

IN THE MATTER OF

The Resource Management Act 1991

AND

IN THE MATTER OF

An application by Real Journeys Limited to carry out commercial surface water activities in the coastal marine area of Fiordland, between Yates Point and Puysegur Point, including the Doubtful Sound/Patea complex.

REPORT AND DECISION OF INDEPENDENT HEARING COMMISSIONER

Sharon McGarry

19 February 2021

Heard on the 26 January 2021

Meeting Room, Invercargill Library, 50 Dee Street, Invercargill.

Representations and Appearances

Applicant:

Ms K. F. Black, Manager Concessions and Consents, Real Journeys Limited

Mr P. Norris, General Manager, Real Journeys Limited

Submitters:

None in attendance

Section 42A Reporting Officers:

Mr G. Gericke, Consents Officer, Southland Regional Council

It is the decision of the Southland Regional Council, pursuant to sections 104, 104B, and 104D, and subject to Part 2 of the Resource Management Act 1991, to **GRANT** Coastal Permit APP-20201876 to carry out commercial surface water activities in the coastal marine area of Fiordland, between Yates Point and Puysegur Point, including the Doubtful Sound/Patea complex.

BACKGROUND AND PROCEDURAL MATTERS

1. This is the report and decision of independent Hearing Commissioner Sharon McGarry. I was appointed by the Southland Regional Council (**SRC** or ‘the Council’) to hear and decide an application by Real Journeys (‘the Applicant’) pursuant to the Resource Management Act 1991 (**RMA** or ‘the Act’) for resource consent to carry out commercial surface water activities in the coastal marine area of Fiordland, between Yates Point and Puysegur Point, including the Doubtful Sound/Patea complex.
2. The application was lodged on 8 January 2020.
3. Further information was requested by the Council under section 92 of the Act on 24 January 2020. The Applicant provided further information on 7 February 2020.
4. The application was publicly notified on 21 February 2020. One submission was received within the submission period
5. Prior to the hearing, a report was produced pursuant to section 42A of the Act by the Council’s Reporting Officer, Mr George Gericke. This ‘Staff Report’ provided an analysis of the matters requiring consideration and stated that the application could be partially granted with appropriate conditions. Attached to the Report was a set of recommended consent conditions.
6. The Staff Report and the Applicant’s evidence were pre-circulated prior to the hearing in accordance with section 103B of the Act. This evidence was pre-read by me prior to the hearing and was ‘taken as read’ at the hearing.
7. The hearing commenced at 9.00am on Tuesday 26 January 2021 and was adjourned at 12.10 pm the same day, to enable the Reporting Officer to provide further information; and for the Applicant to provide a written right of reply and revised proposed conditions.
8. I did not consider a site visit was necessary given my familiarity with the Doubtful Sound area and the commercial surface water activities undertaken.
9. A revised set of recommended conditions and a supplementary statement of evidence from the Reporting Officer was provided on 12 February 2021.
10. The Applicant’s written right of reply and final set of proposed conditions was provided on 15 February 2021, by way of final comments on conditions.
11. I formally closed the hearing on 16 February 2021.

THE APPLICATION

12. This application is to renew¹ existing Coastal Permit 97049 which allows the Applicant to operate commercial day and backcountry trips using a vessel of approximately 44 metres (currently the 'Fiordland Navigator') and two tender vessels and up to 30 kayaks, within the principal arms of the Doubtful Sound/Patea complex. The principal arms consist of Doubtful Sound, First Arm, Hall Arm, Crooked Arm, Thompson Sound, Bradshaw Sound, Gaer Arm and Precipice Cove.
13. The application proposes to maintain the Applicant's current size and scale of its activities for day trips. However, to improve operational practice and health and safety, this application seeks authorisation to alter some of the number of nights backcountry trips can operate in some areas. In particular, the Applicant seeks to allow the vessel operating (currently the 'Fiordland Navigator') to overnight in First Arm for more than 12 nights per calendar month throughout the year.
14. At the hearing, the Applicant proposed to volunteer additional conditions to avoid and mitigate any adverse effects of the consent which would require:
 - (a) the consent sought to be exercised in conjunction with existing Coastal Permit 301635 (for overnights trips using up to a 30m vessel – currently the 'Fiordland Wanderer') to ensure there is no increase in the overall number of backcountry trips undertaken by the two vessels currently operated for overnight trips (Fiordland Wanderer and Fiordland Navigator);
 - (b) the surrender of Coastal Permit 207431 (to use a motorised vessel in Doubtful Sound to assist guided sea kayaking) held by Go Orange Ltd;
 - (c) the establishment of a permanent mooring in First Arm (subject to obtaining resource consent) to avoid adverse benthic effects from anchoring while overnighting and enhance vessel safety; and
 - (d) the avoidance of mooring two vessels in First Arm overnight at the same time, unless necessary in adverse weather conditions.
15. I have assessed the application on the basis of the mitigation provided by the conditions volunteered by the Applicant in the final set of conditions.

