

In the Environment Court of New Zealand  
Christchurch Registry

**ENV-2018-CHC-29**  
**ENV-2018-CHC-38**  
**ENV-2018-CHC-47**  
**ENV-2018-CHC-50**

I Mua I Te Kōti Taiao o Aotearoa  
Ōtautahi Rohe

Under the Resource Management Act 1991 (**RMA**)

In the matter of an appeal under clause 14 of Schedule 1 of the RMA in relation to decisions on the Proposed Southland Water and Land Plan

Between **Aratiatia Livestock Limited, Meridian Energy Limited, Waihopai Rūnaka, Hokonui Rūnaka, Te Rūnanga o Awarua, Te Rūnanga o Oraka Aparima, and Te Rūnanga o Ngāi Tahu, Royal Forest and Bird Protection Society of New Zealand Incorporated**

Appellant

And **Southland Fish and Game Council**

Appellant

And **Southland Regional Council**

Respondent

---

**S 274 Party Evidence of Ben Farrell**

Topic B6

19 August 2022

---

---

Counsel: Sally Gepp  
Level 1, 189 Hardy Street,  
Nelson 7010  
Email: sally@sallygepp.co.nz  
Telephone: 021 558 241

<b>Contents</b>	
INTRODUCTION	2
Qualifications and experience	2
Code of Conduct for Expert Witnesses	2
Scope of Evidence	2
EXECUTIVE SUMMARY	4
EVIDENCE	5
National Significance of the MPS	5
Costs of the MPS	6
Relevant statutory documents, provisions and weighting	7
Consideration of options for Policy 26	16
Consideration of options for Rule 52A (Activity Status)	17
Consideration of options for Appendix E	19
CONCLUSION	19
APPENDIX BF1 – RECOMMENDED AMENDMENTS	22

## INTRODUCTION

### Qualifications and experience

- 1 My full name is Ben Farrell. I reside in Queenstown. I am an environmental planning expert. I hold a Master of Environmental Policy and Bachelor of Resource Studies (majoring in environmental policy and planning). I am a full member of the New Zealand Planning Institute. My qualifications and experience are as set out in my evidence in chief (**EiC**) dated 20 December 2021.
- 2 I gave expert planning evidence on behalf of the Royal Forest and Bird Protection Society Incorporated of New Zealand (**FB**) and Southland Fish and Game (**FG**) the before the Environment Court in the Topic A and various Topic B hearings. For Topic B I participated in most but not all expert conferencing sessions, provided various written evidence, was a signatory to all the planning JWS, and presented to the Court in July 2022.

### Code of Conduct for Expert Witnesses

- 3 I confirm I have read the Code of Conduct for expert witnesses contained in the Environment Court of New Zealand Practice Note 2014 and that I have complied with it when preparing my evidence. Other than when I state I am relying on the advice of another person, this evidence is within my area of expertise. I have not omitted to consider material facts known to me that might alter or detract from the opinions that I express.

### Scope of Evidence

- 4 I have prepared this evidence in relation to the s.274 party interests of the Southland Fish and Game Council (**FG**) in appeals by Waihopai Rūnaka, Hokonui Rūnaka, Te Rūnanga o Awarua, Te Rūnanga o Oraka Aparima, and Te Rūnanga o Ngāi Tahu (**Ngā Rūnanga**), Royal Forest and Bird Protection Society of New Zealand Incorporated (**FB**), Meridian Energy Limited (**MEL**), and Aratiatia Livestock Limited (**Aratiatia**).
- 5 My evidence draws on the following EiC; Ms Whyte, Mr Hunt, Mr McConchie, Ms Hogsden, Mr Feierabend for MEL; Ms Jordan, Mr Marshall for Aratiatia; Ms Davidson, Ms Kitson, Ms Cain for Ngā Rūnanga; Ms Sitarz for FB; and Mr Moss for FG.
- 6 My evidence refers to numerous other evidence and statutory policy documentation including but not limited to that below. If I refer to additional documents, I have referenced such documents in my evidence below:
  - (a) Te Tiriti o Waitangi

- (b) Resource Management Act 1991 (RMA)
  - (c) Manapouri Te Anau Development Act 1963 (MTADA)
  - (d) Ngai Tahu Claims Settlement Act 1998 (NTCSA)
  - (e) New Zealand Coastal Policy Statement 2010 (NZCPS)
  - (f) National Policy Statement for Freshwater Management 2020 (NPSFM)
  - (g) Te Tangi a Taurira – The Cry of the People: Ngāi Tahu ki Murihiku Natural Resource and Environmental Iwi Management Plan 2008
  - (h) Southland Regional Policy Statement 2017 (RPS)
  - (i) Proposed Southland Water and Land Plan (pSWLP)
- 7 My evidence also refers to the National Policy Statement for Renewable Electricity Generation 2011 (NPSREG); National Policy Statement for Freshwater Management 2014 (NPSFM 2014); and various evidence, joint witness statements, transcripts, and legal submissions tabled as part of the Topic A and Topic B hearings on the pSWLP.
- 8 My evidence addresses matters arising from the abovementioned expert evidence of relevance to my planning expertise in relation to the evaluation of the most appropriate wording for Policy 26, Rule 52A, and Appendix E of the Proposed Southland Water and Land Plan (**pSWLP**).
- 9 I have prepared my evidence based on my expertise as a planner given my qualifications and experience noted in my EiC. I note of particular relevance to this matter that:
- (a) I prepared the s42A Report for Southland Regional Council (**SRC**) on the Infrastructure and Energy Chapter of the Regional Policy Statement (**RPS**).
  - (b) I studied integrated environmental management and climate change science and policy as mandatory components of my Master of Environmental Policy.
  - (c) I was involved in the preparation, education and early implementation of the NPSREG around most of New Zealand (I was also a member of the working party that help prepare and roll out the NPSREG Implementation Guide).

