

IN THE MATTER of the Resource Management Act
1991

AND

IN THE MATTER of the proposed Horizons One Plan

LEGAL SUBMISSIONS ON BEHALF OF MIGHTY RIVER POWER

1. INTRODUCTION

- 1.1 Mighty River Power is a State Owned Enterprise and is the fourth largest energy generator in New Zealand, based on generation production.
- 1.2 Mighty River Power is involved in exploring new wind, geothermal, thermal, gas and hydro development opportunities, as part of the pursuit of a diverse energy generation portfolio. Currently, over 85% of Mighty River Power's electricity production is from renewable resources.
- 1.3 Mighty River Power has made submissions and further submissions on the Proposed One Plan ("POP"). For the purposes of this hearing on the 'Overall Plan' issues, Mighty River Power's submissions seek:
 - The addition of a separate chapter or section in the POP that includes objectives and policies recognising the 'enabling' element of section 5 – the benefits that people and communities obtain from the use and development of natural and physical resources¹; and
 - The removal from the RPS of references to the Schedules to the POP, so that those Schedules are only referenced as part of the Regional Plan.²

¹ Officer's Report page 83 recommendation 4.7.3.

² Officer's Report page 27 recommendation 4.2.4.

- Cabinet's stated intention to prepare a National Policy Statement under the RMA on renewable electricity generation.

2.4 It is acknowledged that the last two of these documents are proposals only. However the Committee will be aware that they may be passed or promulgated prior to the close of hearings on the POP.

2.5 Against the background set out in Mr Hunter's and Mr Peterson's evidence, Mighty River Power has made submissions on the following Chapters of the POP:

- Setting the Scene and Administration (Chapters 1 and 2)
- Land
- Te Ao Maori
- Biodiversity and Heritage
- Infrastructure, Energy and Waste
- Landscape and Natural Character
- Water Allocation
- The Coast.

2.6 For completeness I note that Mighty River Power's submission also made some 'big picture' comments on the POP in relation to:

- The recognition of energy development and use³; and
- water allocation for hydro-electricity⁴

2.7 Council Officers have indicated that these big picture comments will not be dealt with at this hearing but rather at the hearings on the Chapters to which those issues relate.

³ MRP submission part 2.3.

⁴ MRP submission part 2.4.

3. LEGAL FRAMEWORK: MATTERS TO BE CONSIDERED BY REGIONAL COUNCIL PREPARING RPS AND REGIONAL PLAN

- 3.1 Mighty River Power generally supports the approach of *combining* the Regional Policy Statement and the Regional Plan. This is clearly allowed by section 78A of the Act. Mighty River commends the Council on producing an integrated planning document, taking advantage of a number of synergies between the RPS and the Regional Plan, so as to avoid repetition.
- 3.2 The matters to be considered by a Regional Council when preparing a regional policy statement ("RPS") and a regional plan are (usefully) very similar⁵.
- 3.3 Both a RPS and a regional plan must be prepared in accordance with:
- the Council's functions under section 30;
 - the provisions of Part 2;
 - its duty under section 32; and
 - any regulations
- 3.4 In addition, for both a RPS and a regional plan, a regional council must have regard to (*inter alia*) any management plans and strategies prepared under other Acts to the extent that their content has a bearing on the resource management issues of the region. In this respect, the Energy Efficiency Conservation Strategy October 2007 ("NZECS") is relevant. The NZECS is prepared under the Energy Efficiency and Conservation Act 2000, and *does* have a bearing on the resource management issues of the region. I will refer to that document shortly.
- 3.5 Finally, both the RPS and the Regional Plan must *give effect to* a national policy statement.⁶ Currently, operative national policy statements include the New Zealand Coastal Policy Statement and the National Policy Statement on

⁵ Refer sections 61 and 66 RMA.

⁶ Sections 62(3) and 67(3).

Electricity Transmission. In addition, a Regional Plan must *give effect to* the RPS⁷, which is of course the dominant document.

