

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

UNDER The Resource Management Act 1991
(RMA)

IN THE MATTER Appeals under clause 14(1) of the First
Schedule of the Act in relation to the
Proposed Southland Water and Land Plan

BETWEEN **MERIDIAN ENERGY LIMITED**
Appellants

AND **SOUTHLAND REGIONAL COUNCIL**
Respondent

STATEMENT OF EVIDENCE OF MARGARET JANE WHYTE

FOR

MERIDIAN ENERGY LIMITED

19 August 2022

Topic B6 Infrastructure – Section 274 Evidence

Judicial Officer: Judge Borthwick

Solicitor acting:

Humphrey Tapper

In-house counsel

287–293 Durham St North

Christchurch Central

Christchurch 8013

humphrey.tapper@meridianenergy.co.nz

Counsel acting:

Stephen Christensen

Project Barrister

421 Highgate, Dunedin 9010

P 027 448 2325

stephen@projectbarrister.nz

FONTERRA CO-OPERATIVE LTD

(ENV-2018-CHC-27)

HORTICULTURE NEW ZEALAND

(ENV-2018-CHC-28)

ARATIATIA LIVESTOCK LTD

(ENV-2018-CHC-29)

WILKINS FARMING CO

(ENV-2018-CHC-30)

GORE AND SOUTHLAND DISTRICT COUNCILS, INVERCARGILL CITY COUNCIL

(ENV-2018-CHC-31)

DAIRYNZ LTD

(ENV-2018-CHC-32)

H W RICHARDSON GROUP LTD

(ENV-2018-CHC-33)

BEEF + LAMB NEW ZEALAND

(ENV-2018-CHC-34 AND 35)

DIRECTOR-GENERAL OF CONSERVATION

(ENV-2018-CHC-36)

SOUTHLAND FISH & GAME COUNCIL

(ENV-2018-CHC-37)

MERIDIAN ENERGY LTD

(ENV-2018-CHC-38)

ALLIANCE GROUP LTD

(ENV-2018-CHC-39)

FEDERATED FARMERS OF NEW ZEALAND

(ENV-2018-CHC-40)

HERITAGE NEW ZEALAND POHERE TAONGA

(ENV-2018-CHC-41)

STONEY CREEK STATION LTD

(ENV-2018-CHC-42)

THE TERRACES LTD

(ENV-2018-CHC-43)

CAMPBELL'S BLOCK LTD

(ENV-2018-CHC-44)

ROBERT GRANT

(ENV-2018-CHC-45)

SOUTHWOOD EXPORT LTD, SOUTHLAND PLANTATION FOREST COMPANY OF NZ

(ENV-2018-CHC-46)

TE RUNANGA O NGAI TAHU, HOKONUI RUNAKA, WAIHOPAI RUNAKA, TE

RUNANGA O AWARUA AND TE RUNANGA O ORAKA APARIMA

(ENV-2018-CHC-47)

PETER CHARTRES

(ENV-2018-CHC-48)

RAYONIER NEW ZEALAND LTD

(ENV-2018-CHC-49)

ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NZ INC

(ENV-2018-CHC-50)

Appellants

AND

SOUTHLAND REGIONAL COUNCIL

Respondent

CONTENTS

Introduction.....	3
Executive Summary.....	4
Scope of Evidence.....	5
General Matters.....	6
Over-allocation	8
Policy 26.....	15
Rule 52A.....	21
Appendix E and Other Drafting Matters	24

INTRODUCTION

- 1 My full name is Margaret Jane Whyte
- 2 My qualifications and experience are as set out in my Evidence in Chief dated 29 July 2022.
- 3 I have prepared this statement addressing matters subject to the Section 274 notices lodged by Meridian Energy Limited (Meridian). In particular I focus on planning matters addressed in the planning evidence of Natasha Sitarz for Forest & Bird and in the evidence of Claire Jordan for Aratiatia Livestock Limited¹.
- 4 I confirm that I have read the code of conduct for expert witnesses as contained in the Environment Court’s Practice Note 2014. I have complied with the practice note when preparing my written statement of evidence and will do so when I give oral evidence before the Environment Court.
- 5 The data, information, facts and assumptions I have considered in forming my opinions are set out in my evidence to follow. The reasons for the opinions expressed are also set out in the evidence to follow.
- 6 Unless I state otherwise, this evidence is within my knowledge and sphere of expertise. I have not omitted to consider material facts known to me that might alter or detract from the opinions that I express.

¹ Both statements of evidence are dated 29 July 2022

- 7 I provide the following declaration of conflict of interest. My husband is an employee of Meridian Energy. This relationship has not had any influence on my evidence and my opinion as an independent expert.

