



## Joint Witness Statement – Topic B6 – Waiau – Planning

**Topic:** Proposed Southland Water and Land Plan – Topic B6 Infrastructure

**Date of conference:** 29 and 30 November 2022

**Venue:** Aoraki Environmental Consultancy, 3/12 Princess Street, Addington, Christchurch

### Attendees

Name	Employed or engaged by	Signature
Treena Davidson	Ngā Rūnanga	
Jane Whyte	Meridian Energy Ltd	

### Environment Court Practice Note

- 1 All participants confirm that they have read the Environment Court Consolidated Practice Note 2014 and in particular Section 7 (Code of Conduct, Duty to the Court and Evidence of an expert witness) and Appendix 3 – Protocol for Expert Witness Conferences and agree to abide by it.

### Experts' qualifications and experience

- 2 The qualifications of the experts are set out in their respective statements of evidence.

### Purpose of expert conference

- 3 The purpose of the conferencing is to address Policy 26 and Rule 52A.
- 4 Particular matters to be addressed are identified in the Minute of the Environment Court Timetable directions – tranche 2 (22 November 2022).
- 5 The experts will assist the court by responding to a series of questions addressed in the Minute. For each question, the experts are to state matters on which they agree and on which they do not agree, with reasons.

### Key information sources relied on

- 6 Except for the Notes of the Court dated 14 November 2022 no additional material to that relied upon in planning evidence provided on Tranche 3.

## Proposed plan provisions relevant to this conference

7 Policy 26 and Rule 52A

### Topic B6 issues to be considered

**A. *Is the direction on how the discretion is to be exercised a matter of policy or a matter for a rule. (If their recommendation is to leave the direction for the rule only, they are to set out their reasoning for the same). (Paragraphs 8 and 9 of the Direction of the Court).***

8 We consider the direction on how the matter of discretion is to be exercised is a matter for a rule. Our reason for this is that we consider that if a rule is to apply post the FMU process the appropriate rule status for the activity is a restricted discretionary activity. In applying an RDA the matters over which discretion is restricted in relation to the activity must be specified in the rule<sup>1</sup>. The direction is intended to be a restriction on discretion. We have addressed the key matters considered in drafting the RDA rule in paragraph 11.

9 In relation to replacing the RDA with a policy we agree with the Court that you could provide guidance in terms of activity status. However, when looking at any policy addressing a post FMU environment we consider it would only be appropriate to provide policy guidance that reinforced that any consent application for consenting rely on the environmental outcomes and subsequent environmental flows and levels and limits and attributes set through NPSFM 2020, which we consider does not take you further than as required in giving effect to the NPSFM. The NPSFM requires values to be set as objectives and we considered that policy guidance provided now may also be revisited through the FMU process

10 We have drafted a policy provision for consideration but as indicated we do not prefer this over the RDA but have provided it to show our thinking:

*On considering an application for replacement consents for the operation of the existing Manapōuri hydro-electric generation scheme consents that are granted are to be consistent with the attainment of the environmental outcomes established for values in the Waiau FMU via the National Objectives Framework.*

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<sup>1</sup> Section 77B(4) Resource Management Act