- 10 My evidence assumes that any reference to freshwater associated with the Manapōuri hydro-electric generation scheme (**MPS**) relate to the purpose of renewable electricity generation (**REG**)<sup>1</sup>.
- 11 For the avoidance of any perceived conflict of interest I advise that I am married to Ms Ailsa Cain who is providing evidence on behalf of Nga Runanga, but I do not consider that any conflict of interest arises out of this. I also confirm I have no current or previous membership ties or interests to Fish & Game.

## **EXECUTIVE SUMMARY**

- 12 I agree with Ms Whyte, Ms Davidson, Ms Sitarz, and Ms Jordan that Policy 26 should be further amended:
  - (a) I agree with Ms Whyte and Ms Davidson that an additional reverse sensitivity clause could be introduced but I consider clarification is required to identify (i) what activities and development may be incompatible with the MPS and (ii) how this infrastructure should be protected from such activities.
  - (b) I agree with Ms Sitarz and Ms Jordan that further policy limbs should be introduced to provide some direction about the management of adverse effects of the MPS.
- 13 I agree with Ms Whyte, Ms Davidson, Ms Sitarz, and Ms Jordan that Rule 52A should be amended so that consenting the MPS is provided for as a discretionary activity ahead of the FMU process being completed.
- 14 I consider it is premature to classify a post-FMU restricted discretionary activity status for the MPS. The activity status could be revisited as part of the Plan Change Tuatahi process.
- 15 I agree with Ms Whyte and Ms Davidson that Appendix E can be amended to exclude the MPS from meeting the water quality standards in certain scenarios.
- 16 In arriving at my conclusions, I have put considerable weight on the pSWLP Objectives that require that the life-supporting capacity and aquatic ecosystem health is safeguarded, that infrastructure like the MPS is sustainable and effective, and that the MPS is recognised and provided for in any resulting flow and level regime. Those objectives apply within an

---

<sup>1</sup> Including the taking or use of water; the discharge of water into water and onto or into land; the discharge of contaminants into water or onto or into land; the damming or diversion of water

overall framework where land and water are to be managed as integrated resources, in a manner that ensures the mauri of water provides for hauora.

- 17 I consider the objectives provide a basis for the future allocation regime for the Waiau catchment to allow genuine reconsideration of the MPS water allocation regime. The FMU process provides the opportunity for this reconsideration and until this discussion is completed it would be premature to restrict matters of discretion on any future resource consent decision-making on the MPS water allocation and discharge regime.

## **EVIDENCE**

### **National Significance of the MPS**

- 18 The national significance of the MPS is recognised and provided for in Objective 10 of the pSWLP, various Objectives, Policies, and Methods of the Regional Policy Statement (**RPS**)<sup>2</sup>, and the NPSREG.
- 19 The MPS is of such scale and significance that it is also recognised in the NPSFM as one of five large hydro schemes that, when applying the FMU process, the regional council must have regard to the importance of the Schemes’:
- (a) contribution to meeting New Zealand’s greenhouse gas emission targets;
  - (b) contribution to maintaining the security of New Zealand’s electricity supply; and
  - (c) generation capacity, storage, and operational flexibility.
- 20 I acknowledge the economic evidence of Mr Hunt in support of the significance of the MPS. Mr Hunt has described the MPS electricity generation output and comparable costs of producing the same amount of electricity from other sources. The national significance of the MPS in respect of generating renewable electricity is clear, and not in dispute.
- 21 I observe Mr Hunt has not identified the associated revenue or local and regional benefits of the MPS.

---

<sup>2</sup> Including but not limited to Objective WQUAN.2, Policy WQUAN.3, Method WQUAN.1, Objective INF.1, Policies INF.1 and INF.2, Method ENG.1

