in the matter of: the Resource Management Act 1991

and

in the matter of: submissions and further submissions by **Meridian Energy Limited** to the Manawatu-Wanganui Regional Council on the proposed Horizons One Plan – **Water**

Synopsis of submissions of Meridian Energy Limited in relation to Water Chapter

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SYNOPSIS OF SUBMISSIONS OF MERIDIAN ENERGY LIMITED IN RELATION TO WATER CHAPTER

Introduction

1 This is the hearing of matters raised in the submissions and further submissions of Meridian Energy Limited (Meridian) in relation to the 'water chapters' of the proposed One Plan for the Manawatu-Wanganui ('Horizons') Regional Council.

2 The background to Meridian Energy and its involvement in the One Plan hearing process is already known to the Commissioners. In short:

2.1 Meridian is a limited liability company wholly owned by the New Zealand Government. 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. It is New Zealand's largest generator of renewable energy, and it is planning to increase its renewable generation capacity in the future.

2.2 Meridian currently owns hydro generating assets in the Waitaki Catchment in South Canterbury and at Manapouri in Fiordland. As such it holds a suite of resource consents which entitle it to take and use water. It also is an applicant for new consents seeking authorisation to take and use water for new hydro generation projects in the South Island.

2.3 In addition Meridian is interested in the taking and use of water for irrigation. For example, it is an applicant for the taking and use of water for the irrigation of 40,000 ha in South Canterbury.

3 At hearings like this a question asked is why Meridian wishes to be a submitter and present evidence when it does not own or is currently seeking resource consent for any hydro electricity generation assets in the Region . A similar question arose during Meridian's involvement in the Environment Waikato Regional Plan process.

4 One of Meridian's reasons for submitting on the One Plan is to ensure there is consistency of planning practice and in the application of the law whenever regional authorities around New Zealand make decisions on Plans which deal with the issue of water allocation.

5 Meridian believes it is well placed to deliver its submissions and evidence on such issues because it has been at the forefront of processes involving developments in law and policy in the area of water allocation. For example:

5.1 it has obtained declarations from the Environment Court about what its entitlement in the Waitaki Catchment to take water expressed at a rate in m^3/sec (cumecs) meant in annual volumetric terms;

5.2 it was the successful respondent in the decision of the full bench of the High Court in *Aoraki Water Trust & Ors v Meridian Energy Limited*;

5.3 it was the most actively engaged submitter in the development of the special legislation relating to the Waitaki Catchment and the subsequent development of the Water Allocation Plan for that Catchment;

5.4 its lawyers have been involved in all of the significant cases in Canterbury relating to water allocation and priority issues;

5.5 it applied for and obtained leave to appear before the Supreme Court as an intervener in *Ngai Tahu v Central Plains Water*;

5.6 commissioned paper on Freshwater Management by Frontier Economics.

6 Throughout these processes Meridian has become very familiar with the general principles which currently underlie decision making with respect to water allocation. While appropriate planning responses may differ from Region to Region (and thus should recognise the characteristics of particular relevant catchments) the underlying principles do not differ. Accordingly, Meridian wishes to ensure that its work to date in regions where Meridian has assets (such as the Waitaki) is not undermined by inconsistent decision making between regions.

7 With the benefit of that experience behind it Meridian believes is in a good position to comment on and assist the Hearing Panel with issues such as:

7.1 the legal issues around priority and processing of resource consent applications;

7.2 the need to maintain the discretion to be flexible in terms of consent expiry dates, and why a policy of "common expiry dates" would improperly restrict the discretion expressly provided for under the Act.

8 It is Meridian's submission that in some instances the proposed One Plan, as is currently worded, and/or as proposed by the Officers would be a significant departure from the underlying principles of the law on water allocation.

9 These submissions and the evidence are accordingly focused on the areas that in Meridian's view, require further amendment to ensure the One Plan accords with the proper interpretation of the RMA as developed through case law and is effective in achieving the sustainable management of the region's natural and physical resources.

