

**BEFORE THE SOUTHLAND REGIONAL COUNCIL**

**UNDER** The Resource Management Act 1991 (RMA)

**IN THE MATTER** of an application by **MERIDIAN ENERGY LIMITED** (Meridian) for a water and discharge permit to authorise the construction, operation and maintenance of a diversion channel – Application AP 20233670.

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**ORAL SUBMISSION OF THE WAI AU FISHERIES AND WILDLIFE HABITAT  
ENHANCEMENT TRUST**

**17 SEPTEMBER 2024**

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1. Tena koutou katoa, good afternoon Commissioners.
2. Thank you for the opportunity to provide an oral submission on behalf of the Waiau Fisheries and Wildlife Habitat Enhancement Trust (which I will hereafter refer to as the Trust) in support of its written submission on Meridian Energy Ltd's (Meridian) APP-20233670.
3. The Trust's understanding is that the purpose of this application is to enable construction and subsequent use of an additional channel upstream of the Manapouri Lake Control Structure (MLC) to facilitate more reliable provision of flushing flows. Meridian has advised that this will enable it to provide flushing flows around 70% of the time flows are required, compared to less than 30% currently.
4. My name is Claire Louise Marshall Jordan. I hold a Master of Resource and Environmental Planning with 1<sup>st</sup> class honours from Massey University, and a Bachelor of Science with 1<sup>st</sup> class honours from the University of Canterbury majoring in chemistry and environmental science.
5. I have 11 years' experience working as a policy analyst/planner and environmental scientist, including roles with the Ministry for the Environment, Tonkin & Taylor Ltd and Environment Southland (ES). I am currently engaged as an independent contractor to the Trust in a planning capacity.
6. While this is not an Environment Court hearing, I have read, and agree to abide by, the 'Code of Conduct for Expert Witnesses' in the Environment Court Consolidated Practise Note 2023.
7. The Trust submitted in support of the application, on the condition that concerns raised were adequately addressed through conditions. Meridian has made some progress in addressing the concerns raised by the Trust, and Meridian's efforts through the consultation process for this application are acknowledged. This presentation will focus on issues raised by the Trust which are yet to be satisfactorily

resolved. I will clarify the Trust's position on these issues, and the consent conditions it supports. These conditions are consistent with those submitted in the Waiau Working Party's evidence dated 10 September 2024.

8. I do not intend to embark on a full planning assessment, as that has been undertaken by others, and I am comfortable with their assessment of activity status and the relevant provisions.

9. The remaining issues for the Trust are:

9.1. The provision of bird nesting habitat, i.e. a bird island, suitable for black billed gulls. This has been ably addressed by Councillor Rodway, and I have nothing further to add on this point, but to reiterate the Trust's support of the Waiau Working Party's position.

9.2. Second, Waiau Arm water quality. Specifically, incursion of sediment into the existing channel of the Waiau Arm from the Mararoa River when the Mararoa is turbid, given the predicted flow reduction in the existing channel. The Trust understands that the existing turbidity monitoring site is approximately 1 km upstream of the MLC, north of the new channel. Adding turbidity to the suite of parameters in proposed condition 15 would provide some comfort that sediment ingress into the existing channel is being monitored, and that if a deterioration is observed, a flushing flow could be released to remedy it.

9.3. And finally, the duration of the consent and the review clause. This will be the focus of this submission.

10. Before I address consent duration, I would like to make a point of clarification in relation to a question posed by Commissioner McGarry this morning about the voluntary nature of the Flushing Flow Protocol.

