

BEFORE THE MACKENZIE DISTRICT COUNCIL

IN THE MATTER OF A Plan Change under Schedule 1 of the
Resource Management Act 1991

AND

IN THE MATTER OF Plan Change 18 to address the effects of
vegetation clearance on indigenous vegetation

**LEGAL SUBMISSIONS FOR MERIDIAN ENERGY LIMITED
REGARDING PLAN CHANGE 18
DATED 2 March 2021**

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TABLE OF CONTENTS

| | |
|---|----|
| Introduction and Housekeeping..... | 3 |
| Terms | 3 |
| Summary of Analysis | 4 |
| Some Self-Evident Facts..... | 6 |
| The Waitaki Power Scheme Operating Easement..... | 7 |
| Legal Analysis | 7 |
| What should the content of the objective for MDP Section 19 be? | 7 |
| Planning is about resolving conflicts in values..... | 7 |
| CRPS and its instructions for MDC on resolving the conflicting values..... | 9 |
| What is an objective, and what is its relationship to policies and methods? | 12 |
| The first decision of the Environment Court in High Country Rosehip and Orchards Limited v. Mackenzie District Council..... | 13 |
| Conclusion on the content of the objective..... | 13 |
| Policy 2 and no “net loss” | 14 |
| Policy 7 guiding Management of the Waitaki Power Scheme | 14 |
| Existing use rights | 15 |
| The s42A Report by Ms White | 16 |
| The Evidence of Dr Susan Walker..... | 17 |

MAY IT PLEASE THE PANEL:**Introduction and Housekeeping**

- [1] My name is John Maassen, and I represent Meridian Energy Limited, a submitter to Plan Change 18. I am very familiar with the Waitaki Power Scheme and the Mackenzie District Plan because:
- (a) I acted for Meridian Energy Limited on Plan Change 13 concerning the outstanding landscape provisions of the Mackenzie District Plan for the Mackenzie Basin. The litigation spanned almost a decade in the Environment Court and High Court. It involved at least 11 decisions of the Environment Court and two decisions of the High Court.
 - (b) I acted for Meridian Energy Limited on Plan Change 19.
 - (c) I recently acted for Meridian Energy Limited on a Public Works Act matter concerning Lake Pukaki's margins and Meridian Energy Limited's operating easement that was addressed by the High Court decision *Guide Hill Station Limited v. Her Majesty's Attorney-General & Meridian Energy Limited*.¹
- [2] These submissions support changes to Ms White's recommended version for PC 18. The submissions are made for Meridian Energy Limited and support the planning analysis and recommendations made by Sue Ruston for Meridian Energy Limited. There is some cross-over between the planning and legal disciplines. The directions in RMA, ss74 and 75 and the instruments to which these provisions relate require interpretation that falls within the legal discipline as *King Salmon*² shows. Still, a legal analysis is not evaluative and, therefore, a legal analysis is secondary to the main business of plan-making, which is planning based using the tools in RMA, s32 in combination with ss74 and 75.

Terms

- [3] Ms White's recommended version is called "PC-18(s42A)". Ms Ruston's proposed variation to PC-18(s42A) is called "PC-18 (Ruston)". For clarity "PC-18 (Ruston)" includes the agreed iterations in provisions that I have been given following conferencing between Ms Ruston and Mr Mitchell for Genesis Energy after evidence was exchanged.
- [4] All other acronyms are self-explanatory from the evidence.

¹ *Guide Hill Station Limited v. Her Majesty's Attorney-General & Meridian Energy Limited* [2019] NZHC 3216

² *Environmental Defence Society Incorporated v. The New Zealand King Salmon Company Limited* [2014] NZSC 38

