Tabled at Hearing 28/02/2013

Before the Hearings Commissioners
at Christchurch

in the matter of: a submission and further submission on the proposed Canterbury Land and Water Regional Plan under the Resource Management Act 1991

to: **Environment Canterbury**

submitter **Meridian Energy Limited**

Opening legal submissions on behalf of Meridian Energy Limited

Date: 28 February 2013

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LEGAL SUBMISSIONS ON BEHALF OF MERIDIAN ENERGY LIMITED

STRUCTURE OF THESE SUBMISSIONS

1 These submissions are provided on behalf of Meridian Energy Limited (*Meridian*) and will cover the following topics:

1.1 Meridian's evidence/witnesses;

1.2 Meridian's approach to its submission on the proposed Canterbury Land and Water Regional Plan (*the Proposed Plan*) and this hearing;

1.3 the different approach to the Waitaki Catchment; and

1.4 key legal issues.

MERIDIAN EVIDENCE/WITNESSES

2 Meridian will call the following witnesses:

2.1 **Mr Jeff Page** on the practical implications of the Proposed Plan for Meridian;

2.2 **Dr Mark James** on why Meridian is interested in water quality, particularly in the Upper Waitaki Catchment; and

2.3 **Ms Sarah Dawson** on planning.

3 **Mr Kenneth Smales** (on Meridian's operation and management of the Waitaki Power Scheme) and **Mr James Truesdale** (on an overview of the electricity market and the national role of the Waitaki Power Scheme) have also provided evidence, but will not be giving a presentation at this hearing.

MERIDIAN AND THE PROPOSED PLAN

4 Meridian has made extensive submissions on the Proposed Plan. The Proposed Plan is of importance for Meridian given the scale of its existing infrastructure in the Waitaki Catchment and the implications for its ongoing operation and management due to the potential introduction of new plan provisions.

5 As the Commissioners will be aware from Meridian's submission and evidence filed:

5.1 Meridian is New Zealand's largest generator of renewable energy, and it is planning to increase its renewable generation capacity in the future. Meridian's core business is the generation, marketing, trading and retailing of energy and

includes the management of hydrological reservoirs, wind farms and other related assets.

5.2 Meridian's substantive asset in the Canterbury Region is the Waitaki Power Scheme in the Waitaki Catchment.[1]

5.3 The Waitaki Power Scheme is a regionally and nationally important physical resource. In Meridian's view regional policy and plans should appropriately recognise this and specifically provide for the continued operation and maintenance of the Waitaki Power Scheme.

5.4 Meridian considers that the Waitaki Catchment and its resource management issues are unique and unlike other Canterbury catchments. The infrastructure of the Waitaki Power Scheme have significantly influenced the natural and physical resource management outcomes in the Waitaki Catchment. The Proposed Plan, unlike the Waitaki Catchment Water Allocation Regional Plan (*Waitaki Plan*), does not appropriately recognise this and provide a coherent management framework.

5.5 Currently, Meridian relies on a variety of different authorisations and planning provisions including rules for its operation and management of the Waitaki Power Scheme. These include:

(a) multiple operating consents relating to the key management of water for generation purposes administered by ECan. These will expire in 2025;

(b) for Meridian's dams, in relation to beds of lakes and rivers it relies on the permitted activity Rule BLR2 in the Canterbury Natural Resources Regional Plan (the "NRRP"); and

(c) for land uses controlled by the district councils, Meridian relies on either existing use rights or permitted activity rules in the Mackenzie, Waitaki and Waimate district plans.[2]

5.6 In 2005 Meridian participated fully in the development of the Waitaki Plan. That Plan recognises the specific characteristics that apply to the Waitaki Catchment and in particular the existence of the Waitaki Power Scheme. Absent the Proposed

[1] Tekapo A and B now owned by Genesis.

[2] The operative Waimate (2001), Mackenzie (2004) and Waitaki (2004[2]/2010)[2] district plans, and the Proposed Waimate District Plan in relation to these territorial authorities control of the use of land.

Plan Meridian would have expected to seek replacement consents prior to 2025 against the provisions of the Waitaki Plan (should it be reviewed).

6 Meridian is concerned that the Proposed Plan has the potential to introduce new planning provisions which would impact Meridian's future operation and management of the Waitaki Power Scheme. During the likely operative period of the Proposed Plan, Meridian anticipates that:

6.1 the Waitaki Plan will likely be reviewed in, or before, 2016 (and may be incorporated in some form into the sub-regional section of the Proposed Plan). It is of concern that the Waitaki Plan, which is specifically tailored to the circumstances of the catchment, could change through the review process related to a single land and water plan for all of Canterbury;

6.2 given the expiry date of Meridian's Waitaki Power Scheme operating consents in 2025, replacement consents may need to be sought and determined under the provisions of the Proposed Plan;

6.3 given the ongoing asset management activities described in the evidence of **Mr Smales**, the Proposed Plan will be key in regulating those activities and that could result in requirements for Meridian to obtain ancillary consents; and

6.4 the Proposed Plan will also regulate the activities of others, such as the discharge of contaminants and rural land use change, which may impact on the operation and management of the Waitaki Power Scheme.

7 The relief sought by Meridian is discussed in detail by Meridian's witnesses, particularly **Ms Dawson**.

THE WAITAKI CATCHMENT IS UNIQUE

8 The Waitaki Catchment has had a different legislative and planning history to others within Canterbury and New Zealand. This is unsurprising given the large amount of capital investment and the resultant change in the environment.

9 The authorisations for the construction of the Power Scheme stems from various Orders in Council in 1929, 1939, 1968 and 1969.

10 Construction of the first power station on the river after the building of Waitaki Dam commenced in 1928 and was commissioned in 1934-35. Other structures were then completed which enabled Tekapo A Power Station to be commissioned in 1951 and Tekapo B

in 1977. Ohau A was commissioned in 1980, Ohau B in 1984 and Ohau C in 1985. Benmore was commissioned in 1965 and Aviemore in 1968.