- 11 In redrafting the restricted discretionary activity rule [**RDA**] contained in Attachment A we agreed on the following intent as to how we approach drafting:
- (a) The Manapouri Power Scheme [**MPS**] is a discrete matter in the Plan that requires its own provision.
  - (b) The drafting of the RDA was to meet the Objectives of the Plan including 1, 2, and 3 and while also providing for Objective 10 which we consider clearly anticipates the Manapouri Hydro scheme is provided for and that it needed to be recognised any flow and level regime.
  - (c) We consider that a consenting process is not the most appropriate place to establish environmental flows and limits, identify values and establish environmental outcomes. We anticipate that, as identified in the NPSFM, and Policies 44 – 47 of the Plan, the Waiau FMU process would consider range of matters. This is set out in Subpart 2 the National Objectives Framework (**NOF**) of the NPSFM. The NOF process for the Waiau FMU will require environmental outcomes to be established for all the values that are found to be applicable to the FMU. That will include the compulsory values of ecosystem health, human contact, threatened species and mahinga kai. It must also consider those values identified in Appendix 1B of the NPSFM, which amongst other values, will include Hydro-electricity power generation.
  - (d) We consider that where a plan has established objectives, environmental outcomes for values, environmental flows and levels, limits, target attribute the consent regime should rely on these.
  - (e) The RDA specifically references the adverse effects and any seasonal effects on: the customary use of mahinga kai and nohoanga; taonga species; and the spiritual and cultural values and beliefs of tangata whenua and this is intended to specifically identify the importance of these in the Waiau. The specific drafting means these matters cannot be missed.
  - (f) When addressing matters it is appropriate for this to occur within the context of environmental flows and levels and limits and target attribute states set through National Objectives Framework in the NPSFM 2020. Matters that fall outside of should be able to be considered in a resource consent.
  - (g) Our intent in drafting matter of discretion 1, and in establishing the relationship between matters of discretion 1, 3, 4 and 5, is that:
    - (i) It provides for the consideration of, and imposition of conditions to achieve environmental flows and levels and limits (including both limits on resource use and take limits) set in the Waiau FMU process.

- (ii) If a matter has not been considered in identifying environmental outcomes and in environmental flows and levels and limits set through the NPSFM 2020 then alternative environmental flows and levels and limits than are set in the Plan should be able to be considered as part of the consent process. This would provide for the ability to consider matters that were not addressed or not known at the time the Waiau FMU process was completed, (such as new information, or a new change to the environment as occurred with didymo).
- (iii) If a matter has been considered in identifying environmental outcomes and in environmental flows and levels and limits set through the NPSFM 2020 but it has been determined that there are specific matters that should be addressed as part of a future consent for example ramping rates, or aspects of flow variability if environmental flows, levels, limits to achieve the environmental outcomes cannot be determined as part of the Waiau FMU process, these matters can be identified in the Plan and alternative environmental flows and levels and limits able to be considered for identified matters.
- (iv) Placing reliance on environmental flows and levels and limits set in the Waiau FMU was not focused or driven from the perspective benefitting or providing for Meridian, but importantly was focussed achieving the environmental outcomes for the range of values within the Waiau FMU.

- 12 We recognise that any proposed rule, including an RDA rule as we have drafted, can be redrafted as a part of Plan Change Tuatahi.
- 13 We further considered in drafting the RDA that overall effectiveness of any rule relying on post FMU is reduced with the rule being subject to revisitation as part of the FMU as outlined in paragraph 3 of the memo of Counsel for the Southland Regional Council dated 22 November 2022. We consider that this issue applies to the drafting of a rule to reflect a pre and post FMU process irrespective of whether it is a Discretionary Activity or RDA.
- 14 In drafting an RDA rule we have endeavoured to use language consistent with the NPSFM where possible. Below identifies the matters of detail we have addressed in our drafting:
- (a) Clause (a)(1) we have referred to the “total volume” and “total rate” to be consistent with the language in 3.17(2) in the NPSFM.

- (b) Clause (a)(3) we have referred to:
  - (i) “environmental flows and levels” language consistent with 3.16(3),
  - (ii) “limits” to include both ‘take limits’ and ‘limits on resource use’ consistent with the definition of limits in the NPSFM and clauses 3.14 and 3.17 of the NPSFM
  - (iii) “target attribute states” consistent with 3.11 in the NPSFM.
- (c) Clause (a)(4) we have referred to:
  - (i) “environmental flows and levels” language consistent with 3.16(3),
  - (ii) “limits” to include both ‘take limits’ and ‘limits on resource use’ consistent with the definition of limits in the NPSFM and clauses 3.14 and 3.17 of the NPSFM
- (d) Matter discretion is restricted to 1 – language used is “environmental flows and levels” and “limits” consistent with the explanation provided above
- (e) Matter discretion is restricted to 2 – the language is “measures to achieve target attribute states”. This is consistent with the language in NPSFM 3.12(1)(c), (2)(c) and 3(c) which identifies the ability to impose conditions on resource consents to “achieve target attribute states”. On the basis that this matter of discretion provides the ability to address the achievement of target attribute states it is not considered necessary for it to be a condition of entry into the RDA rule, nor a matter where a further limitation on discretion is needed.
- (f) Matter discretion is restricted to 3 – the language used is “total volume” and “total rate” or “both a total volume and total rate” consistent with the language in 3.17(2) in the NPSFM. This matter of discretion is intended to be implemented in accordance with matter of discretion 1 and this is reflected in the wording.
- (g) Matters discretion is restricted to 3 and 4 – the language in the matter includes measures to “avoid, remedy or mitigate”. These matters of discretion are intended to be implemented in accordance with matter of discretion 1 and this is reflected in the wording.
- (h) Matter of discretion 7 provides the ability for more restrictive environmental flows and levels or limits to be proffered by an applicant.

