ba:

*"In addition to the values identified in Schedule Ba, water management zones and sub-zones throughout the Region (and particularly those with good head and flow available) may have value for hydro-electricity generation. Further site specific assessment will be needed in order to establish the locations where such values are the greatest and the degree to which they may be able to be realised having regards to all other values of the waterbodies concerned."*

- (b) Amending Table 6.2 and Schedule Ba to remove references to values other than the in-stream ones.

2.30 Mighty River Power's preference is for the first option, with specific recognition of the importance of potential future hydroelectricity development being included in Schedule Ba (and indeed other parts of the Proposed One Plan, as detailed in Messers Collins and Peterson's evidence).

### **Electricity generation and the RMA**

2.31 The amendments sought by Mighty River Power in its original submissions and the evidence provided by its experts are, in my submission, supported by the provisions of the Act and relevant case law.

2.32 Placing electricity generation and its role in our society in context, the Environment Court has said:<sup>5</sup>

*"... the capacity to produce a reliable, and relatively affordable supply of electricity is vital to enable people and communities to provide for their social and economic wellbeing, and for their health and safety."*

2.33 The Court has thus explicitly recognised electricity generation as a matter that falls squarely within s 5 of the RMA. It has identified the generation of a reliable supply of electricity as a factor central to the purpose of the Act and recognises its vital nature in enabling sustainable management of natural and physical resources. Accordingly, in my submission it is appropriate to include specific recognition of the importance of electricity generation in the Proposed One Plan.

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5.. *Unison Networks Limited v Hastings District Council* W58/2006 para 81.

- 2.34 In considering the content of the Proposed One Plan regard must also be had to the direction contained in s 7(j) of the Act. It requires persons exercising functions under the Act (including those involved in the development of Regional Policy Statements and Regional Plans) to have particular regard to the benefits to be derived from the use and development of renewable energy.
- 2.35 In my submission, the Proposed One Plan, as it currently stands, fails to give sufficient recognition to the potential future use of the Region's water resources, the generation of renewable energy, and in particular hydroelectric generation. The changes to the Plan that Mighty River Power seeks are aimed at providing an appropriate level of recognition of the importance of electricity generation to society; and in the context of the water related chapters the importance of both existing and new hydroelectric development.
- 2.36 Mighty River Power acknowledges that in response to submissions made and evidence provided by various submitters, council officers have recommended additional changes to various Plan Provisions. Those recommended changes are shown in the November 2009 track changes versions of the water related chapters. Mighty River Power endorses those recommended changes that accord with the amendments it is seeking.

### **Issues of Jurisdiction**

- 2.37 An issue of concern to Mighty River Power relates to scope and jurisdiction, and in particular where the scope to make a number of the changes recommended by council officers derives from. The Company has seen the lists of questions posed by the Hearing Panel, dated 1 December 2009 and 12 January 2010, and appreciates that this is evidently an issue of concern for the Panel also. It appears that the Panel has identified many changes recommended by council officers where the jurisdictional scope – based on submissions on the Proposed One Plan – is not clear.

2.38 As the Panel will be aware, the First Schedule to the Act specifies the process to be followed in the making of policy statements and plans. Clause 10 deals with decisions on provisions and matters raised in submissions. The Clause was amended in 2009 by the Resource Management (Simplifying and Streamlining) Amendment Act 2009. The transitional provisions of that Amendment Act direct that proposed policy statements and plans notified prior to 1 October 2009 must be determined as if the amendments made by the 2009 Act had not been made.<sup>6</sup> The Proposed One Plan was notified on 31 May 2007. Accordingly, the applicable, pre 1 October 2009, version of Clause 10 states:

