Before Environment Canterbury

Under	the Resource Management Act 1991 (**RMA**)
In the matter of	of Plan Change 5 to the Canterbury Land and Water Regional Plan

Memorandum on behalf of Meridian Energy Limited

12 October 2016

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1 At the hearing of Meridian's submissions on Plan Change 5 on 4 October 2016 the Hearing Commissioners asked a number of questions to which Meridian reserved its response.

2 The purpose of this Memorandum is to provide responses to these questions.

Scope of Meridian's submission – Schedule 27

Q1. Does the expression of the relief sought in Meridian's original submission provide scope for the particular relief proposed in the evidence of Mr Ellwood?

3 The relevant written submission is found in the "Decision Sought" column of the table at page 4 of the primary submission dated 11 March 2016. It says:

> Amend Schedule 27 to ensure that:
>
> - the total nitrogen load limits for the Haldon and Mid-Catchment Zones are not exceeded as a result of any individual or combination of land-cased nitrogen losses; and
>
> - the Upper Waitaki Nitrogen Headroom available per property at any time has taken into account the nitrogen losses associated with any existing consent granted, existing consent already lodged with Environment Canterbury, potential consents that could be lodged, and any property allowance with additional nitrogen losses.

4 This relief sought needs to be read in conjunction with the "Submission" column of the table which includes the statement that:

> As proposed, Meridian considers that the methodology set out in Schedule 27 to calculate of (sic) the headroom per property is flawed. This is because…

5 I submit that Meridian's written submission identifies what it considers to be a flaw in the notified version of Schedule 27, and the detail of the relief sought is precise – an amendment to the Schedule to ensure the method of nitrogen headroom calculation accounts for nitrogen losses associated with consents both granted and lodged; potential consents that could be applied for; and any property allowance with additional nitrogen losses. By so specifying the decision it asks the consent authority to make, the submission complies with the requirement of "Form 5"[1] to give precise details of the decision the submitter wishes the consent authority to make.

6 The written submission does not set out the consequential plan drafting necessary to amend Schedule 27 to deliver the precise outcome Meridian seeks.

[1] Form 5, Resource Management (Forms, Fees and Procedure) Regulations 2003

7 The wording of the necessary amendment is contained in the evidence of Mr Ellwood, and in his response to questions in **Attachment A** to this Memorandum.

8 The legal question to be answered is whether the wording as set out in Mr Ellwood's evidence is within scope of the written submission dated 11 March 2016.

9 Case law discusses this question of scope generally in the context of the relationship between the terms of an original submission, and the nature of the specific relief sought in an appeal. This is not the same context as the question asked by the Hearing Commissioners, which concerns the relationship between the precise detail of the relief sought in an original submission and the technical plan drafting advanced at a first instance hearing before the consent authority in order to give effect to the relief sought. In my submission there is no basis for adopting a different approach here than is taken by the Court in the context of an appeal.

10 Case law also discusses a slightly different issue which is not relevant in the present context. This issue is the relationship between the relief sought in a notice of appeal and the subsequent relief the Court is invited to consider through the conduct of an appeal.

11 A recent Environment Court case that discusses the leading authorities relevant to the question asked by the Hearing Commissioners is *Church of Jesus Christ of Latter Day Saints Trust Board v Hamilton City Council*[2].

12 This case concerned the provisions in the proposed Hamilton District Plan for the protection of heritage values of significant buildings, and in particular the methodology used to assess significance.

13 The question the Court had to determine in *Latter Day Saints* was whether the specific amendments before it were within scope of the notified proposed plan or as sought to be amended by the appellant's submission and notice of appeal. In reaching the conclusion that the specific amendments were within scope the Court considered the principles that apply as follows:

(a) The original submission must raise a relevant resource management issue[3];

[2] [2015] NZEnvC 166

[3] *Re Vivid Holdings Limited* [1999] NZRMA 468

(b) The relief sought (i.e. the specific amendment) before the Court must be fairly and reasonably within the general scope of:

(i) An original submission; or

(ii) The proposed plan as notified; or

(iii) Somewhere in between[4].

(c) The test is whether the amendments sought are raised by and within the ambit of what is reasonably and fairly raised in submissions. This will usually be a question of degree to be judged on the terms of the proposed change and the content of submissions[5];

(d) What is "reasonably and fairly" raised in submissions is to be approached in a realistic workable fashion rather than from the perspective of legal nicety[6]; and

(e) The underlying principle is that a change to a planning instrument cannot be made without those potentially affected by the change having an opportunity to comment on it[7].