EXECUTIVE SUMMARY

- 8 I do not support the changes to Policy 26 and Rule 52A set out in the evidence of Ms Jordan and Ms Sitarz.
- 9 I do not agree with the approach Ms Jordan or Ms Sitarz have taken to arrive at the conclusion that the Waiau River is over-allocated. I do not agree with the planning response they suggest having reached that conclusion. Objective 7 in the proposed Southland Water and Land Plan (pSWLP) sets out that any existing over-allocation is to be phased out in accordance with freshwater objectives, targets, limits and timeframes.
- 10 I consider that the changes to Policy 26 supported by Ms Jordan and Ms Sitarz are not needed, nor are they appropriate. In particular:
- (a) They impose different and more stringent requirements in relation to mauri and degradation on MPS-related activities in the Waiau River than apply to other waterbodies and activities.
 - (b) They seek to predetermine outcomes, responsibilities and actions required in relation to the ongoing operation of the Manapōuri Power Scheme (MPS) that cannot be determined until the completion of the National Objectives Framework (NOF) process for the Waiau Freshwater Management Unit (FMU).
 - (c) The structure of the policies in the plan means that matters relating to mauri, ecosystem health and degradation do not need to be embedded into Policy 26. Policy 26 does not exempt or predetermine consideration of any of these factors in relation to any renewable electricity generation including the MPS. All of the objectives and policies, as relevant, need to be considered. The Plan is required to be read as a whole, and the Interpretation Statement needs to be considered.
- 11 I consider that the changes to Rule 52A supported by Ms Jordan and Ms Sitarz are not needed, nor are they appropriate. In particular:
- (a) complying with the environmental flows and levels and take limits established under the NOF process will not result in an outcome that

is contrary to or inconsistent with the National Policy Statement for Freshwater Management (NPSFM). Having been set via the NOF process, it is not efficient, effective or necessary for these matters to be reconsidered through a consent process.

- (b) the rule as supported by Ms Jordan and Ms Sitarz is not an effective restricted discretionary rule. By its nature the rule would effectively become fully discretionary.

- 12 In relation to Appendix E the wording change from “not permanent” to “temporary” achieves the same thing. As it does not change the meaning, I consider there is no benefit in making the change.

SCOPE OF EVIDENCE

- 13 In this evidence I address the changes sought to:

- (a) Policy 26 supported by both Ms Jordan and Ms Sitarz
- (b) Rule 52A supported by both Ms Jordan and Ms Sitarz, and
- (c) Appendix E wording changes suggested by Ms Sitarz.

- 14 By way of background to the detailed wording of the provisions in dispute, I comment on a number of matters relating to the consideration of higher order statutory documents addressed by Ms Jordan and Ms Sitarz. I address these in a preliminary section of this evidence under the heading “General Matters”. The matters I address concern the relationships between:

- (a) The National Policy Statement for Renewable Electricity Generation (NPSREG) and the Southland Regional Policy Statement (SRPS)
- (b) The NPSREG and the NPSFM 2020, and
- (c) The New Zealand Coastal Policy Statement (NSCPS) and Southland Coastal Plan.

- 15 I also address matters relating to over-allocation that have been addressed by Ms Jordan.

- 16 The relevant statutory provisions I have considered are referenced in my evidence.

GENERAL MATTERS

NPSREG and SRPS

- 17 Ms Jordan addresses a number of matters that inform her consideration of Policy 26 and Rule 52A. Her consideration includes the National Policy Statement for Renewable Electricity Generation and the Southland Regional Policy Statement provisions relating to renewable electricity generation and the MPS.
- 18 I addressed relevant provisions in the NPSREG and the SRPS in my evidence to the first hearing on the Objectives, as part of my consideration of the MPS being part of the existing environment and in my consideration of Objective 10 and Objective 9B. I further considered the relationship between the SRPS and the NPSREG in an Appendix to that evidence. I rely on my previous consideration of these provisions as they are relevant to this hearing.
- 19 The matter I wish to address is the conclusion of Ms Jordan that any activity status from permitted to non-complying, provided there is an ability to pass the “gateway test”, could give effect to the NPSREG². I do not agree with her evaluation relating to non-complying activities and consider that a non-complying activity status would not achieve Objectives 2, 9B and 10. However, I do not address this matter further as I understand that non-complying activity status for all MPS-related operating consents is not sought by any appellants.

NPSREG and NPSFM

- 20 Ms Sitarz in her evidence, under the heading “The National Policy Statement for Renewable Electricity Generation 2011”, considers that some of the provisions in the SRPS may not give effect to the NPSFM. She has identified Policies ENG.2, WQUAN.1 and WQUAN.2 as examples of this.
- 21 The SRPS does pre-date the NPSFM and as such the provisions cannot be automatically considered to have given effect to the NPSFM. Ms Sitarz and I are in agreement that the NPSFM needs to be referred to directly in considering freshwater management for this appeal topic. This has been the case with every appeal topic for the pSWLP.