11 In resource management terms the Waitaki Power Scheme is a nationally significantly hydro-electricity generation scheme and the existence and operation and infrastructure itself has, and will continue to be, a significant influence on the natural and physical resource management outcomes in the Waitaki Catchment. It is inescapable that within the Waitaki Catchment the Waitaki Power Scheme has:

11.1 created significant hydro-electricity generation potential;

11.2 resulted in significant modification to the movement and distribution of water;

11.3 changed (probably in an irreversible way) natural processes and ecosystems, particularly in relation to wetlands, rivers and lakes;

11.4 altered the physical landscape;

11.5 changed farming opportunities and practices in both negative (inundation and fragmentation of land) and positive (access to reliable water) ways;

11.6 changed recreation and tourism opportunities;

11.7 changed the composition and focus of local communities; and

11.8 changed the associated human values, including cultural values.

12 In 2004 Parliament passed the Resource Management (Waitaki Catchment) Amendment Act (*Waitaki Act*) which directed the development of a Regional Plan for the allocation of water in the Waitaki Catchment. As far as Meridian is aware this intervention was unprecedented at the time (and subsequently) in the sense that Parliament has not on any other occasion passed legislation relating to the development of a Regional Plan for a specific water catchment.

13 The Waitaki Plan was prepared in accordance with the Waitaki Act which had specific provisions relating to the nature of the Plan and the process for its preparation, including provisions that sections of the RMA did or did not apply to the development of the Plan.

14 Meridian considers that the Waitaki Plan which was prepared in the context of the specific circumstances of the catchment, including

recognising the importance of the Power Scheme and the ongoing impact of its infrastructure as well as demand for irrigation, was an appropriate response to what were, and are, the unique circumstances of that catchment that do not apply to others in Canterbury.

15 Meridian has concerns that the Proposed Plan makes it explicit that ECan's intention is to incorporate existing regional plans into a single land and water regional plan in the future.[3] Meridian submits that there is, however, no requirement in law or otherwise, for ECan to do so. That is, ECan are not required to incorporate the Waitaki Plan into the Proposed Plan in the future.

16 Clearly it is not the Hearing Commissioners' task to review or amend the Waitaki Plan as part of this current process. However Meridian submits that the Commissioners do have the ability to alter the framework of the Proposed Plan so that it dictates, how (or if), the Waitaki sub-regional chapter is ultimately formulated.

17 Meridian's preference is, given the unique characteristics of the catchment and the recent development of a catchment specific regional plan that the Waitaki Plan remain outside of the Proposed Plan.

18 However, given where Meridian sits at present, and in the face of ECan's intention to include the Waitaki Plan as a subchapter in the Proposed Plan in future, Meridian's appearance at this hearing is to make sure the Commissioners are aware of the implications that setting a general framework in the Proposed Plan could have on a later review of the Waitaki Plan, including specifically on the ongoing operation of the Waitaki Power Scheme. As outlined, the Waitaki Plan contains catchment specific provisions promulgated as a result of the particular issues faced in this catchment, which, in Meridian's submission, do not fit, nor should they be made to fit, under the wider (general) regional policies and objectives in the Proposed Plan at some future date. More specific objectives (in particular) that are relevant to the Catchment are therefore required to address catchment specific issues (for the situation where the Waitaki Plan may be incorporated into the Proposed Plan).

19 In addition, at the time of the Waitaki Act/Waitaki Plan implementation, the focus was on water quantity. Meridian recognises that over time, as outlined in **Dr James'** evidence, the shift in focus has largely turned to the implications of water quality as a result of the now emerging effects of water use. Accordingly, water quality in the Waitaki Catchment has become a major issue for Meridian and was the predominant driver behind its participation in the recent Upper Waitaki resource consent application hearings.

[3] Proposed Plan, Section 2.9, page 2-3.

20 Meridian considers the Proposed Plan must therefore provide the appropriate framework to address water quality issues.

KEY LEGAL ISSUES

21 As they relate to Meridian's relief sought, the following key legal issues will be covered in these submissions:

21.1 the consent authority's obligations in preparing a regional plan;

21.2 the place of the Proposed Plan within the current planning framework for the region, including:

(a) giving effect to the National Policy Statements for Freshwater (*NPSFW*) and National Policy Statement for Renewable Energy Generation (*NPSREG*);

(b) giving effect to the Canterbury Regional Policy Statement 2013 (*CRPS*);

(c) inconsistency with the Waitaki Catchment Water Allocation Regional Plan (*Waitaki Plan*);

(d) relationship with the Canterbury Water Management Strategy (*CWMS*);

21.3 the appropriate recognition for existing activities, such as hydro generation activities, in Plan formation;

21.4 Rule 5.132 – unreasonable to require resource consent for the use of Meridian's Waitaki Power Scheme structures given previous existing use rights;

21.5 the inappropriately high test afforded by the use of 'protection' in some of the Proposed Plan's objectives; and

21.6 offsetting of effects with regard to wetlands.

The consent authority's obligations in preparing a plan

22 Section 66 of the RMA requires ECan to prepare the Proposed Plan:

22.1 in accordance with its functions under section 30;

22.2 the provisions of Part 2; and

22.3 its duties under section 32.

23 In addition, section 67(3) of the RMA provides that the Proposed Plan must give effect to:

23.1 any National Policy Statement; and

23.2 the Canterbury Regional Policy Statement 2012.

24 Finally, section 67(4) requires the Proposed Plan must not be inconsistent with any other Regional Plan for that region. Specific reference is made here to the need for the Proposed Plan not to be inconsistent with the Waitaki Catchment Water Allocation Regional Plan which is the regional plan for water allocation in the Waitaki Catchment.