11. Condition 7 of Auth-206156-V4, which forms part of the suite of operational consents for the Power Scheme, requires a Protocol for flushing flows. The heading above Condition 7 explicitly describes these flushing flows as ‘voluntary’. So, while there is a requirement for Meridian to prepare and implement the Protocol, there is also a lack of enforceability. My understanding is that the Protocol itself uses the wording ‘will endeavour’ in relation to the provision of flushing flows. Based on previous conversations with Meridian staff, I understand that this wording is deliberately distinct from the ‘best endeavours’ required by the Operating Guidelines for the Lakes, and the associated legal obligation to act.
12. Consequently, Meridian has provided these flushing flows less than 30% of the time in the 11 years the Protocol has been in place<sup>1</sup> without risking compliance action from Environment Southland.
13. The Habitat Trust’s submission requested that the consent being considered today require the flushing flow Protocol be reviewed. Alternatively, that the consent include a condition requiring financial compensation if Meridian doesn’t provide flushing flows moving forward. I accept the view expressed in the s42A report that these requests fall outside the scope of the current consent application. However, the inadequacy of Condition 7 persists, and will not be remedied by Meridian’s proposed new channel.
14. The Habitat Trust’s submission requested a consent duration of 7 years, to align this consent with the operational consents for the Power Scheme, which expire in 2031. While the Habitat Trust acknowledges that 7 years is a relatively short timeframe given the investment but sees value in the full suite of consents for the Power Scheme being considered together in 2031 when the operational consents expire.

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<sup>1</sup> Evidence of Andrew Feierabend, paragraph 45.

15. Meridian has sought a 35-year term. Meridian's planner, Mr Murray, has provided evidence in support of both a 35-year term and the review clause as proposed by Meridian, which I wish to address.
16. Firstly, a point of clarification. Mr Murray's paragraph 117 states that *'the diversion does not 'use' or lose water from the Waiau Arm.'* The physical reality of Meridian's proposal is that the last kilometre or so of the Waiau Arm above the MLC<sup>2</sup> will suffer a 2/3rds<sup>3</sup> reduction (or 'loss') in flow as a result of flow being diverted into the proposed new channel. Indeed, it is for this reason that the Waiau Trust raised concerns about potential for increases in both phytoplankton (chlorophyll-a) and fine sediment ingress into the existing channel from the Mararoa River.
17. It appears that Mr Murray considers the non-consumptive nature of the diversion somewhat unusual, and that the activity is perhaps 'inadvertently' captured by rules in the pSWLP which don't strictly address it. I disagree that the pSWLP's treatment of non-consumptive diversions is 'inadvertent'. While the same diversion rules may apply to many consumptive and non-consumptive diversions, the specificity for non-consumptive diversions comes in Policy 42. It is here that the pSWLP specifically allows for non-consumptive diversions to have unregulated flow (i.e. no gate to manage magnitude or frequency of flows), no mandated minimum flow, and no metering. Consumptive takes do not have this luxury.
18. There are other examples of non-consumptive diversions in the Waiau Catchment. For example, the Trust holds a diversion consent for habitat enhancement at the Waiau Mouth. Water is diverted into constructed wetlands for habitat enhancement,

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<sup>2</sup> Page 28 of the Proposed Manapōuri Lake Control Improvement Project Resource Consent Applications and Assessment of Effects on the Environment, December 2023.

<sup>3</sup> Paragraph 19 of the Report on pre-hearing meeting, 22 July 2024, on page 29 of the Appendices to the s42A Report.

then flows back into the River system, essentially bypassing a portion of the Waiau River, much like the proposal before you. This diversion consent was initially granted for 10 years in 2011, and a further diversion to support expanding the wetland was granted in 2014 for 7 years, to align with the existing consent. When those consents expired in 2021 the renewal was granted for 35 years, on the basis that the wetland's sustainability had been demonstrated. While there were some changes to the planning framework over the lifetime of these consents, the point is that non-consumptive diversions and associated discharges are not unique to this proposal and are not always granted for the maximum term of 35 years, even when they are activities undertaken for a net environmental benefit.