DESCRIPTION OF THE ENVIRONMENT

16. The application documentation and Staff Report provided a description of the existing environment at Doubtful Sound. This is not contested and is repeated here.

SUBMISSION

17. The Staff Report summarised the issues raised in the submission from Mr W. P. Chisholm. I adopt² the summary of the issues raised in the submission for the purpose of my assessment.

¹ Under the Act an application for a 'renewal' of an existing consent is assessed as if it is a new application under section 104.

² In accordance with section 113(3) of the Act.

THE HEARING

Applicant's Case

18. **Ms Fiona Black**, Manager Concession and Consents for Real Journeys, provided a pre-circulated written statement of evidence and tabled further written submissions at the hearing. She was accompanied by Mr Paul Norris, General Manager for Real Journeys Limited, who attended the hearing to answer questions. Ms Black's evidence outlined the Applicant's background to operating in Fiordland and the application.
19. Ms Black noted that Coastal Permit 207431 (to use a motorised vessel to assist guided sea kayaking) had not been exercised and had lapsed, and should not be counted in the overall number of day trips consented. She noted that the consent effectively only allowed the use of Doubtful Sound as a thoroughfare, from Deep Cove to near the entrance of Hall Arm, and that the Regional Coastal Plan for Southland 2013 (**RCP**) had no limits on the use of Doubtful Sound as a thoroughfare. She considered the summary table of 'consented' day trip numbers in the Staff Report should be revised to exclude such trips that related to use of Doubtful Sound as a thoroughfare only.
20. Ms Black noted that the ability to overnight the Fiordland Navigator more than the 12 nights per month currently allowed would make it viable to install a mooring in First Arm. As a way forward, she stated that the Applicant proposed to operate the consent sought in conjunction with Coastal Permit 301635 (for overnights trips using up to a 30m vessel – currently the Fiordland Wanderer) to a maximum combined number of nights for each month. She noted this would ensure there was no overall increase in the number of nights stayed in First Arm by both vessels each month. She considered that because the effects of the two vessels on remoteness and wilderness values were similar, as shown in the photographs, there would be no change in cumulative effects over the current situation.
21. Ms Black's written submissions presented at the hearing highlighted the importance of the Doubtful Sound operations to the Applicant in the post COVID-19 environment and during times when the Milford Sound Road is closed. In response to questions, she provided additional details on Coastal Permit 207431 and confirmed the consent was held in the name of Go Orange Limited but was owned by the Applicant. She advised that this consent could be surrendered as part of this application process to give certainty that the consented number of day trips were significantly lower than calculated in the Staff Report.
22. In response to questions, Mr Norris provided more information on suitable overnight mooring options in different wind conditions and current activity levels. He noted that the Applicant was now exercising its consent up to maximum consented levels given the effect of the Milford Road closures (since February 2020) and post COVID-19 changes in demand. He confirmed his agreement to volunteer conditions to reflect the undertakings made at the hearing to mitigate effects including:
 - (a) to not overnight the two overnight vessels in the same area (unless necessary for health and safety reasons in adverse weather conditions);
 - (b) to surrender Coastal Permit 207431³;
 - (c) to install a mooring in First Arm (subject to obtaining resource consent); and
 - (d) to exercise the consent sought in conjunction with existing Coastal Permit 301635.

Staff Report

³ Following the hearing adjournment, I was provided with a copy of the 'Surrender of Resource Consent' for Coastal Permit 207431 signed by Paul Norris dated 12 February 2021.