25 Where relevant, these obligations are discussed in these submissions.

National Policy Statements

26 As set out in the evidence of **Ms Dawson**, Meridian does not consider the Proposed Plan adequately provides for and gives effect to the NPSREG and the NPSFW. As outlined, section 67(3) of the RMA requires the Proposed Plan to 'give effect to' any national policy statement.

27 Until section 67(3) was amended in 2003, a Regional Plan was only required to 'not be inconsistent with any National Policy Statement'. This distinction between the two tests was discussed in *Clevedon Cares Inc v Manukau City Council*:[4]

> [50] ... the change in the test from "not inconsistent with" to "must give effect to" is significant. The former test ["not inconsistent with"] allowed a degree of neutrality. A plan change that did not offend the superior planning instrument could be acceptable. The current test ["give effect to"] requires a **positive implementation** of the superior instrument. [*Own emphasis*]

28 Therefore ECan are required to positively implement any NPS in the Proposed Plan.

29 Meridian acknowledges that, in positively implementing the NPS, section 67(3) does not require the exact wording of any NPS to be incorporated into the Proposed Plan,[5] although this may be necessary in some instances. Instead, a regional council may give effect to a NPS through interpreting the requirements of the NPS to make it apply in the RPS in a local or regional context, such as the Proposed Plan in this instance.[6]

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[4] *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211

[5] See *Wairoa River Canal Partnership v Auckland Regional Council* (2010) 16 ELRNZ 152 at [10]

[6] *Wairoa River Canal Partnership* at [12]

30 Further, it is recognised that a goal such as providing for renewable energy generation does not prevail over all other RMA considerations. Through its submissions, Meridian is not suggesting that such generation may be maintained no matter what its effects may be.[7] However without the proper recognition of such renewable energy generation by way of appropriate provisions in the Proposed Plan, there is insufficient ability for a decision maker, when weighing up a proposal under the whole Plan, to consider and weigh competing objectives, policies and rules. It is submitted that this ability to balance competing objectives must be provided for. This was discussed in the Horizons 'One Plan' decision[8]:

> [2-44] ... Notable too is the last sentence [in the Plan provision in dispute], clearly recognising that adverse environmental effects can be a barrier to generation development if they cannot be avoided, remedied or mitigated. In other words, even a goal as important as renewable energy generation will not necessarily prevail over any other consideration. As with all RMA decisions involving benefits and disbenefits, it will be a question of deciding where the balance between them should lie, having regard to the factors and criteria set out in the primary and subordinate legislation.
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> ...
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> [2-46] What is to be taken from those provisions is a recognition of the importance of renewable generation, eg Objective 3-1, Policy 3-4(a) and Policy 3-3(b). What should be noted is the emphasis on *minor* adverse effects in that provision, and the direction in Policy 3-3(c) that more than minor adverse effects must be managed by being avoided, remedied, mitigated or even offset. Those are the sort of issues which can and should be taken account of in considering a particular proposal, when its benefits and disbenefits can be identified and their relative weights and importance assessed.

31 Meridian has sought greater consistency and certainty with the NPSFW and NPSREG with respect to a number of Proposed Plan provisions to ensure there is adequate provision in the Proposed Plan for renewable energy generation. Meridian's relief is not discussed at length in these submissions as this relief is addressed in the evidence of **Ms Dawson**. However examples are:

31.1 the general lack of policies in the Proposed Plan to achieve Objective 3.16, particularly the lack of recognition for new hydro-electricity generation;

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[7] Expressly recognised in *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182 at [2-44] (the Horizons 'One Plan' decision).

[8] *Day v Manawatu-Wanganui Regional Council*

31.2 Policy 4.48 is too narrow in providing for infrastructure associated with renewable hydro-electricity generation, to give appropriate effect to the NPSREG;

31.3 the lack of recognition for temporal and spatial sharing of water in Policy 4.68 is not an efficient use of water (NPSFW – Objective B3, Policy B2) so fails to give effect to NPS and s7(b) (*The efficient use and development of natural and physical resources*).

Canterbury Regional Policy Statement 2013 (*CRPS*)

32 As well as any NPS, the consent authority is required to give effect to the CRPS, by positively implementing the CRPS in the Proposed Plan.[9]

33 **Ms Dawson** has provided an extensive discussion of the Proposed Plan provisions that Meridian considers do not give effect to the CRPS, therefore again this relief will not be covered in detail in these submissions.

34 It is, however, worth highlighting the part of **Ms Dawson's** analysis in which she concludes there is insufficient recognition and provision in the Proposed Plan for hydro electricity generation and its significant use of freshwater, given its specific recognition in the CRPS. Given the requirement to positively implement the CRPS in the Proposed Plan, it is difficult to reconcile how the Proposed Plan can contain provisions which are much more general than those in the CRPS. For example:

34.1 CRPS Objective 16.2.2 and Policy 16.3.5 focus on enabling the provision of reliable electricity generation, while Policy 16.3.3 specifically requires the benefits of renewable energy facilities be recognised and provided for;

34.2 CRPS Objective 7.2.1 seeks the sustainable management of the region's freshwater resources, including by providing for economic and social well-being through abstraction for hydro electricity generation. Objective 7.2.4 seeks integrated management of freshwater resources, including considering the benefits (and the significance of these benefits) of using water and water infrastructure. Policy 7.3.11 reflects these objectives by recognising and providing for the continuation of existing hydro-electricity schemes.

34.3 Proposed Plan Objectives 3.11 and 3.16 go some way towards vaguely recognising hydro electricity generation infrastructure and its water use. However, with the exception of Policy 4.48 (which is too narrow), there are no policies which recognise

[9] See the discussion above from *Clevedon Cares Inc v Manukau City Council*.

existing hydro electricity generation as a nationally significant use of freshwater, nor any policies that recognise the need to protect the generation capacity of existing generation infrastructure, for example, from upstream takes which may diminish the generation potential of existing generation infrastructure.