14 I submit the above principles are appropriate to apply in the present context. This last principle – relating to ensuring potentially affected persons are not denied an effective opportunity to participate in the plan-making process – is perhaps the most important consideration of all and has been commented on at some length in the context of High Court appeals in *Clearwater Resort v Christchurch City Council*[8] and *Palmerston North City Council v Motor Machinists*[9] where the issue was whether submissions were "on" a plan change.

15 I submit the detailed change to the methodology Mr Ellwood recommends in his evidence is within the ambit of what is reasonably and fairly raised in Meridian's original submission.

16 Meridian's original submission is that the Schedule 27 methodology as notified is flawed and needs to be amended so as to properly account for all nitrogen

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[4] Idem

[5] *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145

[6] Idem

[7] *Royal Forest and Bird Protection Society of New Zealand Incorporated* v Southland District Council [1997] NZRMA 408

[8] HC Christchurch, AP 34/02, 14 March 2003, William Young J

[9] [2014] NZRMA 519

contributions. The wording change proposed by Mr Ellwood is a matter of drafting and is entirely consistent with that submission. Mr Ellwood introduces the wording necessary to achieve the precise outcome sought in the original submission.

17 To put it another way, had the detailed wording Mr Ellwood recommends been included in the original submission would that have meaningfully changed the understanding a potential submitter would have had as to what it was that Meridian was seeking? I submit it would have made little, if any, difference.

18 Mr Ellwood's technical wording can therefore be considered "reasonably and fairly" raised in the submission. I therefore submit the Hearing Commissioners have the jurisdiction to make the change recommended by Mr Ellwood, including a potential change to the formula he recommends as set out in **Attachment A** in response to another question from the Hearing Commissioners.

Q2. Assuming the Hearing Commissioners do not accept the view that the changes recommended by Mr Ellwood are within scope of Meridian's original submission, can the change be made under Schedule 1 Clause 16(2) RMA as a minor amendment?

19 Clause 16(2) states:

> A local authority may make an amendment, without using the process in this Schedule, to its proposed policy statement or plan to alter any information, where such an alteration is of minor effect, or may correct any minor errors.

20 The test for "minor effect" is whether the amendment affects the rights of some members of the public, or whether it is merely neutral. Only if it is neutral may such an amendment be made under Clause 16[10].

21 Therefore, the test for using this clause to amend a plan is similar to the scope requirements (above) in relation to a submission in that the amendment must not restrict public participation rights.

22 The case *Christchurch City Council, Application by* discusses the purpose of Clause 16(2). In this case the proposed Christchurch City Plan was in the process of being finally printed in the weeks leading up to notification, and it became apparent there were a number of errors and omissions in the text and planning maps that needed to be altered by way of Clause 16(2)[11].

23 The Court determined that the clause is concerned with two distinct possibilities:

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[10] *Christchurch City Council, Application by* (1996) 2 ELRNZ 431 at page 10

[11] Ibid at page 3

(a) The first is the alteration of "information", which means "anything said in the plan which informs the public of their rights and obligations". An example given in the case is changing the description of a tree on someone's property so that it is correctly described. If this is changed, it will be a neutral change to the owner of the property; and

(b) The second is the correction of errors, which means a mistake or inaccuracy which has crept into the plan, for example spelling mistakes.

24 In both situations, the Clause is clearly focused on correcting errors, or wrong / misleading information.

25 The purpose of Clause 16(2) is helpfully described as:

> The power conferred on the Council to amend a draft plan "without further formality" is a recognition of the human condition that from time to time errata will creep into the most carefully drafted documents. Where that happens it would be a waste of public money to require the Council to go to the expense of re-opening the full public participation process. The public have no legitimate interest in the matter other than to know that such errors, which change nothing affecting their rights, will be corrected. Certainly it cannot be anticipated that more public money than is necessary will be spent on correcting drafting errors.[12]

26 As I noted in my legal submission at the hearing[13], while the change Mr Ellwood proposes is likely to be small in terms of the nitrogen load received in the Haldon Arm, it is significant in the sense that it will make the nitrogen calculation more accurate and will reduce the possibility of unaccounted for nitrogen threatening the water quality in Lake Benmore.

27 On that basis, while the effect of the change is likely to be modest I submit it goes beyond what could properly be considered minor for the purposes of Clause 16(2) of Schedule 1.

Technical questions – Schedule 27

Q3. What is the date after which the amendment to Schedule 27 recommended by Mr Ellwood is no longer necessary?

Q4. What is the relevance of 1 December 2013 within the change to Schedule 27 recommended by Mr Ellwood?

