

*in the matter of*

the Resource Management Act 1991

*and in the matter*

An inquiry pursuant to Schedule 1 RMA into the provisions of the proposed One Plan notified by Horizons Regional Council.

---

**DOCUMENTS INCORPORATED  
BY REFERENCE**

---

Dated 26 January 2010

---

**COOPER RAPLEY**  
LAWYERS  
Palmerston North & Feilding

Solicitor: J W Maassen

Address: 240 Broadway Avenue  
P O Box 1945  
DX PP80001  
Palmerston North

Telephone: (06) 353 5210  
Facsimile: (06) 356 4345  
Email: [jmaassen@crlaw.co.nz](mailto:jmaassen@crlaw.co.nz)

## EXECUTIVE SUMMARY

1. The 2005 Amendment Act Incorporated Part 3 Schedule 1 RMA because of the trend towards use of international, national and local authority publications to provide in-plan direction or guidance while recognising the necessity for the content to be off-plan. As documents incorporated by reference have the same effect as plan provisions the process of notification and submission on documents incorporated by reference, operates in much the same way as for the contents of plans.
2. Documents incorporated by reference (DIR's) may be changed in response to submissions and the RMA contemplates a process for those changes as much as for any other part of a notified plan. The question of scope is not dealt with in this paper but is dealt with in another paper.
3. Modification and changes to DIR's need not be specified in the plan but may be incorporated by editing the DIR. There is a breadth of DIR's for example, international publications and guidelines as well as Council generated documents. Legal considerations such as copyright influence the referencing of modifications and will vary from document to document. Overseas publications or NZS publications are not available to HRC in editable form. It is unlikely that modifications to such documents will be significant. In that case modifications can be specifically identified in the plan. On the other hand, documents emanating from HRC such as a notified *Manual for On-Site Wastewater Systems – Design and Management*<sup>1</sup> or *FARM strategy*<sup>2</sup> are easily amended by HRC through the plan change process. Amendments to HRC documents should be made by editing the document irrespective of the degree of editing subject only to the question of scope and not by scheduling the modifications in the plan.
4. Typically DIR's are of interest to groups of submitters including specific industries. Where it has been confirmed (or it may be safely assumed) that interested submitters have had input into the modifications, it is not considered necessary for the Hearing Panel to consider those changes in great detail in their deliberations as the final form of the DIR is not in contention.<sup>3</sup> For example Mr Bhana from HRC confirmed that the amendments to the DIR called *Manual for On-Site Wastewater Systems – Design and Management* was amended following consultation with stake holders.<sup>4</sup> If a particular part of a DIR is still in dispute, this dispute must be resolved as if it was a dispute on part of the plan. It is not proposed to address all disputes in this paper as any outstanding issues may still be resolved as part of the iterative process managed by Helen Marr.

---

<sup>1</sup> HRC 2006

<sup>2</sup> HRC 2007

<sup>3</sup> Changes to the detail of the DIR may in fact be inappropriate as it can be assumed that the relevant sector interests and HRC have a good understanding of the issues arising in relation to the particular activities which the DIR addresses. In the absence of specific questions by the Hearing Panel on these documents, the Hearing Panel may well make erroneous judgements in circumstances where any changes should have been put both to HRC and the relevant industry sector.

<sup>4</sup> See transcript for Q&A for Mr Van Voorthuysen on 18 January 2010

## **INTRODUCTION**

5. Some general questions have arisen during the water related hearings concerning DIR's. In addition there are questions relating to DIR's in the Chairpersons questions dated 12 January 2006.
6. To address questions related to DIR's, it is proposed:
  - (a) To address the general legal issues relating to DIR's and how they are changed and referenced in plans.
  - (b) To address some specific documents incorporated by reference and some issues which must be considered in respect of these.
7. There are 14 documents incorporated by reference in POP. Some of those are national standards. Some of the DIR's are documents which emanate from HRC.
8. All DIR's have been notified in accordance with Schedule 3 RMA. Schedule 3 RMA is considered to have the following scheme:
  - (a) To recognise the value of DIR's including:
    - (i) Their ability to provide greater clarity as to the intent of the plan.
    - (ii) Provide greater off-plan guidance.
    - (iii) To leverage off technical work already undertaken nationally or overseas with modifications as necessary for local conditions.
    - (iv) To accommodate industry standards as performance standards for sector activities.
  - (b) To provide for DIR's off-plan to avoid plan clutter.
  - (c) To maintain the process of plan notification and evaluation in Schedule 1 and apply it to DIR's.

## **General Law Relating to DIR's**

9. Clause 30 Part 3 Schedule 1 RMA authorises incorporation of DIR's. If a document is incorporated by reference in a proposed plan pursuant to clause 30 then clause 30(3) states:

“Material incorporated by reference in a plan or proposed plan has legal effect as part of the plan or proposed plan.”