10 In this context, the primary areas of comment and concern relate to:

10.1 policy 15-5(b) on allocation; and

10.2 policy 15-5 on consent duration

11 A number of other aspects of the One Plan are covered by **Ms Catherine Clarke**.

Policy 15-5(b)

12 Policy 15-5(b), as currently proposed sets out the order of priority by which water resources shall be allocated within each Water Management Sub-Zone upon their expiry in accordance with the dates specified in Table 11.1A. Meridian lodged further submissions supporting in part a number of submissions that opposed and sought changes to that part of the policy.

13 In this manner, the One Plan attempts to set through a Policy a direction to decision makers to set an *"order of priority"* for considering what might otherwise be competing resource consent applications. In particular it purports to elevate certain activities over others and it effectively sets in place a hierarchy for consideration which in order is:

13.1 the taking of small amounts of water under both sections 14(2) and (3) of the RMA (15-5(b)(i));

13.2 public water supplies which are predominantly for domestic use, that are due for review or are expiring (15-5(b)(ii));

13.3 current resource consents that are dues for review (15-5(b)(iii));

13.4 current resource consents that are expiring and have been re-applied for at least 6 months prior to expiry (15-5(b)(iv));

13.5 new resource consent applications for essential takes (domestic or stockwater takes, hospitals, defences, schools, marae, etc) (15-5(b)(v)); and

13.6 all other resource consent applications (15-5(b)(vi)).

14 As has been discussed by **Ms Clarke** in her planning evidence that has been already submitted to the Hearings Panel, it is extremely difficult to see how this would work in practice. Under policy 15-5(b) Council Officers and decision makers will inevitably need to make determinations as to how water will be allocated between competing users – both between categories (i) to (v) and within categories (i) to (v).

15 At its very simplest level this might be an application for public water supply 'gazumping' an application for the renewal of an existing irrigation take. However, it also appears that a Council Officer or decision maker might need to make a determination as to how water is allocated within a category, for example, where two applications for the renewal of existing consents are received by the Council at the same time – a realistic scenario given the proposed approach on common expiry dates that I will also address below.

16 There also appears to be an absolute absence of anything in the plan to suggest how such a decision might be made. There is not a single policy or objective directed to assisting Council Officers and decision makers make a comparative assessment of any competing application received at the same time – and nor do the proposed rules address how the two or more applications might be assessed.

17 It is submitted that such a regime would be inconsistent with good resource management process under the Act.

18 However, leaving to one side the existing provisions provided for in the proposed plan and the practical issues that might accrue with such an approach, there are a number of fundamental legal issues with policy 15-5 that must be addressed. These include:

18.1 the extent to which the RMA provides for or requires a first-come-first-served test?

18.2 if so, is it legal for the Council to vary through the wording of a policy what the RMA provides for in the way of processing so as to afford priority to an application for a particular activity (e.g. public supply) even if that applicant is later in time?

18.3 can a consent authority considering individual resource consent applications undertake a comparative assessment of competing applications?

18.4 is policy 15-5 simply a poorly drafted attempt at allocating water to activities and if so is there a better way to achieve this?

19 The points are linked as obviously the ability of a consent authority to undertake a comparative assessment of applications will only be possible where it can control or influence the processing (and grant) of applications in a manner that is different to the first-come-first-served test.

The first-come-first-served test

20 The Commissioners will already have some familiarity with the *'first-come-first-served'* concept. It is also apparent that the drafters of the plan at least had in mind when they drafted policy 15(b)(v).

21 However the exact parameters of the test and the point at which it needs to applied to a resource consent application has been the subject of judicial development.

22 Until recently, consent authorities and decision makers under the Act generally held that as between two applicants competing for the same resource, then the one that has their application ready for notification first and any relevant requests for further applications (section 91) or information (section 92) would be the one entitled to have their application considered first. This has been replaced by the Court of Appeal through the Central Plains saga[1] with a more simplistic 'priority on lodgement'.