² Evidence of Claire Jordan paragraph 64

- 22 I do not agree with Ms Sitarz that the provisions of the SRPS that recognise renewable electricity generation, or that recognise that there are special circumstances in the Waiau Catchment, do not, and cannot, give effect to the NPSFM.
- 23 Ms Sitarz considers that the recognition of the special circumstances of the Waiau catchment under the SRPS (because of the MPS) creates uncertainty³. She considers that the recognition of special circumstances may suggest an exception which may not be appropriate in giving effect to the NPSFM, identifying Policy 5 and 13 of the NPSFM as examples. In relation to Policy 11 of the NPSFM she considers that the recognition of special circumstances creates uncertainty as to how over-allocation would be addressed, as no exception is provided in Policy 11 of the NPSFM. I address the matter of over-allocation in response to Ms Jordan's evidence below.
- 24 Policy 5 of the NPSFM is that "*Freshwater is managed through a National Objectives Framework to ensure that the health and well-being of degraded water bodies and freshwater ecosystems is improved, and the health and well-being of all other water bodies and freshwater ecosystems is maintained and (if communities choose) improved*".
- 25 Policy 13 is that "*The condition of water bodies and freshwater ecosystems is systematically monitored over time, and action is taken where freshwater is degraded, and to reverse deteriorating trends*".
- 26 I do not consider that the recognition that there are special circumstances in the Waiau Catchment is in conflict with anything in Policy 5 or 13.
- 27 As identified in my Evidence in Chief the National Objectives Framework that must be followed, and will be a key part of the implementation of both Policy 5 and Policy 13, will identify the values within the Waiau Catchment, (including the generation of hydro electricity via the MPS), set environmental outcomes for each of those values as objectives, and address all of the matters required in clauses 3.12–3.20 of the NPSFM. All of this will need to be done in a manner that is consistent with Clause 3.31 which recognises the special circumstances of the Waiau Catchment because of the MPS.

³ Evidence of Natasha Sitarz paragraph 45 and paragraph 46

28 The SRPS's recognition of special circumstances in the Waiau Catchment is not in conflict with the requirement to give effect to the NPSFM. Rather, it reflects the fact that the presence of the nationally significant MPS means there are special circumstances that must be considered within the Waiau Catchment that are different to other catchments in the region. The recognition of special circumstances accords with Clause 3.31 of the NPSFM which identifies that there are additional matters that regard must be had to in implementing the NPSFM in the five catchments where the identified large hydro-electric generation schemes are located.

New Zealand Coastal Policy Statement (NZCPS) and Southland Coastal Plan

29 Ms Sitarz has identified the NZCPS and the Southland Coastal Plan. I do not address these matters in detail, but simply note that the NZCPS was in existence at the time the SRPS was prepared, and the SRPS gives effect to the NZCPS⁴. With respect to the Southland Coastal Plan I note that this plan pre-dates the NZCPS. The Environment Southland website identifies that *"The operative Coastal Plan needs updating. It was originally notified in 1997 and is out-of-step with current legislation and policy, as well as suffering from a number of drafting issues common to first generation regional plans. The review of the Coastal Plan is being undertaken in three stages⁵."* My understanding is that the Regional Council proposes to notify a new Proposed Regional Coastal Plan either in 2023 or 2024.

OVER-ALLOCATION

30 Ms Jordan addresses over-allocation and considers there are two aspects of this concept being:

- (a) The technical and caveated definition of over-allocation under the NPSFM⁶, and
- (b) A common-usage of the term, "over-allocation" as might be informed by Part 2 of the RMA, as implied by Policy WQUAN.2 of the SRPS⁷.

⁴ Southland Regional Policy Statement 2017, section 1.3, Legislative context, Chapter 1 – page 12

⁵ [es.govt.nz/about us/plans and strategies/regional plans/coastal plan](https://es.govt.nz/about-us/plans-and-strategies/regional-plans/coastal-plan)

⁶ Evidence of Claire Jordan paragraph 108(a)

⁷ Evidence of Claire Jordan paragraph 108(b)

- 31 In relation to the approach to over-allocation in the NPSFM, Ms Jordan gives particular consideration to Policy 11 of the NPSFM. She states that in her opinion *“the second limb of the definition of over-allocation anticipates that Policy 11 can be implemented prior to limit setting occurring. With that in mind, to ensure that the Plan gives effect to this Policy, I consider it important to assess what contributes to the overallocation of the Lower Waiau River with respect to suspended sediment.”*⁸
- 32 In paragraphs 117–119 she expresses her opinion as to the contribution of the MPS operational activities to the current state of degradation in the Lower Waiau with respect to suspended sediment. For the purpose of this evidence in response, I have not addressed the evidence Ms Jordan relies on to support the proposition that the MPS causes elevated suspended sediment in the Lower Waiau River. I have simply proceeded on the assumption that the MPS does contribute to suspended sediment. I note however that the topics of suspended fine sediment and turbidity are addressed in the evidence of Dr Hogsden and Dr McConchie for Meridian.
- 33 In paragraph 120 she concludes that *“Because of this contribution, it is my opinion that if Rule 52A constrains the Council’s discretion in relation to the flow and level regime of the Lower Waiau River, such as through a controlled activity status, it could materially frustrate the existing over-allocation being phased out, which would be contrary to Policy 11 of the NPS-FM”*⁹.
- 34 In relation to what she describes as a common usage of the term over-allocation, Ms Jordan in paragraphs 121–123 states:
- “Moving on to the more common-usage definition of over-allocation, as outlined above, in my opinion Policy WQUAN.2 of the RPS addresses not only the overallocation as defined in the NPS-FM, but also a more plain-English overallocation, such as one might read into Part 2. An overallocation which occurs when water quantity has been allocated to the point that the requirement to give effect to the matters articulated in Part 2 of the Act is frustrated.”*

⁸ Evidence of Claire Jordan paragraph 116

⁹ Evidence of Claire Jordan paragraph 120

“The inclusion of the Waiau River within the Policy, seems to me to be an acknowledgement that a Part 2 overallocation exists in the Waiau Catchment as a result of the Scheme, regardless of whether over-allocation exists in terms of the NPS-FM definition.”