## Costs of the MPS

- 22 The MPS has resulted in significant adverse effects on the environment. Examples of such environmental costs were canvassed in the Topic A hearing process, and are evident in the evidence prepared by Mr Marshall, Ms Jordan, Ms Kitson, Mr Moss, and Ms Cain.
- 23 MEL's evidence on the environmental costs of the MPS addresses water quality<sup>3</sup>. MEL's evidence does not appear to identify that the MPS has had or is having any significant adverse effects on ecosystems (including impacts on species abundance), ngāi tahu interests, and recreation values including angling.
- 24 I observe from MEL's evidence there is no identification of how the MPS can help remedy or mitigate (including offsetting and compensating) adverse effects that have arising from the MPS and might continue.
- 25 I observe Mr Hunt has not identified in any economic or financial terms any:
- (a) Revenues associated with the MPS
  - (b) Economic costs arising from the environmental costs of the MPS
  - (c) Opportunity costs of the MPS. Mr Hunt has not identified the societal opportunity costs of the local community not being able to use the water (what could the local, regional and national benefits be if water was reallocated for different purposes).
- 26 Effectively, local water (resource) is taken and used 16 times over for the benefit of people outside the local community. It is unclear what benefit/compensation local people receive from this huge economic/financial income. In my opinion the opportunity costs of MEL taking water from the local people and benefiting the rest of NZ could be compensated through direct or indirect contributions that:
- (a) reduce adverse impacts of other land uses on water quality across the region;
  - (b) support people recreate and gather resources from freshwater.
- 27 I observe Mr Hunt has assessed the cost impacts of the MPS not generating any electricity. No party is suggesting that the MPS should stop generating

---

<sup>3</sup> I acknowledge Ms Hodgesen at [87] opines the MPS is unlikely creating any impact on water quality trends, at least over the last two decades.

renewable electricity. It is unclear why Mr Hunt has not considered the cost implications of reducing electricity generation output by different percentages.

*Reverse sensitivity*

- 28 Ms Whyte and Ms Jordan appear to have a difference of opinion in respect to the extent to which the policy direction requires protection of the MPS from reverse sensitivity effects.
- 29 I agree with Ms Jordan that NPSREG (Policy D) does not support the protection of any allocation or prioritisation of freshwater.
- 30 I also agree with Ms Whyte that RPS Policy INF.3 seeks to protect infrastructure from incompatible activities, and the pSWLP needs to give effect to this policy directive. Ms Whyte<sup>4</sup> opines that *“the policy does not specify what outcome must be achieved. This will be determined by the consent authority depending on the particular facts and circumstances and in light of the relevant policies and objectives”*. In my opinion the absence of policy guidance to help identify what activities and development may be incompatible with this infrastructure; and (ii) how this infrastructure should be protected from such activities could lead to ineffective and inefficient decision-making (Ms Whyte also refers to Method INF.1 which directs regional plans to *“identify... (i) what activities and development may be incompatible with this infrastructure; and (ii) how this infrastructure should be protected from such activities;”*).
- 31 Accordingly, if the amendments sought by MEL are to be included then Policy 26 would further benefit from some articulation about what activities and development may be incompatible with this infrastructure; and (ii) how this infrastructure should be protected. I would support further amendments to Policy 26 to provide such guidance/direction, however given the reverse sensitivity issue is the concern of MEL I feel it would be more appropriate for MEL (or Mr Feierabend or Ms Whyte) to suggest additional guidance in the first instance.

**Relevant statutory documents, provisions and weighting**

- 32 Ms Whyte, Ms Davidson, Ms Sitarz, Ms Jordan, and Ms Cain have collectively identified various statutory documents (as listed in par 6 of my

---

<sup>4</sup> Evidence dated 29 July 2022 @ Par 22(c)

evidence above) as being relevant. I consider all these documents to be relevant.

- 33 In my opinion the most relevant provisions for determining the most appropriate wording of Policy 26, Rule 52A, and Appendix E are the Plan Objectives. This is on the basis the Plan Objectives are settled and give effect to the higher order documents, including the NPSFM to the extent they need do ahead of the FMU process. As the FMU process is yet to be completed, the pSWLP has not fully given effect to the NPSFM and other national policy. Consequently, if the MPS flow and allocation regime is to be determined through a resource consent process ahead of FMU completion then the higher order provisions will remain relevant to that resource consent process.
- 34 I have reviewed the respective evidence of Ms Whyte, Ms Davidson, Ms Sitarz, and Ms Jordan. I agree with their evidence to the extent it is consistent. The following identifies where I have observed material differences in opinion or where I share a material difference in opinion.

*Plan Objectives*

- 35 I agree that Plan Objectives 3 and 10 provide policy support for the benefits of the MPS to be recognised and provided for. They are subject to the Interpretation Statement. Objective 10, in requiring that the national importance of the MPS is provided for and recognised in a flow and level regime, does not preclude consideration of how its importance can be provided for through alternative flows and levels.
- 36 I consider Plan Objectives 1, 2, 4, 5, 6, 7, 9/9A, 9B, 10, 14, 15, 17, 18, 19 are particularly relevant. As the Waiau is in a degraded and overallocated state, read together these provide strong policy direction that the existing MPS take limits, environmental flows and level limits should be revisited (in accordance with the FMU process). In this regard:
- (a) Objective 1 suggests all components of the Waiau Catchment and its connectivity with the coast should be managed as a connected whole. The MPS has disrupted natural connections / systems so any replacement consents should remedy or mitigate such disruptions.
  - (b) Evidence from Ngā Rūnunga, Aratiatia, and FG identifies how the mauri and hauora o te wai have been significantly degraded by the MPS (Objective 2).