Confirmation of first-in-first served

23 Before committing discussion to why alternatives to the first-in-first-served test (such as comparative assessments) are inconsistent with the Act, it is necessary to briefly recap on the development of the first-in-first served test.

24 The most appropriate starting point is perhaps *Fleetwing Farms Ltd v Marlborough District Council*[2] the applicants had filed applications for marine farms in the same area. The matter advanced to the Court of Appeal and the Court assessed the array of choices that Parliament had in terms of resource allocation when passing the RMA. These included providing for a comparative assessment of competing applications, providing for tenders, for proportional allocation, or on a *"first-come-first-served basis"*. The Court of Appeal concluded:

> "On our reading of the Resource Management Act Parliament has used the ... approach of first-come-first-served." (p391)

25 This point is also illustrated in the decision of *Geotherm Group Ltd v Waikato Regional Council*,[3] where Salmon J observed:

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1 *Central Plains Water Trust v Ngai Tahu Properties Ltd* [2008] NZRMA 200 (CA); *Central Plains Water Trust v Synlait Limited* [2009] NZCA 609 (CA)

2 [1997] NZRMA 385

3 [2004] NZRMA (High Court)

> "[12] The Fleetwing judgment concerned the legal test for determining priorities for the hearing of competing appeals. Fleetwing concerned competing applications for a coastal permit which applied to essentially the same area of water, so that **the grant of one necessarily excluded the other**. The Court held that because the Environment Court sits in the shoes of the Council it must, in the exercise of its jurisdiction, take account of the priority accorded to applications at the time they were before the Consent Authority. This, of course, required a consideration of the proper approach to determination of priority at that stage.
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> [13] In the present case the applications relate to different locations. They seek, however, to take geothermal fluid from the same resource. **In those circumstances it is accepted by the parties that there is the potential for one to affect what could be granted to the other and in the worst case, to exclude the other**. As in Fleetwing, therefore, the issue of priority is of great significance to each applicant." [Emphasis added]

26 However, the Court in *Fleetwing* did not provide a definitive answer to the issue of what stage an application had to be at to 'join' a priority queue. Various judgments since *Fleetwing* have approached the issue of priority on the basis of the application only joining the priority queue once any relevant requests for further applications (section 91) or information (section 92) had been fulfilled.[4] As noted, this has been developed by the Court of Appeal hearing the *Central Plains* matter to be 'priority on lodgement'. The Court of Appeal again expressed its concerns around comparative assessment:[5]

> [4] ... In *Fleetwing* this Court inferred from the structure of the RMA that a "first come first served" approach should be adopted. That starting point was refined by this Court in the *Ngai Tahu* case (*Central Plains Water Trust v Ngai Tahu Properties Ltd* [2008] NZRMA 200 (CA)). We held that the test of entitlement to priority of hearing should be "first to file a complete application".
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> [5] ... with the benefit of further argument and consideration in this case we hold that, assuming there are several applications for the one finite resource, the applicant who satisfies the *Ngai Tahu* criteria is entitled to the first full hearing for access to that resource. Other applicants, later in

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[4] Including: *Central Plains Water Trust v Ngai Tahu Properties Limited* (unreported, High Court, Christchurch, CIV-2006-409-2116, 1 December 2006, Randerson J); *Re Ngai Tahu Property Limited* (unreported Environment Court C104/06, 21 August 2006, Bollard J)

[5] *Central Plains Water Trust v Synlait Limited* [2009] NZCA 609 (CA)

> time on the *Ngai Tahu* principle, are of course entitled to object to the proposal and to advance such arguments as may be open to them as to why the first in time applicant does not satisfy the RMA criteria. But they are not entitled, at that hearing, to put up their own competing applications, and contend that their competing application is preferable to that which is first in time.