“I think it important to consider this form of overallocation in drafting the ‘Waiau Provisions’ as it seems to me that the highly technically prescribed and caveated definition of over-allocation in the NPS-FM means that it may only partially address the essence of over-allocation. In my opinion this leaves a portion of ‘common-usage’ overallocation unaddressed explicitly by the NPS-FM and warrants specific consideration of Part 2 in light of the effects of the Scheme, rather than reliance on the NPS-FM alone to address overallocation.”

- 35 There are three matters I address relating to Ms Jordan’s evaluation of over-allocation:
- (a) The idea that a “common-usage” definition of over-allocation should inform the way the concept of over-allocation is understood in the pSWLP.
 - (b) The NPSFM approach to over-allocation.
 - (c) That the formulation of Rule 52A could frustrate the future phasing out of over-allocation in the Waiau FMU.

Over-allocation in common-usage

- 36 Ms Jordan considers that there is a “common-usage” definition of over-allocation that can be derived from Policy WQUAN.2 of the SRPS and linked to Part 2 of the RMA, and that this is appropriately addressed in the pSWLP.
- 37 I have looked to the statutory documents to see if there is any direction as to what “common-usage over-allocation” is (as distinct from over-allocation as defined in the NPSFM 2020, or in the earlier NPSFM 2014, as amended 2017) and how it should be addressed. I have found no reference to such a matter in the relevant statutory documents, including the RMA, the pSWLP, the SRPS, the two NPSFMs or the National Planning Standards 2019. It is not a planning term I am familiar with, nor have I seen it addressed in other regional plans or resource consent processes that I have knowledge of.

- 38 I have considered Policy WQUAN.2 of the SRPS and do not consider it states or directs as Ms Jordan has considered in paragraph 122 of her evidence that a *“Part 2 overallocation exists in the Waiau Catchment as a result of the Scheme, regardless of whether over-allocation exists in terms of the NPS-FM definition”*.
- 39 Neither the policy, nor the explanation, state or acknowledge that over-allocation exists in the Waiau Catchment. Nor do they state or acknowledge that over-allocation is as a result of the MPS.
- 40 At the time the pSWLP was publicly notified the SRPS was at the stage when the latter part of the appeals was being addressed. The Section 32 document¹⁰ in Section 2.2.4 when addressing the Proposed Southland Regional Policy Statement 2012 states:
- “Under Section 67(3)(c) of the RMA, a regional plan must give effect to any regional policy statement.*
- The pRPS is still a proposed plan, but is substantially through the policy-making process, with appeals being resolved and a number of parts now ‘beyond challenge’.”*
- 41 In addressing Water Takes the Section 32 assessment for the pSWLP states:
- “Section 66(2)(a) of the RMA states that a Regional Plan shall have regard to any proposed regional policy statement. The pRPS is currently under appeal, however mediation is nearing conclusion and a number of consent orders have been lodged with the Environment Court. It is expected that the pRPS will be made operative once all appeals are resolved, which is likely to be before the pSWLP becomes operative. It is therefore important that the pSWLP gives effect to the pRPS as well as the RPS. The most relevant section of the pRPS in relation to water takes is Chapter 4: Water.”¹¹*
- 42 The Section 32 assessment is clear that the pSWLP seeks to give effect to the pRPS.
- 43 The pSWLP describes the Waiau Catchment as fully allocated, not over-allocated. The introduction to the surface water provisions in paragraph

¹⁰ Section 32 Report Proposed Southland Water and Land Plan Page 13

¹¹ Section 32 Report Proposed Southland Water and Land Plan Page 191

two on page 19 states “*The Waiau catchment is fully allocated as a result of the Manapōuri hydro-electricity generation scheme, which uses water in the Fiordland and Waiau catchments for the generation of renewable energy. The resulting flow regime is highly modified, particularly below the Manapouri Lake Control Structure (Mararoa weir), whilst supporting a range of biological, recreational, landscape, amenity and other community values.*”

- 44 The allocation approach in the current provisions in the pSWLP, including Policy 21 (addressing allocation of water), Policy 22 (addressing management of the effects of groundwater and surface water use), and Rule 52 (addressing water abstraction, damming, diversion and use from the Waiau Catchment) are also consistent with the catchment being fully allocated.
- 45 In particular I note Policy 22(1) (which is not subject to appeal) is to “*Manage the effects of surface and groundwater abstraction by:*
1. *avoiding allocating water to the extent that the effects on surface water flow would not safeguard the mauri of that waterway and mahinga kai, taonga species or the habitat of trout and salmon, in accordance with Appendix K.*”
- 46 Appendix K notes that “*in the Waiau catchment, the primary allocation is that authorised through resource consents in force and operative within their terms¹²” and “in the Waiau catchment...the primary allocation encompasses any supplementary allocation¹³”.*
- 47 The pSWLP’s description of and approach to water allocation in the Waiau Catchment was made in the knowledge of Policy WQUAN.2 of the SRPS. I do not agree with Ms Jordan that Policy WQUAN.2 of the SRPS implies or acknowledges that an over-allocation exists in the Waiau catchment; rather it confirms that the catchment is fully allocated.
- 48 From a planning perspective, I consider that the NPSFM provides a clear definition of what over-allocation means in the freshwater context and it would not be appropriate to look for a different “common-usage” meaning of over-allocation.