***“Decision of local authority***

- (1) *Subject to clause 9, whether or not a hearing is held on a proposed policy statement or plan, the local authority shall give its decisions, which shall include the reasons for accepting or rejecting any submissions (grouped by subject-matter or individually).*
- (2) ***The decisions of the local authority may include any consequential alterations arising out of submissions and any other relevant matters it considered relating to matters raised in submissions.***
- (3) *If a local authority publicly notifies a proposed policy statement or plan under clause 5, it must, not later than 2 years after giving that notice, make its decisions under subclause (1) and publicly notify that fact.*
- (4) *On and from the date of the public notice given under subclause (3), the proposed plan is amended in accordance with the decisions of the local authority given under subclause (1).”*

(emphasis added)

2.39 In interpreting Clause 10(2) the Courts have determined that the test to be applied is:<sup>7</sup>

*“... whether the amendment made goes beyond what is reasonably and fairly raised in submissions, usually a question of degree to be judged by the terms of the proposed instrument and the content of submissions.”*

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6. Section 161 Resource Management (Simplifying and Streamlining) Amendment Act 2009.

7. *Melanesian Mission Trust Board v Auckland City Council* A56/1997.

- 2.40 In my submission there are certain changes that the council officers are recommending, such as new Objectives 15-1 and 16-1 that go beyond that which has been reasonably and fairly raised. The content of these two regional plan objectives is a significant issue. It is likely that Mighty River Power would have made submissions on them if they had been present in the notified version of the Proposed One Plan, or any submission had been made specifically seeking the inclusion of the wording that has been recommended by council officers.
- 2.41 In my submission, this is an example, but by no means the only one, where changes to the plan have been recommended by council officers that appear to be outside the scope of submissions raised.
- 2.42 It is of course incumbent upon the Hearing Panel to ensure that all decisions it makes on the content of the Proposed One Plan fall within the scope allowed by Clause 10 and the Courts' application of it. I am encouraged by the depth and extent of questions that that Panel has made to date in relation to this particular issue and I request that the Panel continue to be vigilant over issues of scope.

### **3. RELIEF SOUGHT BY MIGHTY RIVER POWER ON SPECIFIC PROVISIONS OF THE PROPOSED ONE PLAN**

- 3.1 Since Mighty River Power made its original submissions on the Proposed One Plan things have moved and various iterations of the Proposed One Plan have become available. Accordingly the specific relief sought by Mighty River Power has also moved, though it remains within the scope of what was originally sought by it.
- 3.2 In order to assist the Hearing Panel the Company has refined the relief it seeks and has provided, through its planning witnesses, the specific changes to the wording of the Plan Provisions (in the most up to date version that was available at the time when its evidence was provided) that it seeks.

## Chapter 6 - Water

- 3.3 As you are aware, Chapter 6 of the Proposed One Plan is the Regional Policy Statement part of the Plan that deals with water related issues. Its purpose is to provide policies and methods dealing with water as part of the wider imperative for the Regional Policy Statement to achieve the integrated management of natural and physical resources.<sup>8</sup>
- 3.4 Mr Collins has addressed issues related to water quantity/allocation in his evidence while Mr Peterson has addressed those portions of Chapter 6 relating to Water Management Zones, Water Management Sub-Zones, water quality, and the beds of rivers and lakes.
- 3.5 As can be seen in the marked up version of Chapter 6 attached to Mr Peterson's evidence Mighty River Power is seeking a number of specific amendments to the Chapter.
- 3.6 I do not intend to restate in detail the changes that are sought. That detail is provided in the planners' evidence and the marked-up version of the Chapter appended to Mr Peterson's evidence. What I will do is identify the sections in which amendments have been sought and provide a brief explanation as to why the change is being sought. In those cases where the provision that Mighty River Seeks to change has been relocated in the most recent officer recommendations version of the Proposed One Plan I will identify where the relevant provision is now proposed to be included in the Plan. I will adopt the same approach with respect to all chapters in which Mighty River Power seeks specific amendments.
- (a) *6.1.3 – Water Quantity.* Mighty River Power seeks the inclusion of words acknowledging the potential benefits of the future use of water for power generation and the fact that the take of water for power generation is not necessarily the same as other types of take in terms of environmental effects.