10. A person is entitled to make submissions on a plan (see Schedule 1 Clause 6). This includes submissions on the content of DIR's. Submissions can seek:
  - (a) Adoption of the DIR.
  - (b) Modification of the DIR.
  - (c) Greater clarity in the DIR.
  - (d) Deletion of the DIR.
11. Clause 34 provides for pre-notification and consultation on the DIR before the proposed plan is notified. This provides interested parties with a lead in time to understand the off-plan material intended to be incorporated by reference. That material is able to be accessed in accordance with the requirements of Clause 35 Part 3 Schedule 1.
12. DIR's may include standards from international or national organisations. Such standards are typically a single *corpus* of work or publication. In such cases when these are modified in the proposed plan, those modifications should be specified in the proposed plan, see clause 30(3).
13. DIR's may also include technical publications of the local authority promulgating the plan. For example, design guides or other technical publications. In such cases, clause 30(3) does not apply to the proposed plan as notified as the document is that of the local authority and there will be no amendments not made to the DIR but referenced in the proposed plan.
14. Clause 35 Part 3 Schedule 1 RMA relates to access to DIR's. Clause 35(2)(b) contemplates that amendments or replacement material may be available as discreet from the DIR or incorporated within the DIR. Clause 35(2) states:

“The material referred to in subclause (1) is—

- (a) material incorporated by reference in a plan or proposed plan:
- (b) any amendment to, or replacement of, that material that is incorporated in the plan or proposed plan or the material referred to in paragraph (a) with the amendments or replacement material incorporated:
- (c) if the material referred to in paragraph (a) or paragraph (b) is not in an official New Zealand language, as well as the material itself, an accurate translation in an official New Zealand language of the material.”

15. It is considered that changes to DIR's through the Schedule 1 process should be dealt with in the following way:
  - (a) Amendments to HRC DIR's shall be by incorporation of the replacement/edited document.
  - (b) Amendments to non-HRC DIR's be noted in the plan.
16. As a result of the conclusion in the paragraph above, all references in the plan to the material to HRC DIR's should be references to the most current version. The change in the date (assuming all other changes are within scope) is an insignificant modification. Consequently the answer to question four in the Chairpersons questions dated 12 January 2010 is 'yes'.
17. With reference to paragraph 1 of the Chairpersons questions dated 12 January 2010, Clause 30 Part 3 Schedule 1 RMA does not contemplate that DIR's are documents that guide interpretation of the plan. They can contain guidelines or BMP's that inform the application of a rule.
18. A new DIR can be inserted in response to a submission even if the submission did not specifically request that DIR where inclusion of the DIR addresses the concern identified in the submission scope. This answers question 6 of the Chairpersons questions dated 12 January 2010.

### Specific Questions of HRC's DIR's

19. This paragraph refers to question 5 in the Chairpersons questions dated 12 January 2006. The DIR notified through Part 3 Schedule 1 was the April 2000 *Manual for On-Site Wastewater Design and Management: Technical Report to Support Policy Development*. This was the only document of its type addressing that topic publicly available at the time of notification. The reference in the proposed plan to the 2006 version is a minor error. It may and should be corrected.
20. In relation to the *FARM Strategy*. A DIR in a proposed rule assumes a rule configuration yet to be determined. This is intrinsic quality of the process. This may mean consequential change to the DIR is required following decisions of the Hearing Panel.
21. The *FARM Strategy* has moved from being a performance standard to an information requirement (see the Pink Tracked version). The FARM strategy is an important resource intended to:
  - (a) Assist farmers affected by Rule 13-1 to understand how all on-farm activities can impact on water quality and how to implement BMP's.
  - (b) Enable HRC to understand the nature of the farming operation and what practices are followed to minimise transfer of contaminants

- (c) Provide a framework for consent conditions.<sup>5</sup>
22. It is important that the information requirements of HRC are plain from the plan so that applications users know what is expected. Version three is an integrated workbook and resource consent application form. It simplifies the information required and provides a greater level of usability.<sup>6</sup> This simplification to improve usability is in direct response to submissions.<sup>7</sup>
23. Rule 13-1 require calculation of LUC areas and N values. These are all capable of ascertainment. For practical purposes the N values will be determined by the only accredited assessment model, namely Overseer. This is confirmed in the *FARM Strategy*. There is no need to refer to the most recent version as accredited use of the most up to date version by implication will meet the information requirements of HRC.
24. In relation to LUC classification, the plan does refer to edition 2 in the definition. Some submissions raise the fact that edition 2 is too harsh on land that may qualify for a better classification if fully irrigated. The evidence of Dr Douglas confirms the third edition is better in that regard. But it does not always work this way. However, there does not appear to be any submission that authorises the 3rd edition and it was not in existence at the time the plan was notified. An amendment to the glossary may be required by way of plan change after the plan becomes operative.<sup>8</sup>

John Maassen

---

<sup>5</sup> See Manderson Section 42A Report para 2

<sup>6</sup> See Manderson Section 42A Report para 34 and (Manderson 2009b)

<sup>7</sup> See for example submission ID 100 Pedersen page 4 item ii

<sup>8</sup> For DIR versions that came into existence after the close of submissions, see *Telecom New Zealand Limited v. Christchurch City Council* [2003] NZRMA 280