Q5. Can Mr Ellwood's suggested amendment to E1 of Schedule 27 be more simply expressed as: E1 = 66 N/yr – ((<u>the amount of on-land based agricultural N load</u>

[12] Ibid at page 9

[13] Legal Submission of Meridian Energy Limited, 4 October 2016, paragraph 34

*allocated in excess of 1.6 /kg/ha via resource consent granted after 1 December 2013 but before the Rules 5.53A, 5.54A, 15B5.19 to 15B.5.23 become operative) *G)?*

28 These questions are answered by Mr Ellwood in **Attachment A** to this Memorandum.

Location of new policy concerning the recognition of natural processes and variability

Q6. As a partial alternative to amending the fresh water outcome and limit tables Ms Dawson has recommended a new policy requiring naturally occurring processes and natural variability to be taken into account when implementing Policies 4.1 and 4.2 within the Waitaki sub-region FMUs. Where within PC5 would such a policy most appropriately sit?

29 This question is answered by Ms Dawson in **Attachment B** to this Memorandum. I note that upon reflection Ms Dawson recommends that the new policy should apply only to the Upper Waitaki FMUs rather than the whole catchment as this is the context within which the evidence concerning naturally occurring processes and natural variability arises. Ms Dawson raises this issue in Attachment B.

Monitoring and response conditions

Q7. Appendix 2 to Mr Page's evidence comprises a list of existing resource consents with monitoring and response conditions. Which of these consents do not form part of the Upper Waitaki Irrigation Consent Hearing Process?

30 This question is answered by Mr Page in **Attachment C** to this Memorandum.

Dated this 12th day of October 2016

S W Christensen
Counsel for Meridian Energy Limited

Attachment A – Response from Mr Ellwood

Response to questions from the Plan Change 5 Panel:

Question 1. What is the date after which the amendment to Schedule 27 recommended by Mr Ellwood is no longer necessary?

Amendments to the headroom E1 would only be required for land use consent applications:

1. Made prior to Rule 15B.5.23 becoming operative; and

2. Where consent is required under proposed Rule 15B.5.18C; and

3. Consent is granted to a N loss exceeding 1.6kgN/ha/yr above the N baseline.

If the application is made **after** the date Prohibited Activity Rule 15B.5.23 becomes operative no adjustment would be required.

If Prohibited Activity Rule 15B.5.23 is not made operative or a different activity status is selected, then an adjustment to the formula may always be required to address the circumstance where the allocation is for more than the Upper Waitaki Nitrogen Headroom available to the property.

Question 2. What is the relevance of 1 December 2013 within the change to Schedule 27 recommended by Mr Ellwood?

1 December 2013 is the date all of the scientific studies have used to determine the Reference Landuse Pattern which was used to determine the current agricultural load – this current on-land load was then compared to the current in-lake water quality (as at 1 December 2013) to create the catchment attenuation factor.

The date 1 December 2013 fixes the land use pattern and the associated nutrient loss the catchment is currently receiving to produce the current (1 December 2013) water quality outcomes. Changes after this date are accounted for in the calculation of the headroom available.

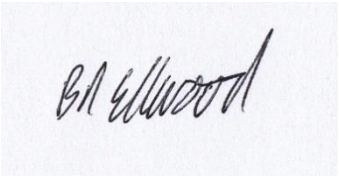
FMU	Scenarios	Brief description
Upper Waitaki	Current	As at December 2013
	Scenario 1	Current + consented land use as at December 2013
	Scenario 2a	Additional small blocks (approx. 100 ha each)of irrigated sheep and beef / dairy support
	Scenario 2b	Additional large blocks (approx. 500 ha each) of irrigated dairy
	Scenario 2c	Additional small blocks (approx. 100 ha each) of irrigated sheep and beef / dairy support in Haldon Arm sub-catchment only

Question 3. Can the amendment to E1 of Schedule 27 within Mr Elwood's evidence be more simply expressed as: E1 = 66 N/yr – ((the amount of on-land based agricultural N load allocated in excess of 1.6 /kg/ha via resource consent granted after 1 December 2013 but before the Rules 5.53A, 5.54A, 15B5.19 to 15B.5.23 become operative) *G)?

The amendment suggested by the Hearing Commissioners would achieve the correct adjustment to E1 (available headroom) provided the extra on-land load is **divided** by G (the attenuation factor to convert it to in-lake load).