- (c) Evidence from Ngā Rūnunga that tangata whenua values and interests including customary uses have been significantly degraded by the MPS (Objectives 4 and 5).
  - (d) I assume, following the FMU process, the MPS will have an important role to play in helping improve water quality in the Waiau Catchment where it is degraded from human activity, even if the cause of that degradation is not from the MPS (Objective 6).
  - (e) Any over-allocation will need to be phased out in accordance with the FMU freshwater objectives, targets, limits and timeframes (Objective 7).
  - (f) The evidence of Ngā Rūnunga, Aratiatia, and FG is that the life-supporting capacity, aquatic ecosystem health, and natural character of waterbodies affected by the MPS have not been safeguarded (Objective 9/9A).
  - (g) Objective 9B requires operation of infrastructure to be “sustainable and effective”.
  - (h) Taonga species, as set out in Appendix M, and related habitats, are to be recognised and provided for.
  - (i) Objective 17 requires the preservation of the natural character values of wetlands, rivers and lakes and their margins.
  - (j) Objective 18 requires all persons (including the consent holders of MEL) to implement environmental practices that optimise efficient resource use, safeguard the life supporting capacity of the region’s land and soils, and maintain or improve the quality and quantity of the region’s water resources.
  - (k) Objective 19 requires the passage of fish to be maintained or improved.
- 37 In respect of Objective 11 it is not clear (from the evidence) how efficient the MPS water use actually is, particularly as opportunity costs (benefits of alternative uses of the water used by the MPS) do not appear to have been factored into the evidence of MEL.

*Giving effect to te mana o te wai*

- 38 Ms Sitarz [par 32] says the pSWLP does not fully give effect to NPSFM Objective 1. My understanding is that the Plan Objectives and overall plan architecture (including the way in which the plan has been prepared and

taking account of the Interpretation Statement) do give effect to Objective 1 to the extent it has needed to at this point in its development. This is on the basis that the FMU process is required to be implemented to give full effect to the concept of TMOTW. There is a prioritisation (hierarchy) stated in the pSWLP framework through the Interpretation Statement. I understand the Court's key findings on TMOTW in its first interim decision articulates that priority is to be given to the health of the waterbody, which aligns with the expression of TMOTW set out in the NPSFM20. To clarify I do not think there is any need for the Plan Objectives to be revisited in light of the NPSFM20. Notwithstanding all of this, I assume that ES will clarify this matter when it updates the RPS<sup>5</sup>.

*Effectiveness of pSWLP policies in protecting the environment*

- 39 Ms Whyte and Ms Davidson have agreed on the suite of matters to be considered in Policy 26. Ms Sitarz and Ms Jordan are recommending Policy 26 be further amended. I understand their rationale to be on the basis that Policy 26 provides a lack of direction about managing the adverse effects of the MPS, leaving too much uncertainty and potential for conflict when seeking to recognise and provide for renewable energy and managing adverse effects on freshwater.
- 40 For any resource consent process undertaken ahead of the FMU process, I consider policies 1-3, A4, 13, 15A-C, B7, 20-23, 26A, 28-30, 32-34, 40, 42 would need to be relied on in lieu of the FMU process. In respect of these policies, I observe:
- (a) Policies 1-3 provide strong support for Ngāi Tahu matters to be taken into account.
  - (b) Policies A4 and B7 respectively would require regard to be given to the extent to which any change in water quantity would adversely affect safeguarding the life-supporting capacity of freshwater and of any associated ecosystem; and the feasibility and dependability of avoiding any discharge or change in quantity that might result in a more than minor adverse effects on freshwater and any associated ecosystems.
  - (c) Policies 13, 26 (subject to this hearing) and 26A Policy 26A would provide policy support for the MPS to continue to operate subject to

---

<sup>5</sup> Mr McCallum-Clarke (Evidence dated Oct 2021 par 60 (d)) states that by Mid 2022 Environment Southland intends on notifying "changes to the Freshwater chapter of the RPS, including Te Mana o te Wai and visions)

operating in a way that avoids (where practicable) or otherwise remedies or mitigates adverse effects on the environment

- (d) Policies 15A, 15C, 5C may or may not require discharges to water to be reduced (subject to the outcome of tranche 2 and this hearing).
  - (e) Policies 20-23 would require consideration of numerous adverse effects associated with the taking, abstraction, use, damming or diversion of water, albeit policies 22 and 42 (together with Appendix K) could be interpreted as allowing the MPS flow and allocation regime to continue (as discussed in the evidence of Ms Jordan at par 105)
  - (f) Policies 28, 29, 30 would require the avoidance, mitigation or of structures and bed disturbance within rivers and lakes, gravel extraction and drainage maintenance (clearance of modified water courses).
  - (g) Policies 32, 33, 34 would require the protection of significant indigenous vegetation and habitat, protection of natural wetlands, and promotion of the restoration of existing wetlands and creation of new wetlands.
  - (h) Policy would provide specific direction to consider the timing of the FMU process when determining the term of any resource consent.
- 41 The above policies provide a reasonable level of recognition of and provision for the MPS, a reasonable level of protection of Ngāi Tahu interests, and a reasonable level of protection of environmental matters. However, there is no direction in Policy 26 (or any other policy) that would assist in resolving the tensions between providing for the MPS and avoiding, remedying, and mitigating the adverse effects of the MPS.
- 42 I consider the plan provisions, as I recommend be amended, will better accord with and assist the Council carrying out its functions to achieve the purpose of the Act and implement the respective National Policy Statements to the extent they can ahead of the FMU process being completed. Policy 26, Rule 52A, and Appendix E directly engage with the national directions for freshwater and renewable electricity generation. However, the Plan Objectives and relevant policies do not provide a sufficient decision-making framework for allowing any long term reconstenting of the MPS – this should only occur after completion of the FMU when all significant issues associated with the MPS can be comprehensively addressed and reconciled to the text that any reconciliation may be possible.

