

**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 known as the Manapōuri Lake Control Improvement Project (**MLC:IP**)

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**OPENING SUBMISSIONS OF COUNSEL FOR MERIDIAN ENERGY LIMITED**

**17 SEPTEMBER 2024**

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## MAY IT PLEASE THE COMMISSIONERS

### Introduction

- 1 Meridian Energy Limited (**Meridian**) seeks a water permit and a discharge permit to authorise the construction, operation and maintenance of a new channel approximately 900m long to convey water in the Waiau Arm of Lake Manapōuri immediately above the Manapōuri Lake Control structure (**MLC**). The project is known as the Manapōuri Lake Control Improvement Project (**MLC:IP**).
- 2 The MLC:IP has no generation or other electricity benefits for Meridian. Rather, it is an environmental maintenance and enhancement project designed to improve flow performance through the MLC by increasing the reliability with which flows can be delivered into the Lower Waiau River (**LWR**), particularly flushing flows. Flushing flows are designed to assist in managing undesirable periphyton growths (especially didymo) that accumulate on the bed of the LWR. The MLC:IP will help ensure that the Manapōuri Power Scheme's (**MPS's**) environmental performance is maintained into the future, and, critically, that improved flow delivery is achieved without unduly compromising its vital renewable energy contributions.
- 3 The MLC:IP will not change the existing resource consent requirements Meridian operates under to provide various minimum and recreational flows in the LWR. The MLC:IP will not affect Meridian's existing obligation to manage the levels of Lakes Te Anau and Manapōuri in accordance with the Lake Operating Guidelines promulgated pursuant to the Manapouri-Te Anau Development Act 1963 (**Lake Operating Guidelines**). The MLC:IP will not change the limits on the volume of water that can be diverted through the Manapōuri Power Station.
- 4 As discussed in Mr Feierabend's evidence<sup>1</sup>, Meridian operates in accordance with an agreed protocol (**Protocol**) by which didymo accumulation (or "standing crop") in the LWR immediately downstream of MLC is monitored, and when it reaches high levels Meridian has an agreed allocation of water available annually, sufficient to provide 4 or 5 flushing flows (short duration, high volume pulses of water) which are designed to dislodge and flush downstream the overgrowth of the accumulated periphyton, allowing

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<sup>1</sup> Evidence of Andrew Feierabend, paragraphs 40 - 45

the ecology system to reset and consequently improving the overall ecological health of the upper reaches of the LWR.<sup>2</sup>

- 5 High levels of didymo accumulation in the LWR occur in summer months, typically coinciding with times when the level of Lake Manapōuri is in the lower part of the Main Operating Range as per the Lake Operating Guidelines.
- 6 Operationally, Meridian has learned that when the level of Lake Manapōuri is below the middle of the Main Operating Range (equating to a level of 177.69 m) the form and depth of the channel within the Waiau Arm immediately above MLC is such that insufficient channel volume is available to convey the desired flushing flows through MLC. This constraint is discussed in more detail in the evidence of Dr Clunie<sup>3</sup>.
- 7 The consequence is that the reliability with which flushing flows are able to be delivered in accordance with the Protocol has proven to be low – less than 30%. This in turn means that the LWR is not presently receiving most of the flows that were agreed in the Protocol as being appropriate to assist with reducing the effects of didymo proliferation.
- 8 The MLC:IP addresses the existing constraint by proposing the excavation of a new parallel channel upstream of MLC to better convey Lake Manapōuri flows from higher up the Waiau Arm through MLC. The result is expected to be the much more reliable provision of flushing flows at times indicated in accordance with the Protocol<sup>4</sup>. This is in turn expected to provide ecological benefits to the LWR by reducing the adverse effects of didymo.
- 9 As would be expected, the construction of the new channel inevitably involves earthworks in the Waiau Arm that interact with water and which will release sediment into the water. That cannot be avoided. However, Meridian has undertaken a detailed analysis of different engineering options, channel designs and construction approaches, including undertaking sediment modelling and a trial excavation project, to arrive at a proposed methodology and channel design that minimises the time construction activities are likely to encounter water, thereby minimising the opportunity for sediment to become entrained in the water column.
- 10 Meridian has completed a comprehensive assessment of the effects of the proposal which concludes that only minor short term effects are anticipated, and these are able

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<sup>2</sup> A copy of the Protocol can be found in the evidence of Andrew Feierabend, Appendix 6

<sup>3</sup> Evidence of Dougal Clunie, paragraphs 45 - 46

<sup>4</sup> Although it is noted that at times of low Lake Manapōuri levels delivery of flushing flows will still be constrained

to be appropriately managed in accordance with the approaches set out in the application and the conditions proffered.