35 Meridian has sought a range of new or amended provisions in the Proposed Plan to provide for specific recognition of these interests. The Section 42A Officers have rejected Meridian's relief sought on the basis that the existing provisions are sufficient, and adding a specific topic area into the policies will not be a good fit with the structure and balance of the Proposed Plan.[10] However this is an unacceptable reason given the level of detail in the CRPS, which the Proposed Plan must give effect to, when compared to the generality of the provisions in the Proposed Plan.

'Not Inconsistent With' the Waitaki Plan

36 As already outlined, the Waitaki Plan is the regional plan for the allocation of water in the part of the Waitaki Catchment that is within the Canterbury region. The Waitaki Plan became fully operative in July 2006.

37 The Proposed Plan acknowledges that, by virtue of being a pre-existing regional plan, the Waitaki Plan will continue to operate separately of the Proposed Plan for now. As such, any objective, policy or rule on the same subject matter in the Waitaki Plan will prevail over those contained in the Proposed Plan in the interim.

38 Further, section 67(4) of the RMA provides that the Proposed Plan must not be inconsistent with another regional plan such as the Waitaki Plan. As the Waitaki Plan is the pre-existing regional plan, the Proposed Plan cannot be inconsistent with it.

39 The phrase "not inconsistent with" was discussed in *Ministry of Conservation v Otago Regional Council*,[11] where the Environment Court held:

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[10] Section 42A Report for Hearing Group 1, page 379.

[11] *Ministry of Conservation v Otago Regional Council* Environment Court Christchurch, C71/2002, 25 June 2002, Judge Smith, Commissioner Burley, Commissioner Kerr. Note this case was heard in the context of pre-2003 amendments to the RMA, where a regional plan was only required to 'not be inconsistent **with**' a regional policy statement.

> [105] Accordingly we reach the conclusion that for the water plan to not be inconsistent with the RPS, the mandatory nature of the language of the two RPS clauses 6.5.4 and 6.6.27 requires an implementation of these provisions (at least). In this context the use of the words *"not inconsistent with"* means that the **provisions of both the RPS and the water plan must live together or stand side by side** and requires that the water plan implements the particular policies and method, 6.5.4 and 6.6.27 respectively.
>
> [Own emphasis]

40 This is consistent with the earlier quote from *Clevedon Cares Inc v Manukau City Council*, where the Court in the context of that case considered 'not inconsistent with' meant a plan change that *"did not offend the superior planning instrument could be acceptable"*.[12]

41 In her evidence, **Ms Dawson** concludes that the framework of the Proposed Plan is largely inconsistent with the Waitaki Plan.[13] Accordingly, a large part of Meridian's submission is tailored towards seeking amendments to the Proposed Plan to ensure consistency with the Waitaki Plan, so that the incorporation of the water allocation framework for the Waitaki Catchment is not driven by a whole of region approach which does not appropriately respond to the unique circumstances of the catchment.

42 If the Waitaki Plan is reviewed and superseded, the Proposed Plan will allocate water in the Waitaki Catchment through the limits to be set by way of policies and rules in Section 15 ('Waitaki and South Coastal Canterbury Coast'). At the time of review, the objectives of the Proposed Plan will apply to the catchment, as may, but not necessarily, the policies and rules of the Proposed Plan.

43 This occurs as the sub-regional sections in the Proposed Plan are only to contain policies and rules specific to that catchment, with these policies and rules to be formulated to implement the region-wide objectives in the Proposed Plan in the most appropriate way for that specific catchment. The objectives will therefore set the outcomes sought to be achieved in respect of water allocation.

44 This approach is of serious concern to Meridian in terms of the future allocation of water for the Waitaki Power Scheme if the Proposed Plan objectives, in particular, but also the policies and rules, are inconsistent with those currently in the Waitaki Plan. Ultimately, the Waitaki sub-regional chapter will potentially have a much different framework than in the Waitaki Plan. The extent of

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[12] At para [50].

[13] This is disputed by the Section 42A Officers for Hearing Group 1, who consider the Proposed Plan is not inconsistent with any other existing regional plan. See page 26 of the Section 42A Report.

this change, and how it will affect Meridian, is difficult to establish because the incorporation of the Waitaki Plan will occur in isolation from the current process.

45 As outlined by **Mr Page**, Meridian has premised its submission and evidence on the basis of neither supporting, nor opposing, a single land and water regional plan for Canterbury, while highlighting its desire for the Waitaki Plan to be recognised as a unique exception that will not fit within the single plan format with its current framework. What Meridian therefore seeks is an appropriate regional plan framework that remains relatively stable, unless there are robust reasons for change. Further, this framework must ensure greater consistency with the Waitaki Plan now (i.e. so the two Plans are not inconsistent with each other) to support better integration should the Waitaki Plan be incorporated into the Proposed Plan.

Canterbury Water Management Strategy (*CWMS*)

46 The Commissioners must have particular regard to the vision and principles of the CWMS, in addition to the relevant matters under the RMA,[14] in accordance with section 63 of the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 (*ECan Act*).

47 The requirement to have 'particular regard to' the vision and principles of the CWMS does not go as far requiring the Commissioners to 'give effect to' the CWMS as for the NPSs and the CRPS. However it does impose a high test, and a duty "to be on enquiry", rather than take a passive approach to these matters.[15]

48 It is the CWMS targets, which sit within the CWMS as a way to measure progress towards achieving the vision and principles of the CWMS, that are expressly included in the Proposed Plan through Objective 3.21. Rather than incorporate the specific CWMS targets into the objectives and policies of the Proposed Plan, the effect of Objective 3.21 is to leave these targets external to the Proposed Plan. **Ms Dawson** discusses in more detail why this approach is inappropriate.[16]

49 It is submitted that rather than the reference to the CWMS targets in Objective 3.21, the more appropriate approach to have particular regard to the vision and principles would be to incorporate the relevant parts of the CWMS into the Proposed Plan.