*Policy direction for responding to climate change*

43 I consider the NPSREG and NPSFM read together provide the appropriate central government / national policy direction for New Zealand's approach to addressing climate change. I note the following key messages set out in the NPSREG Implementation Guide which are relevance to this matter:

The NPS REG confirms that:

- renewable electricity generation (REG), regardless of scale, makes a crucial contribution to the well-being of New Zealand, its people and the environment, and any reductions in existing REG will compromise achievement of the Government's renewable electricity target of 90% of electricity from renewable sources by 2025
- the development, operation, maintenance and upgrading of new and existing REG activities throughout New Zealand, and the associated benefits of REG, are matters of national significance.
- in developing policy and plan provisions, and assessing resource consent applications, heritage orders and notices of requirement, decision-makers are required to have particular regard to the practical implications of achieving New Zealand's renewable electricity target and the constraints associated with developing, operating, maintaining and upgrading new, existing and consented REG activities
- local authorities are encouraged to engage early with electricity generators to understand the issues associated with developing, operating, maintaining and upgrading new and existing REG activities, and in developing regional and district policies to give effect to the NPS REG
- electricity generators are encouraged to work closely with local authorities to ensure relevant information is provided to inform policy development and the resource consent processes.

44 I acknowledge New Zealand's international climate change obligations and internal emissions reduction commitments have changed since the NPSREG was prepared in 2011<sup>6</sup>. However, the NPSREG was drafted in a way that anticipated and allowed for the renewable energy target to change (note the language in the NPSREG Objective refers to "*New Zealand Government's national target for renewable electricity generation*" without specifying what that target actually is.

45 In respect of section 3.31 of the NPSFM, it is unclear what "*a significant adverse effect on the Manapōuri Power Scheme*" might entail – there is no evidence on this point. Identifying the point at which an adverse effect on the MPS is significant is likely to be highly relevant in the FMU process. Once that point is established it can then be factored into other considerations including how the allocation regime takes into account matters of relevance to ngā rūnunga and affected stakeholders.

---

<sup>6</sup> Evidenced in Ms Purdies EiC

*Evaluation of policies, rules and other methods*

46 I have considered the following relevant assessment matters in my evidence below:

- (a) Whether the provisions accord with and assist the Council in carrying out its functions and achieve the purpose of the Act (s74(1) of the Act);
- (b) Whether the provisions accord with Part 2 of the Act (s74(1)(b));
- (c) Whether the provisions give effect to the regional policy statement (s75(3)(c)) and have regard to any proposed regional policy statement (s74(2));
- (d) Whether the provisions give effect to a national policy statement (s75(3)(a));
- (e) Whether the provisions have regard to the actual or potential effects on the environment, including, in particular, any adverse effect (s76(3));
- (f) Whether the policies and methods are the most appropriate way to achieve the Plan Objectives, having regard to their efficiency and effectiveness (s32(1)(b)) and taking into account (under s32(2): (i) the benefits and costs of the proposed policies and methods; and (ii) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules of other methods. I note the evidence of Ms Whyte articulates these matters in her section 32Aa evaluation in Appendix 2 of her evidence, and I've highlighted in my evidence where I share a material difference of opinion.
- (g) Any changes to a proposal that are made after the initial section 32 evaluation has been completed require further evaluation under section 32AA of the Act. This further evaluation must be undertaken in accordance with section 32(1) to (4) of the Act and must be undertaken at a level of detail that corresponds with the significance of the changes. Section 32(1) and 32(2) specifies what the evaluation must examine:
  - (1) An evaluation report required under this Act must—
    - (a) examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of this Act; and
    - (b) examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by— (i) identifying other

reasonably practicable options for achieving the objectives; and (ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives; and (iii) summarising the reasons for deciding on the provisions; and

(c) contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal.

(2) An assessment under subsection (1)(b)(ii) must—

(a) identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for— (i) economic growth that are anticipated to be provided or reduced; and (ii) employment that are anticipated to be provided or reduced; and (b) if practicable, quantify the benefits and costs referred to in paragraph (a); and

(c) assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.