23. **Mr George Gericke**, a Consents Officer for SRC, tabled his Staff Report at the hearing. Having heard the evidence and the Applicant's commitment to volunteer additional conditions to ensure there was no increase in day trips or backcountry trips over current levels, Mr Gericke indicated he considered the application could be granted.
24. Mr Gericke's supplementary statement of evidence confirmed his view, that with the imposition of the additional volunteered conditions, the effects of the activities would be no more than minor; and that the application was consistent with the relevant provisions of the RCP. On this basis, he considered the application passed both 'gateway tests' of section 104D and that the consent could be considered and granted under section 104. He recommended that the consent sought be granted subject to conditions, with a concurrent expiry date with Coastal Permit 301635 of 29 October 2032. He also provided a revised set of recommended conditions.

Applicant's Right of Reply

25. The Applicant provided a written right of reply by way of final comments on Mr Gericke's revised recommended conditions, which reflected the discussions in the hearing.

ASSESSMENT

26. In assessing the application, I have considered the application documentation and AEE, the Staff Report, the submission received and the evidence provided during and after the hearing adjournment. I have summarised this evidence above. I record I have considered all the issues raised in making my determination.
27. In response to comments in the submission, I note that the effects of climate change on the proposed activities are relevant considerations under Part 2 of the RMA⁴. I consider the issue raised by the submitter in relation to the use of helicopters is irrelevant to my assessment of this application given this is not part of the proposal. I am satisfied that any discharge of sewage associated with the application can be undertaken by discharging into the Deep Cove Outdoor Education Trust's wastewater treatment plant; or in accordance with the Resource Management (Marine Pollution Regulations) 1998. After the adjournment, the Reporting Officer confirmed the existing resource consent for the Deep Cove Outdoor Education Trust's wastewater treatment plant allows for the treatment of wastewater from vessels based in Deep Cove.
28. I also note the submission raised concern that all commercial operators should be invited to participate in any changes to the current surface water activity restrictions in the RCP and that this would be best done through a plan change process due to the RMA restriction on submissions by trade competitors. I note that in this case the application was publicly notified and that any person could have made a submission. I highlight that section 104(3)(a)(i) of the Act requires me to not have regard to 'trade competition or the effects of trade competition'. This does not prevent trade competitors making a submission on relevant environmental matters outside of trade competition or the effects of trade competition.
29. I agree with the submitter that the current restrictions and allocations for commercial surface water activities under the provisions of the RCP are best dealt with by a plan review or change process. However, there are no provisions of the Act which restrict any person's ability to make an application for resource consent, unless an activity is deemed to be a prohibited activity in an operative plan. This is clearly not the case here and the application must therefore be processed in accordance with

⁴ Section 7(i)

the provisions of the Act and under the relevant planning provisions. However, I was informed at the hearing that the Council is looking to review the RCP in the near future.

Status of the Application

30. The starting point for my assessment of the application is to determine the status of the activities under the statutory planning provisions.
31. There was agreement between the parties that the application activities should be ‘bundled’ and considered as a **non-complying activity**. I agree.

Statutory Considerations

32. In terms of my responsibility for giving consideration to the application, I am required to have regard to the matters listed in sections 104, 104B and 104D of the Act.
33. Pursuant to section 104(1), and subject to Part 2 of the Act, which contains the Act’s purpose and principles, I must have regard to-
 - (a) *Any actual and potential effects on the environment of allowing the activity;*
 - (ab) *Any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity;*
 - (b) *Any relevant provisions of a national environmental standard, other regulations, a national policy statement, a New Zealand coastal policy statement, a regional policy statement or a proposed regional policy statement, a plan or proposed plan; and*
 - (c) *Any other matters the consent authority considers relevant and reasonably necessary to determine the application.*
34. Section 104(2) states that when forming an opinion for the purposes of section 104(1)(a), I may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect. This is referred to as consideration of the ‘permitted baseline’. No party drew my attention to any relevant permitted activities. I record I have not applied any permitted baseline in making my assessment.
35. As noted above, section 104(3)(a)(i) states that when considering the application, I must not have regard to trade competition or the effects of trade competition.
36. Section 104(3)(a)(ii) states that when considering the application, I must not have regard to any effect on a person who has given written approval to the application. I note the written approvals provided from the Department of Conservation, Te Ao Marama Incorporated, and the Fiordland Guardians.
37. Section 104B states that after consideration of an application for a non-complying activity, I may grant or refuse the application; and if granted, I may impose conditions under section 108.
38. In making my assessment under section 104D(1) of the Act, I can only grant consent for a non-complying activity, if either or both of the following ‘gateway tests’ is passed:
 - (a) *The adverse effects of the activity on the environment will be minor; **or***
 - (b) *The application is for an activity that will not be contrary to the objectives and policies of –*
 - (i) *the relevant plan, if there is a plan but no proposed plan in respect of the activity; or*

- (ii) *the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity; or*
- (iii) *both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.*

39. Under section 108, if I grant consent, I may impose conditions under section 108.
40. I consider each of these sections of the RMA separately below.

SECTION 104(1)(a) - ACTUAL AND POTENTIAL EFFECTS ON THE ENVIRONMENT

The Existing Environment

41. In making my assessment, I am required to consider the actual and potential effects of the activities on the existing environment. The existing environment is that which exists at the time this determination is made and includes lawful existing activities, permitted activities and activities authorised by existing resource consents.
42. I confirm I have taken into account the existing environment as it exists with the full implementation of the existing consents for commercial surface water activities in Doubtful Sound, excluding the activities for which consent is sought here. I have relied on the evidence of the Reporting Officer regarding the consented numbers of day trips (as revised following the adjournment) and backcountry trips. I acknowledge these do not reflect actual use, which may be less than that consented, as some existing consents may not be exercised to the fullest extent possible.

Actual and Potential Environmental Effects

43. The Staff Report considered the following actual and potential effects:
- (a) Cultural and historical values;
 - (b) Visual effects;
 - (c) Wildlife, ecosystem and habitats;
 - (d) Noise;
 - (e) Bio-invasion risk;
 - (f) Navigational safety;
 - (g) Waste management; and
 - (h) Natural character, remoteness and wilderness values.
44. Overall, I adopt the conclusions reached in the Staff Report and supplementary statement that any actual and potential adverse effects on the environment are likely to be minor or less than minor, with the imposition of conditions recommended and those volunteered by the Application.
45. I agree that the key concern relates to the protection natural character, and remoteness and wilderness values. I note the submitter's concern that - *'There is no real analysis of the actual and potential effects on landscape, natural character, visual amenity and wilderness values on the affected areas'*. I consider further assessment would be required if the application was to increase the Applicant's existing level of commercial surface water activities given the RCP limits. However, I am satisfied that with the conditions imposed regarding the concurrent exercise of this consent for the Fiordland Navigator, with the consent for the Fiordland Wanderer (or similar size vessels), there will be no increase in the overall number of backcountry trips consented under the existing consents.
46. I accept that the volunteered condition requiring the Applicant to install a mooring in First Arm, subject to obtaining a resource consent, will have a positive effect by avoiding benthic damage caused by the use of anchors and will improve vessel safety in adverse weather conditions. Given

there is some uncertainty as to whether resource consent will be granted, I have not balanced these positive effects against the assessment of adverse effects.

47. I consider that any adverse effects associated with both of the Applicant’s vessels mooring overnight in First Arm is sufficiently mitigated by the volunteered condition to not overnight in the same area, other than for health and safety reasons during adverse weather conditions. I acknowledge that existing operators attempt to avoid mooring overnight in areas with other commercial vessels if possible, anyway. However, I consider this volunteered condition provides mitigation of adverse effects on other operators and users above the current situation.

SECTION 104(1)(ab) – POSITIVE EFFECTS TO OFFSET OR COMPENSATE FOR ADVERSE EFFECTS

48. No offsets or compensation were proposed by the Applicant for my consideration.

SECTION 104(1)(b) - RELEVANT PLANNING PROVISIONS

49. An analysis of the relevant provisions of the New Zealand Coastal Policy Statement 2010 (**NZCPS**), the Regional Policy Statement 2017 (**RPS**) and the RCP was provided in the Staff Report.
50. I have considered all the relevant provisions of the NZCPS, RPS and RCP. I note that the RPS and RCP have been reviewed and updated to give effect to the NZCPS. I accept that the NZCPS gives effect to the provisions of the RMA in relation to the coastal environment.
51. I note that Mr Gericke’s original concerns regarding uncertainty and the need to take a precautionary approach in accordance with NZCPS Policy 3, related to potential cumulative effects on the remoteness and wilderness values of the First Arm. However, he confirmed in responses to my questions at the hearing that with the certainty there will be no overall increase in backcountry trips, this is no longer required.
52. Overall, I find that with the imposition of the conditions recommended by the Reporting Officer and the additional conditions volunteered by the Applicant the application is consistent with the relevant provisions of the NZCPS, RPS and RCP.