- 11 The area where earthworks will be undertaken is a highly modified environment with correspondingly modest environmental values. This fact, together with a construction approach that allows almost all of the earthworks to be completed outside the primary channels of the existing Waiau Arm mean that significant adverse effects are not anticipated.
- 12 Extensive engagement with key stakeholders has occurred, with mixed results. While stakeholders can see the benefits of the proposal, and appear to agree that the adverse effects are limited and short term, a number have continued to want to address other matters that are beyond the scope of the application. This manifests in requests from some submitters for conditions that go well beyond anything that is reasonably required to address effects of the MLC:IP, and particularly in the case of the Waiau Working Party (**WWP**) some of the points raised in submissions and pre-hearing meetings that are identified in the expert evidence not to be problematic have again been raised as matters of contention in WWP evidence.
- 13 Meridian is under no obligation to implement the MLC:IP and submitters are free to suggest whatever conditions and restrictions they like, but do so in the knowledge that if the result was to be the granting of consents for a limited term, and/or the setting of conditions which, as a consent holder, Meridian considers are unreasonable, Meridian may elect not to give effect to the consents, with the result that the volunteered improvements in flushing flows will not be achieved.
- 14 In contrast, the expert analysis undertaken on behalf of Environment Southland as reported in the section 42A report (**42A Report**) identifies the benefits of the proposal and concludes that the adverse effects will be appropriately managed.
- 15 It is also relevant to note that discussions between Meridian and DOC have addressed DOC's areas of interest, particularly in relation to the Freshwater Fauna Management Plan, with the result that DOC is satisfied with the conditions as proffered and no longer seeks to be heard in relation to its submission.
- 16 Discussions between the expert planners Mr Murray and Ms Sullivan subsequent to the writing of the 42A Report and Meridian's evidence have resulted in the proposed condition wording which is provided with these submissions and to which Mr Murray will speak. I can confirm that Meridian accepts these conditions as being appropriate and proffers them to the Commissioners.

17 The only matter that is not agreed as between Mr Murray and Ms Sullivan as far as I am aware is the duration of consent. Mr Murray considers a 35 year term for both consents is appropriate while Ms Sullivan prefers a 25 year term. I discuss consent duration later in these submissions.

### **The Manapōuri Power Scheme**

18 The Manapōuri Power Station is the largest power station in New Zealand and lies at the heart of the Manapōuri Power Scheme (**MPS**). It contributes a large amount of electricity to the National Grid – around 12% of the current electricity needs of the nation<sup>5</sup>. It does so by harnessing the energy of water, and in doing so is a 100% renewable source of electricity.

19 While the amount of electricity produced by the MPS is vitally important to New Zealand, the importance of the MPS is further heightened because the availability of water in Lake Te Anau and Lake Manapōuri from consistent inflow patterns means that generation is able to be provided flexibly.

20 The large scale and flexibility of the MPS means that it is expected to continue to perform an essential role as a cornerstone of New Zealand's electricity system for the foreseeable future. Indeed, its importance moving forward is probably greater than it has ever been. Overall demand for electricity is expected to rise sharply over the next several decades. New Zealand is committed to a renewable electricity future as part of the decarbonisation of the economy and the amount of electricity generated from non-renewable sources (primarily coal and gas) is declining.

21 Most new renewable generation being planned and built to meet growing demand is wind and solar. These types of generation are intermittent. They produce electricity only when the wind is blowing and the sun is shining. They are inflexible, in the sense that their fuel - wind and solar radiation – cannot be stored to use at a later time.

22 That is why large hydro with consistent inflows and storage is becoming more and more critical to our electricity system. The importance of being able to operate flexibly to meet growing (and variable) electricity demand by drawing on greater or lesser amounts of stored water in a way that keeps the electricity system in balance having regard to the amount of electricity being produced from intermittent sources, and having regard to reductions in flexible non-renewable generation, cannot be overstated.