27 On this basis it is crystal clear that the first-in-first served test is the intended test for establishing priority between competing applications under the RMA. It is also clear from *Fleetwing* (as it is from the *Central Plains* cases) that the Courts have necessarily rejected any form of comparative test:

> "... Clearly the statute requires each applicant's application or applications to be determined on their own merits. It does not allow for a comparative assessment of competing claims to the same resource.
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> The conclusion that the statute requires the Council to judge each case on its merits also accords with the primacy attached to s5. If the relevant statutory criteria infused with the underlying objective of sustainable management are met in a particular case there is nothing in the Act to warrant refusing an application on the ground that another applicant would or might meet a higher standard than the Act specifies.
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> Further, the statutory scheme requires the Council to focus on that consideration and determination of each application so as to meet the prescriptive and tight timetable. In each case the Council must advance the application through to the point of public notification and then plan for the hearing and determination of the application so as to meet the statutory time limits. It is, we think, implicit that if another applicant applies for a similar resource consent while the first application remains undecided, that does not justify comparing one against the other and failing to give a timely decision on the first application on its merits and without regard to the other."

28 This quote was picked up by the High Court in *Aoraki*[6] – perhaps the most important case relating to existing user rights - where it said:

> "[32] Apart from Richardson P's express recognition of the point in *Fleetwing*, we agree with Mr Kos that the Court of Appeal's adoption of the first come, first served approach where there is competition for the same resource would be pointless unless it meant that the first permit in time of grant also had priority in terms of the right to use the resource. This conclusion is reinforced by the President's observation in *Fleetwing* that, if another applicant applies for a

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[6] *Aoraki Water Trust v Meridian Energy Limited* [2005] 2 NZLR 268

> similar resource consent while the first application remains undecided, the consent authority is not justified in comparing one against the other and failing to give a timely decision on the first on its merits and without regard to the other (264)."

29 It is submitted that these are emphatic statements of judicial interpretation - including from the Court of Appeal. I therefore cannot make the point more simply than to say that they are the law. A Council does not have the power to simply change the RMA through the wording of a policy. If the fundamental first-in-first-served approach to competing applications is to be altered this can only be done by Parliament itself.

30 The Council similarly does not have the power when deciding resource consent applications to disrupt this priority of processing. If an application is lodged in a complete form it secures its place in the priority queue regardless of what activity the application might be for. Council has no discretion to interfere with the applicant's right to have their application determined in the order intended by Parliament and in accordance with statutory timeframes.

31 I have already described some of the inherent difficulties with policy 15-5(b). This also extends to procedural concerns – e.g. what would Council do if it were on day one of a hearing for an irrigation proposal and a complete application for public water supply arrived during the hearing? Would Policy 15-5(b) oblige the hearing to cease until the application with higher priority was determined? This is the type of process that was described in *Aoraki* as the *"chaotic situation"* which *"would be the antithesis of the management regime contemplated by the Act"*.[7]

32 Overall it is emphasised that the tests for determining priority are now well developed and certain. No case law supports a consent authority developing or electing its own preferred priority for the processing of consent applications it has received or for bending statutory timeframes in order to impact on applicant's rights. In fact this approach has been explicitly rejected by the Court of Appeal on 3 occasions. Instead, all applications regardless of their size, intent, or nature, must be determined in accordance with the first in first served principle.

33 On this basis the Council does not have a legal power to on a *de facto* basis seek to amend the RMA via the wording of a policy which is contrary to the intention of Parliament as interpreted by our Courts. A Policy which seeks to take away rights granted to applicants under the RMA would is void for illegality.

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[7] Para 30.

Policy 15-5 and Table 11.1

34 Meridian lodged further submissions supporting a number of submissions that opposed Policy 15-. Within this Meridian has significant concerns with policy 15-5 and Table 11.2 (now 11.1 in the Officers Report) which specify common expiry dates for resource consents.

35 Meridian has sought that the policy be deleted.

36 This has not been accepted by the Officers. As has been described in the planning evidence of by **Ms Clarke** already submitted to the Hearings Panel, the reasoning behind this is the need to consider the effects of activities on a holistic basis and to provide for more co-ordinated decision making at the catchment level. However, such an approach appears to be contrary to that provided for by the Act.

37 Section 123 of the RMA gives a decision maker in relation to an application for resource consent a wide discretion to decide the duration of a consent.