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8. Section 59 of the RMA.

- (b) *6.1.5 – River and Lake Beds.* The requested additional wording seeks explicit recognition that there can be both positive and negative effects associated with the modification of the beds of lakes and rivers.
- (c) *Issue 6-2: Water quantity and allocation.* The additional wording sought provides balance to the comments about potential adverse effects by acknowledging the importance of water use in the wider context of the purpose of the Act.
- (d) *Issue 6-3: River and lake beds.* The additional wording sought identifies the fact that the benefits associated with structures such as dams are wider than just flood mitigation and explicitly acknowledges the importance of electricity generation to community well-being.
- (e) *Objective 6-1: Water management values.* The amended wording seeks to better reflect the purpose of the Act by incorporating the words of the Act and recognising the purpose of Act is not absolute protection of natural and physical resources but the promotion of the sustainable management of them.
- (f) *Objective 6-3: Water quantity and allocation.* Additional wording is sought to acknowledge the position of renewable energy generation as an industry, temper the absolute nature of the requirement to provide for the identified values of water bodies, and acknowledge the potential for groundwater takes to impact on the amount of water available for electricity generation.
- (g) *Objective 6-4: River and lake beds.* The changes sought aim to retain the version of the Objective that was originally notified, while excluding wording that is unnecessary or ambiguous.
- (h) *Policy 6-1: Water Management Framework.* Wording changes are sought to acknowledge that it will not always be appropriate to use Water Management Zones and Water Management Sub-zones as the special unit for assessing the effects of activities on

water bodies. The logic of this approach has been accepted by the reporting officers, in that in a number of places in the latest version of the water provisions they recommend changes that refer to specified reaches of water bodies. That approach is not yet reflected in Policy 6-1. Wording is also sought to recognise that the Act is not about absolute protection and to give decision makers some flexibility in the application of the Policy.

- (i) *Policy 6-3: Ongoing compliance where water quality standards are met.* Additional wording is sought to recognise that the Act contemplates remediation and mitigation where adverse effects cannot be avoided. It also incorporates the concept of “no net loss” in relation to water quality. This approach aligns with the approach Mighty River Power advocated for with respect to the biodiversity provisions of the Proposed Plan. A similar approach has been adopted in the Provisional Determination on the biodiversity provisions.<sup>9</sup>
- (j) *Policy 6-4: Enhancement where water quality standards are not met.* Wording changes of similar effect to those in Policy 6-3 are sought, for the same reasons.
- (k) *Policy 6-5: Management of activities in areas where existing water quality is unknown.* The changes sought are to the same effect as those sought for Policy 6-4.
- (l) *Policy 6-14: Consideration of alternative water sources.* A recommendation has been made in the latest officers’ report that the policy be moved to become Policy 15-9. Additional wording is sought to limit the requirement for consideration of alternatives to those situations where such consideration is appropriate and where the implementation of an alternative will not adversely affect any existing consent holders’ ability to exercise their consent.

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9. See Policy 12-5 where the term “net indigenous biological diversity gain” has been included.

- (m) *Policy 6-15: Overall approach for surface water allocation.* Mighty River Power seeks to have takes, uses, dams, and diversions for hydroelectricity purposes excluded from core allocation and minimum flow requirements. Mr Collins explains the reason for the relief sought at paragraphs 5.31 to 5.35 of his evidence. It is linked to Mighty River Power's request that a specific consenting path be established in the One Plan for new hydro development as a discretionary activity. In addition the Company is concerned that the following definition of 'supplementary allocations' is recommended for inclusion: "being allocations in excess of core allocations". This definition is different from the definition of 'supplementary water allocation take' contained in the Glossary which is:

***"Supplementary water allocation take means, in relation to the taking of water<sup>^</sup> from a river<sup>^</sup>, a take granted consent in accordance with Policy 6-5 or any preceding supplementary water<sup>^</sup> allocation regime."***

In my submission this variance in definitions, for what appear to be similar concepts, will lead to confusion over what a supplementary water allocation take actually is. In any event the regime of core allocations and supplementary allocations does not assist new electricity generation based on water resources in the Region. For this reason alone a better resource consent framework for new hydroelectricity generation proposals is required.