Summary of Analysis

- [5] The primary question is whether and how the proposed new single objective (or goal) of Section 19 of the Plan should address the clearance of significant or any indigenous vegetation to support the operation, maintenance, refurbishment and upgrade of the Waitaki Power Scheme. I address that question in light of the following uncertainties and risks:
- (a) Non-identification of the indigenous vegetation resources to which Section 19 relates and the absence of a resource values taxonomy. Therefore, the proposed regime can only be a somewhat blunt planning instrument with significant potential for unintended consequences: see Ms White's Summary Statement in her s42A report at [6]. That non-identification runs against directions in case law. For example Whata J's finding in the high Court the s 6(c) resources should be identified.³ See also [36] of these submissions.
 - (b) The potential risk to New Zealand's ability to meet climate change goals as an unintended consequence of poor planning and poor drafting that affects nationally significant renewable energy infrastructure. That risk is elevated by a sectional review process the Council follows; see White s42A report at [273].
 - (c) Uncertainties concerning what indigenous vegetation may be affected by the refurbishment and upgrade of the Waitaki Power Scheme and hence uncertainty about future potential effects on biodiversity.
 - (d) The small spatial scale of activities involving the operation and maintenance of the Waitaki Power Scheme relative to the district's scale and the likely distribution of indigenous vegetation throughout the district.
- [6] My conclusion on the content of the single proposed objective is that the relevant provisions of the RMA, especially Part 5, NPSREG and especially the relevant parts of Chapter 16 in the CRPS point to the need to:
- (a) Advance the reconciliation of the foreseeable conflict in values between maintaining indigenous vegetation and significant habitat and sustaining and enabling the operation, maintenance, refurbishment and upgrade of nationally significant renewable energy resources to different degrees. That is best done by creating in the Objective (not elsewhere) an *ethic* or approach to addressing that potential conflict in values in cases of uncertainty in cases such as for refurbishment or upgrades of the Waitaki Power Scheme rather than presenting a definitive and directive resource outcome for

³ *Royal Forest and Bird Protection Society of New Zealand Inc v Auckland Council* [2018] NZHC 1069, (2018) 20 ELRNZ 704

indigenous biodiversity such as “protection”. Such a definitive outcome has the pretence of resolving (or even side-stepping) the conflict and is contrary to the CRPS Chapter 16.

- (b) My recommended approach is the optimal way *to assist* the Mackenzie District Council to perform its functions as required by RMA, s72 recognising the competing and high-order values and the risks and uncertainties. The national significance of the renewable energy resources and their role in addressing climate change warrant a bespoke consideration in the objective that pastoral farming, for example, or other activities presenting a risk to indigenous vegetation do not. That also follows from the CRPS at Chapter 16 that recognises that renewable energy infrastructure needs special planning treatment.
- (c) The Plan's ethic expressed in the Objective for Section 19 should be one of ‘management’ where the activity affecting indigenous vegetation is the refurbishment and upgrade of the Waitaki Power Scheme and one of enabling ‘use’ for activities required for operation and maintenance of the Waitaki Power Scheme. That is consistent with Ms White’s s42 A report at [9] of the summary statement and gives effect to NPSREG and the CRPS. Policies and assessment criteria can provide more finely grained ‘matters of regard’ to be accounted for in evaluating resource consent applications for refurbishment and upgrade. These provisions can flesh out the machinery and values of the management ethic. I note that ‘management’ (as with the definition of “sustainable management”) captures the protection, use and development of indigenous vegetation resources. That represents a continuum of potential options. Decisions on where on that continuum, the optimal regulatory setting lies in any case where the conflict arises are best addressed in the resource consent process based on the regulatory efficacy standards of RMA, s32. The last point is supported by Ms White’s report at [121], where Ms White says: *As proposed, the District Plan itself does not identify the values that makes particular areas significant, as not all significant areas are identified. In this case, what makes areas significant is driven by the criteria in Appendix 3 of the CRPS, and outside of SONS, this requires assessment on a case-by-case basis.*

- [7] My conclusion on Policy 2 is that ‘no net loss’ policy should be confined to rural development and pastoral intensification as the primary risks in the evidence to indigenous biodiversity with no correlative national benefits. In this respect, I go slightly further than Ms Ruston. I also consider that is necessary to give effect to the CRPS Chapter 16 that recognises off sets and environmental compensation for refurbishment and upgrade of existing infrastructure.

