

IN THE MATTER of the Resource Management
Act 1991 ('the Act')

AND

IN THE MATTER of the proposed Horizons One
Plan – Overall Plan hearing

**SUPPLEMENTARY LEGAL SUBMISSIONS ON BEHALF OF MIGHTY RIVER
POWER**

1. INTRODUCTION

- 1.1 Legal submissions presented on behalf of Mighty River Power at the Overall Plan hearing (2 July 2008) addressed the matter of the Schedules to the Proposed One Plan ("One Plan"), and status of those Schedules as part of the Regional Policy Statement ("RPS").
- 1.2 Mighty River Power seeks that the Schedules only form part of the Regional Plan (Part II of the One Plan) and not part of the RPS (Part I of the One Plan). This would enable individuals have an opportunity to amend the Schedules through the private plan change process. Although an individual may request a change to a regional plan, an individual is not able to request a change to a regional policy statement.¹
- 1.3 Mighty River Power requested that the references to the Schedules make it clear that the Schedules are not part of the RPS, but are only part of the Regional Plan. It was requested that, should the RPS need to refer to Schedules, the reference be made to the Schedules *in the Regional Plan*.
- 1.4 These supplementary submissions further address this issue. In particular, the issue whether objectives and policies of a regional policy statement may refer to parts of a regional plan without offending against the law that applies to 'material incorporated by reference'.

¹ Clause 21(3) First Schedule Resource Management Act 1991.

2. RELIEF SOUGHT BY MIGHTY RIVER POWER LIMITED

2.1 Mighty River Power's concerns regarding the Schedules primarily relate to Schedules B and E of the One Plan. Schedules B and E have significant regulatory implications under rules 15-6 and 12-8.

2.2 Rule 15-6 provides that the following activity is to be considered a non-complying activity (the rule does provide for exceptions):

"The taking of surface water from a river which, when assessed in combination with all other water takes, exceeds the relevant core allocation set out in Schedule B."

2.3 Rule 12-8 provides that the following activities within a "rare or threatened habitat" are non-complying activities (this rule also provides for some exceptions):

(a) vegetation clearance

(b) land disturbance

(c) discharges of contaminants into water, or into or onto land

(d) diversions of water, including for the purpose of wetland drainage."

2.4 Rare and threatened habitats are defined in Schedule E.

2.5 Mighty River Power acknowledges that the Schedules should be able to be referenced in the RPS, because they form an important basis for many objectives and policies in the RPS. However Mighty River Power requested that the references to the Schedules in the RPS part of the One Plan be amended so that the Schedules do not actually form part of the RPS. For example, Policy 6-16(a) currently states:

"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".

2.6 Using this example, Policy 6-16(a) would 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)

- 2.7 There may be other mechanisms for achieving the same outcome. A global statement could be included at the front of the One Plan stating that the Schedules only form part of the Regional Plan and not the RPS, and references to the Schedules in Part I – Chapters 1 – 10 (the RPS) should be read as references to the Schedules in the Regional Plan. In the Table of Contents, the Schedules would therefore need to be listed under Part II. Mighty River Power does not have a particular preference for the mechanism, provided that the right to apply for a private plan change to amend the Schedules, in so far as they form part of rules, is preserved.

3. STATUTORY PROVISIONS REGARDING MATERIAL INCORPORATED BY REFERENCE

- 3.1 There is a question whether by referring in a regional policy statement to Schedules that form part of a regional plan, the regional policy statement would offend against the law that applies to ‘material incorporated by reference’.
- 3.2 As the Chairperson noted during the course of the hearing on 2 July 2008, there are now specific provisions of the Act relating to ‘material incorporated by reference’. These provisions are contained in Part 3 of the First Schedule and new Schedule 1AA to the Act. These provisions refer to plans, proposed plans, national environmental standards, national policy statements and New Zealand coastal policy statements. Curiously, there are no equivalent provisions for *regional policy statements*.