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[14] Those in clause 10(1) of the First Schedule of the RMA.

[15] *Gill v Rotorua District Council* (1993) 1A ELRNZ 374; (1993) 2 NZRMA 604. This case discusses the phrase 'have particular regard' in relation to section 7, however the proposition is equally applicable to section 63 of the ECan Act.

[16] See the evidence of Ms Sarah Dawson, paragraphs [52] – [57].

Lack of recognition for existing activities

50 A central theme of these submissions is the general lack of recognition for existing hydro generation activities in the Waitaki Catchment in the Proposed Plan.

51 Meridian's submission outlined the need for ECan in developing the Proposed Plan to be cognisant that it is not seeking to develop a plan for greenfields sites where no development has occurred to date. ECan cannot ignore lawfully established long-standing areas and operations that are now integral parts of the existing environment and are of national importance.

52 As discussed by **Ms Dawson**, existing activities influence the nature and tenor of the resource management issues of relevance, and the appropriate policy responses to address them. As already discussed, the recognition of existing hydro-generation activities in higher order planning documents such as National Policy Statements and the CRPS influences how these activities should be treated in the Proposed Plan.

53 Meridian has sought amendment to a number of Proposed Plan provisions to more appropriately recognise and support its existing hydro-electricity generation activities in the Waitaki. **Ms Dawson** discusses these in detail in her evidence, however the following are brief examples of note taken from her evidence:

53.1 recognition that existing infrastructure, including hydro-electricity schemes, prevent the achievement of some outcomes in Table 1a;

53.2 the deletion or amendment of Policy 4.4 in order to enable priorities for water allocation and use, which have been determined at a catchment level as part of Zone collaborative processes, to then be recognised in the sub-regional sections of the Plan, with their incorporation being tested through the rigor of a statutory RMA assessment. This would recognise that in the Waitaki Catchment, hydro-electricity generation is a significant activity and is afforded national significance under the NPSREG, and national and regional significance under the CRPS. Accordingly hydro-electricity generation may be a higher priority in that particular catchment; and

53.3 amendments to Rules 5.131 and 5.132, in order to recognise that the existing structures of the dams of the Waitaki Power Scheme have effects that cannot be practically avoided or mitigated.

54 Under section 66(1) of the RMA, ECan is required to prepare its regional plan in accordance with the provisions of the RMA. It is submitted that for the following reasons, the lack of recognition

afforded to existing hydro electricity generation results in the Proposed Plan failing to meet the requirements of Part II of the RMA.

55 A secure and reliable electricity supply is a fundamental need in a modern society. It is important for social and economic wellbeing and is therefore a relevant consideration under Section 5 of the Act.

56 In addition the Government is committed, for environmental reasons, to increasing the proportion of electricity generated from renewable sources. **Mr Truesdale** discusses this in his evidence.

57 The Government's direction has been reflected within the RMA. Section 7 of the Act states that in making decisions under the Act *"particular regard"* is to be given to:

> ...
>
> (j) the benefits to be derived from the use and development of renewable energy."

58 The Courts in two cases involving the Tongariro Power Development (*TPD*) and Contact's Power Scheme on the Clutha River have had to consider the issues of the national interest and weigh up competing values in the context of hydro development, albeit in relation to applications for resource consents. Both cases contain discussion about the effects of continuing the Power Schemes on the national interest and the contributions of those Schemes to New Zealand's power needs in terms of section 5.

59 In the TPD case[17] a conflict existed between the continued operation of the Power Scheme and the diversion of the Wanganui River which was culturally unacceptable to Maori. This was a typical balancing exercise under section 5.

60 In the Environment Court, the Court conducted the balancing exercise and provided for the continuation of the TDP in the national interest but for only ten years. The High Court[18] amended the term to 35 years citing the *"national importance"* of the TDP in terms of its contribution to New Zealand's renewable energy generation. This decision was upheld on appeal to the Court of Appeal.[19]

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[17] *Ngati Rangi Trust v Manawatu-Wanganui Regional Council*, Environment Court Auckland, A067/04, 18 May 2004, Judge Whiting

[18] *Genesis Power Limited v Manawatu-Wanganui Regional Council* (2006) 12 ELRNZ 241; [2006] NZRMA 536

[19] *Ngati Rangi Trust v Genesis Power Limited* (2009) 15 ELRNZ 164; [2009] NZRMA 312

61 In the Contact Energy case[20] a conflict existed between continuation of the Power Scheme and the protection of residents of Alexandra from flooding. The Court under the discussion in Part II of the RMA discussed hydro electricity generation as a sustainable process which at first sight promotes the purpose of the Act and recorded and gave due weight to the contribution of the Clutha River's hydro electricity plants to New Zealand's power supply.

62 Finally there is the example of the Waitaki Plan itself. The final Plan recognised the national importance of hydro electricity generation and in its final form, after hearing from submitters, the Board removed earlier draft provisions which would have significantly impacted on the operation of the existing Waitaki Power Scheme. In addition the final Plan included an allocation to enable future hydro development in the Lower Waitaki.

63 It is therefore submitted that there should be recognition that the existing Waitaki Power Scheme infrastructure, its associated use of natural resources, and its existing effects, are ongoing activities within the Waitaki Catchment. As already discussed earlier, Meridian is in no way suggesting that such recognition should occur at the expense of all other considerations.

Rule 5.132

Background

64 Meridian is the owner of a large number of existing structures within the beds of lakes and rivers which comprise the physical assets of the Waitaki Power Scheme.