- (n) *Policy 6-16: Core water allocation and minimum flows.* The changes sought by Mighty River Power relate to the request that a specific consenting pathway be included for new hydroelectricity generation proposals. Mighty River Power strongly supports the inclusion in the Policy of the 'protection' of takes associated with existing hydroelectricity uses. Mr Murray explains in some detail why Fonterra's criticism of this approach is not supported by the economic evidence that it has provided.
- (o) *Policy 6-17: Approach to setting minimum flows and core allocations.* The additional wording sought provides that where

new hydrological information becomes available minimum flow levels may be reduced if the data supports such a reduction. The original officers' report (at page 122) recommends that Mighty River Power's submission should be accepted in part but as yet no change to the policy has been recommended by council officers.

- (p) *Policy 6-18: Supplementary water allocation.* The most recent officers' report recommends that this policy be moved to become Policy 15-10. A change is sought to include use of water, as well as takes in the Policy.
- (q) *Policy 6-19: Apportioning, restricting and suspending takes in times of low flow.* The most recent officers' report recommends that this policy be moved to become Policy 15-11. Additional wording is sought by Mighty River Power to recognise takes for hydroelectricity generation as essential, on the basis that it is most appropriate to build low flow controls for hydro developments into the conditions of consent that enable their operation. In addition the Company seeks that the wording contained Policy 6-16(iii) in the October 2009 version of the officers' report be retained so that the cut-off time for lawfully established takes is when the Plan becomes operative rather than when it was notified. In my submission this cut-off time is appropriate as any lawful take existing when the Plan becomes operative and which was not existent at the time when the Plan was notified will have been assessed against the provisions of the Proposed One Plan, in accordance with the requirements of s 104(1) of the Act.
- (r) *Table 6.2a - Surface water depletion.* The most recent officers' report recommends that this Table be relocated as Table 15-1. Mighty River Power seeks that additional wording be added to the Table to accommodate the fact that there is hydrological linkage between ground water and surface water. The linkage is explained in Mr Male's evidence.
- (s) *Policy 6-28: Activities in water bodies with a Value of Natural Sites of Significance – Cultural, or Sites of Significance – Aquatic.*

The most recent officers' report recommends that this policy be moved to become Policy 16-4. Changes are sought to the Policy to better reflect the purpose of the Act and to acknowledge that in some circumstances the purpose of the Act may be best achieved by allowing an activity and requiring appropriate remedy, mitigation or offset.

- (t) *6.7 Explanation and Principal Reasons.* Minor changes are requested in this section to reflect the other changes sought throughout the Chapter by Might River Power.

### **Chapter 13 – Discharges to Land and Water**

- 3.7 During the presentation of Mighty River Power's case on the Biodiversity provisions of the Proposed One Plan the issue of potential duplication, overlap, and inconsistency of activity status classification for discharges to water was raised.
- 3.8 That concern remains live. The Provisional Determination version of Rule 12-6 classifies discharge of contaminants into water within rare habitats, threatened habitats and at-risk habitats as a discretionary activity. Both the notified and officers' report versions of Rule 13-23 classify direct discharges of contaminants into a range of water bodies, including wetlands classified as rare habitats or threatened habitats, as non-complying.
- 3.9 In my submission the duplication of controls over the same activity in different parts of the Proposed One Plan is unnecessary and does not represent best practice, particularly where the classification status is not the same. As Mr Peterson states in his evidence, he considers that this particular double-up is best resolved by retaining the broader Rule 12-6 and removing the reference to rare habitat and threatened habitat wetlands from Rule 13-23. Mighty River Power endorses that approach.
- 3.10 In addition the Company seeks that additional changes be made to Rule 13-23 to reflect the fact that a finer level of physical location than water body or Water Management Sub-zone is the appropriate scale for assessment of the effects of discharges of contaminants to highly valued

water bodies. To a degree the latest track changes version of the Rule achieves this. However, I note that the Panel has posed questions on the text of the Rule to officers that identify flaws in the grammatical construction and effect of the recommended wording. In my submission the wording sought by Mighty River Power is preferable.