4. IS A REFERENCE IN A RPS TO SCHEDULES IN A REGIONAL PLAN ‘MATERIAL INCORPORATED BY REFERENCE’?

- 4.1 In my submission, the provisions in Schedule 1 Part 3 and Schedule 1AA are not relevant here, because relief requested by Mighty River Power would not constitute ‘incorporation of material by reference’.

4.2 In this situation, section 78A of the Resource Management Act has been utilised such that the RPS and the Regional Plan are one in the same document. The Regional Plan is not separate to the RPS.

4.3 The purpose of the reference to the Regional Plan would simply be for the purposes of clarifying that an individual has the opportunity to request a private plan change to the Schedules. This is achieved by clarifying which *part* of the One Plan the Schedules are contained within.

4.4 Where RPS and the Regional Plan are one document, in my submission there is no question of 'material incorporated by reference' to consider.

5. IF 'MATERIAL INCORPORATED BY REFERENCE', DOES THE REFERENCE OFFEND AGAINST LEGAL PRINCIPLES?

5.1 In the event my first submission is incorrect, I will address whether it is possible to incorporate material by reference in a regional policy statement.

5.2 The Resource Management Act 1991 was amended in 2005² by adding:

- Part 3 of the First Schedule - "Incorporation of documents by reference in plans and proposed plans"; and
- Schedule 1AA - "Incorporation of documents by reference in national environmental standards, national policy statements, and New Zealand coastal policy statements".

5.3 As stated, these provisions refer to plans, proposed plans, national environmental standards, national policy statements, the New Zealand Coastal Policy Statement, but not to regional policy statements.

5.4 Brookers Resource Management Law (in the commentary to Schedule 1 Part 3) notes the following:

"In July 1999, the Regulations Review Committee presented to the House of Representatives a report entitled Inquiry into Instruments Deemed to be Regulations: an Examination of Delegated Legislation. The Committee expressed concerns about the growing trend of applying provisions contained in

² By section 129 Resource Management Amendment Act 2005 (2005 No 87).

other documents over which the House of Representatives has no control, such as international treaties and technical documents such as standards, simply by reference to the provisions, rather than setting them out in full (a practice described as 'incorporation by reference').

The Committee's concern was that provision was not being made for the:

- (a) Documents to be readily and publicly available; or
- (b) Status of amendments to these documents.

The Committee took the view that principles were needed to give guidance on when and how a statute or regulation could employ this drafting technique. The Government sought the advice of the Legislation Advisory Committee (LAC). Ultimately LAC included advice and model clauses in its Guidelines on Process and Content of Legislation (2001, 2003 Supplement), available at <http://www.justice.govt.nz>. LAC requires legislation to include such clauses to ensure the general accessibility of material incorporated by references and to clarify the status of amendments."

- 5.5 The LAC "Guidelines on Process and Content of Legislation" state in Chapter 10 Part 6:

"IS THE USE OF "INCORPORATION BY REFERENCE" APPROPRIATE?"

10.6.1 Outline of issue

The term "incorporation by reference" refers to the creation or definition of rights, powers, and obligations by a reference in an Act of Parliament or delegated legislation to another document the provisions of which are not set out in the legislation. When should an empowering provision permit the use of incorporation by reference?

10.6.2 Comment

The issue of incorporation by reference can be considered in relation to the following principles of making or amending any law (other than the common law):

- Parliament must make or authorise the law:
- Parliament should have control over delegated legislation:
- an appropriate process, including consultation, should be followed in making the law:

- the obligations imposed by legislation should be certain and understandable by those affected:
- all legislation should be published in a form and manner that enables ready access by those affected.

Incorporation by reference is, to a certain extent, inconsistent with these principles of good law making. Accordingly, incorporation by reference should only be used where it is impracticable to do otherwise.

10.6.3 Guidelines

When considering whether to use incorporation by reference, the principles set out in Appendix 4 should be complied with.”