65 From Meridian's perspective, a significant new provision in the Proposed Plan is the requirement in Rule 5.132 that consent be sought as a controlled activity for the use of a structure in the bed of a river associated with a lawfully established hydro-electricity power scheme that existed on 1 November 2013.

66 Meridian considers it is unclear on the current wording of this Rule what structures this Rule is intended to cover. For example, one reading of this Rule is that the use of Meridian's structures is not '*associated*' with a lawfully established hydro-electricity power scheme because they **are** the hydro-electricity power scheme. Rather, what the Rule is intended to capture is those other activities/structures that exist in the environment because of the Waitaki Power Scheme. On this reading of the wording, the Rule would not apply to Meridian's structures.

67 Meridian's submits that this wording needs to be clarified by the Commissioners, as if it does in fact apply to the use of Meridian's

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[20] *Alexandra District Flood Action Society v Otago Regional Council*, EC Christchurch, C102/05, 20 July 2005, Judge Jackson

structures, Rule 5.132 will require Meridian to seek resource consent for its structures (including dams if the section 42A Officers' recommendations are accepted)[21] within six months of the Rule becoming operative due to section 20A of the RMA.

68 Section 20A(2) criteria provides a 6 month time limit for applying for resource consent from the day the Rule become operative provided:

68.1 before the Rule became operative, the activity:

(a) was permitted or allowed to continue under subsection (1) or otherwise could have been lawfully carried on without a resource consent; and

(b) was lawfully established; and

68.2 the effects of the activity are the same or similar in character, intensity, and scale to the effects that existed before the Rule became operative.

69 Accordingly, Meridian has sought that the activity status of this Rule be changed to a permitted activity.

70 In terms of the effect of Rule 5.132 if it applies to the use of Meridian's structures, Meridian is arguably the most affected submitter. It is difficult to identify another party who would have more structures in terms of significance and scale which are built in the beds of rivers in the Canterbury Region.

71 As outlined in the evidence of **Mr Page** and as set out in the following, the use of very few of the Waitaki Power Scheme pre-1991 structures are authorised by a resource consent. The background to existing authorisations for such structures predate the RMA and can be explained as follows.

71.1 The authorisations for the construction of the Power Scheme on the Waitaki River stem from various Order in Councils commencing with an Order in Council in 1929 which authorised the Minister of Public Works to erect, construct, provide and use certain works, appliances and conveniences in connection with the utilisation of water power from the Waitaki River for the generation, storage, transmission, distribution and sale of electrical energy.

71.2 At the time the Crown sold the assets of the Waitaki Power Scheme to ECNZ in 1988, the various authorisations to do what are now described as the activities of taking, damming,

[21] See page 378 of the Section 42A Report for Hearing Group 1.

diverting, using and discharging water were based on historical Order in Councils. The last of these Orders in Councils had been granted in 1969 for 21 years with a right of renewal.

71.3 At the time ECNZ became the statutory successor to the Crown it gave an undertaking to the Crown to formally apply for the water permits associated with the damming, diverting, taking, use and discharge of water under the Water and Soil Conservation Amendment Act 1988 before 31 March 2033. This did not include the part of the authorisations dealing with physical structures.

71.4 ECNZ considered that the appropriate time to apply for water permits was the expiry of the first term of the 1969 Order in Council. In May 1990 ECNZ made applications for the water rights to enable the continued operation of the Waitaki Power Scheme. The water rights were duly granted and became deemed resource consents with the passing of the RMA. The 1990 consent process was a major consenting exercise. These water permits expire in 2025 in what will again be a major consenting process.

The RMA

72 This section of these submissions discusses the legal situation with respect to Meridian's structures, in, on, under and over the beds of rivers in the Waitaki catchment.

73 Section 13 of the RMA provides:

> **13 Restriction on certain uses of beds of lakes and rivers**
>
> (1) No person may, in relation to the bed of any lake or river,—
>
> (a) Use, erect, reconstruct, place, alter, extend, remove, or demolish any structure or part of any structure in, on, under, or over the bed; or
>
> (b) Excavate, drill, tunnel, or otherwise disturb the bed; or
>
> (c) Introduce or plant any plant or any part of any plant (whether exotic or indigenous) in, on, or under the bed; or
>
> (d) Deposit any substance in, on, or under the bed; or
>
> (e) Reclaim or drain the bed—
>
> unless expressly allowed by a rule in a regional plan and in any relevant proposed regional plan or a resource consent. ...

74 As a basic starting proposition therefore the continuing use and placement/occupation of the structures associated with the Waitaki Power Scheme has to be expressly allowed by the Proposed Plan.

75 Notwithstanding section 13, section 418(3) of the RMA is relevant and provides:

> For the purposes of this Act, section 13(1) shall not apply in respect of any activity lawfully being carried out in relation to the bed of any river or lake before the 1st day of October 1991 which did not require any licence or other authorisation relating to such activity under any of the Acts, regulations, or bylaws, or parts thereof, amended, repealed, or revoked by this Act, until a regional plan provides otherwise.

76 Section 418(3B) provides:

> (3B) Notwithstanding section 13(1)(a), any use, erection, reconstruction, placement, alteration, extension, removal, or demolition of any structure or part of any structure in, on, under, or over the bed of any river or lake (whether or not commenced or being carried out) which, before the 1st day of October 1991, could have been lawfully commenced and continued without any licence or other authorisation relating to such activity under any of the Acts, regulations, or bylaws, or parts thereof, amended, repealed, or revoked by this Act, may be continued or commenced at any time after the date of commencement of this Act until a regional plan provides otherwise.

77 Meridian's position is that its rights to continued existing use of its structures are protected by section 418(3) or (3B). Obviously the critical words in section 418 are *"until a regional plan provides otherwise"* as it is the provisions of the Plan which determine whether Meridian can continue to rely on section 418 to authorise the continued use of the structures associated with the Waitaki Power Scheme.

