

BEFORE THE ENVIRONMENT COURT  
I MUA I TE KOOTI TAIAO O AOTEAROA

**Decision No. [2018] NZEnvC 218**

IN THE MATTER of the Resource Management Act 1991  
AND of appeals under Clause 14 of the First  
Schedule of the Act  
BETWEEN ARATIATIA LIVESTOCK LIMITED  
(ENV-2018-CHC-29)  
MERIDIAN ENERGY LIMITED  
(ENV-2018-CHC-38)  
FEDERATED FARMERS OF NEW  
ZEALAND  
(ENV-2018-CHC-40)  
TE RŪNANGA O NGĀI TAHU, HOKONUI  
RŪNAKA, WAIHOPAI RŪNAKA, TE  
RŪNANGA O AWARUA & TE RŪNANGA  
O ORAKA APARIMA  
(ENV-2018-CHC-47)  
ROYAL FOREST AND BIRD  
PROTECTION SOCIETY OF NZ INC  
(ENV-2018-CHC-50)  
Appellants  
AND SOUTHLAND REGIONAL COUNCIL  
Respondent

Court: Environment Judge J J M Hassan  
Hearing: In Chambers at Christchurch  
Submissions: R W Donnelly for Waiau Rivercare Group  
C Lenihan for Waiau River Liaison Committee  
S Christensen for Meridian Energy Limited  
PAC Maw and K J Wyss for Southland Regional Council  
Date of Decision: 14 November 2018  
Date of Issue: 14 November 2018



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**DECISION ON STANDING OF CERTAIN PERSONS  
TO JOIN APPEALS UNDER SECTION 274**

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- A: Waiau Rivercare Group has standing as a s274 party to this appeal.
- B: Waiau River Liaison Committee has no standing as a s274 party to this appeal and its s274 notice is struck out.
- C: Costs are reserved.

**REASONS**

**Introduction**

[1] This decision concerns a preliminary legal issue as to whether two entities are entitled to join appeals on the proposed Southland Water and Land Plan ('pSWLP'). I commence with an apology to the parties for the lateness of this decision, given the timetable is running on evidence filing.

[2] The two entities are Waiau Rivercare Group ('WRG') and Waiau River Liaison Committee ('WRLC'). Each filed notices under s274 of the Resource Management Act 1991 ('s274 notices') to join the following appeals ('the five appeals'):

- (a) Meridian Energy Limited (ENV-2018-CHC-38);
- (b) Aratiatia Livestock Limited (ENV-2018-CHC-29);
- (c) Te Rūnanga o Ngāi Tahu and others<sup>1</sup> (ENV-2018-CHC-47);
- (d) Royal Forest and Bird Protection Society of New Zealand Incorporated (ENV-2018-CHC-50); and
- (e) Federated Farmers of New Zealand (ENV-2018-CHC-50).

[3] The question of whether WRG and WRLC have status to join these appeals was first raised by the respondent, Southland Regional Council ('Council'), in its 17 July 2018 memorandum of counsel.<sup>2</sup> This was in response to the court's direction that the parties



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<sup>1</sup> Hokonui Rūnaka; Waihopai Rūnaka, Te Rūnanga o Awarua and Te Rūnanga o Oraka Aparima.  
<sup>2</sup> Memorandum of counsel for Southland Council, dated 17 July 2018.

identify any preliminary or jurisdictional issues. In addition to the two entities and the Council, Meridian Energy Limited ('Meridian') was the only other party to file submissions. The parties agree that the matter can be dealt with on the papers.

[4] The Council later informed the court<sup>3</sup> that it "did not express any views" as to whether or not WRG or WRLC would be able to meet the legal tests by reasons not stated in their s274 notices.<sup>4</sup> Rather, the Council seeks only to bring the matter to the attention of the court (indeed as directed). It takes a neutral position on the matter.<sup>5</sup>

### Section 274 RMA and related principles

[5] The relevant eligibility ground for joining an appeal are in s274(1)(d) and are as follows:

...

- (d) a person who has an interest in the proceedings that is greater than the interest that the general public has...

[6] Both WRG and WRLC claim eligibility to be parties to the appeals under that provision. The determination of whether a person has standing as a s274 party is best approached in terms of s269 RMA, which provides that the court may regulate its proceedings in such a manner as it thinks fit, and more particularly, s279(1)(a), which empowers the court to make orders in the course of a proceeding.<sup>6</sup> A body of case law has developed which guides the court in determining what is meant by the phrase used in s 274(1)(d).

[7] The interest that qualifies a person to participate in a proceeding "must be one of some advantage or disadvantage", such as that arising from a right in property directly affected, and which is not remote.<sup>7</sup> 'Remote' is used in the legal, as opposed to the geographical, sense.<sup>8</sup> The circumstances for the court's consideration are not restricted solely to property rights and neither are they closed or prescribed.<sup>9</sup> Where individuals are clearly disadvantaged, a group representing those individuals can be treated as

<sup>3</sup> Memorandum of counsel for Southland Council, dated 7 September 2018.

