BEFORE THE CANTERBURY REGIONAL COUNCIL
AT OAMARU

Under the	Resource Management Act 1991
In the Matter of	Proposed Plan Change 3 to the Waitaki Catchment Water Allocation Regional Plan

---

SUBMISSIONS OF COUNSEL FOR THE LOWER WAITAKI RIVER MANAGEMENT SOCIETY OPPOSING CONTROLLED ACTIVITY STATUS FOR HYDROELECTRICITY AND OTHER MAJOR INFRASTRUCTURE

Acting Solicitor: Richard Reeve
Wilkinson Rodgers Lawyers
PO Box 803
Dunedin 9054
Fax: 03 474 0922 / Ph. 03 477 9844
richard.reeve@wrlawyers.co.nz

MAY IT PLEASE THE COMMISSIONERS

1. This submission opposing controlled activity status for hydroelectricity and other major infrastructure in the Waitaki Catchment is made on behalf of the Lower Waitaki River Management Society ("Society").

Background **– Rangitata *does not support controlled activity status***

2. In *Rangitata Diversion Race Management Limited et Anor v Canterbury Regional Council* [2015] NZHC 2174], the Court identified that the Commissioners assigned for the Proposed Land and Water Regional Plan erroneously believed themselves legally prohibited from granting controlled activity status to replacement water consents.[1]

3. As Justice Mander observed, the error of law was by the Commissioners' own admission material:

   In addition to the legal arguments, there were merit-based arguments for and against the classification. The Commissioners did not engage the merits in any substantive way, and concluded that those arguments "do not prevail over ... [the] inconsistency" mentioned above.[2]

4. As assigned contradictor, counsel for the Royal Forest and Bird Society of New Zealand had argued in the course of the High Court hearing that the Commissioners' decision was primarily based 'on the merits', notwithstanding their legal rationale.[3] While His Honour accepted that an error of law had indeed been material to the decision, this argument evidently found favour:

   I do not accept the submission that the only reason the Commissioners concluded as they did was because of the erroneous legal interpretation. In other words, the outcome desired by the appellants does not, in my view, automatically follow from the error of law. My reading of the Commissioners' decision is that they did not ultimately consider they needed to substantively engage in the merits argument, for the simple reason that those arguments could not surmount the legal, or jurisdictional, bar which flowed from their interpretation.[4]

---

[1] *Rangitata Diversion Race Management Limited et Anor v Canterbury Regional Council* [2015] NZHC 2174 at [49]: "I therefore conclude that the Commissioners erred when they considered their approach to activity status under s 77A was circumscribed by s 123, or any other section, of the RMA. Part 6 can inform the interpretative task, but in this case the approach unduly restricted the prima facie unfettered discretion to assign activity status."

[2] *Rangitata* at [14].

[3] See *Rangitata* at [17] for the Court's summary of Forest and Bird's arguments as assigned contradictor for the hearing.

[4] *Rangitata* at [60]

5. Despite the urging of the appellants to determine otherwise, the Court did not find that controlled activity status was the most appropriate categorisation for replacement water consents, only that "controlled activity is an option for consideration in respect of the activities in question".[5]

6. The matter was remitted by the High Court back to the Commissioners on that basis:

   For clarity, I make no findings as to whether the categorisation of the actitivities in this case were, or would have been, available as findings of facts in the circumstances of this case. That will be a matter for CRC [ie the Commissioners] *to determine.*[6]

Inappropriate on the merits

7. On the Society's submission, controlled activity status remains inappropriate on the merits.

8. As Justice Mander observed in respect of sections 87A(2) and 104A(a) of the Resource Management Act 1991 ("Act"):

   A controlled activity is one for which the relevant authority must *grant a consent. The extent to which it can control such an activity is by the imposition of conditions.*[7]

9. This would apply irrespective of whether the consents being sought were replacement consents or wholly new. The only check on unsustainable activity would be conditions of varying enforceability (though the fact-finders could hold there was insufficient information to determine that the activity in question was a controlled activity (in the case of hydroelectricity, a low test)).[8]

10. It is submitted, the Commissioners need not look far for an illustrative historical example showing why controlled activity status is inappropriate: Project Aqua.