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<sup>5</sup> Evidence of Andrew Feierabend, paragraph 14

- 23 The critical importance of the MPS and the other four largest hydro schemes in this regard is recognised in the National Policy Statement for Freshwater Management 2020 (**NPSFM**) which seeks to ensure their contributions are protected<sup>6</sup>.
- 24 It is well recognised that large renewable electricity schemes like the MPS create major national benefits, but have unavoidable effects at a local level<sup>7</sup>.
- 25 The MPS works by diverting water through the power station in the West Arm of Lake Manapōuri and discharging it to Deep Cove in Doubtful Sound, and by controlling the levels of Lake Te Anau and Lake Manapōuri through the use of lake outlet structures Te Anau Lake Control (TLC) and MLC respectively. MLC also controls flows from the Mararoa River which can be either passed through into the LWR or diverted along the Waiau Arm of Lake Manapōuri for generation purposes.<sup>8</sup>
- 26 As a result of the way the MPS operates both the volume and timing of flows from Lake Manapōuri into the LWR immediately below MLC are impacted, as are flows into the LWR from the Mararoa River.
- 27 The operation of the MPS is authorised and regulated in part by the Manapōuri – Te Anau Development Act 1963 (**MTADA**), and in part by the Resource Management Act 1991 (**RMA**).<sup>9</sup> In relation to the RMA, Meridian Energy holds a variety of existing resource consents which authorise the operation and maintenance of the MPS, and which include (amongst other matters) conditions specifying maximum rates of water take for generation purposes and minimum flow requirements in the LWR. None of the existing resource consents relating to the current operation of the MPS are being changed as part of the MLC:IP<sup>10</sup>.
- 28 The MLC:IP engages both MTADA and RMA. Some activities associated with the MLC:IP are authorised under MTADA. These are described in Mr Murray’s planning evidence<sup>11</sup> and in the 42A Report<sup>12</sup>. Those activities cannot be controlled under the RMA. The taking, diverting and use of water for the MLC:IP and the discharge of water and associated suspended sediment for construction and maintenance purposes are

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<sup>6</sup> Clause 3.31 of the NPSFM provides that in implementing any part of the NPSFM regional councils must have regard to the importance of the energy contributions of the MPS, Waitaki Scheme, Clutha Scheme, Waikato Scheme, and Tongariro Scheme. Together these schemes account for almost all of New Zealand’s controllable hydro storage

<sup>7</sup> For example the Preamble to the National Policy Statement for Renewable Electricity Generation 2011 states: “Development that increases renewable electricity generation capacity can have environmental effects that span local, regional and national scales, often with adverse effects manifesting locally and positive effects manifesting nationally.”

<sup>8</sup> Evidence of Andrew Feierabend, paragraphs 14-17

<sup>9</sup> Evidence of Andrew Feierabend, paragraphs 18-39

<sup>10</sup> The main operating consents for the MPS expire in 2031 and will need to be replaced via a separate process

<sup>11</sup> Evidence of Daniel Murray, paragraphs 29 - 34

<sup>12</sup> Section 42A Report, paragraph 3.2.5

not authorised under MTADA, are not permitted under the relevant regional plan rules, and therefore require consents under the RMA. It is these consents to which this hearing relates.

- 29 Importantly, the MLC:IP does not engage with the appropriateness or otherwise of the environmental flows in the LWR set in existing resource consents. This topic is raised in several submissions, but existing flow requirements cannot be changed in this process. This includes the details of the Protocol which is required by a condition of an existing consent, and the conditions that address the effects of the operation of the MPS generally. Similarly, the way Mararoa River flows are managed is not within scope, and neither are the obligations Meridian has to manage the levels of the lakes in accordance with the Lake Operating Guidelines. These matters are all effectively part of the existing environment that forms the context within which the MLC:IP sits.
- 30 Similarly, submissions suggesting that engineering changes should be considered at MLC to lower the ‘sill’ are misplaced. MLC is an existing lawful structure and there is no proposal to undertake significant engineering works on that structure. Any such works would necessarily involve a major programme of investigation, design, and consenting, and would no doubt give rise to adverse effects different and potentially greater than those contemplated by the MLC:IP. Meridian has no current plan to undertake such works and they are not considered to be a realistic alternative means by which more reliable flushing flows could be delivered to the LWR. In any event the MLC:IP or a similar project would need to be completed before any such work could even be contemplated.

### **Why the MLC:IP?**

- 31 The Waiau catchment (including the Mararoa River and the Lower Waiau River immediately below MLC) is subject to didymo infestation. Didymo is an exotic nuisance form of periphyton that thrives in cool, clear, low-nutrient water. It particularly enjoys the stable flows that typically result where rivers are lake-fed. The Waiau and Mararoa Rivers therefore provide ideal conditions for didymo. Didymo forms thick, dense mats on riverbeds that adversely affect both ecological health and amenity.
- 32 The source of didymo’s introduction to the Waiau is not known although it is thought likely to have been brought in from overseas on angling gear. It was first detected in 2004, long after the MPS’s construction, and is not caused by the MPS. To the extent that the operation of the MPS results in further stabilisation of flows in the LWR this may increase the suitability of the riverbed for didymo, although attribution is scientifically difficult because it is impossible to study what didymo would look like in the LWR without MLC and the Lake Operating Guidelines in place.