<sup>4</sup> Memorandum of counsel for Southland Council, dated 7 September 2018 at [7].

<sup>5</sup> Memorandum of counsel for Southland Council, dated 7 September 2018 at [13].

<sup>6</sup> *Meadow 3 Limited v van Brandenburg* (2008) 14 ELRNZ 267 at [19].

<sup>7</sup> *Purification Technologies Limited v Taupo District Council* [1995] NZRMA 197 at 204; cited in *Wallace Group Limited v Auckland Council* [2017] NZEnvC 106 at [23].

<sup>8</sup> *Powerco Limited v Thames-Coromandel District Council* [2017] NZEnvC 67 at [28].

<sup>9</sup> *Meadow 3 Limited v Queenstown Lakes District Council* C001/08.



similarly disadvantaged.<sup>10</sup> On the other hand, the fact that a community group or entity is representative of a subset of the general public on issues of concern to them does not automatically qualify it as having an interest “greater than the interest that the general public has”. What is required is that the group or entity can establish that it has some advantage or disadvantage that is not too remote.<sup>11</sup> The relationship between the claimed interest and consequent effect of the proceedings on the interest is relevant. Interest (e.g. ‘advantage or disadvantage’) must be direct and not just emotional or intellectual interest.<sup>12</sup> Where a group or entity has an interest different from (as in greater than) that of the general public and specific when compared to that of the general public, that may give the group a sufficiently qualifying interest.<sup>13</sup>

[8] If the court finds that a party has the requisite standing it continues on as a party to the appeals. If a party is found not to have standing, it follows that it must be removed as a party from the proceedings. Under s279(4) RMA, the court is able to strike out a person’s case where it is found to be (a) frivolous or vexatious; or (b) that it discloses no reasonable or relevant case in respect of the proceeding; or (c) where it would otherwise be an abuse of the court to allow the case to be taken further. In circumstances where a party is found to have no standing, s279(4)(b) or (c) apply.

## Waiau River Group

### *The Council’s submissions*

[9] The Council notes that the simple fact that WRG is a representative group of the general public does not automatically mean it qualifies under s274(1)(d), noting observations in *Mangawhai Heads* to similar effect. The Council expresses caution about recent cases that suggest that a more specific interest than that of the general public may go towards establishing a qualifying interest. It points out that those cases have generally been in the context of a particular street or neighbourhood,<sup>14</sup> rather than an environment

<sup>10</sup> *Sandspit Yacht Club Marine Society Incorporated v Auckland Council* [2011] NZRMA 300 at [18]; also in *Lindsay v Dunedin City Council* [2013] NZEnvC 8 at [20], an aspiring s274 party had a better relationship with the potential advantages or disadvantages of the proceedings because at least five of its members were property owners residing near or in the street.

<sup>11</sup> *Mangawhai Heads Holdings Limited v Kaipara District Council* [2011] NZEnvC 203 at [13].

<sup>12</sup> *Wallace Group v Auckland Council* [2017] NZEnvC 106 at [25]; *Remarkables Park Ltd v Queenstown Lakes District Council* C26/2005.

<sup>13</sup> *Trustees of the Neville Crawford Family Trust v Far North District Council* [2013] NZEnvC 141 at [12]. For completeness, see also this court’s other recent Queenstown Lakes proposed District Plan decisions: [2018] NZEnvC 145; [2018] NZEnvC 190.

<sup>14</sup> *Lindsay v Dunedin City Council* [2013] NZEnvC 8.



such as a river. The Council submits that WRG's s274 notice does not indicate the specific area that the group is interested in and the purpose of the group is not made clear.<sup>15</sup>

### **WRG submissions**

[10] The WRG comprises a committee of seven people, elected at the group's inaugural meeting and a broader membership of forty-seven people who receive correspondence and notice of meetings from the WRG.<sup>16</sup>

[11] By way of background, WRG explains that it was formed on 7 June 2017 (in essence, some eleven months after the submissions' period on the pSWLP closed). It does not have a constitution and its membership is comprised of individuals from the Lower Waiau River community – extending from Manapouri Lake Control at Mararoa to the Tuatapere Township to Te Wae Lagoon. It also points out that a number of its members (including both co-chairs) own land immediately adjacent to the Waiau River. The primary focus of the group is to improve the health of the Lower Waiau River.<sup>17</sup>

[12] WRG also traverses initiatives it took with regard to its concerns over the implementation of the National Policy Statement for Freshwater Management ('NPSFM') in the pSWLP. On 9 October 2017, it wrote to the Council (copying the letter to the Minister for the Environment) ('the letter').<sup>18</sup> The letter detailed the WRG's concern within the Waiau-Waiiau Lagoon Freshwater Management Unit, in that it would proceed without taking proper account of the significant and ongoing adverse impacts of power generation on the Lower Waiau River. The letter articulated some of the adverse effects on its members and voiced concern that the limits could impact on the community.