15 We have set out the intent we have had in drafting our preferred RDA rule. We have sought to be clear (as identified in (f) and (g)) above that the intent is that the ability to address matters of discretion 3, 4 and 5 in relation to environmental flows and levels and limits are intended to be restricted by matter of discretion 1. In the event that there remains concern with the way the provision is worded, we have included alternative wording for the restriction of discretion that does not embed the restriction

of discretion into other clauses but has it retained as a separate clause. This is provided as a drafting alternative in Attachment A.

- 16 Finally, while our preferred rule is a RDA, we have sought to assist the Court by identifying how we would draft a Discretionary Activity Rule. This is provided in Attachment A.

## **Policy 26A**

### ***B. Whether a single policy is to apply to renewable electricity generation ('REG') activities, including the MPS and if so, proposing amendments to Policy 26(DV) (if required) [Paragraph 11(a) of the Direction of the Court ]***

- 17 We consider the policy could be re-merged into a policy for renewable energy. We considered however, given the scope of what constitutes renewable energy and consideration of Objective 10 in the Plan a specific policy that focuses on Manapōuri Power Scheme may be more appropriate.

- 18 If the Court includes detailed matters addressing reverse sensitivity effects on the MPS then we consider a specific policy for Manapōuri to be more appropriate. With regard to drafting we drafted the policy to provide more detail and clarity relating to reverse sensitivity effects relating to the MPS to provide more guidance as to what is being addressed in the Policy.

- 19 We have considered two possible way to draft the policy, with the first providing for renewable electricity generation (including the MPS) – This is identified as *Policy 26 Combined* in Appendix A, and the second providing for the MPS in a separate clause – this is identified as *Policy 26 Separate* in Appendix A.

- 20 We had no specific preference as to which option as we saw them achieving the same thing.

### ***C. Whether the policy would be easier to understand if the word 'when' appeared on a separate line at the end of sub-cl(2) before (a) and (b); and [Paragraph 11(b) of the Direction of the Court ]***

- 21 We agree, and have incorporated this into both options of our policy drafting.

**D Whether the reverse sensitivity provision is to be contained in a separate sub-clause (i.e. new sub-clause (c)), noting the first part of sub-cl (b), as written concerns would be easier to understand if the word ‘when’ appeared on a separate line at the end of sub-cl(2) before (a) and (b); and [Paragraph 11(c) of the Direction of the Court ]**

22 We agree it should be in a new subclause as this provides greater clarity. This is incorporated into both options of our policy drafting.

**E If the policy retains two parts, should it be structured and presented so that it is clear whether sub-clause (a), (b) and (c) apply to sub-cl 1 (all REG) and/or 2 (the MPS) and [Paragraph 11(d) of the Direction of the Court ]**

23 We agree it should be clear what applies to what subclause. We have sought to achieve this in both options of our policy drafting.

### **Reverse Sensitivity**

**F Giving reasons, the planners attending the conference are to explain the scope of the reverse sensitivity provision and explain whether (and why) the policy applies to:**  
**(a) direct and indirect effects on the MPS; and**  
**(b) effects of activities above and below the Manapōuri Lake Control.**  
**[Paragraph 12 of the Direction of the Court ]**

24 We looked at how the reverse sensitivity provision is intended to apply to direct effects on the MPS. We considered that it is designed to apply to activities both above and below the Manapōuri Lake Control (**MLC**). However the policy is more limited in its application to activities occurring below the MLC

25 The reverse sensitivity policy we have drafted contains more specificity as to the activities that may have reverse sensitivity effects and where these effects may occur. It is noted here that Ms Davidson took direction from Ms Whyte as to the sorts of affects that Meridian might encounter as matters affecting their operations. Ms Davidson agreed with the approach of providing specificity and clarity within the policy.