- [8] My conclusion on Policy 7, as recommended by Ms Ruston, is that it gives effect to the NPSREG and the CRPS. The proposed rules applying to the Waitaki Power Scheme appropriately implement that policy.
- [9] I support the definition of “indigenous vegetation” by Dr Thorsen at [42] of his SOE because without identification a higher degree of accuracy in definition is warranted to ensure the application of the proposed rules in the field can be achieved by an expert without too much interpretation and personal judgment. The need for that is self-evident and I do not address the point further in these submissions.⁴
- [10] The following sections of these submissions address the law and related matters and collectively support the summary above.

Some Self-Evident Facts

- [11] These submissions accept that the Waitaki Power Scheme is of immense national significance. It is not an overstatement to say that it is the ‘battery’ of New Zealand. The Scheme will play a crucial role in enabling New Zealand to meet its climate change goals, and managing the effects of climate change is the most pressing environmental issue to sustain New Zealand’s indigenous biodiversity. I rely on the evidence of Catherine Bryant for Meridian Energy Limited.
- [12] Because of that context, the weight to be attached to the direction to implement NPSREG and CRPS relating to renewable energy infrastructure is great and should guide and inform every step of the planning process.
- [13] In *High Country Rosehip and Orchards Limited v. Mackenzie District Council*⁵ the Environment Court held:

[45] The Waitaki valley's hydroelectric power scheme as a whole generates nearly 30% of New Zealand electricity. While extensive, the Waitaki Power Scheme is not large in proportion to the area of the Mackenzie Basin as a whole. Key assets in the (upper) Waitaki Power Scheme are two dams - the Pukaki High Dam and the Ruataniwha Dam, four canals, five power stations and the transmission lines. As we have recorded, there is an appeal about PC13 by Meridian, the owner (at the time of the hearing) of most of the infrastructure in the Waitaki Power Scheme. The transmission lines are owned by Transpower, which took no part in the hearing. Meridian's witness, Mr Smales, and counsel also emphasised that the Waitaki Power Scheme is a major and ongoing engineering enterprise. It requires maintenance to ensure it continues to run efficiently and indeed to meet resource

⁴ See discussion on Quality Planning website [here](#)

⁵ *High Country Rosehip and Orchards Limited v. Mackenzie District Council* [2011] NZEnvC 387

consent conditions. We will consider the predicted relationships between the Waitaki Power Scheme and both existing and likely new activities in part 2.4 of this decision.

- [14] In *Federated Farmers Of New Zealand (Inc) Mackenzie Branch v. Mackenzie District Council*⁶ the Environment Court noted at fn 48 that hydroelectricity is *sui generis* i.e. meaning legal protection that exists outside typical legal protections and is something that is unique or different.

The Waitaki Power Scheme Operating Easement

- [15] The Waitaki Power Scheme operating easement is a legal agreement entered into with the Crown and registered on Crown land to secure the Waitaki Power Scheme's operation following privatisation of electricity generation in the late 1980s. It provides that Meridian Energy Limited may carry out all works necessary to operate and maintain hydroelectricity and generation activities. That includes the right to inundate land and erode land, and implement works necessary to support the Waitaki Power Scheme. The easement, therefore, confers rights that are almost equivalent to complete ownership. The easement area includes flood and erosion margins associated with lake operating levels.
- [16] The operating easement represents the boundary of the site for the Waitaki Power Scheme connected with the operation of the Scheme.

Legal Analysis

What should the content of the objective for MDP Section 19 be?

Planning is about resolving conflicts in values

- [17] It is trite to observe that planning is about identifying and resolving conflicting values. The statutory function of territorial authorities under RMA, s31(1)(a) for the implementation of integrated management objectives requires careful strategic planning. Strategic planning is best performed with useful data about the resources, the values and the activities presenting risks likely to arise during the Plan's life. The less data and less information about resources, values and risks, the greater, the less one can justify drafting targeted objectives and policies to achieve specific outcomes following s32.
- [18] The need to resolve conflicting values is evident from the direction in RMA, s74, that provides in subsection 1 a range of requirements to be followed, some of which can pull in different

⁶ *Federated Farmers Of New Zealand (Inc) Mackenzie Branch v. Mackenzie District Council* [2017] NZEnvC 53

directions. Also, there is a list of other matters relevant to the consideration of the Plan provisions.