[13] Turning to its s274 notice to join the five appeals, WRG explains that its interest in the proceedings centres on the following pSWLP provisions:<sup>19</sup>

- (a) Objective 10, including the matters that must be recognised and provided for;



<sup>15</sup> Memorandum of counsel for Southland Council, dated 17 July 2018 at [19].

<sup>16</sup> Affidavit of Paul David Marshall, dated 12 September 2018 at [1].

<sup>17</sup> Submissions for Waiau Rivercare Group, dated 31 August 2018 at [6].

<sup>18</sup> Affidavit of Paul David Marshall, sworn 31 August 2018, Annexure A.

<sup>19</sup> Submissions for Waiau Rivercare Group, dated 31 August 2018 at [2].

- (b) Policy 26 Renewable energy;
- (c) Rule 52 Water abstraction, damming, diversion and use from the Waiau catchment;
- (d) Rule 52A Manapouri Hydro-electric Generation Scheme; and
- (e) Appendix E Receiving Water Quality Standards.

[14] The s274 notice states that WRG is concerned about the impact of these provisions on the following:<sup>20</sup>

- (a) the Waiau River;
- (b) Te Wae Wae Lagoon and surrounding coastal marine area;
- (c) Deep Cove; and
- (d) the ability for the community to realise their aspirations for freshwater, both in terms of quality and quantity, including (but not exclusively) through the National Policy Statement for Freshwater Management.

[15] WRG submits that those farmer members who have land immediately adjacent to the Waiau River would experience a disadvantage as a result of the proceedings if the relevant appeals are successful. Related to that, it points out that the Council has described the Waiau Catchment as fully or over-allocated. It says that, historically, access to water for all users in the catchment has reflected this. It also notes that the pSWLP states that the Waiau Catchment includes tributaries of the Waiau River and any hydraulically connected groundwater.<sup>21</sup>

[16] It also notes the potential consequence that the proceedings could have for their farming members, in terms of the capacity for their businesses to be considered when new resource consents for the Manapouri Power Scheme ('MPS') are sought. Further, WRG submits that the greater consideration of the MPS in the pSWLP would significantly reduce the prospects for these landowners of gaining access to water.<sup>22</sup> It points out that water is an essential constraint on and enabler of agricultural production and ultimately, business profitability, resilience and value. It submits that therefore impeded access to water and reduced consideration of effects are a significant disadvantage to members of the WRG that is not remote.<sup>23</sup> It also notes that, for those appeals it seeks to support,

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<sup>20</sup> Submissions for Waiau Rivercare Group, dated 31 August 2018 at [3].  
<sup>21</sup> Submissions for Waiau Rivercare Group, dated 31 August 2018 at [18].  
<sup>22</sup> Submissions for Waiau Rivercare Group, dated 31 August 2018 at [19].  
<sup>23</sup> Submissions for Waiau Rivercare Group, dated 31 August 2018 at [20].



the success or otherwise in securing the relief pursued would have direct consequences for members of the WRG. Specifically, it refers to the implications that could arise from any consenting of the MPS on a basis that does not take proper account of the adverse effects of power generation (including from reduced flows).<sup>24</sup>

[17] In those respects, it submits that the risk that a determination of the appeals could significantly reduce the consideration of the adverse effects on members of the WRG is a reason why it qualifies under s274(1)(d). That is in the sense that there is a potential significant disadvantage to members of the group which is not remote.<sup>25</sup>

[18] WRG submits that its interests are also more specific than those of the general public. Those include its interest in improving the health of the Lower Waiau River, specifically the stretch from the Manapouri Lake Control ('MLC') to Te Wae Wae Lagoon, where the water flows to the ocean.<sup>26</sup>

[19] In response to Meridian's submission that WRG does not have interests that are sufficiently distinct from those of the general community, WRG relies on the affidavit of Mr Marshall (a farming member) to submit that there is a difference between the public generally and the community he refers to. It says that the affected community are those residing in the vicinity of the lower Waiau River, downstream of the MLC.<sup>27</sup>

[20] While it acknowledges that it does not have a constitution, WRG submits that the letter demonstrates its interest in relevant resource management matters, particularly as to the connection between positive outcomes for the Lower Waiau River, the MPS and planning processes throughout.