¹² pSWLP Appendix K, Primary and Secondary Allocation, Primary Allocation (ii)

¹³ pSWLP Appendix K, Primary and Secondary Allocation, Secondary Allocation (ii)

The NPSFM approach to over-allocation

- 49 Ms Jordan has identified that the *“the second limb of the definition of over-allocation anticipates that Policy 11 can be implemented prior to limit setting occurring”* and has addressed suspended sediment.
- 50 Objective 7 in the pSWLP directly responds to Policy 11 in the NPSFM. Objective 7 in the pSWLP is:
- “Objective 7*
- Following the establishment of freshwater objectives, limits, and targets (water quality and quantity) in accordance with the Freshwater Management Unit processes:*
- (a) where water quality objectives and limits are met, water quality shall be maintained or improved;*
 - (b) any further over-allocation of freshwater is avoided; and*
 - (c) any existing over-allocation is phased out in accordance with freshwater objectives, targets, limits and timeframes.”*
- 51 This objective states that avoiding further over-allocation and phasing out any existing over-allocation will occur following the establishment of freshwater objectives, limits and targets in accordance with the Freshwater Management Unit processes. This is an appropriate response because until the freshwater objectives, limits and targets for both freshwater quality and quantity are established, it will not be known what, if any, over-allocation is to be avoided or phased out. The Freshwater Management Unit process for the Waiau will also need to consider the matters in Section 3.31 NPSFM 2020, in relation to the Manapouri Scheme.
- 52 Objective 7 provides clear direction that the phasing out of over-allocation (as defined in the NPSFM) that exists at the time the NOF is implemented will occur according to the objectives, targets, limits and timeframes that are set through that process.
- 53 If a resource consent application seeking to reconsent the MPS is lodged before limits have been set through the FMU process, the activity status

of these activities would be discretionary¹⁴. This would enable consideration of matters relating to water quality and water quantity in a degraded or degrading catchment. Discretionary activity consents can be granted or refused, and conditions can be imposed on consents to manage adverse effects. This approach provides the ability, irrespective of Objective 7, to address phasing out any existing over-allocation and avoiding future over-allocation prior to implementation of the NOF in the Waiau FMU through the consent process in a manner consistent with Policy 11 of the NPSFM.

Frustrating future phasing-out of any over-allocation

- 54 At paragraph 120 of her evidence Ms Jordan considers that if Rule 52A constrains the Council's discretion in relation to the flow and level regime of the Lower Waiau River it could materially frustrate existing over-allocation being phased out, which would be contrary to Policy 11 of the NPSFM.
- 55 I consider that no version of Rule 52A currently before the Court, including the controlled activity decision version, would be contrary to Policy 11 in the NPSFM. As addressed earlier, Objective 7 in the pSWLP relates to Policy 11 in the NPSFM. I have considered both the decision version of Rule 52A, and the version of Rule 52A that I support, which does contain a restriction of discretion relating to flows post the Waiau FMU process. The Section 32AA assessment in my Evidence in Chief considers these rules and Objective 7 of the pSWLP.
- 56 The process and matters that must be addressed in the FMU process under the NPSFM will identify whether any over-allocation exists, and if it does how and over what timeframe it is to be phased out. These matters will be built into the mandatory outcomes from the FMU process. The flows, levels and take limits established in the Waiau FMU process will necessarily address any over-allocation, and a subsequent resource consent application for replacement consents for the MPS that complies with the established flows, levels and take limits will by definition conform to the FMU plan's expectations regarding any over-allocation. On that basis it is inefficient and unnecessary to reconsider these matters.

¹⁴ On the basis that the amount of water being sought in the consents is not greater than already consented. If a greater amount of water is sought than is already consented the application would be for a non-complying activity.

- 57 I do not agree that limiting consideration of flows in the circumstances described in my suggested wording of Rule 52A would be contrary to or inconsistent with either Objective 7 of the pSWLP or Policy 11 of the NPSFM.

POLICY 26

- 58 I now address the additional wording that both Ms Jordan and Ms Sitarz support being included in Policy 26. The wording they support is:

“Policy 26 – Renewable energy

Recognise and provide for:

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

When:

- a. allocating surface water for abstraction, damming, diversion and use; and*
- b. considering all resource consent applications for surface water abstractions, damming, diversion and use; and while;*
- (c) safeguarding the mauri and providing for the ecosystem health of the Waiau River, and*
- (d) reversing or reducing the degradation of the Waiau River as a result of the Manapouri hydro-electricity generation scheme.”*

- 59 I do not support this wording of the policy, particularly the inclusion of “while” and matters (c) and (d).

60 In considering the proposed changes I record that my understanding is that the objectives and policies in the Plan are designed to work together. That is, they are all to be considered, as is relevant to the particular circumstances. They are also to be considered in light of the Interpretation Statement. Some of the provisions focus on the outcomes and actions to be achieved, some are restrictive, and some are enabling. In the case of Policy 26 the focus (in relation to the MPS) is on ensuring provision is made for the existing MPS when water allocation decisions are made, and that the MPS is considered when applications for consent for other activities that may affect it are being considered. Managing the adverse effects of water allocation, including in the Waiau Catchment is directly addressed in Policies 20, 21 and 22.

