

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

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

Between **Meridian Energy Limited**

Appellant

And **Southland Regional Council**

Respondent

Notice of appeal

17 May 2018

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**NOTICE OF APPEAL TO ENVIRONMENT COURT AGAINST DECISION ON
PROPOSED POLICY STATEMENT OR PLAN**

Clause 14(1) of First Schedule, Resource Management Act 1991

TO: The Registrar
Environment Court
Christchurch

- 1 Meridian Energy Limited (**Meridian**) appeals against parts of a decision of Southland Regional Council (**Respondent**) on the Proposed Southland Water and Land Plan (**pSWLP**).
- 2 Meridian made submissions and further submissions on the pSWLP.
- 3 Meridian is not a trade competitor for the purposes of section 308D of the RMA.
- 4 Meridian received notice of the decision on 4 April 2018.
- 5 The decision was made by the Respondent.
- 6 The parts of the decision Meridian is appealing relate to:
 - (a) Objective 10 which concerns provision for, and recognition of existing hydro-electric generation schemes.
 - (b) The decision not to include a new Objective relating to the recognition and provision for the national significance of renewable electricity generation activities.
 - (c) Policy 26 which concerns renewable energy.
 - (d) New Rule 49(ab) which concerns the taking and use of surface water for infrastructure construction, maintenance, and repair activities.
 - (e) Rule 52 which concerns water abstraction, damming, diversion and use from the Waiau catchment.
 - (f) Rule 52A and the decision not to include a new Rule 52B, both of which concern the Manapouri Hydro-electric Generation Scheme.

OBJECTIVE 10

- 7 Meridian appeals the decision to word Objective 10 as follows:

Objective 10

The national importance of existing hydro-electric generation schemes, including the Manapōuri hydro-electric generation scheme in the Waiau catchment, is provided for, recognised in any resulting flow and level regime, and their structures are considered as part of the existing environment.

Reason for the appeal

- 8 The decision version of Objective 10 fails to recognise that the existing water flows and levels that occur in the Waiau catchment as a consequence of inflow hydrology, the physical presence of elements of the Manapouri Hydro-electric Generation Scheme (**Scheme**), the operation of the Scheme in accordance with its consents, and the requirement to comply with the Operating Guidelines for levels of Lakes Manapouri and Te Anau¹ should also be considered as part of the existing environment.
- 9 The decision version of Objective 10 fails to adequately recognise the importance of allowing for enhancement of the Scheme where adverse effects are able to be appropriately managed in a way that gives effect to the Southland Regional Policy Statement (**SRPS**), and the National Policy Statement for Renewable Electricity Generation 2017 (**NPS-REG**).

Relief sought

- 10 The primary relief sought is rewording of Objective 10 as set out in Meridian's Memorandum of Counsel provided to the Respondent's Commissioners dated 2 October 2017 as follows (with additional text shown in underlining and deleted text shown in ~~striketthrough~~):

Objective 10

The national importance of the ~~existing hydro-electric generation schemes,~~ ~~including the~~ Manapōuri hydro-electric generation scheme in the Waiau catchment, is provided for, ~~recognised in any resulting flow and level regime,~~ ~~and their structures are considered as part of the existing environment~~ and.

1. is recognised in any resulting flow and level regime, and

¹ Manapouri-Te Anau Development Act 1963, section 4A

2. the Scheme and its components and activities is considered as part of the existing environment, including that water takes, use, diversions and discharges are an integral part of the scheme; and

3. allows for enhancement of the scheme where the effects of these can be appropriately managed.

- 11 In the alternative Meridian seeks such other relief as the Court thinks appropriate to address the reasons for Meridian's appeal.

NEW OBJECTIVE

- 12 In its original submission Meridian sought the inclusion of a new Objective concerning the national significance of renewable electricity generation activities in addition to the Scheme to give better effect to the **NPS-REG** and the **SRPS**.

Reasons for the appeal

- 13 In its decision the Respondent states that other provisions of the pSWLP, including Objective 10, adequately address these matters. Meridian appeals against that decision.
- 14 Meridian does not agree that the other provisions of the pSWLP adequately address this topic. Objective 10 relates only to existing hydro-electric generation schemes and not to other nationally significant renewable generation activities including Meridian's White Hill Wind Farm, and no other Objective directly addresses renewable energy. The importance of an appropriate objective for this activity is underscored by reference to the higher order planning instruments and the government's commitment to a renewable energy target of 100% renewables by 2035.

Relief sought

- 15 The primary relief sought is the inclusion of a new Objective as worded in Meridian's original submission as follows:

Objective X

Recognise and make provision for the national significance of renewable electricity generation activities.

- 16 In the alternative Meridian seeks such other relief as the Court thinks appropriate to address the reasons for Meridian's appeal.