[21] As to the fact that WRG did not exist when the pSWLP was notified and the submission period was open, it submits that its situation can be distinguished from that described in *Toomey v Thames-Coromandel District Council*, where the court observed that participation in resource management matters could give some organisations standing as true representatives of the public interest.<sup>28</sup> WRG says that, while it was similarly formed after the close of submissions, the group has since demonstrated



<sup>24</sup> Submissions for Waiau Rivercare Group, dated 31 August 2018 at [21]-[22].

<sup>25</sup> Submissions for Waiau Rivercare Group, dated 31 August 2018 at [24].

<sup>26</sup> Submissions for Waiau Rivercare Group, dated 31 August 2018 at [30].

<sup>27</sup> Further submissions for WRG, dated 10 September 2018 at [4]-[5].

<sup>28</sup> *Toomey v Thames-Coromandel District Council* [2017] NZEnvC 199 at [30].

participation in resource management issues. That submission is supported by Mr Marshall's affidavit. He deposes that the WRG has held three public meetings<sup>29</sup> at which Council staff and the Council Chairperson have been present and resource management issues pertaining to the Waiau River have been discussed.<sup>30</sup> The WRG has also held regular meetings since its formation relating to resource management issues that affect the community.<sup>31</sup>

[22] For all of these reasons, the WRG says it meets the test under s274(1)(d) and hence qualifies as a party to the proceedings.

### ***Meridian's submissions***

[23] Meridian is an appellant and s274 party in these proceedings and owns and operates the MPS (for which resource consents for its operation expire in 2031). It submits that WRG does not qualify under s274(1)(d).

[24] I do not need to traverse Meridian's submissions querying WRG's membership, as I find these matters sufficiently clarified by Mr Marshall's affidavit and WRG's above-noted further submissions. Similarly, in light of Mr Marshall's affidavit, I can leave aside Meridian's observations that Mr Marshall is already participating in the proceedings through the involvement of Aratiatia Livestock Limited ('ALL'),<sup>32</sup> I accept Mr Marshall's unchallenged explanation that he is not a 100% owner of ALL and he personally holds less than 1% of ALL's shares and is trustee of Marshall Family Trust which is the majority shareholder of the company.<sup>33</sup>

[25] Furthermore, I leave aside Meridian's submissions as to how Mr Marshall's interests may compare with WRG's claimed interests.<sup>34</sup> That is because the question in issue is whether WRG is a qualifying party. Hence, provided I am satisfied that WRG honestly has the interests it asserts (including in Mr Marshall's affidavit), I do not need to make any findings concerning what Mr Marshall is or is not interested in and how this may compare.

<sup>29</sup> 7 June 2017, 31 October 2017 and 30 April 2018.

<sup>30</sup> Affidavit of P D Marshall, dated 31 August 2018 at [16].

<sup>31</sup> Submissions for Waiau Rivercare Group, dated 31 August 2018 at [35].

<sup>32</sup> Submissions for Meridian, dated 7 September 2018 at [14].

<sup>33</sup> Affidavit of Paul David Marshall, dated 12 September 2018 at [2].

<sup>34</sup> Submissions for Meridian, dated 7 September 2018 at [12].





[26] Finally, as unchallenged evidence, I find Mr Marshall's affidavit sufficiently clarifies the extent of WRG's interests.<sup>35</sup> That is, I accept Mr Marshall's explanation that the stretch of particular interest to the group commences at the Manapouri Lake Control Structure, approximately 10km downstream of the point at which the lower Waiau River leaves Lake Manapouri.<sup>36</sup>

[27] Meridian submits that the nature of the interest shared by the wide geographically-spread members of the WRG has not been satisfactorily described in WRG's evidence. It says that the evidence simply asserts a range of "generic impacts" of the operation of the MPS, which Meridian says would be experienced by the community generally rather than WRG in particular.<sup>37</sup>

[28] Meridian disputes WRG's claim of disadvantage, characterising the claim as illusory. The crux of Meridian's position is that the present appeal proceedings do not constrain or preclude WRG's capacity to be involved in relevant further Sch 1 RMA planning processes and future MPS consenting processes.<sup>38</sup>

[29] It emphasises that there will be a further Sch 1 plan-making process for the development of a FMU for the Waiau and, in that process, consideration will be given to flow, level and allocation regimes for the catchment in order to give effect to the requirements of the NPSFM and the policies of the pSWLP. It notes this must include methods to phase out any over-allocation within a specified timeframe. It points out that any Sch 1 process will confer rights of submissions, further submission and appeal and, hence, appropriate protection of WRG's interests.<sup>39</sup>

[30] Meridian goes on to argue that, if any replacement consent application were to be made before the Sch 1 FMU process is completed, the consent authority would have capacity to set limits on the volume, rate and timing of water taken and discharged. However, under Meridian's preferred wording of r 52A, once those limits and allocations have been established in the Plan and provided Meridian's application stays within those limits and allocations, the consent authority would not be able to set conditions that impose different limits. If the application is made after the Sch 1 FMU process is



<sup>35</sup> Submissions for Meridian, dated 7 September 2018 at [10].