- [19] The *King Salmon*⁷ decision is, of course, the most important in New Zealand on policy development however, it needs to be read in light of its important features. Those important features enabled the Court to conclude that all that was needed to assess an appropriate objective for a regional coastal plan was a textual reconciliation of the relevant policies in the New Zealand Coastal Policy Statement 2010. That is because the New Zealand Coastal Policy Statement covered the field and was complete for the resource domain (the CMA) under consideration. Further, aquaculture was not nationally important and was required to be placed in appropriate locations that plainly did not include the small number of locations that identified in the Marlborough Regional Policy Statement as outstanding landscapes or seascapes.
- [20] In most cases the task of reconciling conflicting values is more complex and is not solely textual analysis of a single national policy statement as in *King Salmon*. The task requires an evaluation and weighting of matters in a range of sources in light of the facts using s32. This is such a case. Plainly, the NPSREG must be given effect to but it is not an authoritative expression of Part 2 like the NZCPS. Part 2 comes into play here in a way that it did not in *King Salmon* because there is no other higher instrument pertaining to indigenous vegetation. Notwithstanding that, I consider the CRPS has advanced matters by providing a framework for achieving sustainability in the Canterbury Region. The CPRS can be textually assessed in much the same way as the NZCPS in *King Salmon* for specific guidance that Part 2 does not give. My textual assessment of the CRPS and in particular Chapter 16 which is most relevant supports the conclusions in these submissions.
- [21] Therefore, for Plan Change 18 two things are true:
- (a) The task of strategic planning and in particular assessing what is an “appropriate” objective affected by information about the resources, risks and uncertainties.
 - (b) The objective must attempt to advance resolution of the foreseeable conflict in values. In this case the conflicts between the NPSREG as a partial expression of Part 2 and other provisions of Part 2 by implementing the regime in the CRPS. That involves balancing relevant matters arising from that tension following section 16.1.4 of the CRPS and by specifically addressing the Waitaki Power scheme as a unique activity.

⁷ *Environmental Defence Society Incorporated v. The New Zealand King Salmon Company Limited* [2014] NZSC 38

CRPS and its instructions for MDC on resolving the conflicting values

[22] RMA, s75(3) sets out what a District Plan must give effect to. For present purposes the Mackenzie District Plan must give effect to NPSREG following s75(3)(a) and the CRPS following s75(3)(c).

[23] The CRPS tackled the conflicting values between Part 2 (concerning regionally significant natural resources such as S 6(c) resources and the NPSREG in Chapter 16. That is the most specific and hence most relevant chapter addressing the conflict between protecting significant resources under Part 2 and providing for renewable energy infrastructure to achieve Part 2 and NPSREG. Chapter 16 introduces the impacts of infrastructure on biodiversity in the introduction of Chapter 16 in this way:

Biodiversity can be affected by energy generation and distribution activities, while the use of energy can have flow-on effects, such as discharges of gasses to air, that may be harmful to biodiversity. Energy use and access to energy sources have helped to shape our cultural heritage, affecting the position of transport routes, the placement of settlements and creating some heritage features such as historic dams. Works for the generation and distribution of energy, including transport, may also adversely affect the heritage values of areas such as wahi tapu. These issues are addressed through the provisions of both Chapter 16 and other chapters as relevant. If there is a perceived conflict between competing policies, the provisions of all the applicable chapters will be evaluated and applied on a case-by-case basis.

[24] In Section 16.1.4 sets out the approach of the CRPS as one that balances the conflicts involved with renewable energy generation. The relevant provision is as follows:

16.1.4 BALANCING CONFLICTS CREATED BY THE EFFECTS OF RENEWABLE ELECTRICITY GENERATION WITH THE BENEFITS OF RENEWABLE ENERGY

The benefits of renewable electricity generation, at any scale, are of significance in terms of providing for increasing regional electricity demands, as well as a wider contribution to meeting electricity demands that extend beyond Canterbury. However, renewable electricity projects tend to be located close to natural electricity sources; this can create conflicts with a wide range of biophysical and community held values and raise issues of scale and location.