4. ADDITION OF A NEW CHAPTER OR SECTION TO THE RPS

- 4.1 In its submissions, Mighty River Power requests the addition of a new chapter or section to the RPS that includes objectives and policies which expressly recognise the benefits that people and communities obtain from the *use and development* of natural and physical resources.
- 4.2 Mighty River Power considers that the POP contains an inherent focus on the actual and potential *effects* on the environment of activities, which is inappropriate. In particular, Mighty River Power considers that the way the POP is currently framed will present an inappropriate barrier to the use of natural resources for the generation of electricity.
- 4.3 It is difficult to underestimate the importance of energy to the functioning and wellbeing of a modern society. Mr Hunter will explain the forecasts of increasing demand in electricity use, and the challenges in keeping up with these increases in demand, given New Zealand's isolated geographical location. Both Mr Hunter and Mr Peterson will explain why it is now preferable that this demand be met by renewable energy sources. They will also explain the importance of the Manawatu-Wanganui Region (Horizons) in terms of renewable energy opportunities.⁸
- 4.4 The Resource Management Act now provides explicit provision relating to the benefits to be derived from the use and development of renewable energy. Section 7 was amended on 2 March 2004 (by way of the Resource Management Amendment (Energy and Climate Change) Act 2004) by inserting section 7(j). When making decisions under the Act, particular regard must now be had to "*the benefits to be derived from the use and development of renewable energy*".
- 4.5 As I have noted the NZEECS is a relevant statutory strategy that must be had regard to in developing the POP. The Energy Efficiency and Conservation Act

⁷ Section 67(3).

⁸ In this hearing generic information will be presented on these topic areas with expert information being presented at the hearing on Chapter 3 Infrastructure, Energy and Waste.

requires that the Strategy under the Act contain “targets”, “objectives” and “policies”⁹. The NZEECS contains the following targets, objectives and policies.

TARGET (page 12):

“To have 90 percent of electricity generated from renewable sources by 2025.”

OBJECTIVE (page 61)

“An efficient electricity system where 90 percent of electricity is generated from renewable sources by 2025”

POLICY

5.1 “Promoting an efficient electricity system”

5.2 “Promoting the uptake of renewable electricity”

- 4.6 These provisions are very relevant to the resource management issues of this particular Region.
- 4.7 *Actions* under Policy 5.2 of the NZEECS include the Government’s intention to finalise the NPS on Renewable Energy in 2008. This would provide an even more direct link between decision-making under the RMA and the Government’s targets to increase the proportion of renewable energy in New Zealand’s generation profile.
- 4.8 The Environment Court has recognised the importance of energy, and of electricity. In the *Awhitu*¹⁰ wind farm decision, the Environment Court summarised the positive effects of Genesis Energy’s proposal for a wind farm on the Awhitu Peninsula in the Auckland Region, stating:
- “(i) Electricity is a vital resource for New Zealand. There can be no sustainable management of natural and physical resources without energy, of which electricity is a major component.*

⁹ As required by section 10(2) of the Energy Efficiency and Conservation Act 2000.

¹⁰ *Genesis Power Limited v Franklin District Council* [2005] NZRMA 54, para 64.

(ii) New Zealand needs a more diverse electricity generation base, to avoid for example over-reliance on hydro which is susceptible to dry years; in any event new large hydro options are limited.

(iii) More thermal generation will have adverse effects, including contributing to climate change ...

... ”

- 4.9 So, the importance of enabling the development of renewable energy resources has been recognised through amendment to Part 2 of the RMA, strategy under other legislation (the NZEECS) and by the Environment Court.
- 4.10 In terms of how to ensure that the Plan recognises importance of electricity in enabling people and communities to provide for their social and economic wellbeing, health and safety, it is possible, and probably preferable, that this be recognised by changes to *existing* Chapters of the POP. This would remove the need to include an entirely new Chapter within the POP. In this respect, Chapters 1 and 3 are particularly important.
- 4.11 If Mighty River Power's submissions on the remainder of the POP (particularly on Chapters 1 and 3) are accepted, then Mighty River Power would no longer see the need for an entirely new Chapter to be added to the POP.