61 The first concern I have with the proposed wording relates to consistency with other provisions. The wording relating to mauri sought to be introduced is “safeguarding the mauri.” I have only identified one other policy in the pSWLP that refers to “safeguard the mauri,” being Policy 22(1). This Policy is:

“Policy 22 – Management of the effects of groundwater and surface water use

Manage the effects of surface and groundwater abstractions by:

- 1. avoiding allocating water to the extent that the effects on surface water flow would not safeguard the mauri of that waterway and mahinga kai, taonga species or the habitat of trout and salmon, in accordance with Appendix K;*
- 2. ensuring interference effects are acceptable, in accordance with Appendix L.3; and*
- 3. utilising the methodology established in Appendix L.2 to:*
 - (a) manage the effects of consented groundwater abstractions on surface water bodies; and*
 - (b) assess and manage the effects of consented groundwater abstractions in groundwater management zones other than those specified in Appendix L.5.”*

62 This policy links the safeguarding of mauri with the allocation of surface water in accordance with the approach set out in Appendix K. There is no such link in the wording sought to be introduced into Policy 26 which must mean that the mauri to be safeguarded relating to the MPS and the Waiau River is intended to mean something different. I have looked to the other provisions in the Plan for guidance as to what the “different” approach to safeguarding mauri in the Waiau River from that set out in Policy 22 (that applies across the whole region) might be. I have found no such guidance. In paragraphs 63 to 69 below, I identify the provisions that reference mauri that I have considered.

63 The pSWLP on page 9 when addressing Te Mana o te Wai states:

“This Plan recognises the national significance of Te Mana o te Wai, which puts the mauri of the water body and its ability to provide for te hauora o te tangata (the health of the people), te hauora o te taiao (the health of the environment) and te hauora o te wai (the health of the water body) to the forefront of freshwater management.”

64 Objective 2 is:

“The mauri of water provides for te hauora o te taiao (health and mauri of the environment), te hauora o te wai (health and mauri of the waterbody) and te hauora o te tangata (health and mauri of the people).”

65 The interpretation statement to the Region-wide Objectives is:

“Interpretation Statement

All persons exercising functions and powers under this Plan and all persons who use, develop or protect resources to which this Plan applies shall recognise that:

(i) Objectives 1 and 2 are fundamental to this plan, providing an overarching statement on the management of water and land, and all objectives are to be read together and considered in that context; and

(ii) The plan embodies ki uta ki tai and upholds Te Mana o Te Wai and they are at the forefront of all discussions and decisions about water and land.”

66 Policy 44 – Implementing Te Mana o te Wai is:

“Policy 44 – Implementing Te Mana o te Wai

Te Mana o te Wai is recognised at a regional level by tangata whenua and the local community identifying values held for, and associations with, a particular water body and freshwater management unit.

Particular regard will be given to the following values, alongside any additional regional and local values determined in the Freshwater Management Unit limit setting process:

- *Te Hauora o te Wai (the health and mauri of water);*
- *Te Hauora o te Tangata (the health and mauri of the people);*
- *Te Hauora o te Taiao (the health and mauri of the environment);*
- *Mahinga kai;*
- *Mahi māra (cultivation);*
- *Wai Tapu (Sacred Waters);*
- *Wai Māori (municipal and domestic water supply);*
- *Āu Putea (economic or commercial value);*
- *He ara haere (navigation).”*

67 I note that Policy 20, which as a region-wide policy is relevant to the Waiau, concerns management of water resources and contains a list of adverse effects to be addressed. The policy requires the action of “where reasonably practicable, or otherwise remedied and mitigated”¹⁵. Mauri is not explicitly listed (although “the spiritual and cultural values and beliefs of tangata whenua¹⁶” is listed).

68 Objective 2 is a key objective. As stated in the Interpretation Statement Objectives 1 and 2 are fundamental to the Plan, providing an overarching statement on the management of water and land. Objective 2 is therefore relevant to all policies and activities addressed in the pSWLP, including the policies in dispute in Tranche 1, which as with Policy 20 are also

¹⁵ Subject to a decision of the Court, the wording in the decision version of this policy is avoid, remedy or mitigate

¹⁶ pSWLP Policy 20(1)(e)

seeking to achieve Objective 2. I note that neither Policy 20, nor any of the policies considered in Tranche 1 specifically refer to mauri as an outcome to be achieved, yet they must achieve Objective 2. I do not understand why a different approach should be taken in relation to Policy 26 than has been taken with other policies.

- 69 I am not qualified to address the meaning of mauri or how it should be safeguarded. However, from a planning perspective addressing mauri differently in Policy 26 than in other provisions currently within this plan¹⁷ creates interpretative and implementation uncertainty, particularly without the reason for the difference being evident. Intended or not, I do not consider this to be an appropriate approach to be adopted for Policy 26.
- 70 Another example of matters being addressed differently to other provisions in the Plan is the approach to degradation included in Policy 26 by Ms Jordan and Ms Sitarz. The wording is *“reversing or reducing the degradation of the Waiau River as a result of the Manapouri hydro-electric generation scheme”*.
- 71 Objective 6 in the pSWLP is:
- “Water quality in each freshwater body, coastal lagoon and estuary will be:*
- (a) *maintained where water quality is not degraded; and*
- (b) *improved where water quality is degraded by human activities.”*
- 72 Noting that final decisions on all policies¹⁸ have yet to be made by the Court, the other provision where specific reference to degradation or degraded may be found is in some versions of Policy 16 being sought by parties to that appeal. I have not addressed this provision in detail as it is still under dispute, however I note that when addressing degradation none of the versions of Policy 16 refer to *“reversing or reducing degradation.”*
- 73 Therefore the requirement for reversing or reducing degradation would only be applicable to activities associated with the MPS in the Waiau Catchment.