POLICY 26

17 The decision version of Policy 26 is worded as follows:

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 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 the practical constraints associated with its development, operation, maintenance and upgrading, when:

- 1. allocating surface water for abstraction, damming, diversion and use; and*
- 2. considering all resource consent applications for surface water abstractions, damming, diversion and use.*

Reasons for the appeal

18 In its original submission Meridian sought the addition of a clause 3. to Policy 26 to address reverse sensitivity. In its decision the Respondent stated that in relation to this addition “*we are not persuaded that the amendment requested would be a more effective and reasonably practicable option for achieving the objectives of the pSWLP, and for giving effect to the superior instruments.*”

19 Meridian does not understand any other provisions of the pSWLP to address the issue of reverse sensitivity in relation to renewable electricity generation activities and does not understand what provisions the Respondent considers are more effective and reasonably practicable to achieve the pSWLP’s objectives and to give effect to the superior instruments (which Meridian understands to be the NPS-REG and SRPS).

Relief sought

20 The primary relief sought is the inclusion of a new clause 3. to Policy 26 as worded in Meridian’s original submission as follows (with additional text shown in underlining):

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 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 the practical constraints associated with its development, operation, maintenance and upgrading, when:

- 1. allocating surface water for abstraction, damming, diversion and use; and*
- 2. considering all resource consent applications for surface water abstractions, damming, diversion and use; and*
- 3. considering uses of land, use of the beds of lakes and rivers and discharge of contaminants or water to water or land for, or which may impact on, renewable electricity generation activities.*

21 In the alternative Meridian seeks such other relief as the Court thinks appropriate to address the reasons for Meridian's appeal.

RULES 49(ab), and 52(a) and (b)

22 New Rule 49(ab) makes the taking and use of surface water for infrastructure construction, maintenance and repair a permitted activity, subject to the activity meeting various performance standards.

23 New Rule 49(ab) states:

(ab) Despite Rule 49(a), the take and use of surface water for infrastructure construction, maintenance and repair is a permitted activity provided the following conditions are met:

- (i) the rate of take does not exceed 15 litres per second; and*
- (ii) the volume of take does not exceed 100,000 litres per day; and*
- (iii) the bed of the watercourse from where the take occurs is at least 1 metre wide and the depth of flow in the watercourse at that location exceeds 0.5 metres at the time of the take; and*
- (iv) the take does not occur for more than 45 consecutive minutes and multiple takes from the same site on a single day are at least 30 minutes apart; and*
- (v) the point of abstraction is not located within 50 metres of any existing lawfully established surface water take; and*
- (vi) the Southland Regional Council is notified at least three working days prior to the take commencing; and*
- (vii) the take occurs between 1 September and 31 March inclusive; and*

(viii) fish are prevented from entering the water intake in accordance with Appendix R.

Reason for the appeal

- 24 In its original submission Meridian sought that in relation to its renewable electricity generation facilities the taking, use, damming and diversion of surface water necessary in connection with construction, maintenance and repair activities should be permitted, subject to reasonable performance standards. New Rule 49(ab) as worded applies to surface water takes and uses, but omits damming and diversion.
- 25 Subject to an amendment to one performance standard as set out at paragraph 26 below, Meridian considers that new Rule 49(ab) is appropriate in terms of the standards that apply to a permitted activity in connection with infrastructure construction, maintenance and repair. However, it appears that there has been an oversight and new Rule 49(ab) does not apply to construction, maintenance and repair activities associated with the Scheme. That is because new Rule 49(ab) does not refer to minor surface water takes, use, damming and diversions in relation to infrastructure construction, maintenance and repair activities in the Waiau catchment. These activities are dealt with in Rule 52, but new Rule 49(ab) contains no reference to Rule 52. As a consequence, activities throughout the rest of Southland that come within the standards set out in Rule 49(ab) are permitted, but in the Waiau catchment the same activities will always be classed as discretionary or non-complying. It appears this is an unintended consequence.
- 26 Rule 49(ab)(vii) requires activities to take place between 1 September and 31 March in order to be permitted. Meridian considers this is unnecessarily restrictive in relation to infrastructure construction, maintenance and repair activities that may be required for the Scheme.
- 27 In the case of minor activities in connection with the Scheme where new permits are applied for, and which cannot meet one or more of the performance standards in Rule 49(ab)(i)-(viii), these activities will default to non-complying activities under Rule 49(d) because the activity will not meet conditions (i)-(iii) of Rule 49(b), and because the Waiau catchment is fully allocated Rule 49(c) will not apply. Meridian considers this is an unintended outcome.