Chapter 3

- 4.12 Chapter 3 of the POP "Infrastructure, Energy and Waste" is largely supported by Mighty River Power. However Mighty River Power considers Chapter 3 should be strengthened, and has suggested specific amendments to this Chapter. The amendments requested to Chapter 3 are based on the following themes¹¹:
- Recognition of the importance of security of energy supply as a pivotal component to the sustainable management of natural and physical resources;

¹¹ These themes are set out in Mighty River Power's written submission.

- Recognition of the *benefits* that accrue from the use and development of renewable energy resources, including reducing dependency on imported fuels;
- Recognition that renewable energy must be harnessed where the resource is;
- Recognition that priority should be given to renewable energy through resource allocation decisions;
- Recognition of the contribution that renewable energy projects make towards meeting New Zealand's energy targets and international obligations such as the Kyoto Protocol; and
- The significance of the national grid in facilitating renewable generation from dispersed locations.

4.13 These themes, and the proposed amendments, permeate the relief sought in other chapters of the RPS and sections of the Regional Plan.

Chapter 1

4.14 In relation to Chapter 1, Mighty River Power's submissions seek that the 'big four' issues be placed in context, in that the 'enabling element' of section 5 of the Act be recognised in the Chapter.

4.15 The 'big four' issues in Chapter 1 focus on potential adverse environmental effects but without recognition of the social and economic benefits that can arise from the *use* of natural and physical resources. Mighty River Power's submission seeks specific wording changes to Chapter 1. These requested amendments will be further addressed in the hearing on that Chapter.

4.16 In this respect, it is concerning that the Officer's Report states that "all recommendations and changes to the POP keep in mind the philosophy and intent of the POP since its inception, maintain a focus on the big four issues and the links with community outcomes and LTCCP funding" (recommendation 4.1.1). Although there has been extensive community consultation, neither Mighty River Power nor other submitters have had an opportunity to be heard

on the big four issues in the formal First Schedule process. That matter is set down for a further hearing. In such circumstances it is inappropriate that the big four issues guide all recommendations and changes to the POP from the start of the hearing process.

Summary

- 4.17 Relegating recognition of the benefits of energy generation to an implicit assumption within the plan will require generators to argue the importance of such benefits on a 'first principles' basis at each and every consent hearing, in a way that may or may not be successful. This approach would fail to implement the important guidance and direction that Councils have been given through amendment to the RMA, and through strategy prepared under other legislation. In addition to the NPS on Transmission, it is also likely that an NPS on Renewable Energy will be promulgated. Given the national benefits involved, the POP should be amended to ensure that the benefits of energy generation are brought to the forefront of the POP. Mighty River Power's submissions on the balance of the POP would achieve this.
- 4.18 If Mighty River Power's submissions to the remainder of the POP are not accepted, it is submitted that a new Chapter *does* need to be added to the POP explicitly recognising the benefits that the use and development of natural and physical resources can provide.

Evidence of other electricity generators

- 4.19 Trustpower supports Mighty River Power's position. The evidence of Robert Schofield is that the POP should include key objectives and/or policies that specifically recognise the numerous benefits associated with the use and development of the Region's natural and physical resources renewable, where the use of such resources have significant regional and national benefits.¹² Renewable energy generation meets this criteria and, as Mr Schfield mentions, can even be said to have international benefits.¹³
- 4.20 Genesis has also supported Mighty River Power's submission. The evidence of Mr Richard Matthews sets out amendments sought by Genesis throughout the

¹² Refer Mr Schofield's evidence paragraphs 6.3 – 6.5 and 6.10 – 6.12.

¹³ Refer Mr Schofield's evidence paragraph 6.11.

Regional Plan (rather than the addition of one new Chapter). These suggested amendments would emphasise the importance that resource use and development has in enabling people and communities to provide for their social, cultural and economic wellbeing and for their health and safety.