<sup>36</sup> Affidavit of Paul David Marshall, dated 12 September 2018 at [4].

<sup>37</sup> Submissions for Meridian, dated 7 September 2018 at [16].

<sup>38</sup> Submissions for Meridian, dated 7 September 2018 at [34].

<sup>39</sup> pSWLP Policy 47.

completed, any application would be considered subject to whatever provisions result from the FMU process. It submits that, in any case, any application for replacement consents would be subject to public notification and WRG will have the opportunity to participate. Furthermore, it notes that the consent authority would retain control over, and be able to set conditions relating to, the mitigation or remediation of all adverse effects of the operation of the consent subject to where allocations and flows have been set in the SWLP.

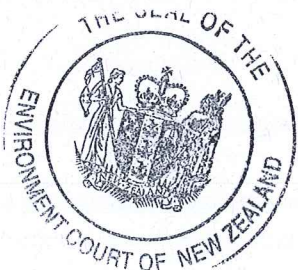
### **Consideration**

[31] I approach consideration of whether WRG has status under s274(1)(d) recognising that this matter is being considered at a preliminary stage, on an understanding that the question of whether it has status is distinct from the case that WRG may bring. It can be anticipated that this case would be expanded on with evidence and submissions to come.

[32] I accept WRG's submissions concerning the nature of its membership. I accept this includes members with direct interests in the resource of the relevant stretch of the Waiau River as WRG has particularised.

[33] I am satisfied that neither the lack of a constitution nor the fact that the WRG was formed after submissions on the pSWLP is fatal to WRG's position. Whilst a constitution can be a convenient means of recording an entity's interests, it is not a necessary prerequisite to s274(1)(d) standing. Rather, the first enquiry is as to what the person's or group's true interest is in the proceeding. That is in order to adjudge whether that interest is greater than that the general public has.

[34] I am satisfied that farmer members of the WRG have a sufficiently direct interest in the proceedings the WRG seeks to join. Related to that, I am also satisfied that the WRG is an appropriately representative body for those members' interests. That is in the sense that I find that the advantage or disadvantage that relief in related appeals could mean for those farmer members can be properly also imputed to the WRG. I make that finding, having accepted what Mr Marshall has attested and for a combination of reasons. One is the fact that all member farmers have land immediately adjacent to the Waiau River and within the WRG's specified section of interest. Another is the fact that there is a close correlation between the stated aspirations of the WRG of improving the health of the Lower Waiau River and the fact that farmer members depend upon the river



resource's health for the success of their farming businesses. Related to those matters, a further relevant consideration influencing my finding is that the Waiau Catchment is a resource sensitive to competing uses and demands. Further, the related proceedings are concerned with objectives, policies and rules of the pSLWP that could directly bear upon how competing uses and demands are determined.

[35] I acknowledge Meridian's submissions concerning the future opportunities that WRG would have for participation in both further Sch 1 plan-making processes and MPS replacement consent application processes. However, the fact of those further potential opportunities do not deny the interest I find WRG to have in the proceedings in issue. In particular, determination of the relevant appeal proceedings could bear upon those interests, both of WRG as a whole and of its farmer members. That is at least in the sense that the relief pursued could materially change the status quo position of the relevant objectives, policies and rules (and, under further Sch 1 processes, also related provisions that must achieve or implement any objectives and policies as may be determined in the present appeals).

[36] For the reasons I have given, I find that WRG's interest is sufficiently significant and direct and specific to the WRG members as to qualify WRG under s274(1)(d).

### **Waiau River Liaison Committee**

#### ***What is the Waiau River Liaison Committee?***

[37] The Council explains that the WRLC is a committee of the Council and operates under Terms of Reference ('TOR'). The TOR specify the purpose of the committee is to establish a means of communication between the ratepayers and the Council. The TOR do not refer to any other purpose and nor do they mention the WRLC being involved in planning appeals, which would qualify it as having an interest greater than the general public has.<sup>40</sup> The method of communication between WRLC and the Council is also stated in the TOR and is to be by way of formal meetings annually.<sup>41</sup> The TOR do not delegate authority to the WRLC and explicitly state that the committee must not make decisions on the Council's behalf, as such decisions must rest with the Council in terms of its statutory authority.<sup>42</sup>




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<sup>40</sup> Memorandum of counsel for Southland Council, dated 17 July 2018 at [28].  
<sup>41</sup> Submissions for Waiau Rivercare Group, dated 7 September 2018 at [11].  
<sup>42</sup> Term of Reference 1.5.

[38] Together with its submissions, WRLC filed an affidavit by Mr Horrell, Chair of the WRLC (Mr Horrell explaining that this is one of eight such liaison committees).