Relief sought

- 28 The primary relief sought is:
- (a) The extension of Rule 49(ab) to include damming and diversion as well as takes and uses of surface water.

- (b) The inclusion of a reference to Rule 49(ab) in the 'exceptions' listed in Rule 52(a) and (b).
 - (c) Add a new Rule 52(a)(iii) to say "the application is for the take, use, damming or diversion of surface water for infrastructure construction, maintenance and repair but is not permitted under Rule 49(ab)".
 - (d) Rule 49(ab)(vii) be amended to read "the take occurs between 1 September and 31 March inclusive unless the activity is being undertaken for the purpose of infrastructure construction, maintenance or repair in connection with the Manapouri Hydro-electric Generation Scheme ; and"
- 29 The requested changes to the rules are shown below with additional text shown in underlining and deleted text shown in ~~strike through~~.

Rule 49

- (ab) *Despite Rule 49(a), the take, ~~and use, damming and diversion~~ of surface water for infrastructure construction, maintenance and repair is a permitted activity provided the following conditions are met:*
 - (i) *the rate of take does not exceed 15 litres per second; and*
 - (ii) *the volume of take does not exceed 100,000 litres per day; and*
 - (iii) *the bed of the watercourse from where the take occurs is at least 1 metre wide and the depth of flow in the watercourse at that location exceeds 0.5 metres at the time of the take; and*
 - (iv) *the take does not occur for more than 45 consecutive minutes and multiple takes from the same site on a single day are at least 30 minutes apart; and*
 - (v) *the point of abstraction is not located within 50 metres of any existing lawfully established surface water take; and*
 - (vi) *the Southland Regional Council is notified at least three working days prior to the take commencing; and*
 - (vii) *the take occurs between 1 September and 31 March inclusive unless the activity is being undertaken for the purpose of infrastructure construction, maintenance or repair in connection with the Manapouri Hydro-electric Generation Scheme; and*
 - (viii) *fish are prevented from entering the water intake in accordance with Appendix R.*

...

Rule 52

- (a) *Except as provided in Rules 49(a), 49(ab), 49(b), 49(c), 50(a), 50(b), 51(a), 51(b), 52A and 52B (including takes authorised by section 14(3) of the Act), any take, damming, diversion or use of water from the Waiau catchment is a discretionary activity provided the following conditions are met:*
- (i) *the application is for the replacement of an expiring water permit pursuant to section 124 of the Act, and the rate of take and volume is not increasing, and use of the water is not changing; or*
 - (ii) *the application is for a groundwater take assessed as having a Low degree of hydraulic connection following the methodology specified in Appendix L.2-,or*
 - (iii) the application is for the take, use, damming or diversion of surface water for infrastructure construction, maintenance and repair but is not permitted under Rule 49(ab).
- (b) *Except as provided in Rules 49(a), 49(ab), 49(b), 49(c), 50(a), 50(b), 51(a), 51(b), 52A and 52B (including takes authorised by section 14(3) of the Act), any take, damming, diversion or use of water from the Waiau catchment that does not meet the conditions of Rule 52(a) is a noncomplying activity.*

- 30 In the alternative Meridian seeks such other relief as the Court thinks appropriate to address the reasons for Meridian's appeal.

NEW RULE 52A

- 31 In its primary submission Meridian sought inclusion of a new Rule 52A making applications for activities that comprise the replacement of an existing consented activity forming part of the Scheme a controlled activity, and specifying the matters over which the Respondent retained control for the purpose of setting conditions.
- 32 In its decisions the Respondent has adopted Meridian's submission in part, and new Rule 52A makes an application for 'replacement' consents for the Scheme a controlled activity.
- 33 The decisions version of Rule 52A is 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 controlled 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; and*
- (2) *where the replacement consent is for the taking or use of water, the rate of take and volume is not increasing, and the use of water is not changing; and*
- (3) *where the replacement consent is for the taking or use of water, the rate of take and volume complies with any relevant flow and level regimes set out in this Plan.*

The Southland Regional Council will reserve the exercise of its control to the following matters:

- 1. *The volume and rate of water taken, used, diverted or discharged and the timing of any take, diversion or discharge, including how this relates to generation output;*
- 2. *any effects on river flows, wetland and lake water levels, aquatic ecosystems and water quality;*
- 3. *mitigation or remediation measures to address adverse effects on the environment;*
- 4. *the benefits of renewable electricity generation.*

An application for resource consent under Rule 52A(a) will be publicly notified.

(b) *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;*

that does not meet one or more of the conditions of Rule 52A(a) is a non-complying activity.