[25] Policy 16.3.5 then states:

16.3.5 Efficient, reliable and resilient electricity generation within Canterbury

To recognise and provide for efficient, reliable and resilient electricity generation within Canterbury by:

1. *avoiding subdivision, use and development which limits the generation capacity from existing or consented electricity generation infrastructure to be used, upgraded or maintained;*

2. *enabling the upgrade of existing, or development of new electricity generation infrastructure, with a particular emphasis on encouraging the operation, maintenance and upgrade of renewable electricity generation activities and associated infrastructure:*
 - a. *having particular regard to the locational, functional, operational or technical constraints that result in renewable electricity generation activities being located or designed in the manner proposed;*
 - b. *provided that, as a result of site, design and method selection: Regional Policy Statement / Chapter 16 - Energy Environment Canterbury Page 219*
 - i. *the adverse effects on significant natural and physical resources or cultural values are avoided, or where this is not practicable remedied, mitigated or offset; and*
 - ii. *other adverse effects on the environment are appropriately controlled.*

...
4. *maintaining the generation output and enabling the maximum electricity supply benefit to be obtained from the existing electricity generation facilities within Canterbury, where this can be achieved without resulting in additional significant adverse effects on the environment which are not fully offset or compensated?.*

[26] Following Policy 16.3.5 the CRPS directs territorial authorities to do the following (the TA direction):

3. *Set out objectives and policies, and may include methods in district plans to:*
 - a. *avoid land-uses that may result in adverse reverse sensitivity effects on the existing electricity generation infrastructure;*
 - b. *enable the upgrade of existing and establishment of new electricity generation infrastructure while avoiding or mitigating the adverse effects referred to in Policy 16.3.5(2)(a) - (b) above and controlling other adverse effects;*
 - c. *provide for activities associated with the investigation, identification and assessment of potential sites and energy sources for renewable energy generation.*

[27] Policy 16.3.5 and its consequential direction to territorial authorities warrant careful textual assessment.

[28] Policy 16.3.5(2) addresses both upgrading and development of new electricity generation infrastructure. The requirement in Policy 16.3.5(2) and the matters in (a) and (b) therefore are directed at upgrades and new electricity generation. Also, 16.3.5(2) (a) and (b) cannot apply to

existing infrastructure and its operation and maintenance. Rather, it applies to the operation and maintenance of upgrades and new infrastructure because Policy 16.3.5(a) refers to activities *being located or designed in the manner proposed*. That indicates the location or design is being considered as a proposal. Supporting that, the wording of Policy 16.3.5(2)(b) refers to *site, design and method selection*.

- [29] Policy 16.3.5(4), on the other hand, is about maintaining the existing generation output and enabling the maximum electricity supply benefit to be obtained from existing generation facilities.
- [30] The concept of “maximum electricity supply benefit” is captured by the concept of “refurbishment” in the Mackenzie District Plan in Plan Change 18. The words in Policy 16.3.5(4) *where this can be achieved without resulting in additional significant adverse effects in the environment which are not fully off-set or compensated* relate to the second clause of the Policy concerning refurbishment.
- [31] Therefore, the direction to local authorities is to maintain generation output without any limitation. That means maintaining operation and maintenance of the existing facility within the existing site. That makes complete sense. The operation and maintenance are a “built-in” part of the consented development, and the effects are, in that sense, already existing.
- [32] Following that territorial authorities are required under the TA direction at 3(b) to enable the upgrade of existing and establishment of new infrastructure while meeting Policy 16.3.6(2)(a) – (b) above and controlling other adverse effects.
- [33] From this framework it is plain that:
- (a) Existing generation output is to be maintained (Policy 16.3.5(4)).
 - (b) Refurbishment by maximising electricity supply benefit from existing facilities is to be achieved where that does not result in significant adverse effects which are not fully off-set or compensated (Policy 16.3.5(4)).
 - (c) Upgrades and development of new electricity generation energy are to be encouraged considering locational, operational and technical constraints provided that site, design and method selection do not generate adverse effects on significant natural and physical resources (Policy 16.3.5(2)). Following that, territorial authorities are directed to enable that upgrade subject to Policy 16.3.5(2)(a) – (b) and control or manage other adverse effects (TA direction 3(b)).