78 Under the NRRP, the use of these structures was a permitted activity under Rule BLR2 of Chapter 7. Therefore it is only now, with a controlled activity status in Rule 5.132 of the Proposed Plan, that Meridian would not be able to rely on section 418 to authorise the continued use of structures.

79 There is no apparent resource management reason for ECan to now require resource consent for the use of these structures. Of note, the requirement for consents would not be reflective of the effects of such infrastructure which will not change, and the impracticalities of modifying existing infrastructure in response to exercising control over the matters listed in the rule. As outlined by **Mr Page**, the

requirement for resource consent under this Rule would have significant financial cost for Meridian, far outweighing any benefit gained.

80 It should be noted that the Section 42A Officers have incorrectly assumed that Meridian will only require resource consent under this Rule when the Waitaki Power Scheme is to be re-consented. This is incorrect, because as already explained, Meridian does not hold resource consent for the use of its structures and on one reading of the wording of the Rule, it will trigger the need for resource consents within six months of the Rule becoming operative in accordance with section 20A.

Absolute protection

81 This section of the submissions will focus on objectives and policies which contain, in Meridian's submission, an inappropriately high degree of protection when having regard to the purpose and principles of the RMA.

82 For example, a number of objectives (e.g. Objectives 3.3, 3.9 and 3.10) are formulated with a focus on the unqualified protection of the subject matter of the objective. It is submitted that such a focus provides an inappropriately high test, rather than appropriately providing for sections 6, 7, and 8 of the RMA.

83 By way of specific example, Objective 3.3 reads 'The relationship of Ngai Tahu and their culture and traditions with the water and land of Canterbury is protected'. In contrast, section 6(e) of the RMA requires that the relationship of Maori and their culture and traditions with their ancestral lands, water, etc is recognised and provided for.

84 Further, Objective 3.9 reads 'The existing natural character values of alpine rivers are protected'. The unqualified protection of such natural values is ambitious at best. Accordingly, Meridian has sought to qualify the Objective so it only applies *"where there is a high state of natural character, or natural character values are in a modified state but highly valued"*.

85 As described by **Ms Dawson**, Meridian does not consider it is appropriate for the Proposed Plan to contain objectives of such a generally aspirational nature which set the bar unrealistically high in regard to the desired protection, maintenance or restoration of various resources or environmental values. Meridian's amendments will provide a more appropriate balance between the use/development and protection/maintenance of resources for hydro electricity generation.

86 Similar criticism can be levelled on Strategic Policy 4.1 and Tables 1a and 1b. The Policy and Tables are expressed in absolute terms

as there is no degree of temporal (frequency) compliance with freshwater outcome indicators. As discussed by **Dr James**, requiring 100% compliance all the time will be unrealistic to achieve in some circumstances, particularly in the Upper Waitaki Catchment.

87 It is submitted that, as with the Objectives discussed above, to require 100% compliance at all times does not recognise the purpose of the RMA - that is, to promote the sustainable management of natural and physical resources by making an overall judgement balancing the competing factors, their scale and degree, and their relative significance in the final outcome, in section 5.[22] As such, as already discussed at length in these submissions, section 5 does not require ECan to promulgate a Plan which protects natural and physical resources at all costs by effectively prohibiting any adverse effects.

88 There should be more scope in the Proposed Plan for a proposal to be granted consent even if it has adverse effects, provided it meets the section 5 purpose and this is recognised by the Courts[23]:

> Case law clearly establishes that activities with very significant effects may be granted consents, while others without such particular effects may be refused consent. The scale of the effect is clearly a matter which will go into the evaluation necessary under Part 2 of the Act but is not determinative of it.

89 To have provisions in the Proposed Plan which provide for on protection and absolute compliance without qualification is therefore not appropriate.

Offsets and Wetlands

90 Meridian has sought amendments to Policy 4.80 and Rule 5.141 to provide that offsetting effects, when a wetland is modified to install infrastructure, should not be limited to the expansion or improvement of <u>that</u> wetland, but also to any <u>other</u> wetland in the region. It is submitted that ECan's approach to Policy 4.80 and Rule 5.141 does not reflect current practice with regard to offsetting, nor is there any reason to restrict the offset in this way.

Court's approach to offsetting

91 Traditionally, offsetting (and environmental compensation) has arisen in the context of an applicant for a resource consent doing something more than volunteering to avoid, mitigate or (occasionally) remedy the more direct effects of a proposal.

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[22] This concept originated in *NZ Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC) and has continued through a number of cases, for example of note: *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59.

[23] *Upland Landscape Protection Society Inc v Clutha District Council* EC Christchurch C85/08, 25 July 2008 at [94].

92 Although the concepts have developed since, most discussions relating to offsets and compensation start with *JF Investments Limited v Queenstown Lakes District Council*[24] ('*JF Investments*'). In that case the Court gave the following definition of environmental compensation (noting that this definition loosely refers to offsetting):

> "any action (work, services or restrictive covenants) to avoid, remedy or mitigate adverse effects of activities on the relevant area, landscape or environment as compensation for the unavoided and unmitigated adverse effects of the activity for which consent is being sought."[25]

93 The Court noted that the corollary of the definition is that normal conditions that are solely aimed at avoiding, remedying or mitigating the adverse effects of the activity for which consent is sought do not count as environmental compensation.