Reason for the appeal

- 34 Rule 52A is intended to apply to applications to replace existing consents that allow for the operation of the Scheme. Such applications could be made at any time, either before or after the Respondent has established surface water flow and level regimes in the Waiau catchment through a regional plan process as part of the Freshwater Management Unit (**FMU**) limit setting required pursuant to the National Policy Statement for Freshwater Management 2017².
- 35 If such applications were made before the establishment of flow and levels regimes for the catchment, then it is appropriate that on consideration of resource consent applications for 'replacement' consents for the Scheme the Respondent should retain control over the volume and rate of water taken, used, diverted or discharged and the timing of any take, diversion or discharge.
- 36 Where these matters have been already determined via the plan-making process in the First Schedule of the RMA, and Meridian makes an application that conforms to the established regime, the Respondent should not retain a discretion to impose conditions that could operate to impose a different regime than that which has been determined via the plan-making process.
- 37 Such an outcome would create uncertainty and be both inefficient and unlawful.
- 38 Where applications for replacement consents are made for the Scheme but the applications fail to meet one or more of the requirements for a controlled activity, those applications should be considered as discretionary and not non-complying activities.

² pSWLP Policy 47

Relief sought

- 39 The relief sought is the inclusion of the wording Meridian provided to the Respondent's panel of Commissioners in the Memorandum of Counsel dated 2 October 2017 for inclusion in Rule 52A as follows, with additional text shown in underlining and deleted text shown in strikethrough:

Rule 52A – Manapouri and Monowai Hydro-electric Generation Schemes

- (a) *Despite any other rules in this Plan, any activity that is part of the Manapouri or Monowai hydro-electric generation schemes, 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 controlled 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; and*
- (2) *the applicant has requested that the application be publicly notified; and*
- ~~(3) *where the replacement consent is for the taking or use of water, the rate of take and volume complies with any relevant flow and level regimes set out in this Plan.*~~

~~The Southland Regional Council will reserve the exercise of its control to the following matters over which control is reserved are:~~

- ~~(4a) *the volume and rate of water taken, used, diverted or discharged and the timing of any take, diversion or discharge, including how this relates to generation output except for changes or alterations to the volume and rate of water taken and used when this is in accordance with any relevant surface or groundwater allocation volumes and rates of take and discharge set by this Plan and*~~
- ~~(2) *any effects on river flows, wetland and lake water levels, aquatic ecosystems and water quality;*~~

~~(3b) mitigation or remediation measures to address adverse effects on the environment, except for changes or alterations to:~~

~~(i) relevant surface or groundwater allocation volumes and maximum or minimum rates of flow set by this Plan;~~

~~(ii) relevant water quality standards or limits set by this Plan; and~~

~~(c) the collection, recording, monitoring, reporting and provision of information concerning the exercise of consent, and~~

~~(d) lapse period, duration of consent and consent review requirements; and~~

~~(e) mitigation or remediation measures necessary to ensure that any discharge is not the cause of any water quality standards or limits set by this Plan being exceeded.~~

~~4. the benefits of renewable electricity generation.~~

Any application made under Rule 52A(a) will be publicly notified.

~~(b) Despite any other rules in this Plan, any activity that is part of the Manapouri 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;~~

~~that does not meet one or more of the conditions of Rule 52A(a) is a non-complying activity.~~

Rule 52B

Any take, damming, diversion, use of water and the discharge of contaminants or water onto or into land in circumstances where contaminants may enter water, or into surface water, which is an activity that is part of the Manapouri Power Scheme, for which a consent is held and is the subject of an application for a new consent for the same activity that does not meet the conditions of Rule 52A is a discretionary activity.

40 In the alternative Meridian seeks such other relief as the Court thinks appropriate to address the reasons for Meridian's appeal.

Consequential relief and costs

41 Meridian seeks any further relief the Court considers appropriate as a consequence of relief granted under this appeal. Meridian also seeks costs in relation to this appeal.

Dated 17 May 2018



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Advice to recipients of copy of notice of appeal

How to become party to proceedings

You may be a party to the appeal if you made a submission or a further submission on the matter of this appeal.

To become a party to the appeal, you must,—

- within 15 working days after the period for lodging a notice of appeal ends, lodge a notice of your wish to be a party to the proceedings (in form 33) with the Environment Court and serve copies of your notice on the relevant local authority and the appellant; and
- within 20 working days after the period for lodging a notice of appeal ends, serve copies of your notice on all other parties.

Your right to be a party to the proceedings in the court may be limited by the trade competition provisions in section 274(1) and Part 11A of the Resource Management Act 1991.

You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing or service requirements (see form 38).

How to obtain copies of documents relating to appeal

The copy of this notice served on you does not attach a copy of the Appellant's submission, further submissions or relevant parts of the decision appealed. These documents may be obtained, on request, from the Appellant.

Advice

If you have any questions about this notice, contact the Environment Court in Christchurch.