26 The matters addressed in the Policy are:

- (a) The taking of surface water or hydrologically connected groundwater that exceeds an allocation limit<sup>2</sup>, take limit or limit on resource use (being a direct effect on the amount of water currently allocated to Meridian);
- (b) The use of beds of lakes and rivers or any activity that may affect the stability or functioning of structures (being a direct effect on the structures forming part of the MPS);
- (c) Use of the beds of lakes and rivers or new or increased discharge of contaminants exceeding a limit on resource use, that outside the zone of reasonable mixing could affect the quality of water that is available for the generation of electricity – with the location focused on above the MLC or within the Mararoa River (direct effect on the ability to generate electricity relating to water quality), and
- (d) Use of the beds of lakes and rivers or new or increased discharge of contaminants exceeding a limit on resource use, occurring being the MLC that could affect the ability of Meridian to meet its consent obligations.

**G Additionally, the planners are to address whether the reverse sensitivity provision is to apply where the Plan for the Waiau FMU has limits on resource use to achieve target attribute states or support other environmental outcomes, or secondly target limits to meet environmental flows and levels. [Paragraph 13 of the Direction of the Court ]**

27 We consider if the FMU process has established limits on resource use to achieve target attribute states or support environmental target attribute states or support other environmental outcomes, or secondly target limits to meet environmental flows and levels the reverse sensitivity issues that may affect the operation of Meridian should not be a consideration when activities adhere to the plan outcomes.

28 We have sought to address this in our drafting in sub-clauses 1, 3 and 4 by referring to where an allocation regime, take limit or limits on resource use (as relevant to the individual clauses) are exceeded.

**H Additionally, the planners will address the effectiveness of the policy if it is to apply on a case-by-case basis to the indirect effect of activities below the Manapōuri Lake Control. [Paragraph 14 of the Direction of the Court ]**

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<sup>2</sup> The reference to allocation limit is deliberate as it is intended that this policy would apply both before and after the Waiau FMU process and the Plan as drafted refers to allocation.



29 Refer to paragraphs 23 and 24 above as we consider the Policy isn't intended to apply to indirect effects of activities below the Manapōuri Lake Control. Other policies in the Plan, for example Policies 3, 13, 14 and 15A, B and C and 20 address matters that may have implications for the operation of the MPS, but are not reverse sensitivity matters.

## Attachment A – Redrafted Policy 26 and Rule 52A

### Policy 26 Combined Version

(As referred to paragraph 15 in the JWS)

#### Policy 26 – Renewable energy

Recognise and provide for the national and regional significance of renewable electricity generation activities (including the existing Manapōuri hydro-electric generation scheme in the Waiau catchment), the benefits of renewable electricity generation activities and the practical constraints associated with its development, operation, maintenance and upgrading:

When:

- a. allocating surface water for abstraction, damming, diversion and use;
- b. considering all resource consent applications for surface water abstractions, damming, diversion and use;
- c. managing activities to avoid reverse sensitivity effects on renewable electricity generation activities (including the Manapōuri hydro-electric generation scheme). In relation to the Manapōuri hydro-electric generation scheme manage reverse sensitivity effects of the following activities:
  1. taking of surface water or hydrologically connected groundwater that exceeds an allocation regime, take limit or limit on resource use;
  2. use of the beds of lakes and rivers or any activity that may affect the stability or functioning of any structures associated with the existing Manapōuri hydro-electric generation scheme;
  3. use of the beds of lakes and rivers or new or increased discharge of contaminants exceeding a limit on resource use, that outside of zone of reasonable mixing, may affect the quality of the water available for the generation of electricity above the Manapōuri Lake Control structure or within the Mararoa River; and
  4. use of the beds of lakes and rivers or new or increased discharge of contaminants exceeding a limit on resource use, occurring below the Manapōuri Lake Control structure that could affect the ability of Meridian to meet its consent obligations for the existing Manapōuri hydro-electric generation scheme.