38 Previous case law has identified that there are a myriad of factors which might dictate the term of the consent in relation to an application to take water from a catchment. These might include the scale of the development, the extent of its effects, applicant's investment in infrastructure and the specific conditions put up to mitigate effects. The decision in *PVL Proteins Ltd v ARC*[8] sets out just some of those factors and provides for a response 'tailored' to the specific proposal in issue. These, for example, include:[9]

> "[28] Relevant factors in making a decision on the term of the resource consent include that conditions may be imposed requiring adoption of the best practicable option, requiring supply of information relating to the exercise of the consent, requiring observance of minimum standards of quality in the receiving environment, and reserving power to review the conditions.
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> ...
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> [30] Uncertainty for an applicant of a short term, and an applicant's need (to protect investment) for as much security as is consistent with sustainable management, indicate a longer term. Likewise, review of conditions may be more effective than a shorter term to ensure conditions do not become outdated, irrelevant or inadequate.

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8 A061/2001, Sheppard J, 26 March 2001

9 *PVL Proteins v ARC*, above

> [31] By comparison, expected future change in the vicinity has been regarded as indicating a shorter term. Another indication of a shorter term is uncertainty about the effectiveness of conditions to protect the environment (including where the applicant's past record of being unresponsive to effects on the environment and making relatively low capital expenditure on alleviation of environmental effects compared with expenditure on repairs and maintenance or for profit). In addition, where the operation has given rise to considerable public disquiet, review of conditions may not be adequate, as it cannot be initiated by affected residents.
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> [32] The Regional Council submitted that an activity that generates known and minor effects on the environment on a constant basis could generally be granted consent for a longer term, but that one which generates fluctuating or variable effects, or which depends on human intervention or management for maintaining satisfactory performance, or relies on standards that have altered in the past and may be expected to change again in the future should generally be granted for a shorter term. We accept that in general those propositions might influence decisions on the term of discharge consents."

39 In this respect I note that the *Interim Decisions* released by the Hearings Panel (November 2009) includes some of these factors when assessing consent durations for applications under 13, 14 and 15 of the RMA – however, it does not correctly reflect the law and again repeats the common expiry date approach.

40 Many other cases have identified other factors relevant to determining the issue of term of consents. It is not particularly helpful to list numerous cases here as they just illustrate the fundamental point that every application will have its own set of unique factors. It is also clear that the list of factors to be considered is not yet closed and further relevant factors will continue to emerge as new factual situations present themselves and the case law develops.

41 Meridian's overriding submission is that the term of an individual consent must be governed by reference to the statutory purpose of the Act. An applicant is entitled to as much security of term as is consistent with sustainable management – *Bright Wood NZ Ltd v Southland RC*.[10]

42 The overall submission I make in relation to the suggestion of common expiry dates is essentially the same as I made to the Canterbury Regional Council's hearing panel in response to a suggestion by submitters, supported by officers that a Policy of

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[10] EnvC C 143/99.

common expiry dates with a limit on term be added to the Canterbury Regional Plan.

43 In short it is a fundamental principle of administrative law that when Parliament gives a decision maker a discretion, in this case to grant consents for up to 35 years, subordinate legislation in the form of Policy can be used as a guise to fetter that discretion. The text books on judicial review are full of discussions about the development of Policy which is poorly drafted so as to act as a fetter on a discretion given by Parliament.[11]

44 In exercising that discretion a decision maker is required to consider all relevant matters (as signalled by the Courts) and is not permitted to blindly follow directive Policy. To do so would simply result in the Council exposed to judicial review on the grounds that a decision maker has ignored relevant matters and placed weight on irrelevant matters.

45 The approach of Policy 15/Table 11.1 falls into the ultra vires category by its mandatory nature directing decision makers to a certain result rather than listing matters for consideration in the exercise of a discretion.

46 Accordingly, policy drafted in terms of Policy 15/Table 11.1 is in my submission unlawful.

Dated: 10 February 2010

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[11] Taylor, Judicial Review, page 344