## **Chapter 15 – Takes, Uses and Diversions of Water, and Bores**

3.11 The Company seeks that the following amendments be made in Chapter 15:

- (a) *Objective 15-1: Regulation of takes and uses and diversions of water.* As I have previously indicated, Mighty River Power has concern over the jurisdictional scope for the inclusion of this new Objective. It requests that no new provisions be included in the Proposed One Plan that are outside the scope of the submissions made on the Plan. Aside from the jurisdictional issue, the Company has concerns over the substance of the Objective. As drafted it imposes an absolute requirement to “recognise and provide” for the water management values set out in Schedule Ba, and the objectives and policies of Chapter 6 as they relate to surface water and ground water use and allocation. Such an absolute requirement is inappropriate. There may well be cases where the recognising and providing for the specified matters is not the most appropriate means of achieving the purpose of the Act. Additionally the Objective fails to recognise that the Act contemplates that in some cases it is appropriate to remedy or mitigate effects (potentially including provision of offset). If the Objective is within scope and the Panel decides to retain it then Mighty River Power seeks that it be qualified in the same way as it seeks Objective 6-1 be qualified; by adding the words “*where it is appropriate to do so*” to the end of the Objective. In addition it seeks that more balance be provided in the range of matters that are recognised and provided for, where appropriate, via the insertion of reference to Chapters 2, 3, and 4, in Objective 15-1(b), as is shown in Mr Collins’ addendum to his primary evidence.

- (b) *Policy 15-1: Consent decision-making for takes and uses of surface water and groundwater.* Wording is sought to ensure that all relevant parts of the Regional Policy Statement are recognised and provided for in relevant parts of the Regional Plan so that all relevant policy is taken into account in a balanced way when applications for takes and use of surface water are being considered.
- (c) *Policy 15-2: Consent decision-making for diversions and drainage.* In the context of the diversion of water Mighty River Power is of the view that the policy direction provided in the Regional Policy Statement relating to infrastructure and energy needs to be taken into account to the same extent as the policy direction on water. Accordingly it seeks that the provisions of both Chapters 3 and 6 be accorded equal weighting. The most recent officers' report recommends that the provisions relating to water be recognised and provided for while those relating to infrastructure and energy must only be had regard to.
- (d) *Policy 15-5: Consent review and expiry.* Mighty River Power seeks the inclusion of electricity generation in the list of essential takes. In my submission this approach accords with the comment made by the Environment Court about the importance of electricity generation, in the context of the Act, which I have previously quoted. I also note that the recent Court of Appeal decision *Central Plains Water Trust and Anor v Synlait Limited and Anor* [2009] NZCA 609, may have important implications in terms of the application of Policy 15-5 in cases where there are a number of 'competing' applications being reviewed or 'renewed' at a common review or expiry date specified in the Proposed One Plan. As such, the importance of establishing the appropriate position for water takes associated with electricity generation within the priority framework, as an essential take, should not be underestimated.
- (e) *Rule 15-2: Minor takes and uses of groundwater.* A change is sought to reflect the fact that it is inappropriate for groundwater

take, pursuant to s 14(2), to be a permitted activity in circumstances where the take may impact on the amount of water available for electricity generation due to a hydrological linkage.