*(if a clause providing policy direction on reconsenting were to be included it could be inserted as follows:*

- d. considering an application for replacement consents for the operation of the existing Manapōuri hydro-electric generation scheme consents that are granted are to be consistent with the attainment of the environmental outcomes established for values in the Waiau FMU via the National Objectives Framework.

## Policy 26 Separate Version

(As referred to paragraph 19 in the JWS)

### Policy 26 – Renewable energy

- A. 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 of the existing Manapōuri hydro-electric generation scheme in the Waiau catchment, the benefits of renewable electricity generation activities and the practical constraints associated with its development, operation, maintenance and upgrading:
- When:
- a. allocating surface water for abstraction, damming, diversion and use;
  - b. considering all resource consent applications for surface water abstractions, damming, diversion and use;
- B. Manage activities to avoid reverse sensitivity effects on renewable electricity generation activities (including the Manapōuri hydro-electric generation scheme). In relation to the Manapōuri hydro-electric generation scheme manage reverse sensitivity effects of the following activities:
1. taking of surface water or hydrologically connected groundwater that exceeds an allocation regime, take limit or limit on resource use.
  2. use of the beds of lakes and rivers or any activity that may affect the stability or functioning of any structures associated with the existing Manapōuri hydro-electric generation scheme,
  3. use of the beds of lakes and rivers or new or increased discharge of contaminants exceeding a limit on resource use, that outside of zone of reasonable mixing, may affect the quality of the water available for the generation of electricity above the Manapōuri Lake Control structure or within the Mararoa River, and
  4. use of the beds of lakes and rivers or new or increased discharge of contaminants exceeding a limit on resource use, occurring below the Manapōuri Lake Control structure that could affect the ability of Meridian to meet its consent obligations for the existing Manapōuri hydro-electric generation scheme.
- (if a clause providing policy direction on reconsenting were to be included it could be inserted as follows:*
- C. On considering an application for replacement consents for the operation of the existing Manapōuri hydro-electric generation scheme consents that are granted are to be consistent with the attainment of the environmental outcomes established for values in the Waiau FMU via the National Objectives Framework.

## Rule 52A – Preferred Version of Rule

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

- (a) Despite any other rules in this Plan, an application for a new consent that is part of the Manapōuri hydro-electricity generation scheme and is replacing one or more of the following consents
- (i) 96020 Water Permit
  - (ii) 96021 Discharge Permit
  - (iii) 96022 Water Permit
  - (iv) 96023 Discharge Permit
  - (v) 96024 Water Permit
  - (vi) 206156 Water Permit
  - (vii) 206157 Water Permit

is a restricted discretionary activity provided the following conditions are met:

- (1) the application is for the replacement of an expiring resource consent pursuant to section 124 of the Act;
- (2) where the replacement consent is for the taking or use of water, the total volume and total rate of take is not increasing, and the use of water is not changing; and
- (3) the application is lodged after environmental flows and levels, limits and target attribute states established through a FMU process for the Waiau FMU under the NPSFM 2020 has been made operative.
- (4) the application complies with any applicable environmental flows and levels and limits made operative through an FMU process for the Waiau FMU under the NPSFM 2020; and
- (5) the applicant has requested that the application be publicly notified.

**The Southland Regional Council will restrict its discretion to the following matters:**

- 1 Measures to achieve environmental flows and levels and limits established through the FMU process for the Waiau FMU under the NPSFM 2020 or alternative environmental flows and levels and/or limits where:
  - a. a matter has not been considered when identifying environmental outcomes and setting environmental flows and levels and limits in the Waiau FMU; or
  - b. the environmental flow and/or limit is identified as a matter to be addressed in a resource consent process;
- 2 Measures to achieve target attribute states set through the FMU process;
- 3 In accordance with matter of discretion 1 the total volume, total rate or both a total volume and total rate at which water is taken, used, diverted or discharged and the timing of any take, diversion or discharge of water, including how this relates to generation output;
- 4 In accordance with matter of discretion 1 the adverse effects and any seasonal effects on: the customary use of mahinga kai and nohoanga; taonga species; and the spiritual and cultural values and beliefs of tangata whenua, including measures to avoid, remedy or mitigate adverse effects;