19. Mr Murray's example of the 35-year consent term granted for the Mararoa Cut is less compelling in my opinion, as it was granted in 1996, nearly three decades ago, in a very different regulatory context.
20. Mr Murray describes the time-limited nature of consents for non-consumptive diversions as a 'quirk' of the RMA. To my mind, regardless of whether it is a real 'quirk' or a deliberate policy decision which is inconvenient for Meridian in this instance, it is largely academic. The reality is that a time-limited consent is required under law, and the activity applied for is not only to form and utilize the channel, but also to maintain it. This will result in periodic discharges of sediment-laden water during future maintenance. It is appropriate then to have a time-limited consent for this activity, and to determine the duration in accordance with Policy 40 of the pSWLP.
21. Consent duration is one way to achieve the alignment between this consent and the operational consents for the Power Scheme. An alternative is a longer duration consent, combined with a review condition which specifically enables review in response to the re consenting of the operational consents for the Power Scheme. To this end, the Trust requests that the review clause proposed by Meridian is amended to explicitly enable review for this reason, in 2031.

22. The Habitat Trust is not alone in requesting amendment to the review clause. Te Ao Marama Inc (on behalf of Te Rūnanga o Ōraka Aparima), in evidence, has proposed a consent condition requiring review in 2031 should there be any material changes in flow conditions. The WWP also proposed amended wording to Meridian's review condition in its evidence to enable review following re consenting in 2031.

23. Meridian does not appear to share submitters' enthusiasm for an amended review clause. At paragraph 119 of Mr Murray's evidence, he states:

*... the submitters' proposition that the diversion should be renewed or reviewed (under section 128 of the RMA) as early as 2031– and ostensibly potentially amended or ceased at that time – is, in my view, unwarranted.*

24. I note that Meridian's proffered review condition would enable review in 2029, two years before the Trust's proposed amendment. Unfortunately, Meridian's review condition would not allow review again until 2034, three years after the operational consents expire. More importantly, Meridian's proposed review condition would not allow the consent to be reviewed for the purpose of ensuring alignment with the operational consents or to give effect to changes to the Lower Waiau River flow regime. Consequently, the Trust considers Meridian's proposed review condition is inadequate.

25. Further, despite Mr Murray's concern at paragraph 119, it is my view that both Meridian's proposed review condition, and the Trust's (detailed below) essentially preclude a review process which would result in cessation of the consent.

26. The Trust's proposed review condition below combines the suggestions of Te Ao Marama Inc and the WWP (amendments underlined):

*Condition 26. Review.*

*26. The Consent Authority may, in accordance with Sections 128 and 129 of the Resource Management Act 1991, serve notice on the Consent Holder of its intention to review the conditions of these resource consents at five year intervals, or within two months of any enforcement action being taken by the Consent Authority in relation to the exercise of this consent, or within 24 months of consents for the operation of the Manapouri Power Scheme (being replacement consents for those due to expire in 2031) being issued and any appeals decided, for the purposes of:*

- a) Determining whether the conditions of these resource consents are adequate to deal with any adverse effect on the environment, including cumulative effects, which may arise from the exercise of the resource consents, and which it is appropriate to deal with at a later stage, or which become evident after the date of commencement of these resource consents;*
- b) Ensuring the conditions of these resource consents are consistent with any National Environmental Standards, Regulations, relevant plans and/or the Environment Southland Regional Policy Statement;*
- c) Requiring the Consent Holder to adopt the best practicable option to remove or reduce any adverse effect on the environment arising as a result of the exercise of these resource consents;*
- d) Aligning the conditions of this consent with the conditions of consents for the operation of the Manapouri Power Scheme; and/or*
- e) Giving effect to changes to the flow regime for the Lower Waiau River.*

27. To conclude, the Trust endorses the WWP's position in relation to the provision of a bird island. The addition of turbidity to the list of parameters to be measured in

proposed condition 15 would provide the Trust with comfort regarding sediment ingress into the Waiau Arm from the Mararoa River. The Trust would be comfortable with a consent term of 7 years as proposed in the Trust's submission. Alternatively, if consent is to be granted for a term longer than 7 years, that the review condition be amended as described above.

28. Thank you again for the opportunity to present to you today, I'm happy to take any questions.