- 33 There is no proven way to eliminate didymo, but providing ‘flushing flows’ when didymo levels are high can reduce didymo biomass and help reset the ecological system.
- 34 As discussed in Mr Feierabend’s evidence<sup>13</sup>, in 2012 Meridian varied consent 206156 in consultation with key stakeholders to introduce a requirement to initiate flushing flows in accordance with a certified Protocol. The purpose of the Protocol is to add variability to the flow regime downstream of MLC in a way that will help manage nuisance periphyton, and particularly didymo, in the LWR while having an acceptable impact on the MPS’s energy contributions.
- 35 The Protocol was first put in place in 2013 and has subsequently been varied three times, with the current version dating from November 2018<sup>14</sup>. The Protocol in essence provides for the release of a maximum of 15GWh of stored water via 4-5 flushing flows each year (December – May) at times when monitoring shows high levels of didymo.
- 36 The outcome contemplated by the Protocol has not been achieved in practice. This is because at times when monitoring indicates a flushing flow is desirable the level of Lake Manapōuri is often lower than the level required for a sufficiently large flushing flow to be promulgated.
- 37 Investigations undertaken by Damwatch for Meridian Energy revealed that the constraint on being able to provide flushing flows at times when the level of Lake Manapouri is below the middle of the Main Operating Range arises because of the depth and shape of the Waiau Arm channel immediately upstream for about 1km from MLC. This is discussed in detail by Dr Clunie.
- 38 While Meridian is under no consent obligation to improve the conveyance of water out of MLC, the MLC:IP is seen as a responsible response to the didymo problem that Meridian is able to achieve relatively quickly; at a realistic cost (albeit millions of dollars); without having a significant effect on the MPS’s nationally important energy contributions – electricity output and flexibility; and without significant adverse effects.

### **Statutory context**

- 39 The relevant statutory provisions are discussed in detail in the AEE, the 42A Report and Mr Murray’s planning evidence.
- 40 There is no disagreement between Meridian and the Council as to the relevant provisions of the RMA and the statutory planning documents that apply. My comments

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<sup>13</sup> Evidence of Andrew Feierabend, para 37

<sup>14</sup> Evidence of Andrew Feierabend, paragraph 38



are therefore relatively brief, and I simply set out what I submit are the relevant provisions you will need to note and consider as appropriate in your decision-making.

41 There may be a minor disagreement between Meridian and Ms Sullivan’s view as to which rule in the pSWLP (and therefore activity status) applies to the discharge permit, and I discuss this later in these submissions.

42 **Section 104(1)** sets out the matters you must consider when assessing a consent application. Subject to Part 2 (which I discuss later) those matters are:

- The effects on the environment
- The relevant provisions of the planning instruments
- Any other matters you consider relevant and reasonably necessary to determine the application

43 There is broad agreement between Mr Murray and Ms Sullivan as to what matters are relevant and how they should be assessed and weighted on the evidence. I have nothing substantive to add to the discussion contained in the planning evidence and 42A Report, other than to note that effects have been thoroughly assessed, and the various conditions proposed will ensure that adverse effects are properly managed in accordance with the effects management framework such that any residual adverse effects will be minor.

44 **Section 104(3)(c)(i)** provides that you may not grant a consent contrary to section 107. I discuss section 107 below.

45 Mr Murray assesses the activity status of the consents applied for<sup>15</sup> and concludes that the water permit is a non-complying activity and that the discharge permit is either discretionary (if Rule 5 in the pSWLP applies) or non-complying under Rule 6. Applying the bundling concept, which I agree is appropriate in this case as the application is for an integrated project, Mr Murray assesses the overall proposal as a non-complying activity. The jurisdictional test in **section 104D** is therefore engaged. Both expert planners agree that both limbs of the threshold test are met – that is the adverse effects are not more than minor and the proposal is not contrary to the relevant objectives and policies in the pSWLP - and there is therefore no jurisdictional bar to the grant of consents. I agree.