- (h) As the Plan Objectives have been determined, 32(1)(a) is not applicable and the primary assessment is to examine whether the provisions in the proposal are the most appropriate way to achieve the Plan Objectives, by identifying other reasonably practicable options for achieving the objectives; and assessing the efficiency and effectiveness of the provisions in achieving the objectives.
- (i) Section 32(1)(b)(i) requires the identification of other reasonably practicable options for achieving the purpose of the plan change (noting that, in this case, there are no new objectives proposed) as part of the plan change evaluation. These options are to be examined to determine whether or not the different options before the Court are the most appropriate way to achieve the Plan Objectives. As stated above an assessment under subsection (1)(b)(ii) must also: identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for— (i) economic growth that are anticipated to be provided or reduced; and (ii) employment that are anticipated to be provided or reduced; and (b) if practicable, quantify the benefits and costs referred to in paragraph (a); and assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.
- (a) In respect of the Plan Objectives, I consider all of the Plan Objectives to be relevant to this matter, particularly the consideration of the pSWLP provisions that have effect prior to the FMU process being completed. However, the Plan Objectives are not intended to provide FMU-specific outcomes (visions and freshwater objectives). Therefore, as directed by the RPS (in accordance with the NPSFM), the Plan Objectives do not provide much assistance in the formulation

of policies and rules designed to manage activities subject to the FMU process, including the MPS freshwater flow and allocation regime.

47 In summary I consider:

- (a) The Plan Objectives to be key matters for assessment for determining what is the most appropriate policies and rules having effect ahead of FMU completion. There are a range of statutory documents and associated provisions to be considered in the evaluation of FMU provisions, and I have not undertaken an assessment of each and every relevant statutory document or provision, as this is an exercise that I consider is more appropriately undertaken at the s32 stage as part of the Plan Change Tuatahi process.
- (b) There are significant risks associated with not acting on the provisions. However, the risks are competing. On one hand the ability for the electricity generated by the MPS needs to be secured if New Zealand is to achieve its current renewable electricity generation and climate change targets. On the other hand, operating the MPS results in significant adverse effects and costs which could be inappropriate to “lock in” over a medium to long term.
- (c) Having regard to all the statutory directions referred to above, in my opinion, achieving New Zealand’s climate change obligations, as directed in the NPSREG and factored into the NPSFM, does not mean that the MPS should have any assumed or automatic prioritisation of all the water in the Waiau. The benefits of the MPS are obvious and are recognised – it would be fanciful to suggest the MPS needs to stop generating a substantial amount of renewable electricity. However, the MPS has resulted in significant adverse effects and its continued operation (as status quo) clearly does not prioritise the health of the waterbody, ecosystems, or people’s health. There are also significant Te Tiriti o Waitangi matters to be concerned with.

48 Accordingly, there is a basis for the pSWLP to ensure that any future allocation regime for the Waiau catchment is completed in a manner that allows genuine reconsideration of the MPS water allocation regime. The FMU process provides the opportunity for this reconsideration and until this discussion is completed it would be premature to restrict matters of discretion on any future resource consent decision making on the MPS water allocation and discharge regime.

## Consideration of options for Policy 26

- 49 Ms Whyte and Ms Davidson agree on the wording sought by MEL. Ms Sitarz and Ms Jordan suggest further amendments.
- 50 In respect of the relief supported by Ms Whyte, Ms Davidson, Ms Sitarz and Ms Jordan respectively, I consider:
- (a) From a drafting perspective, there is no need for sub-clause 2 to repeat / duplicate of sub-clause 1.
  - (b) When referencing “benefits” in clause 2, I consider it is more appropriate to say “...including benefits” rather than “...and the benefits” of the MPS. If the policy says “and the benefits” then it is suggesting the benefits of the MPS are not part of the national significance of the MPS. I assume this is incorrect as the benefits of the MPS all relate to its renewable electricity generation, and scale of that generation. If it is intended that there are “other” benefits then it such benefits should be clarified as they should not be confused with benefits of national significance).
  - (c) Like Ms Sitarz and Ms Jordan, I consider it would be appropriate for Policy 26 to be amended to provide some additional direction about managing the effects of the MPS. I consider Ms Sitarz recommended policy 26 to be appropriate, except that I am not sure that it is possible or appropriate to try and “safeguard the mauri of the Waiau River”. This is on the basis that the mauri of the river is significantly degraded and may not be recoverable<sup>7</sup>.
  - (d) Except in relation to the costs associated with reverse sensitivity I consider the analysis of benefits and costs provided by Ms Whyte, Ms Davidson, Ms Sitarz, and Ms Jordan to be fairly similar and I generally agree with their respective analysis, noting that:
    - (i) I agree with Ms Whyte and Ms Davidson that the potential costs of not considering reverse sensitivity issues on the MPS should be taken into account and are potentially significant (given the absence of reverse sensitivity direction from other policies in the plan).
    - (ii) I agree with Ms Sitarz and Ms Jordan that the environmental costs of allowing the MPS to continue will be significant and this

---

<sup>7</sup> Cain par 11 (“...the mauri of the waterbodies might take generations, if ever, to be restored”)

justifies amendments to Policy 26 to make sure that all environmental effects of the MPS can be considered if it is to be reconvented ahead of FMU completion.