- 4.21 Mighty River Power has considered the amendments requested by Genesis and supports them. These amendments are however only to the regional plan component of the POP (Chapters 11 – 17), and similar amendments would need to be made to the RPS component of the POP. As stated, these amendments to objectives and policies within each chapter will not be pursued if Mighty River Power's submissions on the other parts of the POP (particularly Chapters 1 and 3) seeking specific wording changes, are accepted.

5. INCLUSION OF SCHEDULES WITHIN THE RPS AND THE REGIONAL PLA.

- 5.1 Mighty River Power has sought that the Schedules to the POP should only be referenced in the Regional Plan, and should not be referenced in the Regional Policy Statement.
- 5.2 Mighty River Power seeks to ensure that private individuals should have an opportunity to initiate a change to the Schedules through the private plan change process. Although an individual may request a change to a *regional plan*, under clause 21(3) of the First Schedule to the Act only a Minister of the Crown or a territorial authority in the region may request a change to a *regional policy statement*.
- 5.3 Mighty River Power is particularly interested in this matter insofar as it relates to Schedule B – core allocations and minimum flow requirements. However the legal principle, which I will now outline, applies to all the Schedules.
- 5.4 The Schedules form part of the rules of the Regional Plan. That is, the Schedules are utilised in the Regional Plan for determining activity status. By way of example:
- Rule 15-6 provides that the taking and use of surface water from a river that exceeds the core allocation set out in Schedule B is a non-complying activity.

- Rule 12-8 provides that vegetation clearance or land disturbance that takes place in a rare or threatened habitat (Schedule E) is a non-complying activity.

- 5.5 In these circumstances, an individual's right to initiate a private plan change may be vital for a particular proposal proceeding. The gateway tests for non-complying activity status may be difficult to meet, and their application may be completely unjustified - for example where resource inventory information used in the Schedules is found to be incorrect. Policy 6-17(a) of the RPS expressly acknowledges that Schedule B is based on incomplete information such that minimum flow requirements for rivers are necessarily set on a default basis. Information upon which Schedule E is based (Rare and Threatened Habitats and At Risk Habitats) may also be updated over time.
- 5.6 Parliament has given individuals the opportunity to apply for a private plan change on a regional plan once the plan is operative.
- 5.7 In *Hall v Rodney District Council*¹⁴ an individual, Mr Hall, requested the Rodney District Council to change the transitional district plan by applying a development zone to his land allowing rural-residential development. The Rodney District Council refused the proposed change, primarily on the ground that a forthcoming general change to the provisions of the district plan would consider the zoning request in a more integrated manner. The Planning Tribunal upheld Mr Hall's appeal to the District Council's decision, stating:
- "Parliament has provided a right for individuals to request plan changes and (unless one of the limited grounds of rejection in clause 25(4) applies) to have them examined and decided on their merits."* (emphasis added)
- 5.8 Under clause 25(4) of the First Schedule, there are very limited grounds upon which a Council may refuse a request for a private plan change. There are rights of appeal against such a decision to refuse a request (clause 27).
- 5.9 In my submission the reason that Parliament has not given private individuals a similar right to request a plan change to regional policy statements, is because an RPS cannot include *rules* that affect individuals directly. Whereas a regional

¹⁴ A 78/95 Judge Sheppard presiding, page 12.

plan can include rules for the purposes of carrying out a regional council's functions¹⁵, a regional policy statement cannot¹⁶.

5.10 I accept that a RPS can include very specific or narrow *policies*. This was established in the caselaw concerning the ability of the Auckland Regional Council to include policies defining the metropolitan urban limits or boundaries for the Auckland Region. In *North Shore City Council v Auckland Regional Council*¹⁷ it was held that a RPS can contain policies or methods directed toward a specific outcome, but cannot contain *rules* that prohibit, regulate or allow activities, that are binding on individual citizens.¹⁸

5.11 In the context of the POP, the inclusion of the Schedules in the RPS has the effect of removing an individual's right to initiate a private plan change to a *rule*. This is entirely inappropriate when such a right has been given by Parliament.