- 5 In accordance with matter of discretion 1 the adverse effects on the environment, including measures to avoid, remedy or mitigate adverse effects that are not addressed under Matter of Discretion 4;
  - 6 the collection, recording, monitoring, reporting and provision of information concerning the exercise of consent;
  7. Environmental flows and levels or limits that are more restrictive than matter of discretion 1 where these are proffered by the applicant;
  - 8 lapse period, duration of consent and consent review requirements; and
  - 9 the benefits of renewable electricity generation.
- (b) Despite any other rules in this Plan, any activity provided for in Rule 52A that does not meet one or more of the conditions of Rule 52A(a) or is not a non-complying activity in Rule 52A(c) is a discretionary activity-
- (c) Despite any other rules in this Plan, any activity that is for the taking of water for the generation of electricity from the Manapōuri hydro-electric generation scheme in Rule 52A which:
- (i) prior to take limits being established through a FMU process for the Waiau FMU under the NPSFM 2020 being made operative seeks a total volume, total rate or both a total volume and total rate of water greater than that currently consented or
  - (ii) once a limit has been established through a FMU process for the Waiau FMU being made operative seeks a total volume, total rate or both a total volume and total rate of water greater than provided within the limits set in the Plan
- is a non-complying activity.

### **Rule 52A – Alternative way of expressing matters of discretion**

(As referred to paragraph in 15 in the JWS)

#### **The Southland Regional Council will restrict its discretion to the following matters:**

- 1 Measures to achieve target attribute states set through the FMU process;
- 2 The total volume, total rate or both a total volume and total rate at which water is taken, used, diverted or discharged and the timing of any take, diversion or discharge of water, including how this relates to generation output;
- 3 The adverse effects and any seasonal effects on: the customary use of mahinga kai and nohoanga; taonga species; and the spiritual and cultural values and beliefs of tangata whenua, including measures to avoid, remedy or mitigate adverse effects;

- 4 The adverse effects on the environment, including measures to avoid, remedy or mitigate adverse effects that are not addressed under Matter of Discretion 4;
- 5 the collection, recording, monitoring, reporting and provision of information concerning the exercise of consent;
- 6 lapse period, duration of consent and consent review requirements; and
- 7 the benefits of renewable electricity generation.

Provided that in exercising its discretion where environmental flows and levels and limits have been made operative through an FMU process for the Waiau FMU under the NPSFM 2020 the consent authority must not require environmental flows and levels and limits more restrictive than those set in the Plan unless:

1. The adverse effect and/or management response being addressed has not been considered as part of the FMU process for the Waiau FMU under the NPSFM 2020 when identifying environmental outcomes and/or setting environmental flows and levels and limits, or
2. The adverse effect and/or management response being addressed has been considered as part of the FMU process for the Waiau FMU under the NPSFM 2020 when setting environmental flows and levels, and limits, but it is identified in the Plan as a matter to be addressed in a resource consent process, or
3. The applicant has proffered more restrictive environmental flows and levels or limits.

#### **ALTERNATIVE – Discretionary Only**

(As referred to paragraph in 15 in the JWS)

Assumes rule will be replaced with a new provision through Plan Change Tuatahi.

- (a) Despite any other rules in this Plan, an application for a new consent that is part of the Manapōuri hydro-electricity generation scheme and is replacing one or more of the following consents
  - (i) 96020 Water Permit
  - (ii) 96021 Discharge Permit
  - (iii) 96022 Water Permit
  - (iv) 96023 Discharge Permit
  - (v) 96024 Water Permit
  - (vi) 206156 Water Permit
  - (vii) 206157 Water Permit

That does not seek a total volume, total rate or both a total volume and total rate of water greater than that currently consented is a discretionary activity.

- (b) Despite any other rules in this Plan, an application for a new consent that is part of the Manapōuri hydro-electricity generation scheme and is replacing one or more of the following consents
  - (i) 96020 Water Permit

- (ii) 96021 Discharge Permit
- (iii) 96022 Water Permit
- (iv) 96023 Discharge Permit
- (v) 96024 Water Permit
- (vi) 206156 Water Permit
- (vii) 206157 Water Permit

that seeks a total volume, total rate or both a total volume and total rate of water greater than that currently consented is a non-complying activity.