11. Called in by Parliament, Project Aqua attracted some 2500 submissions before being cancelled by Meridian in 2004. Had controlled activity status

[5] *Rangitata* at [55].
[6] *Rangitata* at [63].
[7] *Rangitata* at [4].
[8] Resource Management Act 1991 S104A(a).

applied, Project Aqua would have merely been a question of conditions notwithstanding the wave of public opposition.

12. In the case of Project Aqua, controlled activity status would have generated an undesirable public perception that large hydro was a foregone conclusion. This in turn would do little to assist with an appearance of transparency and accountability in local government as regards controversial resource consent applications for hydroelectricity generation.

13. Proponents might argue that controlled activity status in the context of Project Aqua would have focussed the fact-finders on managing adverse effects via conditions. However, conditions created with the intention of subtly rendering a controlled activity unfeasible would equate to an error of law, being a jurisdictional error of the type identified by Lord Reid in *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147. The fact-finders in this scenario would have

    dealt with and based their decision on a matter with which, on a true construction of their powers, they had no right to deal. If they base their decision on some matter which is not prescribed for their adjudication, they are doing something which they have no right to do and ... their decision is a nullity.[9]

14. Conversely, in the terminology of section 5(2)(c) of the the Act, discretionary activity status would grant a consent authority the vital legal option of avoiding adverse environmental effects altogether, rather than merely seeking to remedy or mitigate them, by allowing it to decline applications where necessary on a case-by-case basis.

15. To that end, discretionary activity status would not encourage errors of law in high-pressure situations like Project Aqua, as might be the case with controlled activity status.

Submissions by Meridian Energy Limited

16. Counsel for Meridian Energy Limited ("Meridian") has sought controlled activity status for the Waitaki Power Scheme ("Scheme"). The Scheme is defined as:

[9] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 at [22].

the powerhouses, dams, canals and related infrastructure owned by Meridian and Genesis Energy Limited between (and including) Lake Tekapo and Waitaki Dam.[10]

17. It is noted that there is nothing in the above definition to contain the Scheme to present infrastructure. Rather, Meridian's proposed amendments to Rule 15A, despite putatively only addressing "'core' section 14 RMA consents",[11] would cover any new major infrastructure that could be associated with the Scheme.

18. On the Society's submission, Meridian's argument for controlled activity status can be distilled into two underlying points:

    a. "[T]he Waitaki Power Scheme forms part of the existing environment" so that "effects which arise from the existence and operation of the Scheme are present and observable";[12]

    b. Controlled activity status grants greater security to the generators, with restricted discretionary status being "less effective because consent applications can be declined."[13]

19. It is submitted, Meridian's first point fails to address the possibility that the present Scheme could operate under alternative section 14 consents for which the effects arising would be quite different. Nor does it address the possibility of future additions, nor of progressive obsolescence of plant.

20. As such, this first point does not touch on changes, both positive and negative, that could occur to the in-stream environment under other flow regimes or different demand contexts. The term "existing environment" is to that end misleading.

21. Meridian's second point, it is respectfully submitted, is a platitude. As outlined above, a project as controversial as Project Aqua would have automatically been granted consents subject to conditions under controlled activity status, with flow-on consequences including likely public disenfranchisement from the RMA process. Controlled activity status would inevitably grant hydro operators and developers more security, yet this would be at odds with the participatory, precautionary nature of the Act.

22. Meridian has asserted that:

[10] Meridian Energy Limited (30 September 2015). Submissions on Controlled Activity Matter at ftn. 1.
[11] Meridian Submissions at [4].
[12] Meridian Submissions at [9].
[13] Meridian Submissions at [11].

By providing certainty that the Waitaki Power Scheme will be granted replacement consents that enable it to maintain generation output provided the WAP flows, levels or water allocations are implemented, while still enabling the consent authority to impose conditions in relation to the controlled matters, it better achieves the WAP objectives.[14]

23. The Society has previously stressed the overriding legal importance of consistency with Objective 1 of the Plan, and disagrees that controlled activity status "better achieves the WAP objectives". Objective 1 responded to the public fallout from Project Aqua; on the Society's submission, it is unrealistic to suppose that controlled activity status now achieves the objectives notwithstanding this history.

Cultural Issues – Tāngata Whenua

24. Project Aqua raised the ire of a broad cross-section of the general public, from surgeons to school teachers, but the specific impact of large hydro on tāngata whenua is a powerful reason in itself for deeming controlled activity status inappropriate on the merits.