- (f) *Rule 15-5: Takes and uses of surface water complying with core allocations.* Mighty River Power seeks the inclusion of a new standard for the activity requiring that any take shall not reduce the amount of water available to existing lawfully established takes and uses. Mr Collins has explained, at paragraphs 6.25 to 6.27, of his evidence why this addition is important and why he disagrees with the reasoning behind the reporting officer's recommendation that the submission be rejected.
- (g) *Rule 15-6: Takes of surface water not complying with core allocations.* The inclusion of wording is sought to make it clear that new takes (and use) of water for hydroelectricity generation are discretionary activities under Rule 15-8, rather than non-complying activities. This reflects the Company's submission that a specific consenting path should be provided for hydroelectricity generation.
- (h) *Rule 15-9: Lawfully established diversions, including existing drainage.* Mighty River Power seeks the removal of condition (a) on the basis that condition (d) requires compliance with conditions of consent, which should provide adequate control.

### **Chapter 16 – Structures and Activities Involving the Beds of Rivers, Lakes and Artificial Watercourses, and Damming**

3.12 Mighty River Power made a submission in opposition to the whole of Chapter 16 because the Chapter does not provide rules for dams that exceed the small dam criteria, and consequently there is no specified consenting path for the development of dams associated with medium to large scale renewable energy development. The Company seeks changes to remedy that situation.

3.13 The specific changes to Chapter 16 that the Company seeks are:

- (a) *Objective 16-1:* The comment I made in relation to new Objective 15-1 also applies to this new Objective. In my submission it cannot be included in the Proposed One Plan if it does not reasonably and fairly fall within the scope of a submission made on it. In addition Mighty River Power is concerned about the absolute nature of the requirement to recognise and provide that is included in the Objective, for the same reasons that I have described in relation to recommended new Objective 15-1. The Company seeks the same relief requested in relation to Objective 15-1.
- (b) *Policy 16-1: Consent decision-making for activities in the beds of rivers and lakes (including modified watercourses but excluding artificial watercourses and artificial lakes).* Changes are sought to ensure that the Regional Policy Statement provisions relating to infrastructure and energy are given equal weight to those relating to flood management. In the latest version of the plan officers have recommended the inclusion of a requirement to have regard to the objectives and policies of Chapter 3 (which may then be ignored), while the provisions of Chapter 10 must be recognised and provided for.
- (c) *Table 16.1 Standard condition for permitted activities involving the beds of rivers and lakes.* A number of changes have been sought to the Table. All are focused on limiting the scale of application of the controls to those parts of water bodies of relevance. These requested changes have been adopted in the latest officers' report and Mighty River Power endorses those recommended changes. I note that in the latest officers' recommendations version of the Table there appears to be a minor cross-referencing error in the second column of row two (which deals with Life-Supporting Capacity). In item (c) there is a cross-reference to Schedule Ba. It appears that the correct cross-reference should be to Schedule D.

- (d) *Rule 16-1 contains a list of rivers, and reaches within rivers where damming is prohibited.* Mighty River Power accepts that for those rivers where there is a Water Conservation Order in place this is an appropriate prohibition on development. However, for those rivers or reaches of rivers where the restriction is based upon the water body being protected by a local conservation order because the water body is deemed to be a Natural State River the prohibited activity status is too restrictive. A non-complying activity status would be more appropriate, in recognition that there may be some cases where damming would have no more than minor effect and/or not be contrary to the objectives and policies of the plan. In my submission it is not appropriate that the potential to apply for a resource consent to carry out some form of damming on those rivers is foreclosed by the rules of the Proposed One Plan.<sup>10</sup>
- (e) *Rules 16-4, 16-13 and 16-14:* Mighty River Power seeks changes to the wording of the Rules to limit application to only those parts of a water body containing the values that have been identified as significant. The latest officers' report recommends wording to that effect in each of the three Rules and the Company endorses those recommended amendments.

#### **4. EVIDENCE**

4.1 Evidence has been provided by Mighty River Power from the following witnesses:

- (a) Kieran Murray: Managing Director LECG Limited. Mr Murray will present economic evidence focused on responding to the statement of evidence provided by Dr Layton, dated 17 June 2008, on behalf of Fonterra Co-operative Group Limited ("Fonterra"). Mr Murray explains why he considers the NZIER study that Dr Layton has relied upon is flawed, and why, even if the study

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10. Section 87A(6) of the Act states that resource consent applications cannot be made for activities classified as prohibited.

was not flawed, it would still be inappropriate to apply data derived from a study of dairying operations in Canterbury to water allocation policy in the Horizons Region.