- 51 The amendments I recommend are matters of plan drafting and I do not consider they raise any materially different costs or benefits compared to the versions supported by either Ms Whyte, Ms Davidson, Ms Sitarz, and Ms Jordan.
- 52 Given all the above I consider Policy 26 should be further amended as stated in BF1 below.

### **Consideration of options for Rule 52A (Activity Status)**

#### Controlled Activity Status

- 53 I have not considered the merits of a controlled activity status on the basis MEL is no longer seeking a controlled activity status.

#### Activity status prior to FMU completion

- 54 In addition to my evidence above I observe the planning evidence of Ms Whyte, Ms Davidson, Ms Sitarz, and Ms Jordan is fairly similar in respect of the benefits and costs of the discretionary (unrestricted) activity status for water take applications received ahead of the FMU process being completed, and I generally concur with these findings.

#### Activity status post FMU completion

- 55 For the reasons set out in my evidence above I do not support a bespoke rule or activity status that sits in the pSWLP now (ahead of Plan Change Tuatahi) that is intended to apply post FMU completion.
- 56 In addition to my evidence above, I consider:

- (a) Ms Whyte (at par 70(a)-(e)) sets out a term of reference agreed between Ms Whyte and Ms Davidson for determining the most appropriate rule. I agree with the matters set out in clauses (a), (b), (c), (e) but question clause (d) because it is predicated on an assumption that we will know the outcomes of the FMU process, and that the RDA framework will be appropriate. I don't think we can satisfactorily predict that the RDA framework will be appropriate, or what matters of discretion should apply post FMU completion.
- (b) The exclusion of take limits from the matters of discretion may undermine and derogate from the practical ability to exercise the

matters of discretion in 1 and 2 in relation to mitigation and remediation. It is simply unclear how much mitigation and remediation may be identified in the FMU process. For example, it could be appropriate for the MPS replacement consents to be designed so that *“take limits, environmental flows and level limits that are more limiting for the consent holder than those set in the Plan for the Waiau FMU”* can adapt to the scenario of freshwater objectives or targets are not being met (in that scenario there could be justification for take limits, environmental flows and level limits to be more limiting for the consent holder than those set in the Plan for the Waiau FMU).

- (c) I observe Ms Davidson (at par 38) discusses the NPSFM hierarchy of obligations as a reason for resource consent potentially being declined:

I consider the Te Mana o Te Wai approach in the pSWLP suggests that an ability to decline consents for the Manapōuri Hydro-electric Generation Scheme is appropriate. As detailed in the NPSFM 2020, the hierarchy of obligations sets out that the health and wellbeing of the waterbody comes first. So, for example, if the health and wellbeing of the waterbody could not be prioritised in the context of granting the consent, then that might suggest the consent may need to be declined. The Regional Council would not be able to decline a consent for a controlled activity and in my view this presents a risk that Te Mana o te Wai might not be appropriately achieved.

- (d) The ability to decline consent (and impose conditions) is restricted to the matters that discretion has been restricted to. The decision-maker would not be able to decline or prevent any aspect of the application that is outside the matters of discretion. The health and wellbeing of the waterbody could not be prioritised under an RDA rule unless it is specifically listed under the matters of discretion. Moreover, there is a link between the fundamental concept of TMOTW and Hauora, and I agree with Ms Davidson (at par 40) that:

A fully discretionary activity status prior to the FMU for Waiau being established emphasises that Plan Change Tuatahi is the appropriate place to fully discuss matters of what is needed for the waterbodies within the Waiau catchment to be in a state of hauora, and how this will be achieved. Through Plan Change Tuatahi, the hauora of the waterbody can be discussed in conjunction with matters such as climate change, other uses of water and discharges into the Waiau, the future of Tiwai Smelter and provision of electricity into the National Grid.

- (e) The activity status can be set by the FMU process (Plan Change Tuatahi). Ms Whyte’s evidence talks about the FMU process being completed, but the rule she supports says “a take limit regime has been established”. The wording of the RDA rule does not require the regime to be “completed”. It should, and the meaning of completed should be clarified. Note, if the FMU process included a different activity status then determining “completed” can be applied when the

current rule is replaced/superseded by a proposed rule in PCT. So it would be easier from a plan administration perspective to include a new rule in the FMU process.

- (f) I consider a discretionary (unrestricted) activity status “provides for” REG (there is no policy requirement for enabling large scale REG as a permitted, controlled, or RD activity).

57 For the reasons above I generally agree with the evidence of Ms Sitarz and Ms Jordan in respect of preferring the discretionary (unrestricted) activity status over the RDA. I do not agree with Ms Whyte and Ms Davidson that an RDA is the most appropriate activity status.

58 I consider the appropriate activity status for managing the MPS post FMU completion should be notified as part of Plan Change Tuatahi. It is not logical or in any way necessary to predetermine the status of an activity that is subject to an FMU process. Such an approach would be at odds with the rest of the pSWLP framework.

### **Consideration of options for Appendix E**

59 I concur with the evidence of Ms Davidson and Ms Whyte that MELs relief to Appendix E is appropriate. This is primarily on the basis that adverse effects will be temporary and will be otherwise managed via case-by-case resource consent processes, with sufficient protection for effects on freshwater bodies contained in the relevant pSWLP policies.