The Solution

5.12 Since the lodging of its submission, Mighty River Power has further considered the solution to this dilemma. It is accepted that the Schedules have a dual purpose. In addition to forming part of the rules in the regional plan, the Schedules are also important in guiding policy expressed in the RPS. I submit that it is possible to continue to reference the Schedules in the objectives and policies of the RPS, but in a way that makes it clear that the Schedules are not *part of* the RPS but are part of the Regional Plan only. By way of example, Policy 6-16(a) of the RPS could be amended to state:

"The taking of surface water shall be managed in accordance with the minimum flows and core allocations set out for each water management zone in Schedule B to the Regional Plan." (proposed additional text underlined)

5.13 This would not offend against the law relating to material incorporated by reference. Any amendment to the Schedules would still need to go through the

¹⁵ Refer section 68 RMA (except in relation to the functions in section 30(1)(a) and (b)).

¹⁶ Refer the contents of a RPS as set out in section 62 RMA.

¹⁷ [1995] NZRMA 424 Court of Appeal.

¹⁸ At page 11 of the decision: "*Regional policy statements may contain rules in the ordinary sense of the term, but they are not rules within the special statutory definition and directly binding on individual citizens. Mainly they derive their impact from the stipulation of Parliament that district plans may not be inconsistent with them.*"

First Schedule procedure (whether under a Council-initiated variation or under a private plan change).

- 5.14 A similar approach is taken in the Waikato Region where certain policies of the Waikato Regional Policy Statement contain provisions relating to "Significant Geothermal Features"¹⁹. Such geothermal features are not however defined in the Regional Policy Statement, but are defined in the Waikato Regional Plan²⁰. This approach is set out explicitly in methods in the Waikato RPS which state "In Development Geothermal Systems and Limited Development Geothermal Systems define Significant Geothermal Features that are considered significant and list and map those features in the Waikato Regional Plan".²¹ These provisions in the Waikato RPS and Waikato Regional Plan have been considered and approved by the Environment Court.²²
- 5.15 A similar approach to the Schedules should be adopted here, so that the right of an individual to apply for a change to the Schedules is not removed.

6. CONCLUSION

- 6.1 Mighty River Power is one of New Zealand's larger energy generators. The Horizons Region has some of the best renewable energy resources in the country. Mighty River Power views this Region as vitally important in ensuring New Zealand continues to have secure and diverse electricity generation base.
- 6.2 Mighty River Power considers that the POP contains a bias towards recognising the adverse effects on the environment of activities, at the expense of recognising the *benefits* that the use and development of resources can provide. This bias presents an unnecessary and inappropriate barrier to the consenting of energy generation projects, and should be addressed by appropriate provisions in the plan recognising the benefits of such projects.
- 6.3 The Plan's approach to the Schedules removes an individual's right to apply for a private plan change in relation to rules which directly affect them. For this

¹⁹ For example Policy 5 in Part 3.7.2.1 and Policy 2 of Part 3.7.2.2 of the Waikato RPS.

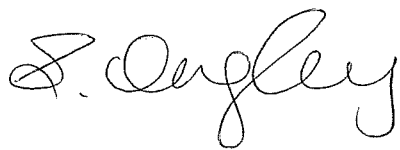
²⁰ Refer Tables 7-5 and 7-6 of the Waikato Regional Plan.

²¹ Methods to implement Policy 2 of Part 3.7.2 of the Waikato RPS.

²² *Geotherm Group Limited & Ors v Waikato Regional Council* A 047/06 and A 151/2006 (in relation to the substantive issues – detail resolved by consent order issued by Judge Whiting and dated 17 August 2006).

reason, the Schedules should be a part of the Regional Plan only (and not part of the RPS).

- 6.4 I have not addressed Mighty River Power's further submissions on the submissions of Affco and Landcorp, but will leave Mr Peterson to address those matters.

A handwritten signature in black ink, appearing to read 'S. Ongley', with a stylized, cursive script.

S J Ongley
Counsel for Mighty River Power Limited
2 July 2008