46 The question of whether Rule 5 or Rule 6 applies to the discharge consent turns on whether the ‘exception’ to the water quality standards in Appendix E of the pSWLP

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<sup>15</sup> Evidence of Daniel Murray, paragraphs 47 - 65

applies<sup>16</sup>. This is because it is anticipated that at times during construction the relevant visual clarity standard may not be met after reasonable mixing. As Mr Murray notes the short term nature of sediment effects associated with the MLC:IP are a poor fit with the policies that underpin the Appendix E water quality standards which are directed more at long-term outcomes<sup>17</sup>. Mr Feierabend notes in his evidence that the MLC:IP was the very project given in the Environment Court as an example of the sort of project to which the ‘exception’ in Appendix E is directed<sup>18</sup>. The exception records that the Appendix E standards do not apply where *“an ancillary activity associated with the maintenance of the Manapōuri hydro-electric generation scheme is proposed. This exception only applies where the activity requires a resource consent pursuant to a rule in this plan and will only result in a temporary change in the state of the water”*. In my submission this exception is well-aligned with the MLC:IP. The proposal is associated with the overall maintenance of the MPS, and in particular the ability to reliably deliver all consented flows with a focus on flushing flows, and will have water quality effects that are temporary. In my submission the exception therefore applies, and this in turn means the proposal comes within Rule 5 (as a discretionary activity) and does not default to a non-complying activity under Rule 6.

47 Notwithstanding the above discussion, and as I noted earlier, I agree with Mr Murray and Ms Sullivan that bundling is appropriate and accordingly the overall project should be considered as a non-complying activity.

48 Because a discharge permit is being applied for **section 105** is engaged. This section requires you to have regard to the nature of the discharge and the sensitivity of the receiving environment; the reasons why Meridian is proposing this discharge; and any possible alternative methods of discharge (including into different receiving environments).

49 Mr Murray discusses this in his evidence<sup>19</sup>. There is ample material before you to allow you to be satisfied on these matters<sup>20</sup>. There is clearly no other receiving environment available for the discharge of water and sediment, and the method Meridian has selected is the one which minimises adverse effects to the greatest extent possible while still achieving the ecological benefits that the project is focused on.

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<sup>16</sup> Evidence of Daniel Murray, paragraph 61 -

<sup>17</sup> Evidence of Daniel Murray, paragraph 59

<sup>18</sup> Evidence of Andrew Feierabend, paragraphs 67 - 68

<sup>19</sup> Evidence of Daniel Murray, paragraphs 138 - 140

<sup>20</sup> The consideration of alternatives is discussed by Mr Feierabend and Dr Clunie, and the sensitivity of the receiving aquatic environment (and the anticipated short term effects) is discussed by Dr Hoyle, Dr Hogsden and Dr Hickford.

50 **Section 107** contains restrictions on the circumstances where discharge permits may be granted by setting out a range of effects that must not be authorised. Neither Mr Murray nor Ms Sullivan consider that this section raises a jurisdictional impediment to the granting of a discharge permit in this case.

51 I agree and make the following observations:

- a. The unacceptable effects must not occur beyond a zone of reasonable mixing, which is not expected to occur in this case
- b. Elevated sediment levels resulting from the construction activities will be a temporary effect, and this is expressly allowed for under section 107(2)(b)
- c. The environmental goal of the MLC:IP is to reduce unwanted nuisance periphyton below MLC, and thereby to enhance the overall ecological health of the LWR. But the additional reliability of flows is certainly intended to have an adverse effect on didymo, a form of aquatic life. Taken literally, it could be argued that this is not allowed for under section 107(1)(g) because the prohibition is on a discharge that gives rise to “any significant adverse effects on aquatic life”, and on its face makes no allowance for reducing unwanted aquatic life. That would of course be a perverse outcome and the provision should not be read in that way in my submission. Nevertheless, if such a perverse interpretation was applied I submit that “exceptional circumstances justify the granting of the permit”<sup>21</sup>.

52 The considerations in section 104(1) are expressed to be subject to Part 2. This allows for a high level check, where necessary, to ensure that the analysis of factors in section 104(1) does not lead to a result that fails to promote the sustainable management purpose of the RMA. In this case I submit the analysis of positive and adverse effects, and consideration of the relevant planning provisions, readily allow the conclusion to be drawn that the MLC:IP consents should be granted as sought. Accordingly, in my submission no recourse to Part 2 is required. In any event, if Part 2 is considered it is abundantly clear that the MLC:IP promotes sustainable management.

53 The application for resource consents was made by Meridian in December 2023. It was accepted as complete by Environment Southland pursuant to section 88.