### **CONCLUSION**

60 The MPS and current allocation regime for the Waiau Catchment includes an enormous amount of exclusive consumptive use of water. This use results in nationally significant benefits at significant local costs, including adverse environmental effects such as loss of the rivers mauri and substantial reductions in ecosystem health, mahinga kai, recreation and food gathering opportunities.

61 Whilst the national significance of REG is to be recognised and provided for, I consider:

- (a) It is difficult to see how taking more water for the MPS (beyond the existing consented allocation regime) might be appropriate. There is strong evidence to suggest that the Waiau is overallocated and I consider it is practically overallocated. I assume MEL would not be so concerned with managing reverse sensitivity effects on the MPS if the catchment was not overallocated.

- (b) Assuming the Waiau is overallocated, and acknowledging that Plan Objectives 3, and 10 provide policy support for the benefits of the MPS to be recognised and provided for, Objectives 1, 2, 4, 5, 6, 7, 9/9A, 9B, 11, 14, 15, 17, 18, 19 read together provide strong policy direction that the existing MPS take limits, environmental flows and level limits should be revisited (in accordance with the FMU process).
- (c) Allowing the existing allocation regime to continue is likely to result in significant local opportunity costs, including the ability for MEL to mitigate or remedy adverse effects of the MPS;
- (d) The matters to be addressed in the FMU process are uncertain and the outcomes of the FMU process cannot be predicted so it is not appropriate to impose a restricted discretionary activity status for taking of water from Waiau Catchment ahead of the FMU process being completed.
- (e) There is a risk that the existing MPS consents will need to be replaced ahead of the FMU process being completed. It is appropriate to impose a discretionary (unrestricted) activity status for any taking of water from the Waiau Catchment ahead of the FMU process being completed.
- (f) It is unclear from evidence before the Court what scenarios might result a significant adverse effect on the Manapōuri Power Scheme. Given this direction in section 3.31 of the NPSFM, understanding this matter could be pivotal in setting and monitoring any updated or new allocation regime for the MPS.
- (g) MEL should not be able to continue to determine what happens to water it has been allocated under previous legislation, unless that is the outcome of the FMU process. The FMU process should be used to provide an opportunity to revisit the allocation regime taking into consideration all relevant legal and policy directives applicable at that time, including but not limited to TOW and Crown Settlement legislation, the NPSFM, and any RPS amendments, the pSPWLP Plan Objectives. Until the FMU process is completed it is premature and not appropriate to codify any matters of discretion in rule 52A.

62 Appendix BF1 sets out my revised recommended amendments having regard to my evidence above.

**Ben Farrell**

Dated this 19<sup>th</sup> day of August 2022

## APPENDIX BF1 – RECOMMENDED AMENDMENTS

### Policy 26

- 1 Amend Policy 26 as follows (track changes show the version agreed by Ms Whyte and Ms Davidson, yellow highlighted text shows changes recommended by Ms Sitarz, green highlight shows my additional changes):

#### ***Policy 26 – Renewable Energy***

Recognise and provide for:

1. the national and regional significance of renewable electricity generation activities including the practical constraints associated with its development, operation, maintenance and upgrading and the benefits of renewable electricity generation activities; and

2. the national and regional significance ~~and including~~ the ~~benefits~~ of renewable electricity generation activities (including the existing Manapōuri hydro-electric generation scheme in the Waiau catchment ), the national, regional and local benefits of renewable electricity generation activities, the need to locate the generation activity where the renewable energy resource is available, and including the practical constraints associated with its development, operation, maintenance and upgrading,

When:

- a. allocating surface water for abstraction, damming, diversion and use; and
- b. considering all resource consent applications for surface water abstractions, damming, diversion and use;

c. [insert a specific reverse sensitivity policy in relation to the MPS that identifies (i) what activities and development may be incompatible with the MPS and (ii) how this infrastructure should be protected from such activities].

While:

- d. safeguarding the mauri and providing for the ecosystem health of the Waiau River, and;

- e. reversing or reducing the degradation of the Waiau River as a result of the Manapōuri hydro-electric generation scheme.

## Rule 52A

- 2 Amend Rule 52B so that it reads as follows:

### ***Rule 52A Manapōuri Hydro-electric Generation Scheme***

- (a) Despite any other rules in this Plan, any activity that is part of the Manapōuri hydro-electric generation scheme, for which consent is held and which is the subject of an application for a new consent for the same activity and is:
- (i) the taking or use of water; or
  - (ii) the discharge of water into water or onto or into land; or
  - (iii) the discharge of contaminants into water or onto or into land; or
  - (iv) the damming or diversion of water;
- is a **discretionary activity**.
- (b) Despite any other rules in this Plan, any activity that is for the taking of water for the generation of electricity from Manapōuri hydro-electric generation scheme which seeks a quantity of water greater than that currently consented is a **non-complying activity**.

## Appendix E

- 3 Amend Appendix E clause (b) as proposed by MEL and stated in the evidence of Ms Whyte and Ms Davidson.