[39] Mr Horrell disagrees with the Council, in that he does not believe that the TOR provide any guidance or limits for the WRLC.<sup>43</sup> In his view, the label of “Wairau River Liaison Committee” (and the accompanying TOR) are more of a vehicle by which the more specific legal requirement of the legally binding Waiau Agreement and the terms of the Special Rating District can be fulfilled.<sup>44</sup>

[40] However, Mr Horrell acknowledges that he has only recently become aware of the TOR.

[41] Mr Horrell also explains that the genesis of the WRLC dates back to the early 1970s, when adverse effects arose along the Lower Waiau River as a result of operation of the MPS. A Waiau Action Group lobbied hard for weed and erosion control and maintenance of the fence along the riverside.<sup>45</sup>

[42] During the period 1990-1996, members of various organisations came together with the Electricity Corporation of New Zealand (as it then was; ‘ECNZ’) to form the Waiau Working Party as part of the process for ECNZ applying for resource consents for the MPS. The parties negotiated what became a joint submission recommending proposed conditions of consent to the Council. It also recommended that, when the Council assessed application under s104 of the RMA, it take account of the various Heads of Agreement reached with members of the Waiau Working Party as mitigation of the adverse effects identified by them.<sup>46</sup>

[43] One of the agreements was between ECNZ, Federated Farmers and the Southland Council (‘the Waiau Agreement’).<sup>47</sup> The Waiau Agreement<sup>48</sup> recognised the likely existence of adverse effects on landowners in the Waiau catchment arising from the use of the Lower Waiau River for the MPS and the importance of the mitigation of

<sup>43</sup> Affidavit of Peter Horrell, dated 31 August 2018 at [39].

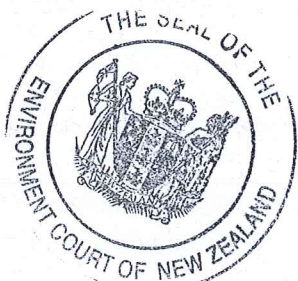
<sup>44</sup> Affidavit of Peter Horrell, dated 31 August 2018 at [40].

<sup>45</sup> Affidavit of Peter Horrell, dated 31 August 2018 at [13].

<sup>46</sup> Affidavit of Peter Horrell, dated 31 August 2018 at [16]-[18].

<sup>47</sup> Affidavit of Peter Horrell, dated 31 August 2018 at [19]; Exhibit 1.

<sup>48</sup> The Agreement terminates when the consents expire in 2031 although Meridian could surrender its current consents and seek replacements consents before then.



those adverse effects for farmers and other landowners in the Waiau catchment. It also recognised the loss of stock access to water as a result of the need to fence river berms in response to lowering the Waiau River.

[44] The Waiau Agreement provided for a Special Rating District to be established.<sup>49</sup> This was followed by formation of the WRLC (which then comprised a group of local landowners) to complete the process of necessary actions to fulfil the Waiau Agreement with ECNZ in connection with its consent application for the MPS.

[45] Mr Horrell further explains that, through the Waiau Agreement,<sup>50</sup> Meridian provides annual funding<sup>51</sup> for the WRLC to carry out, as a minimum:

- (a) maintenance of an effective flood channel in the Waiau riverbed from the Mararoa Weir to the river's mouth;
- (b) maintenance of fencing erected as a consequence of the MPS;
- (c) maintenance of fence areas free of weeds;
- (d) use of any surplus funds by the WRLC for disaster relief fund or other lawful purpose.

[46] The Special Rating District has broader objectives than those contained in the Waiau Agreement. The notice states the benefits likely to accrue to properties within the special rating district, directly or indirectly, are flood protection, improved drainage, noxious plant control, stock fencing on main channel, erosion control, maintenance of high quality water resource protection of community assets.<sup>52</sup>

[47] Mr Horrell explains that the WRLC members include landowners and ratepayers of the Council and Meridian. WRLC also notes in its submissions that Federated Farmers is another member.<sup>53</sup>

[48] Mr Horrell also explains that the WRLC is responsible for scoping out and planning works for each financial year. The Council is consulted. Meridian is a WRLC member. As with other members, it has one vote on any proposal. Once the budget is

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<sup>49</sup> Clause 7.3.

<sup>50</sup> Clause 7.3; Affidavit of Peter Horrell, dated 31 August 2018, Exhibit A.

<sup>51</sup> \$200,000 annually, adjusted for inflation, plus \$1 for every dollar of rates collected from ratepayers in the special rating district.

<sup>52</sup> Affidavit of Peter Horrell, dated 31 August 2018, at [28] and Exhibit B.