I note, in response to Question 1 above, I have formed the view that it is the application date, not the decision date that is the critical matter. Accordingly, the formula should be expressed as follows:

E1 = 66 tN/yr – the amount of on-land based agricultural N load allocated in excess of 1.6 /kg/ha via resource consent granted after 1 December 2013 in respect of an application made before the Rules 5.53A, 5.54A, 15B5.19 to 15B.5.23 become operative/G



Brian Ellwood
12 October 2016

Attachment B – Response from Ms Dawson

Qualifications and Experience

1 My name is Sarah Margaret Dawson.

2 My qualifications and experience are as set out in my statement of evidence of 22 July 2016.

Response to Commissioner's Question regarding new Policy

3 My evidence supported the insertion of the following new policy providing for sub-regional natural processes and variations in water quality to be taken into account:

> Within the Waitaki sub-region Freshwater Management Units, when implementing Policies 4.1 and 4.2 to take into account that the existing freshwater quality in the lakes and rivers is influenced by naturally occurring processes, including the glacial origin of the water, and natural variation.

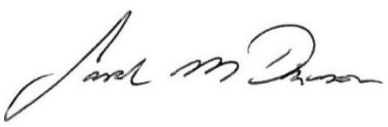
4 I was asked where such a policy should sit within PC5 – before Policy 15B.4.19, after Policy 15B.4.23, or somewhere else?

5 I note that the concerns expressed, and examples given, in the evidence of Dr James, and discussed in my evidence, refer to the natural characteristics and variability of water quality in the Upper Waitaki catchment, particularly the Upper Waitaki FMU (**UWFMU**).

6 The policies relating to this FMU are found from Policy 15B.4.19 to 15B.4.23. I consider the policy would appropriately sit at the start of this group of UWFMU policies (before Policy 15B.4.19), because it is an over-arching, and more generally applicable, water quality policy than the other policies in this section.

7 Upon reflection, in order to target the natural water quality in the UWFMU more specifically, the new policy could be reworded as follows:

> Within the ~~Waitaki sub-region~~ Upper Waitaki Freshwater Management Unit~~s~~, when implementing Policies 4.1 and 4.2 to take into account that the existing freshwater quality in the lakes and rivers is influenced by naturally occurring processes, including the glacial origin of the water, and natural variation.



Sarah Margaret Dawson
12 October 2016

Attachment C – Response from Mr Page

1 At the Plan Change 5 hearing on Tuesday 4 October 2016 the Panel asked which consents identified in **Appendix 2 Examples of consents with monitoring and response conditions** of my evidence-in-chief did not form part of the Upper Waitaki Irrigation Consent Hearing Process (the Hearing Process). In response, I set out the table from Appendix 2, with the only changes made to it being to notate by yellow highlight those consents which did not form part of the Hearing Process.

2 The Hearing Process related to 104 applications for water permits and occurred in the 2009-2012 period[14].

3 I observe that:

(a) The *Glentanner [Catherine Fields] (CRC163408)* water permit in the attached table arose from a new application for the same or similar activity which was subject to the original appealed decisions from the Hearing Process (CRC071362 and CRC083609). The appeals discontinued on 25 November 2014.

(b) Haldon Station was part of the Hearing Process (CRC042561 and CRC082269). Environment Canterbury's on-line consent search shows CRC041461 as "Terminated – Replaced" by CRC140563, which is not shown in the attached table. CRC140563 includes adaptive management receiving environment conditions in relation to Lake Benmore. CRC082269 is shown as "Terminated – Surrendered". This is because CRC082269 is in part overtaken by Haldon Station (CRC144880) in the attached table.

(c) Otamatapaio Station (Otamatapaio) was part of the Hearing Process (CRC012047). Environment Canterbury's on-line consent search database shows this as "Terminated – Replaced" by Otamatapaio CRC162522, which is not shown in the attached table. CRC162522 includes adaptive management receiving environment conditions in relation to Lake Benmore.

[14] The hearing was held between 21 September 2009 and 30 April 2010. The Part A (Catchment Wide Issues) decision is dated 22 November 2011. Environment Canterbury's web-site shows the Part B (Site Specific Decision) decisions on individual applications are dated between 22 November 2011 and 8 November 2012.