What is an objective, and what is its relationship to policies and methods?

- [34] An objective's nature and purpose can be discerned from planning practice and RMA, ss 32(1)(a) and s73. An objective(s) is a textual expression of how the Act's purpose is to be achieved appropriate to the planning instrument's location in the hierarchy of instruments. This may be done by a single objective or a series of objectives. In this case, only one objective is proposed.
- [35] The ascertainment of the Act's purpose when preparing an objective requires one to act following the matters in s74(1). Relevantly:
- (a) The function of the Council to provide integrated objectives.⁸
 - (b) Meeting Part 2.⁹
 - (c) Implementing national policy.¹⁰
- [36] The function of policy is to implement the objectives of the Plan, and therefore the relationship of policies to the objective is always one of advancing the objective (see s32(1)(b)).
- [37] Where nationally important and competing values can potentially be in tension and that cannot be resolved on the available information, the objective must identify the tension and cast light on a pathway for resolution of that tension that the implementing policies and methods should advance.
- [38] A policy cannot be true to its nature by purporting to resolve a conflict in values that does not emerge from the objective. Put another way, if an objective is expressed in definitive terms as an outcome the policy can then not suggest otherwise by attempting a recalibration of the one way in which the Act's purpose will be achieved. The cascade of provisions must flow logically from one provision level to the next.

⁸ RMA s74(1)(a)

⁹ RMA s74(1)(b)

¹⁰ RMA s74(1)(ca)

*The first decision of the Environment Court in High Country Rosehip and Orchards Limited v. Mackenzie District Council*¹¹

- [39] The first Environment Court decisions on Plan Change 13 is illuminating on points relevant to Plan Change 18 and these submissions. The first decision of the Environment Court on Plan Change 13 emphasised the importance of identifying resources and their values that the Plan Change aims to address. That did not occur at the Council level in Plan Change 13 so that a s293 process was required. The Mackenzie District Council has often failed to provide an adequate resource inventory, as was also seen in Plan Change 19 and now 18.
- [40] Also, the Environment Court, in its first decision, reformulated objective 3B concerning outstanding landscapes in the landscape section as part of Plan Change 13. Ms White cites that objective at [263] of her report. Objective 3B expressly addressed the relationship between the maintenance and development of the Waitaki Power Scheme and the Mackenzie Basin as an identified ONFL.¹² Objective 3B is crafted in much the same way as Ms Ruston's proposed objective by creating a specific part of the objective that addresses the Waitaki Power Scheme. The Court in its Plan Change 13 decision described its Objective 3B for Plan Change 13 as more focused and therefore more appropriate.
- [41] Consistent with the CRPS, the Court allowed the operation, maintenance and upgrade of the Waitaki Power Scheme to impact on the Mackenzie Basin ONFL through the objective the Court drafted.
- [42] For similar reasons, it is appropriate to address the relationship of the Waitaki Power Scheme to the indigenous resources in an Objective. Although the significant difference here is that the spatial extent of the outstanding landscape and its important values in Plan Change 13 were identified in the Environment Court's recommended provisions in a way that is not the case for indigenous vegetation in Plan Change 18.

Conclusion on the content of the objective

- [43] As a matter of law, I submit that the objective for Section 19 of the District Plan must advance the issue of conflict identified in the CRPS and fulfil CRPS's and NPSREG's directions at a level appropriate to an objective in a district plan. PC-18 (Ruston)'s objective achieves that and meets the requirements of RMA s74(1) and s75(3).

¹¹ *High Country Rosehip and Orchards Limited v. Mackenzie District Council* [2011] NZEnvC 387

¹² *Ibid* at [151]

Policy 2 and no “net loss”

- [44] Policy 2 (Policy 3 as notified) applied to land development and pastoral intensification. These were identified as the major threats to indigenous vegetation and significant habitats of indigenous fauna, and that is reflected in the ecological evidence presented by Mr Harding and Dr Walker.
- [45] The concept of ‘net loss’ is from the CRPS and relies on identifying significant indigenous vegetation under the CRPS. If Policy 2 as promoted by CP 18 (s42A) is applied, it should be continued to be limited to those activities.
- [46] The CRPS has special provisions for renewable energy that set it apart from these other activities and the CRPS expressly provides for offsetting and compensation for upgrading and new generation affecting new locations. A ‘no net loss’ policy cannot and should not preclude those options.