¹⁷ Recognising that the FMU processes will address mauri further

¹⁸ Other than Policy 18 the policies subject to appeal being sought by parties do not include specific reference to degradation or degrading

- 74 From a planning perspective I consider that “reversing or reducing degradation” as a result of the MPS is a more stringent requirement than water quality being improved where water quality is degraded by human activities, which is what Objective 6 seeks, particularly when target attribute states have not yet been set through the NOF process under the NPSFM.
- 75 I also consider that “reversing or reducing the degradation of the Waiau River as a result of the Manapouri hydro-electric generation scheme” is more stringent than Policy 13 in the NPSFM which uses the words “reverse deteriorating trends”. Policy 13 in the NPSFM is:
- “Policy 13: The condition of water bodies and freshwater ecosystems is systematically monitored over time, and action is taken where freshwater is degraded, and to reverse deteriorating trends.”*
- 76 I have not read any evidence that indicates why a different approach to addressing degradation is appropriate for the MPS, particularly in advance of the completion of Waiau FMU process. It is through the NOF process for the Waiau FMU, which I have addressed in my Evidence in Chief, that the limits on resource use, specified timeframes for achieving target attribute states, and actions that are required to achieve this will be addressed and specified. The NOF process will also need to address clause 3.20 responding to degradation, along with clause 3.31 relating to large hydro-electric generation schemes. The relevant matters will be incorporated into the limits on resource use, in setting environmental flows and levels, and in setting take limits through the FMU process.
- 77 I do not support imposing a stricter response to addressing whatever degradation of the Waiau FMU is found to be attributable to the MPS than applies to other activities and other waterbodies, particularly in advance of the Waiau FMU process. Sufficient consideration has not been provided in the Section 32AA evaluations of the environmental, economic and social implications of imposing stricter requirements on the MPS. Ms Jordan has not addressed benefits and costs of the Policy 26 changes in detail in her Section 32 considerations. Ms Sitarz, in terms of costs, has identified a potential increase in consenting costs for the MPS, but has not considered any costs associated with changes in generation capacity, operational flexibility, security of electricity supply, or contribution to meeting greenhouse gas emissions targets, or responding to climate

change. These are all matters that must be had regard to under clause 3.31 of the NPSFM.

- 78 The final consistency concern I address relates to including only some of the matters that are addressed in other policies in Policy 26. I consider incorporating the reference to “ecosystem health” to be an example of this. Including only “ecosystem health” in Policy 26 creates potential uncertainty as to whether this means that other matters (for example those addressed in Objective 9/9A including life-supporting capacity, the values of outstanding natural features and landscapes, the natural character and the historic heritage values of waterbodies and their margins, or in Policy 20(1)(a) and processes of waterbodies) are excluded from consideration in Policy 26.
- 79 In my experience when a matter is expressed differently in one policy than it is in others, then the Plan will be read as having made a deliberate decision to draft the provisions in that way, and the outcome could be that only selected matters are relevant in Policy 26 and not others.
- 80 I have not identified any circumstances when implementing the pSWLP where Policy 26 will be considered in isolation from the objectives and other policies in the Plan, or identified any circumstances where Policy 26 will be the dominant consideration, compared to the objectives and other policies. The objectives and other policies addressing mauri, ecosystem health and degradation will be relevant considerations, along with Policy 26, and the Interpretation Statement will always be relevant. I consider the change to Policy 26 in relation to reverse sensitivity which I support in my Evidence in Chief is a different type of consideration because there is no other provision in the pSWLP that addresses this matter.
- 81 I do not support the additional matters addressed by Ms Jordan and Ms Sitarz being included in Policy 26 and consider them to be inappropriate for the reasons identified.

RULE 52A

- 82 The fundamental differences in approach to Rule 52A that both Ms Jordan and Ms Sitarz support compared to the version I support are:
- (a) 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 input remains a matter of discretion¹⁹ even after completion of the Waiau FMU process; and

- (b) any effects on river flows, wetland and lake water levels, the coastal waters and coastal processes, estuaries, aquatic ecosystems, and water quality and natural character remains a matter of discretion²⁰; and
- (c) the restriction of discretion that the Southland Regional Council may not require take limits, environmental flows and level limits that are more limiting for the consent holder than those set in the Plan for the Waiau FMU in accordance with the NPSFM 2020²¹
- (d) the restriction of discretion that the Southland Regional Council may not require water quality standards or limits that are more limiting for the consent holder than those specified in the Plan for the Waiau FMU be deleted²¹.