Notated table from Appendix 2 Examples of consents with monitoring and response conditions

Yellow highlight: Notates those consents which did not form part of the Hearing Upper Waitaki Irrigation Consent Hearing Process (2009 – 2012)

Name[15]	Consent type	Decision Type[16]	Adaptive management receiving environment			
			Benmore	Other lakes	Rivers	Ground water
Irishmans Creek Station Limited *(CRC011845)*	Water permit – irrigation	CO	No	No	Yes	No
Killermount Station Limited *(CRC041777)*	Water permit – irrigation	CO	Yes	No	Yes	No
Dunstan Peaks Limited *(CRC011361)*	Water permit – irrigation	CO	Yes	No	Yes	No
Five Rivers Limited *(CRC061154)*	Water permit – irrigation	CO	Yes	Yes (Wairepo Arm Kellands Pond)	Yes	Yes
Falconer and others *[Peak Valley]* *(CRC060253)*	Water permit – irrigation	CO	Yes	No	Yes	No
Anderson (CRC012019)	Water permit – irrigation	CO	Yes	No	Yes	No
Bog Roy (CRC012017)	Water permit – irrigation	CO	Yes	No	Yes	No
Ellis Lea Farms 2000 Limited & others [Government Race] *(CRC991473)*	Water permit – irrigation	CO	Yes	No	Yes	No
Glentanner [Catherine Fields] *(CRC163408)*	Water permit – irrigation)	ECan	Yes	No	No	No

[15] Where these relate to a consent order, the name and CRC number are as recorded in the consent order.

[16] CO = Consent Order, ECan = consent authority local decision

Name[15]	Consent type	Decision Type[16]	Adaptive management receiving environment			
			Benmore	Other lakes	Rivers	Ground water
M Horo (CRC042022)	Water permit – irrigation	CO	Yes	Yes (Wairepo Arm)	Yes	No
McAughtrie (CRC011940)	Water permit – irrigation	CO	Yes	No	Yes	No
Waitangi (CRC030944)	Water permit – irrigation	CO	No[17]	No	Yes	No
Grays Hill (CRC042661)	Water permit – irrigation	CO	Yes	No	Yes	No
Totora (CRC020584)	Water permit – irrigation	CO	Yes	No	Yes	No
Upper Waitaki Community Irrigation Company (CRC01128)[18]	Water permit – irrigation	CO	No	No	No	No
S J B Munro (CRC060938)	Water permit – irrigation	CO	No[19]	No	No	No
Bellfield (CRC011987)	Water permit – irrigation	CO	Yes	No	Yes	No
Otamatapaio (CRC155509)	Water permit – irrigation	ECan	No	No	No	No
Otamatapaio (CRC155512)	Water permit – irrigation	ECan	Yes	No	No	No
Otamatapaio (CRC161485)	Water permit – irrigation	ECan	Yes	No	No	No
Twin Peaks (CRC063564)	Water permit – irrigation	CO	Yes	No	Yes	No
Otematata (CRC041033)	Water permit – irrigation	CO	Yes	No	Yes	No

[17] Receiving environment is Lake Aviemore

[18] Receiving environment is Lower Waitaki River (below the Waitaki Dam)

[19] Receiving environment is Lake Aviemore

Name[15]	Consent type	Decision Type[16]	Adaptive management receiving environment			
			Benmore	Other lakes	Rivers	Ground water
Classic Properties (CRC063106)	Water permit – irrigation	CO	Yes	No	Yes	No
West Edge/Birchwood (CRC012291)	Water permit – irrigation	CO	No	Yes (Wairepo Arm)	Yes	No
McIntyre Dairies (CRC121814)	Discharge permit – dairy shed effluent	CO	Yes	Yes (Wairepo Arm Kellands Pond)	No	No
Mount Cook Alpine Salmon (CRC155604	Discharge permit – contaminants from Salmon farm	ECan	Yes	Yes (Wairepo Arm	No	No
Bendrose (CRC155429 and CRC155422)	Water permit – irrigation	ECan	Yes	No	Yes	No
Black Forest (CRC164826)	Water permit – irrigation	ECan	Yes	No	No	No
Haldon Station (CRC144880)	Water permit – irrigation	ECan	Yes	No	No	No
Glenmore Station (CRC052502)	Water permit – irrigation	ECan	No	No	Yes	No
Aviemore Station (CRC041031 and CRC083692)	Water permit – irrigation	ECan	No	No	No	No
Otematata Station (CRC020355)	Water permit – irrigation	ECan (?)	No	No	No	No
Otematata Station (CRC041033)	Water permit – irrigation	ECan (?)	Yes	No	Yes	No

Name[15]	Consent type	Decision Type[16]	Adaptive management receiving environment			
			Benmore	Other lakes	Rivers	Ground water
Graham *[Te Akatarawa Station]* *(CRC161635)*	Water permit – irrigation	ECan	No[20]	No	No	No

Jeffrey Allen Page
12 October 2016

[20] Receiving environment is Lake Aviemore