Policy 7 guiding Management of the Waitaki Power Scheme

- [47] Ms Ruston’s Policy 7 in PC-18 (Ruston) and the activity rules are a carefully designed response to the higher order instruments and implement her proposed objective.
- [48] Ms Ruston’s Policy 7 has a two-tiered approach. First enabling vegetation clearance associated with the operation, maintenance and refurbishment of the Waitaki Power Scheme. Secondly, providing for upgrading and development of the Waitaki Power Scheme paying particular regard to:
- (a) Operational, functional and locational factors; and
 - (b) The importance of maintaining and developing output from existing renewable energy infrastructure.
- [49] These policies then translate into rules, and the permitted activity rule has a two-tiered regime:
- (a) It permits emergency clearance and clearance required for the operation and maintenance within the existing operational area and also the clearance for refurbishment only within the operational area that is not identified as significant indigenous vegetation and significant habitats of indigenous fauna.
 - (b) The special limitation on refurbishment that is inside significant indigenous vegetation and significant habitats of indigenous fauna responds to the direction in Policy 16.3.5.

If the refurbishment is within an area identified as significant indigenous vegetation and significant habitats of indigenous fauna then it is a controlled activity.

- [50] Proposed Rule 2.3 in PC-18 (Ruston) proposes in all other cases that vegetation clearance (including for new electricity generation) is a discretionary activity responding to the direction and methods implementing Policy 16.3.5 of the CRPS at 3(b).

Existing use rights

- [51] It was noted earlier in these submissions that Judge Jackson described hydroelectricity as *sui generis*. That is true because the scale of the development is unique and it was implemented through unique measures including Orders in Council. The key statistics for the Waitaki Power Scheme is set out in table 1 below.

Table 1: Waitaki Power Scheme – Key Statistics

| Item | Tekapo A | Tekapo B | Ohau A | Ohau B/C | Benmore | Aviemore | Waitaki |
|--------------|----------|----------|--------|-----------|---------|----------|---------|
| Commissioned | 1951 | 1977 | 1979 | 1984/1985 | 1966 | 1968 | 1935 |

- [52] Supporting the position in the CRPS that operation and maintenance should be enabled is the provisions of the RMA, s10. That provision protects existing use rights. The policy of the provision is to ensure that existing lawful activities may continue within a reasonable effects envelope.
- [53] The WEPS' scale and operation have built-in impacts on the environment that inevitably arise from the establishment of the activity. The protection given to activities of the *same or similar character intensity and scale* is a large envelope when addressing a project of this size. As Whata J said in *Meridian Energy Ltd v Southland District Council*¹³ at [42]:

Existing uses are defined by the requirement for lawful authorisation and an existing envelope of effects (ie character, intensity and scale). MPS existing land use activities fall within this description. Future MPS activities may or may not qualify. Whether they do or not will depend on the assessment of effects of the proposed activity. Some evolution of activity is permissible..

¹³ *Meridian Energy Ltd v Southland District Council* [2014] NZHC 3178

[54] It would be unlawful to try and back-fill protections that roll back existing use rights for vegetation clearance of such magnitude by crafting rules that do not permit maintenance and operation of WEPS.

The s42A Report by Ms White

[55] Ms White's s42A report is clear and mostly well-reasoned on matters not on the Waitaki Power Scheme.

[56] I have referred to passages that acknowledge the appropriateness of a management approach concerning vegetation clearance for the upgrade of the Waitaki Power Scheme, including the analysis [280] – [284] report. That supports a policy regime directed at management based on Part 2 and NPSREG. That analysis is consistent with the summary position I have presented.