<sup>53</sup> Submissions for Waiau River Liaison Committee, dated 31 August 2018 at [17].



approved by the WRLC, it carries out the work (through Council staff or third parties).<sup>54</sup>

[49] Mr Horrell attests that the role of the WRLC has expanded over time. It has included investigation of nesting sites for Black Billed gulls and Black Fronted terns. It has also funded a scientific study of E.coli on the Orawia River and a social history documentary about the Waiau catchment. These were all completed with the approval of Meridian.<sup>55</sup>

[50] There is some disagreement between the WRLC and the Council as to what the TOR provide by way of guidance to the WRLC or limits on how it conducts itself. However, the following points can be noted as to the nature of WRLC, and any potentially related interest it can have in the proceedings:

- (a) it is a committee of the Council and operates under the TOR and has no powers of general competence;
- (b) the TOR defines the WRLC's purpose as being to establish a means of communication between the ratepayers and does not specify that the WRLC may be involved in planning appeals (being silent on that);
- (c) the WRLC has no delegated authority to do anything on the Council's behalf and it is precluded by the TOR from making any such decisions (these explicitly resting with the Council in terms of its statutory authority);
- (d) Meridian is one of the members of the WRLC, has one vote, and provides a source of annual funding to the WRLC for the activities Mr Horrell has explained;
- (e) in consultation with its members, including Meridian, the WRLC is responsible for scoping out and planning works for each financial year. Once its budget is approved, the WRLC carries out approved works (using Council staff or third parties for this);
- (f) works the WRLC has undertaken include investigation of nesting sites for Black Billed gulls and Black Fronted terns, funding a scientific study of E. coli on the Orawia River and a social history documentary about the Waiau catchment.



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Affidavit of Peter Horrell, dated 31 August 2018 at [31]-[32].

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Affidavit of Peter Horrell, dated 31 August 2018 at [31].

***The WLRC's stated interest in its s274 notice***

[51] The matters of interest stated in WRLC's s274 notice are the same as those listed for WRG, set out at paragraph [13] of this decision. The matters listed as being impacted by these provisions are also the same as those listed for WRG, set out at paragraph [14] of this decision.

***Council's submissions***

[52] The Council submits that the WRLC does not appear to meet the test of standing as a s274 party. That is on the face of the limited role the WRLC has as a Council committee, the TOR and what the WRLC's s274 notice states.

***Waiau River Liaison Committee's submissions***

[53] The WRLC explains that it lodged a submission on the pSWLP (since it was a signatory to the submission by the Southland River Liaison Committee). However, that submission did not cover the parts of the pSWLP that the WRLC is now seeking to participate in.

[54] WRLC submits that it has an interest greater than the public specifically for two reasons.<sup>56</sup> One is the fact that the WLRC was formed to represent farmers and landowners adjacent to the Lower Waiau adversely affected by the operation of the MPS. Another reason is its specific role, (under the Waiau Agreement and the Special Rating District Notice) which arose as a direct result of the exercise of consents granted under the RMA for the operation of the MPS.

[55] In addition, WRLC submits that it is important for it to be involved in any decisions about the activity status of the consents and other issues relating to the MPS, as the current Waiau Agreement with Meridian expires when Meridian's consents expire. It adds that there are matters not included in the current consents that it considers could be included in any future consent. It gives as examples fencing, weed control and remediation of erosion due to operation of MPS. It acknowledges the existing consents could continue until they expire in 2031, but submits that Meridian could make an application under r 52A of the pSWLP at any time.<sup>57</sup> From this, it reasons that it stands



<sup>56</sup> Submissions for Waiau River Liaison Committee, dated 31 August 2018 at [18].  
<sup>57</sup> Affidavit of Peter Horrell, dated 31 August 2018, at [47]-[49].

to be advantaged or disadvantaged by the appeal proceedings in the following terms:

- (a) if the activity status for renewal of consents for Meridian is a controlled activity and the Waiau Agreement is not renewed, the WRLC could suffer great disadvantage if there is no replacement agreement and no (or limited) ability for consent conditions to be imposed to avoid, remedy or mitigate adverse effects of the operation of the MPS;
- (b) if Meridian's appeal is successful, the situation will be even more disadvantageous. Firstly, it appears Meridian is seeking to have the controlled status extend to an increased take, not just the current take. Secondly, it understands that Meridian seeks that the current water take be treated as part of the existing environment so that all of the effects suffered to date would be essentially disregarded;<sup>58</sup>
- (c) if the activity status is discretionary, the Council could consider any adverse effects of the MPS on the Lower Waiau River and impose consent conditions around erosion, fencing and weed control. Furthermore, if the activity status is discretionary, the WRLC could meaningfully participate in and potentially influence the outcome of the consent process.<sup>59</sup>

[56] In reply to the Council's submissions, the WRLC makes a number of points.<sup>60</sup> It emphasises that, while it consists of landowners and ratepayers, that is not its sole claim to having an interest greater than the public generally. It observes that it is a representative group, including of parties to the binding Waiau agreement (noting Federated Farmers, as well as the Council and Meridian) to carry out specific tasks. It emphasises that it is not set up merely to maintain better communication with the Council (as set out in the TOR). Rather, it notes that it also has "official duties" as set out in the Waiau Agreement and "other lawful purposes" detailed in the Special Rating District Notice. It acknowledges that RMA advocacy is not specifically mentioned in the Waiau Agreement or the Special Rating District Notice. However, it points out that the Waiau Agreement was borne out of a RMA process and, once the current Meridian consents expire, the WRLC will need to participate in a further RMA consent exercise.