94 The concepts of offsets and environmental compensation have since been further refined in a number of subsequent proceedings, including a significant discussion in the decision of the Board of Inquiry in the Transmission Gully Plan Change Request.[26]

95 The Transmission Gully Plan Change Request decision aids in identifying the key difference that has evolved between offsets and environmental compensation. In particular, the Board was of the view that offsetting is a subset of mitigation and there is a point at which the action being offered ceases to remedy or mitigate the adverse effects which have been created (i.e. ceases to be an offset) and is rather offered as an indirect but compensatory benefit for allowing that adverse effect (i.e. is now environmental compensation) which is still relevant under section 104(1)(c) of the RMA. For example:

> [203] Accordingly, the Court in *J F Investments* appeared to use the terms set-off (offsetting) and environmental compensation interchangeably but identified the significance of proximity (in terms of distance, kind or quality) of the counter balancing action in assessing the value of that action. There comes a point at which the action being offered ceases to remedy or mitigate the adverse effect which has been created and is rather offered as an indirect but compensatory benefit for allowing that adverse effect. An example of the latter type of

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24 *JF Investments Limited v Queenstown Lakes District Council* EC Christchurch, C048/06, 27 April 2006, Judge Jackson.

25 At paragraph 8.

26 *Final Decision of the Board of Inquiry into the New Zealand Transport Agency's Transmission Gully Plan Change Request* (5 October 2011, EPA 0072) at paragraph 210 and confirmed in the Environment Court in *Mainpower NZ Ltd v Hurunui District Council* [2011] NZEnvC 384 at paragraph 461.

action would be an offer to make a cash payment to an environmental cause as a response to damaging a water body.

[204] That distinction was recognised by the Environment Court in its decision in *Haka International NZ Ltd v Auckland Regional Council*[40] where the Court was considering the inclusion of provision allowing environmental compensation in a regional plan. The Court made the following observation:

> We do observe however that in the future drafters of similar provisions might find increased clarity in differentiating between mitigation, in the traditional sense of lessening or making less intense, and compensation. Compensation does not carry a sense of the lessening of the adverse effect in question, but rather of offering recompense for the loss or impairment of whatever advantage or amenity has been affected[41].

[40] Decision A097/2007.

[41] Decision A097/2007, para 11.

96 Further, in slightly rephrasing the distinction, the Board held that offsetting which related directly to the values affected by an activity was in fact a form of remedy or mitigation of adverse effects and should be regarded as such. In contrast, offsetting which does not directly relate to the values affected by an activity could more properly be described as environmental compensation.[27]

Offsetting in the Proposed Plan

97 The purpose of the above discussion is to outline the current approach to offsetting, that is, that offsetting in the form of 'like for like' does not have to occur on the location in which the actual effects that are being offset will occur. In simple terms, the effects of the wetland being modified can be 'offset' by improving or enhancing a similar wetland in another location would still qualify as an offset.

98 In rejecting Meridian's relief sought on the Policy, the Section 42A Officers state the intention of the Policy is to avoid the reduction of wetlands in Canterbury.[28] However, the intention of the Policy is upheld with Meridian's proposed relief which expands the location of permitted offsetting from only in the same wetland, to offsetting involving another wetland (within Canterbury). This relief more appropriately reflects current practice with regard to offsetting.

[27] At paragraph [209], [210].

[28] Section 42A Report for Hearing Group 1, page 392.

99 Further, Meridian's relief does not seek what is now defined as environmental compensation, which is where what is offered is an indirect but compensatory benefit for allowing an adverse effect to occur. By way of example, environmental compensation would involve a proposal whereby the modification of a wetland would be compensated by the consent holder offering to provide pest and predator control over a nearby forest. While this would be a compensatory benefit to be included in the overall judgement, there is no direct benefit to wetlands from this compensation. In contrast to Meridian's relief sought, this compensation would not satisfy the intention of the policy as it will not avoid the reduction of wetlands in Canterbury.

100 It is also relevant to note that Policy 9.3.6(5) of the CRPS recognises the ability for an offset to be on a separate site.

CONCLUSION

101 These submissions have highlighted the importance of the Proposed Plan to Meridian, particularly given the scale of its existing infrastructure in the Waitaki Catchment and the implications of the Proposed Plan for its ongoing operation and management. This will be reiterated by the three witnesses giving presentations on behalf of Meridian.

102 Ultimately, Meridian seeks that the Commissioners give careful consideration to the framework in which it deals with the Waitaki Power Scheme and the Waitaki Catchment in the Proposed Plan.

Dated: 28 February 2013

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AR Galbraith QC

Counsel for Meridian Energy Limited

APPENDIX I

1 As already outlined, Meridian's submission and evidence lodged focuses on the provisions in the Proposed Plan which affect its hydro electricity generation interests in the Waitaki. Due to the nature of these interests, Meridian's submission and evidence lodged covers a large proportion of the Proposed Plan, including provisions that are set down to be heard in Hearing Groups 1, 2 and 3. The majority of the Proposed Plan provisions that affect Meridian's interests are provisions that are in the Hearing Group 1 schedule. It is for that reason that Meridian is appearing as part of Hearing Group 1.

2 For completeness, it is noted that:

2.1 The part of Meridian's submission that relates to Hearing Group 2 matters is largely in regard to the policies and rules on water quality as these provisions affect the Waitaki Power Scheme. The purpose of Meridian's submission on the Group 2 provisions relates to ensuring a framework which:

(a) maintains and improves water quality within the catchments of hydro electricity generating infrastructure through managing animal effluent, nitrogen loss from farming and stock access to waterways; and

(b) manages these activities, including by managing nutrient loading of hydro storage lakes, so as to not affect the continued operation and maintenance, nor the operational flexibility of the Waitaki Power Scheme.

2.2 Meridian has provided expert evidence from **Dr Mark James** on water quality issues as they affect the Waitaki Power Scheme.

2.3 Meridian has also submitted on and provided evidence regarding the potential relationship between the Proposed Plan and the Waitaki Catchment Water Allocation Regional Plan as it relates to sub-regional section 15 of the Proposed Plan. As this is a sub-regional issue to an extent, it is an issue scheduled to be heard in Hearing Group 3.