25. It cannot be overlooked that the mana of tāngata whenua is diminished by categorising hydroelectricity as a controlled activity. In the latest version of Rule 15A proposed by Meridian, mitigation of adverse effects on "Ngāi Tahu culture, traditions, customary uses and relationships with land and water" has been rendered a mere condition rather than a determinant of whether consent should be granted.[15]

26. The Waitaha iwi is not directly contemplated in the text of Rule 15A, yet the Waitaki river is its sacred awa, and maintaining the integrity of the river has existential importance for the iwi. Waitaha wahine rangatira Anne Pate Sissie Te-Maiharoa-Dodds on behalf of the Society and the Waitaha Taiwhenua O Waitaki Trust Board has previously given evidence to this effect:

I am the great-granddaughter of Tohuku Te Maiharoa, who renounced Ngai Tahu after Henry Tacy Kemp's Purchase of 1848, because Waitaha believe that the land is our parent, and you cannot buy or sell your parent. Since then, my family have held te ahikaa uninterrupted in the Waitaki. Waitaha is the Waitaki River, the Waitaki River is Waitaha. When Waitaha

[14] Meridian Submissions at [10].
[15] Meridian Submissions at [4].

*stand to speak it is "*Ko te Waitaki Awa*", and the intrinsic value of this intertwines all of Nga Uri o Waitaha values.*[16]

27. Ms Te-Maiharoa-Dodds has also articulated the gulf between Ngāi Tahu and Waitaha in terms of Meridian's negotiations with tāngata whenua:

    I am not Ngaitahu, I am not registered with Te Runanga o Ngaitahu. I was not privy to the negotiation Ngaitahu had with Meridian. From what I can see of the outcome, I cannot agree with it.[17]

28. On her account, Waitaha have witnessed ongoing deterioration of the river's qualities over the past 50 years:

    The Waitaki riverbed is choked with broom, gorse and willow where 50 years ago it was open gravel. The braids are reduced from 22 in number to 12. Meridian controls the flushing flows of the river. To date its efforts at stewardship have been inadequate and ineffectual, given all it has taken from our awa nui.[18]

29. It is submitted, PC3 and now proposed controlled activity status reflect an ongoing sidelining of Waitaha despite the stated importance in Objective 1(a) of "maintaining the integrity of the mauri of the river in meeting the specific spiritual and cultural needs of the tāngata whenua, and by recognising the interconnected nature of the river".

30. Even if conditions could in every case adequately avoid, remedy or mitigate adverse environmental effects associated with large hydro – and this point is in no way conceded – controlled activity status would still deny tāngata whenua their right to play a meaningful role in determining future management of the river.

Conclusion

31. The discretion to determine the correct class of activity for hydroelectricity and other major infrastructure sits entirely with the Commissioners. As the Court in *Rangitata* identified, it requires an assessment on the merits, with all classes of activity under section 77A of the Act available for consideration by the fact-finders.

32. Minute 9 states that the Commissioners were advised by Council that the *Rangitata* decision "could directly affect any recommendation we might

[16] Lower Waitaki River Management Society (8 May 2015). Statement of Evidence of Anne Pate Sissie Te Maiharoa-Dodds at [8].
[17] Lower Waitaki River Management Society (18 May 2015). Statement of Rebuttal of Anne Pate Sissie Te Maiharoa-Dodds at [7].
[18] Statement of Evidence of Anne Pate Sissie Te Maiharoa-Dodds at [22].

make to Council on this matter".[19] While that advice may have been reasonable at the time, the decision has not in any way proved to be a fetter on the Commissioners.

33. Despite the strength of arguments for rejecting controlled activity status on the merits, it is nevertheless of concern to the Society that this matter of potentially significant public interest has not fielded submissions from further afield than the present parties engaged with PC3.

34. A shift from discretionary to controlled activity status represents a profound and unheralded change to the regulatory environment. It is not a decision to be made lightly. On that basis alone, it is submitted that any application to introduce controlled activity status for hydroelectricity and major infrastructure must be the subject of a future, publicly-notified plan change.

_____

Richard Maurice Reeve
(Counsel for Lower Waitaki River Management Society Inc.)

[19] The Commissioners (21 September 2015). Minute 9 at [2].

ERROR: undefined
OFFENDING COMMAND:

STACK: