TABLED AT HEARING
Date 4/12/2009

in the matter of: the Resource Management Act 1991

and

in the matter of: a number of applications to take and use water from the Upper Waitaki catchment

Summary submissions on behalf of Meridian Energy Limited

Dated: 4 December 2009

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SUMMARY SUBMISSIONS ON BEHALF OF MERIDIAN ENERGY LIMITED

Meridian's position – a summary

1 By way of summary I summarise Meridian's position with respect to the various applications being heard as a part of the current hearing process.

2 From the time of the MIC/Meridian agreement, Meridian has reserved its rights to submit in opposition to applications to take water in the upper Catchment on grounds unrelated to allocation.

3 However, from the outset it has purposefully limited the scope of its interest in the applications, seeking to properly understand the impacts that the grant and exercise of consents could have on the infrastructure for the Waitaki HEPS and/or the terms of its own resource consents – e.g. the absence of any requirement to provide for flushing flows. This is apparent from the scope of evidence called which has avoided comment on wider issues of say, landscape or cultural effects.[1]

4 In confirming its position for this hearing, Meridian has relied on the advice of independent experts who are highly qualified in their respective fields and who have spent time in the catchment and who understand the operation of Meridian's assets.

5 That advice has been that there are issues with the adequacy of the work carried out by GHD such that the actual effects of the grant of consents cannot be assessed at this time. This has driven Meridian's appearance at this hearing.

6 That is not the ideal position for Meridian to be in. It would have preferred to have had sufficient information available to its experts for them to advise Meridian that with appropriate conditions consent could be granted without adverse effects on the Waitaki HEPS.

7 Meridian has participated in the process constructively to see whether its issues can be resolved. This includes:

7.1 providing the data it holds;

7.2 attending meetings with MWRL experts;

7.3 making transparent requests for relevant information;

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[1] In relation to Mr Greenaway's evidence (recreation and amenity), Meridian's concern is that the establishment of the Waitaki HEPS has created much of the current opportunities for recreation and as such it forms part of the mitigation of effects of the Waitaki HEPS.

7.4 forthrightly advising in advance of this hearing any areas of concern;

7.5 participating in caucusing;

7.6 amending evidence in response to issues resolved in caucusing;

7.7 clearly outlining what further assessment it considers is required, how that should be carried out, and the timeframe for doing so; and

7.8 despite appearing in opposition to these applications, suggesting changes to the conditions for any consents that might be granted in the future once further assessments have been carried out.

8 Moreover, Meridian's position is not unreasonable. It is not requiring a 'rolls-royce' standard of further assessment – it was a recurring theme from all Meridian witnesses that the work that was required to be done was routinely done for similar applications using standard, well understood and freely available assessment methods. A good of example of this is **Ms Sutherland's** evidence where she advised the Panel that she is not aware of any other assessment in New Zealand where *Chlorophyll a* has been excluded from the calculation of TLI. Other witnesses, for example **Mr Griffiths** and **Mr Callander**, describe standard assessments carried out by experts that have been done for many years.

Options from here

9 Overall, Meridian believes that there are two options available to the Commissioners:

9.1 the first, and least constructive option, is for the Commissioners to close the hearing and for the sake of providing certainty to all applicants, decline most applications on the basis that the level of assessment and information provided does not approach anywhere near the level to enable a decision to grant consent to be made.

Meridian is conscious that this approach would capture renewal applications (although they would be able to continue to operate under s124 during any appeal period). That is not a position Meridian is comfortable with but it is a consequence of the way the applicants have agreed priority between them. Had renewals been heard together and alone (with priority) then the level of concern may not have been as great as at least to some extent the effects of existing activity are known.

9.2 the second, and alternative option, is to adopt a similar approach to that taken by the Commissioners in the Central Plain's matter and to indicate via an interim minute that a decline is likely unless the applicants wish to take the opportunity of adjourning the hearing for a sufficient amount of time to enable the necessary baseline data monitoring and other assessment work to be carried out.

10 Meridian's witnesses have clearly outlined the further work that is required, the longest in timeframe being the data identified by **Ms Sutherland** which will take 18 months to collect (presuming two summers can be included in the assessment).

11 Option 2 is Meridian's preference.

Adaptive management

12 In relation to the amendments to the conditions that Meridian has proposed I reiterate that they are only a template which could be used at a point in time in the future when critical work has been completed to enable critical information (e.g. accurate NDA limits) to be included in them. They are not conditions that could in any way support a grant of consent at this point in time.

13 In this respect it is noted that the applicant's current case places significant reliance on the use of adaptive management to respond to unforeseen problems that might arise.

14 Again, to reiterate Meridian's opening submissions:

14.1 adaptive management is appropriate for slight adjustments in mitigation in response to effects that cannot be completely understood prior to development. It is not however a 'bandage' to be used to compensate for an inadequate assessment in the first place.

14.2 moreover, adaptive management needs a robust baseline assessment against which to compare any effects which might occur. Here we do not have a proper understanding of the existing environment against which to 'adapt'.

15 This is also not the situation where the position can be 'cured' by work being carried out prior to the exercise of consents. In some cases that work may indicate that consent should never have been granted due to the absence of any remaining assimilative capacity. In other cases that work might indicate a new level of mitigation which would render the consent nugatory.

Final matter

16 Lastly, I wish to cover off a potential procedural issue as on the current arrangements this may be the only chance that Meridian's experts have to address the Commissioners.

17 I foreshadow some concern about the scope of information that may emerge under the guise of 'reply'.

18 MWRL have repeatedly informed Meridian that all of the information necessary for the cumulative assessment is in the GHD Report. If that is the case I have no objection to that being referred to and pointed out in reply.

19 I will however be very concerned if the response to issues raised by Meridian's experts is the production of a raft of new work or new evidence as a reply which Meridian and its experts will be unable to consider and respond to. If MWRL now have information that could have dealt with the concerns raised by Meridian's witnesses it should have provided it well before now so that Meridian's experts could have had an opportunity to address the Commissioners on it. Meridian's position is reserved.

Conclusion

20 So in summary, Meridian asks the Commissioners to be clear at the end of the case as to where there are information gaps and to encourage the applicants to adjourn the hearing and to collect and analyse the information required – with an opportunity for submitters to comment further next year.

21 The Commissioners are also asked to make a ruling on the applicability or otherwise of Rules WQL59 and WQL62 of the PNRRP and whether applicants should be required to seek a landuse consent.

Dated: 4 December 2009

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JM Appleyard/BG Williams
Counsel for Meridian Energy Limited

ANNEXURE A: OPERATON OF SECTION 88A

1 Section 88A provides:

88A Description of type of activity to remain the same

[[(1) Subsection (1A) applies if—

(a) an application for a resource consent has been made under section 88 [or 145]; and

(b) the type of activity (being controlled, restricted, discretionary, or non-complying) for which the application was made[, or that the application was treated as being made under section 87B], is altered after the application was first lodged as a result of—

(i) a proposed plan being notified; or

(ii) a decision being made under [clause 10(1)] of the First Schedule; or

(iii) otherwise.]]

[[(1A) The application continues to be processed, considered, and decided as an application for the type of activity that it was for, or was treated as being for, at the time the application was first lodged.]]

(2) Notwithstanding subsection (1), any plan or proposed plan which exists when the application is considered must be had regard to in accordance with section [[104(1)(b)]].

2 It is submitted that the effect of section 88(2) is that where any application is made and at some time lodging the same proposal requires further resource consents, those applications must also be made. In support of the second proposition we note the decision of *Wilson v Selwyn District Council* (C039/03) where the Environment Court noted:

> Therefore we conclude section 88A is not intended to include activities where no consent was required at the time. In the event that there is an alteration to a district plan to include further aspects of a land use consent, then that may be captured within the terms of section 88A. However, **if the district plan had not required a consent for the Rickerbys activity (i.e. it was permitted) but a change had been introduced which did require a consent, we conclude the applicants would have been required to file such an application** if they did not have existing use rights. Thus the intention to establish a permitted land use activity or planning towards it does not establish such existing use rights. We can see no reason to draw a distinction where a regional consent becomes required where the presumption is against a discharge use (contrary to a land use). [Emphasis added]

3 Accordingly all applicants, should an application be required, will still need to make the application. The activity classification will be frozen to the class it was at the time the original applications were lodged – but the provisions of the plan will need to be considered as they are at the time the final decision is made on the more recent application.