54 Two sets of further information were provided by Meridian in response to requests from Environment Southland.

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<sup>21</sup> Section 107(2)(a)

- 55 Meridian requested that the application be publicly notified, which duly occurred, resulting in the receipt of 14 submissions. One of the submitters, the Guardians of Lakes Manapōuri, Monowai, and Te Anau (**Guardians**) is a statutory body with strictly limited functions that do not include making submissions on resource consent applications. That creates an unusual situation which I discuss later in these submissions.
- 56 Two pre-hearing meetings were held with the outcomes from those meetings recorded by Louise Taylor who was engaged as an independent chair to conduct those meetings. You are required to have regard to these reports under s 99(7) of the RMA.
- 57 A comprehensive 42A Report and evidence from Meridian and its independent experts have been provided.
- 58 I therefore submit you have a comprehensive body of information before you upon which you can rely to reach the decision that consents should be granted on the conditions proffered and for a 35 year term.
- 59 The relevant planning provisions are discussed in the AEE as well as in both Mr Murray's evidence and the 42A Report. There are no matters of substantial difference that arise from this material, and in my submission you can rely on the analyses that have been presented.
- 60 The only point I would note is that the MLC:IP is not a 'normal' proposal that the pSWLP contemplates, and accordingly it sits uncomfortably within the rule framework of the pSWLP. However, as Mr Murray in particular discusses, the proposal is in alignment with the policy direction and outcomes anticipated by the plan.

### **Cultural effects**

- 61 The Waiau River is the subject of a statutory acknowledgement in the Ngāi Tahu Claims Settlement Act 1996<sup>22</sup>. Meridian acknowledges the significance of the Waiau to Ngāi Tahu, and recognises that the MPS has unavoidably affected the Waiau and the relationship of Ngāi Tahu with the river.
- 62 A neutral submission was made on the application by Te Ao Mārama Inc (**TAMI**) on behalf of Te Rūnanga o Ōraka Aparima, and evidence has been provided that includes a Cultural Impact Statement (**CIS**).
- 63 The evidence and CIS discuss the wider cultural context and values associated with the Waiau River and the effects of the MPS, as well as the effects of the MLC:IP.

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<sup>22</sup> Schedule 69

Following receipt of the evidence and CIS Meridian has had further discussions with TAMI to clarify the submitter's views in relation to the MLC:IP.

64 Mr Feierabend will address this further in his evidence, and you will hear from Mr Whaanga and/or Ms Blair from TAMI but my understanding is that the position is as follows:

- a. It is accepted that wider issues of cultural concern regarding the effects of the MPS cannot be addressed in the MLC:IP consents
- b. These wider effects will need to be addressed via Plan Change Tuatahi<sup>23</sup> and in the re consenting of the MPS in due course
- c. Te Rūnanga o Ōraka Aparima considers the MLC:IP does have benefits associated with more reliable flushing flows with the objective of improving the ecosystem health and functioning of the LWR
- d. Te Rūnanga o Ōraka Aparima and Meridian will work together outside the consent framework for the MLC:IP to ensure appropriate cultural oversight of construction work, management of any cultural issues associated with construction, and opportunities to enhance cultural values associated with the development site.

### **Waiau Working Party**

65 Evidence for the Waiau Working Party (**WWP**) has been provided by Mr Rodway and Dr Bennett. The evidence raises a number of technical issues, some of which Meridian thought had been resolved through the pre-hearing meeting processes.

66 To the extent that the matters addressed in the WWP evidence are not already traversed in the Meridian evidence, the relevant Meridian experts will provide brief comments when they present their oral evidence.

67 In short, the WWP evidence has not caused the technical advice to Meridian to change, and the conditions proffered therefore remain appropriate.

### **Guardians submission**

68 Section 6X of the Conservation Act 1987 (**CA87**) was inserted by the Conservation Law Reform Act 1990 as part of a series of major changes to the Conservation Act.

69 Section 6X reads:

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<sup>23</sup> Plan Change Tuatahi is the plan change by which Environment Southland will implement the national objectives framework in the NPSFM