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Affidavit of Peter Horrell, dated 31 August 2018 at [50]-[52].

Affidavit of Peter Horrell, dated 31 August 2018 at [50]-[52].

Submissions for Waiau River Liaison Committee, dated 31 August 2018 at [17].



### ***Meridian's submissions***

[57] Meridian's overall submission is that the WRLC does not have an interest greater than that of the public generally and nor will it suffer a disadvantage through non-participation.

[58] Meridian notes that WRLC is a committee of the Council, established under the TOR.<sup>61</sup> It lacks any mandated function in relation to planning processes under the RMA and does not have a power of general competence vested in it by the Council.<sup>62</sup>

[59] Meridian refers specifically to paragraph 1.4 of the TOR which directs that Liaison Committees are not to consider complaints or other matters pertaining to individual ratepayers. It submits that, as Meridian is a ratepayer and the matters in the s274 notice pertain to Meridian as owner and operator of the MPS, WRLC should direct its interest to the Council and not the court.<sup>63</sup>

[60] Meridian's submissions concerning a lack of advantage or disadvantage are essentially the same as those above-recorded concerning WRG. Meridian also comments that, if WRLC wishes to participate in its own right in future resource consent process, or in the FMU limit setting process, it is a matter that it will need to take up with the Council so as to secure the requisite mandate in terms of its TOR.

### ***Consideration***

[61] The WRLC's s274 notice is almost identical to that of WRG in terms of the reasons for its interest in these proceedings. However, there are critical differences in terms of the composition and function of the two groups.

[62] The WRLC is a committee formed by the Council with no mandated function in relation to planning processes under the RMA and no decision-making powers vested in them by the Council. The WRLC would not have the ability to sign off on any settlement reached in relation to the appeals unless the Council mandated it to do so. The WRLC was set up with a very specific and limited purpose in mind, which was to assist with communication between the Council and the community.



<sup>61</sup> Submissions for Meridian, dated 7 September 2018 at [38].

<sup>62</sup> Submissions for Meridian, dated 7 September 2018 at [40].

<sup>63</sup> Submissions for Meridian, dated 7 September 2018 at [41].

[63] Another, more fundamental, issue is that Meridian is a member of the WRLC. At [31] of his affidavit, Mr Horrell deposes that Meridian is a WRLC member and so it is always consulted and has one vote on any particular project or issue.<sup>64</sup> As I have also noted, another identified member is Federated Farmers. Added to that is the representative role the WLRC plays in relation to landowners and ratepayers.

[64] Putting aside the question of mandate for one moment, that constitutional position demonstrates that, by nature, the WLRC starkly contrasts with WRG. Whereas, WRG is a representative group largely comprising farmer members with clear, common interests in relation to a section of the Waiau River, the WLRC is truly a committee of wide ranging, potentially directly conflicting, interests.

[65] There is clearly a related potential, should WRLC be a party, for its various members to have opposing views and be unable to reach agreement. In fact, the members could well be at cross-purposes. That is particularly problematic in the context of appeal proceedings where the Council, as parent of this committee, is respondent and various of its members (including Meridian) are parties. In Meridian's case, it is a party whose appeal WLRC seeks to join but in respect of which WLRC's declared interests do not align.

[66] I am unable to discern any coherent interest WLRC may have in the relevant proceedings, let alone to determine that any such interest reaches the requisite threshold in s274(1)(d). Rather, the WLRC is what it is, namely a Council committee with divergent membership which relies on a mandate to act but has no conferred mandate to be a party to these appeal proceedings.

[67] For those reasons, I find that WLRC is not eligible to be a party to the relevant appeals under s274(1)(d). I strike out the s274 notice under s279(4) RMA, on the grounds that to allow WLRC to proceed as a party without standing would be an abuse of process.



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<sup>64</sup> Affidavit of Peter Horrell, dated 31 August 2018 at [31].

**Outcomes**

[68] Accordingly, I determine that:

- (a) WRG qualifies to join the appeals specified in its s274 notice, under s274(1)(d); and
- (b) WLRC is not eligible to be a party to the relevant appeals under s274(1)(d) and its s274 notice is struck out.



**J J M Hassan**  
**Environment Judge**