- (b) John Male: International Irrigation Service Line Leader and New Zealand Group Manager for Waterways and Water Resources, GHD Limited. Mr Male's evidence focuses on hydrological issues. Mr Male endorses the general approach adopted by the Regional Council in setting minimum flows, but provides words of caution about the verification of data and statistical methods that have been used. He also highlights the importance of the recognition in the Proposed One Plan of the connection that exists between ground water and surface water and identifies the impact that ground water takes may have on activities such as hydroelectricity generation. He also discusses the potential impact permitted activities can have on core allocations and expresses concern that the impact on the hydrologic regime of catchments resulting from land use change associated with permitted water uses has not been effectively addressed in the Plan.
  
- (c) Andrew Collins: Director of Harrison Grierson Consultants Limited. Mr Collins' planning evidence provides information on the national policy and regulatory framework relating to renewable energy and water allocation in order to provide context to one of Mighty River Power's concerns. Namely, that while Chapter 3 contains provisions addressing the importance of infrastructure, including energy related infrastructure, it and subsequent chapters fail to make a clear linkage between infrastructure and the use of resources, such as water, associated with infrastructure. Mr Collins has also identified that there is no clear allocation framework for new takes and uses of water for hydroelectricity generation in the Proposed One Plan, and no clear consenting pathway for such proposals. Mr Collins recommends changes that should be made in Chapters 6 and 15 to address these issues.

(d) Richard Peterson: Senior Associate and Wellington Planning Manager of Harrison Grierson Consultants Limited. Mr Peterson's planning evidence addresses the specific submissions that Mighty River Power made on Chapters 6, 13 and 16. His evidence covers three broad issues: (i), the role of Water Management Zones and Water Management Sub-zones and their related objectives and policies; (ii), water quality; and (iii), beds of lakes and rivers. Appended to Mr Peterson's evidence are track change versions of all of the specific amendments that Mighty River Power is seeking. For the sake of clarity and completeness Mr Peterson has shown changes recommended in the Officer's Report in green. The changes sought by Mighty River Power are shown in red. You will note that the version of the plan that has been marked up is the 19 October 2009 version containing officers' recommendations. That was the most current version available to Mighty River Power at the time when the Council required its evidence to be provided.

4.2 In line with the Chairperson's Minute # 11 – *Supplementary Evidence for the Water Hearing*, Mr Male has prepared supplementary evidence addressing recommendations contained in supplementary officers reports relating to Policy 15-9 and Schedule B, and a point of relief sought by the Minister of Conservation in evidence presented on her behalf. Mr Collins has prepared supplementary evidence addressing Clare Barton's supplementary evidence and associated track change recommendations relating to Chapters 6 and 15.

4.3 Mighty River Power's witnesses are here today and available to address any questions that you may have for them in due course.

## **5. CONCLUSIONS**

5.1 Mighty River Power is actively interested in pursuing future hydroelectricity generation development in the Horizons Region.

5.2 It wishes to ensure that the importance of electricity generation and particularly renewable electricity generation is recognised and

acknowledged at both the policy and rule level in the Proposed One Plan. This applies to both existing generation and potential future electricity generation.

- 5.3 Mighty River Power also seeks that a clear consenting path exists for the development of new hydroelectricity generation projects in the Plan, recognising that the issues of infrastructure development and associated resource use both need to be specifically addressed and that the take of water for hydroelectricity generation should not necessarily be treated in the same way as other takes.
- 5.4 In my submission the relief sought by Mighty River Power seeks to address these issues in an appropriate and balanced way that accords with the purpose and principles of the Act.

**BIJ Cowper/MM Moodie**

Counsel for Mighty River Power Limited

24 February 2010