**6X Guardians of Lakes Manapouri, Monowai, and Te Anau**

- (1) The Minister may, on such terms and conditions as the Minister may from time to time specify, appoint suitable persons to be the Guardians of Lakes Manapouri, Monowai, and Te Anau.
- (1A) The persons appointed to be Guardians must include at least 1 person nominated by Te Rūnanga o Ngāi Tahu (as established by [Te Runanga o Ngai Tahu Act 1996](#)).
- (2) The functions of the Guardians shall be—
  - (a) to make recommendations to the Minister on any matters arising from the environmental, ecological, and social effects of the operation of the Manapouri-Te Anau hydroelectric power scheme on the townships of Manapouri and Te Anau, Lakes Manapouri and Te Anau and their shorelines, and on the rivers flowing in and out of those lakes, having particular regard to the effects of the operation on social values, conservation, recreation, tourism, and related activities and amenities:
  - (b) to make recommendations to the Minister on any matters arising from the environmental, ecological, and social effects of the operation of the Monowai Power Scheme on Lake Monowai, its shoreline, and on the rivers flowing in and out of Lake Monowai, having particular regard to the effects of the operation on social values, conservation, recreation, tourism, and related activities and amenities:
  - (c) to make to the Minister, and to the Minister responsible for the administration of the [Manapouri-Te Anau Development Act 1963](#), recommendations on the operating guidelines for the levels of Lakes Manapouri and Te Anau, for the purposes of [section 4A](#) of that Act.
- (3) The Guardians shall in each year make a report to the Minister on their meetings and recommendations.
- (4) Except as otherwise expressly provided, every reference in any other Act to the Guardians of Lakes Manapouri and Te Anau shall be read as a reference to the Guardians appointed under subsection (1).

70 It is clear from section 6X(2) that the functions of the Guardians are limited to making recommendations to the Minister of Conservation in relation to the matters described in section 6X(2)(a), (b), and (c)<sup>24</sup>. There are no other provisions in the CA87 that mention the Guardians.

71 Section 75 of the now repealed Spatial Planning Act 2023 (**SPA23**) made various amendments to other Acts as specified in Schedule 5 of that Act. One of the amendments was to section 6X of the CA87. A new function was given to the Guardians in relation to limited participation in the development of a regional spatial strategy<sup>25</sup> by adding a new clause (d) to section 6X(2) which stated:

“(d) to participate in the process under the Spatial Planning Act 2023 for preparing the regional spatial strategy that relates to Lakes Manapōuri, Monowai, and Te Anau in a manner that is consistent with the other functions of the Guardians.”

72 That amendment was consequentially repealed when the SPA23 was repealed on 23 December 2023.

73 There is nothing in the CA87 to suggest that the Guardians have the ability to operate beyond or outside of making recommendations to the Minister in relation to the listed

<sup>24</sup> In relation to the lake level operating guidelines as referred to in section 6X(2)(c) the Guardians’ recommendations are also made to the Minister of Energy as the Minister responsible for the administration of the Manapōuri-Te Anau Development Act 1963

<sup>25</sup> Regional spatial strategies were a new regional planning document created by the Spatial Planning Act 2023. With the repeal of that Act at the end of 2023 regional spatial strategies no longer exist as part of the resource management planning framework

matters in section 6X(2)(a) – (c). The Guardians have no general power of competence.

74 The making of a submission and participation in resource consent processes under the RMA are not activities that are reasonably necessary or expedient in fulfilling the Guardians' statutory function to provide recommendations to the Minister. Accordingly I submit that the making of a submission is *ultra vires* and unlawful vis a vis the Guardians' statutory function. This conclusion is reinforced by the brief inclusion of section 6X(2)(d) as an amendment made under the SPA23. The fact that Parliament considered it necessary to explicitly create this additional function for the Guardians in relation to one, now defunct, planning process (the development of a regional spatial strategy) rather than a broader function of participation in planning and consenting processes generally, provides a strong indication that participation in other statutory processes under the RMA is not a function of the Guardians.

75 Notwithstanding the foregoing points regarding the Guardians' submission I note that the substantive issues the submission addresses are also covered in other submissions and have been responded to in the application, evidence and proffered conditions.

76 I also note both the Guardians and DOC<sup>26</sup> have been made aware of Meridian's view on the lawfulness of their submission and both parties have elected not to be heard in relation to their submissions on the application.

### **Consent duration**

77 Meridian seeks 35 year terms on both consents.

78 While initial construction is a time-limited activity, once in place the proposed diversion channel will be permanent, and is likely to require limited periodic maintenance. No party suggests or could expect that MLC:IP channel, once excavated and established, will at the end of the consent then be disestablished and filled back in.

79 A variety of consent durations are suggested by submitters and in the 42A Report. In response I make the following observations.

80 The MLC:IP is a discretionary project. Meridian is under no compulsion to undertake the proposed works, and will likely not do so if it considers it has insufficient certainty of term to justify the investment of capital in the project.