83 The version of Rule 52A supported by Ms Jordan and Ms Sitarz means that for an application to qualify as a restricted discretionary activity, an applicant must comply with relevant environmental flows and levels and/or take limit regimes that have been established through an FMU process for the Waiau FMU under the NPSFM 2020. The NOF in the NPSFM 2020 is a highly prescriptive process that must be followed for all FMUs, including the Waiau, in order to give effect to the NPSFM. This will include addressing

- (a) the objective and all relevant policies of the NPSFM
- (b) all of the other relevant provisions that address both relevant process and outcome matters specified for a NOF process, and
- (c) clause 3.31.

84 Then, having complied with the relevant environmental flows and levels and/or take limit regimes that have been established through an FMU process for the Waiau FMU under the NPSFM 2020 in order to qualify

¹⁹ Clause 1 of the restriction of discretion in Appendix 3 of Ms Sitarz, this clause is deleted in the Rule 52A version I support.

²⁰ Clause 2 of the restriction of discretion in Appendix 3 of Ms Sitarz, this clause is deleted in the Rule 52A version I support.

²¹ Clause (i) and (ii) that is deleted in Appendix 3 of Ms Sitarz. This clause is included in the Rule 52A version I support.

under the restricted discretionary activity rule, under the wording suggested by Ms Jordan and Ms Sitarz, the consent authority has the discretion to set different environmental flows and levels and take limits, than those that have been established to give effect to the NPSFM. From a planning perspective, I consider it odd to have the matters you must comply with in order to qualify as an restricted discretionary activity becoming matters the consent authority then has discretion to change. I am not familiar with another similarly constructed restricted discretionary activity rule.

- 85 I have proceeded on the basis that the NOF process will be properly followed and applied in the Waiau FMU. This is a reasonable approach given that a regional plan must give effect to a national policy statement and that as a freshwater planning instrument, Plan Change Tuatahi will presumably go through the freshwater planning process established in Section 80A of the RMA, including being considered by a specially appointed freshwater hearings panel. In my Evidence in Chief I set out the matters that must be addressed when implementing the NOF in accordance with the NPSFM 2020, including that numbers will need to be set both in terms of environmental flows and levels (clause 3.16(3) of the NPSFM) and for take limits (clause 3.17 of the NPSFM). The setting of take limits is closely related to the environmental flows and levels.
- 86 I consider that it is not necessary, effective or efficient to retain discretion to establish different flows and levels on a consent when compliance with the environmental flows and levels and take limits established in the Plan through a NOF process is required under the rule. I consider that the matters that are addressed in both Clauses 1 and 2 of the restriction of discretion in Rule 52A sought by Ms Sitarz and Ms Jordan will have been incorporated and considered as part of the NOF process for the Waiau FMU and should not be reconsidered further in a consent process.
- 87 To be consistent, if it was determined that compliance with environmental flows and levels and take limits set through the NOF process and incorporated into the Plan post Waiau FMU cannot be relied upon, then equally these should not be relied upon as a trigger to change of activity status from a restricted discretionary to a non-complying activity, as provided in clause (c)(ii) in Rule 52A supported by Ms Jordan and Ms Sitarz. In such circumstances where limits set under the FMU processes

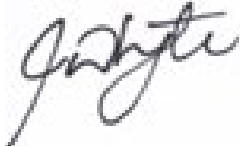
cannot be relied on, I consider a discretionary activity status would be more appropriate than non-complying when these are exceeded.

- 88 I do not consider that the rule as put forward by Ms Sitarz and Ms Jordan is efficient and effective as a restricted discretionary activity rule. In my view if flows and levels that comply with the plan are able to be reconsidered, along with all of the other matters addressed in the rule, the matters of discretion become so broad there is no material restriction on discretion at all. In that scenario it is my view that restricted discretionary activity status would be ineffective and inefficient from a Section 32 perspective.
- 89 It does need to be borne in mind that the restriction on discretion to reconsider flows, levels and allocations that have been set in compliance with the NOF's requirements will apply in an FMU in which the MPS is expressly recognised and provided for in Objective 10 of the SWLP which is that *"The national importance of the existing Manapōuri hydro-electric generation scheme in the Waiau catchment is provided for and recognised in any resulting flow and level regime"* (my emphasis). Against this clear intended outcome in the pSWLP, it would be inappropriate in my view for the rule applying to the consenting of the MPS to reserve discretion to the consent authority to change the regime that is established.

APPENDIX E AND OTHER DRAFTING MATTERS

- 90 In relation to Appendix E, Ms Sitarz has suggested a change in the wording from "not permanent" to "temporary". In my view this does not change the meaning of the provision. The use of "temporary" was considered in the discussions held between Ngā Runanga and Meridian. I understand the preference of both parties was for "not permanent", rather than "temporary". As it does not change the meaning, I consider there is no benefit in making the change suggested.
- 91 However, this is a matter of detail that will be able to be considered and discussed further in upcoming planning conferencing.
- 92 Ms Sitarz has also identified some concerns she has with some of the specific drafting relating to Rule 52A. These include the references to "permitted, controlled or restricted discretionary activity under any other rules in the Plan" (Rule 52A(b) of the version I support), and matters

relating to how take limits are referred to. I have not addressed these matters in this evidence, as I addressed these matters in my Evidence in Chief. However, I consider these are minor drafting matters that I expect will be able to be considered and addressed in upcoming planning conferencing.

A handwritten signature in black ink, appearing to read 'Jane Whyte', written in a cursive style.

Jane Whyte

Director Response Planning Consultants Limited

19 August 2022