5.6 Appendix 4 to the LAC Guidelines states:

“The use of incorporation by reference should be expressly authorised by an Act...”.

5.7 It is noted that these Guidelines apply to delegated legislation only.

Delegated legislation under the Resource Management Act 1991 includes regulations, national environmental standards³, and rules in regional and district plans (which constitute deemed regulations under sections 68(2) and 76(2)). Following an amendment to the provisions governing National Policy Statements, some National Policy Statements now also constitute delegated legislation. Section 46A(4) of the Act provides:

“a national policy statement prepared after the use of a process established under subsection (1)(b) is a regulation for the purposes of the Regulations (Disallowance) Act 1989, but is not a regulation for the purposes of the Acts and Regulations Publication Act 1989.”

5.8 National policy statements prepared under section 46A(1)(b) are national policy statements that do not follow the orthodox process for development (set out in sections 47 – 52), but which follow a process set by the Minister.

³ Which are regulations: section 43.

The New Zealand Coastal Policy Statement can also follow a less orthodox process as allowed for under section 46A(1)(b)⁴.

- 5.9 In my submission the empowering provisions allowing material to be incorporated by reference are important for these instruments, because they constitute delegated legislation or deemed delegated legislation. However for other instruments that *do not* constitute delegated legislation, such as regional policy statements, an empowering provision allowing material to be incorporated by reference is not necessary. For regional policy statements the mechanism of incorporating material by reference can continue to be used in the absence of anything in the Act which prevents it.
- 5.10 For regional policy statements, it may very well be *desirable* to have provisions in a parent Act that set out how material is to be incorporated by reference, however this is not required.

Principles for incorporating material by reference in a Regional Policy Statement

- 5.11 As stated, in my submission it is not necessary for the parent Act to expressly enable references to extraneous material in provisions of a regional policy statement. In determining whether references to extraneous material are legitimate however, other legal principles remain relevant.
- 5.12 Importantly, rights of public participation in the development of regional policy statements must not be undermined by references to extraneous material. Subsequent amendments to the document incorporated by reference should not have legal effect without allowing for proper process.
- 5.13 In *Body Corporate 164980 and Body Corporate 107678 v Auckland City Council A 87/96* the Court referred in obiter comment to the reason reference to extraneous material in a district plan or in a resource consent must be read as reference to material current at the time of preparation and publication of the referring document. In that case the extraneous material referred to was a New Zealand Standard. The Court (Judge Sheppard presiding) stated:

⁴ Refer section 57(1) relating to the New Zealand Coastal Policy Statement.

"Otherwise the district plan or resource consent condition could be altered, not by the appropriate authority and process provided by the Resource Management Act, but by the Standards Council and its process under the Standards Act."

- 5.14 Under the Resource Management Act, the legitimate process for amending plans and policy statements is provided for in the First Schedule.
- 5.15 As stated in submissions presented on 2 July 2008, where a regional policy statement refers to material in a regional plan the problem of undermining rights of public participation does not arise. Any amendment to the regional plan must be made via the procedures set out in the First Schedule to the Act *anyway*. Changes to a regional plan must only be made under the legitimate processes set out in the Act, and these processes are the very same that govern changes made to a regional policy statement. So if subsequent alterations are made to the Schedules, these changes would be made only under the legitimate processes in the Act that apply equally to changing regional policy statements and regional plans.

6. CONCLUSION

- 6.1 Mighty River Power continues to seek that the Schedules to the One Plan, particularly Schedules B and E, form part of the Regional Plan component of the One Plan and be removed from the RPS component. Suggested methods for achieving this have been set out in paragraphs 2.6 and 2.7 of these submissions. There may be other equally effective mechanisms.
- 6.2 As submitted at the hearing on 2 July 2008, to reject this relief would be to effectively remove an individual's right to seek a private plan change to a rule. This right has been given by Parliament, and it is not appropriate that it be removed, whether inadvertently or otherwise.



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