[57] My submissions on Ms White's s42A report focuses mostly on paragraphs [268] – [274] that address a proposal in submissions for a new objective in Section 19 concerning the Waitaki Power Scheme. I submit Ms White's view is correct that the objective originally proposed by Genesis (#11) and Meridian (#13) is not warranted as a stand-alone objective. However, in addressing that proposed wording and the idea of yet another objective, Ms White has lost sight of the fact that there is a need to reconcile the tensions that potentially arise between the operation, maintenance, refurbishment and upgrade of the Waitaki Power Scheme and the protection of indigenous vegetation in the sole Objective she proposes. Therefore, Ms White's proposed Objective fails to address following the CRPS the pre-eminent resource question for the Mackenzie Basin.

[58] At [273] – [274] Ms White acknowledges that there are problems with a sectional review and achieving integration required to recognise the needs of the Waitaki Power Scheme that should be attended to in a full review.

[59] The significance of the Waitaki Power Scheme and integrated management of it in the natural and physical resources in which it is located cannot be left for some future event. It is necessary to treat the relationship between the resources addressed in Section 19, i.e. indigenous vegetation and the Waitaki Power Scheme.

[60] The objective proposed by Sue Ruston for Meridian Energy Limited is consistent with the management focussed policy supported by Ms White at [280] – [284]. That policy regime must, however, flow from the overarching objective. Ms Ruston's objective achieves that.

[61] Because the objective is not appropriate *vis a vis* the Waitaki Power Scheme, the provisions below the objective affecting the Waitaki Power Scheme are similarly deficient.

The Evidence of Dr Susan Walker

- [62] I note that Dr Susan Walker is a scientist, not a planner.
- [63] These submissions focus on paragraphs [60] – [61] of Dr Walker’s SOE.
- [64] Dr Walker’s theses at [60] – [61] of her SOE are as follows:
- (a) Thesis 1 – virtually all of the operating easement in the Waitaki Power Scheme contains significant indigenous vegetation.
 - (b) Thesis 2 – PC-18(s42A) presents significant risks to that indigenous vegetation by conferring a permitted activity status on vegetation clearance for the Waitaki Power Scheme.
 - (c) Thesis 3 – all effects on vegetation clearance for operation and maintenance of the Waitaki Power Scheme affecting significant vegetation should be avoided. For that reason, resource consents should be employed to achieve that.
- [65] I address these theses below.
- [66] Thesis 1 is not valid, and it is not the basis upon which Plan Change 18 was notified. If the matter was so self-evident, one would expect a detailed statement mapping the identified areas with a scientific justification. All Dr Walker makes is an assertion. The assertion appears inconsistent with EDS’s submission to PC 18 that seeks an extension of SONS’ to certain areas. That relief is not pursued in Dr Walker’s evidence. Fair process requires a proper methodology and approach to applying CRPS criteria to identified areas in the Mackenzie Basin.
- [67] Concerning thesis 2, Dr Walker identifies the significant risk to indigenous vegetation loss of connectivity and pastoral intensification, causing fringe effects. None of these key drivers for biodiversity loss are shown by Dr Walker to apply to the operation and maintenance of the Waitaki Power Scheme. It does not appear Dr Walker’s assessment of risk is established by experience about what operation and maintenance of the Waitaki Power Scheme involves. Because the rule stream in PC-18(s42A) requires any permitted activity to be that work which is *required* for operation and maintenance and because there is no evidence that operation and maintenance involves extensive modification to the existing environment Dr Walker’s assertion that there is significant risk with PC-18(42A) is hyperbole.
- [68] Concerning thesis 3, Dr Walker is wrong to assert that all effects should be avoided and that would seem to be reckless, given the potential consequences for the continued operation of the Waitaki Power Scheme. Resource consents cannot achieve avoidance and that is not what is

directed by the CRPS for the operation and maintenance of existing infrastructure. The CRPS directs *enabling* of operation and maintenance. Furthermore, Dr Walker's base assumption is that there should be no compensation or off-setting, which is plainly contrary to the direction of the CRPS in Policy 16.3.5(4) concerning managing the conflict between the significant existing renewable energy infrastructure and significant resources.

A handwritten signature in blue ink, appearing to read 'John Maassen', with a horizontal line extending to the right and a small mark below the start of the signature.

John Maassen
Counsel for Meridian Energy Limited