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<sup>26</sup> Noting that the Guardians' role is to make recommendations to the Minister of Conservation which could inform the Minister or DOC's submission on an application such as this – see paragraph 69 of the second pre-hearing meeting

81 It is a well-accepted principle that consent holders should be entitled to as much security of consent term as is consistent with sustainable management<sup>27</sup>. The question that arises is whether there is a compelling resource management reason why only short term consents should be granted for the operation and maintenance of the MLC:IP.

82 Policy 40 of the pSWLP provides a list of 7 non-exhaustive factors to be considered when determining the duration of consents<sup>28</sup>. I submit that none of those factors indicate the granting of a consent term less than the 35 years sought by Meridian.

83 The oft-quoted case *PVL Proteins Ltd v Auckland RC*<sup>29</sup> provides a catalogue of factors that can be relevant to the duration of a consent, though perhaps the most important point to make that arises from that case is a general one. Consent duration cannot be considered in isolation. Rather, it must be considered within the context of an entire activity and its effects, the relevant provisions in the planning documents, the nature of the receiving environment, and in the context of the various conditions and constraints within which an activity must lawfully operate.

84 The duration of a consent cannot be divorced from the other factors forming the overall context of an activity and is correctly seen as part of a ‘consent package’. Quite properly, where other parts of the package are weak – where there is no commitment to minimise adverse effects on the environment, and those effects could be serious and permanent - a shorter consent duration may be indicated so as to ensure the promotion of sustainable management. Conversely, where potential adverse effects are understood and will be managed to a very low level a longer term is appropriate.

*Factors relevant to this application*

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<sup>27</sup> *Bright Wood NZ Ltd v Southland RC* EnvC C143/99

<sup>28</sup> **Policy 40 – Determining the term of resource consents**

When determining the term of a resource consent consideration will be given, but not limited, to:

1. granting a shorter duration than that sought by the applicant when there is uncertainty regarding the nature, scale, duration and frequency of adverse effects from the activity or the capacity of the resource;
2. relevant tangata whenua values and Ngāi Tahu indicators of health;
3. the duration sought by the applicant and reasons for the duration sought;
4. the permanence and economic life of any capital investment;
5. the desirability of applying a common expiry date for water permits that allocate water from the same resource or land use and discharges that may affect the quality of the same resource;
6. the applicant’s compliance with the conditions of any previous resource consent, and the applicant’s adoption, particularly voluntarily, of good management practices; and
7. the timing of development of FMU sections of this Plan, and whether granting a shorter or longer duration will better enable implementation of the revised frameworks established in those sections.

<sup>29</sup> EnvC A61/2001 at [27] – [34]



- 85 **Scale of adverse effects.** The expert assessments accompanying the application conclude that there are no significant adverse effects arising from the proposed construction and periodic maintenance of the channel. This is not a case where an applicant is proposing to adopt a sub-standard solution, or to suggest that the benefits of the proposal are such that significant adverse effects are justified.
- 86 **A project that benefits the environment.** The MLC:IP will improve environmental conditions downstream in the LWR by increasing flow reliability. There is no proper basis upon which to conclude that this benefit should only be provided for a limited duration.
- 87 **No proposal to reinstate original channel.** The application is to construct, operate and maintain a permanent channel. Meridian is not applying for approval to reinstate the original channel at the end of the consent duration. To require a fresh application to be made within a shorter period than the RMA allows would be inefficient given the permanence of the proposed works.
- 88 **Agreed management plan.** The applicant has proffered strong management plan conditions that are agreed as between it, the 42A Report writer and DOC. This will ensure that activities undertaken pursuant to the consents will occur in a way designed to minimise adverse effects.
- 89 **Monitoring and formal review.** An appropriate monitoring regime is proffered to ensure that water quality effects of the proposal do not cause phytoplankton blooms. A section 128 review condition is proffered to give the Council a 5-yearly ability to review the conditions of the consents.
- 90 This application is for consents to maintain and enhance the performance of an existing nationally important activity that delivers enormous national benefits. The effect of the MLC:IP will be overwhelmingly positive, with unavoidable adverse effects associated with construction being both short term and small scale in the receiving environment.
- 91 The MLC:IP will produce a long term (permanent) benefit for the ecological health of the LWR by enabling the more reliable delivery of flushing flows to reduce the effects of nuisance periphyton. The project has been carefully designed to minimise adverse effects associated with construction of the diversion channel. The effects that cannot be avoided are managed through conditions so that the net effects will be no more than minor.

92 In all the circumstances I submit that the consents sought should be granted on the conditions proffered for a term of 35 years.

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

Stephen Christensen

**Counsel for Meridian Energy Limited**

17 September 2024