SECTION 104(1)(c) - OTHER MATTERS

53. I have considered the relevant policies of Te Tangi a Tauria – the Natural Resources and Environmental Iwi Management Plan for Ngāi Tahu ki Murihiku 2008. I find the application is consistent with the outcomes sought.
54. I have considered the Fiordland National Park Management Plan given the proximity and association the adjacent Fiordland National Park. I find the application is consistent with the outcomes sought by the National Parks Act 1980.
55. I have considered the Resource Management (Marine Pollution Regulations) 1998 which provides for the discharge of sewage from ships, both treated and untreated, with certain parameters.

SECTION 104D

56. The Reporting Officer’s supplementary statement of evidence concluded that the application passed both gateway tests of section 104D, in that the environmental effects would be minor and the activities were consistent with the relevant statutory plans.
57. On the basis of my assessment of the actual and potential environmental effects of the proposed activities and the relevant objective and policies of the RCP, I find the application passes both section 104D(1)(a) and 104D(1)(b); and that there is therefore no restriction on granting the consent sought.

PART 2 OF THE ACT

58. I accept that based on the Court of Appeal’s *RJ Davidson v Marlborough District Council*⁵ (‘Davidson decision’), recourse to Part 2 of the RMA may be of assistance in trying to assess consistency with objectives and policies where there is conflict or tension between the policies, or they pull in different directions. However, recourse to Part 2 should not render the relevant planning documents ineffective if they give effect to Part 2.
59. I consider the relevant objectives and policies of the NZCPS, RPS and RCP have been developed and implemented to give effect to these provisions. I have found that the application is consistent with the relevant objectives and policies of these statutory document.
60. I therefore do not consider that reference to Part 2 would add anything to the evaluative assessment I have undertaken under section 104 of the Act.

Overall Conclusion

61. On the basis of the evidence before me, I conclude that the environmental effects of the application will be no more than minor with the imposition of the recommended and volunteered consent conditions. I have paid particular attention to actual and potential cumulative effects on natural character, and remoteness and wilderness values. I find that the conditions imposed will ensure there is no increase in the existing level of commercial surface water activities undertaken by the Applicant in Doubtful Sound.
62. Overall, I conclude that the application is consistent with the promotion of sustainable management of natural and physical resource, as define on section 5 of the RMA, and the consent should therefore be granted.

Conditions

63. I have considered the final set of consent conditions proposed by the Applicant and agreed to by the Reporting Officer on behalf of the Council. I find these to be appropriate, practicable and enforceable. I note that the conditions discussed at the hearing have been volunteered by the Applicant on an *Augier*⁶ basis and are therefore lawful and enforceable. I have made a number of small changes for clarity and consistency of terminology, none of which change the intent of the conditions.

⁵ [2018] NZCA 316

⁶ Where an applicant gives a clear and unequivocal undertaking and, relying on that undertaking, the local authority grants consent subject to a condition in terms broad enough to embrace the undertaking, the applicant cannot say later that there is no power to require compliance with the undertaking. This is called an ‘Augier’ condition based on caselaw *Augier v Secretary of State for the Environment* (1978) 38 P& CR 219 (QBD).

Consent Term

64. At the adjournment of the hearing there was agreement that it was appropriate to align the term of this consent with the consent expiry of Coastal Permit 301635, which is 29 October 2032. I agree.

DECISION

65. It is the decision of the Southland Regional Council, pursuant to sections 104 104B and 104D, and subject to Part 2 of the Resource Management Act 1991, to **GRANT**, Coastal Permit APP-20201876 to carry out commercial surface water activities in the coastal marine area of Fiordland between Yates Point and Puysegur Point, including the Doubtful Sound/Patea complex; subject to the conditions set out in **Attachment 1** of this decision.

Dated at Christchurch this 22nd day of February 2021



Sharon McGarry
Independent Hearing Commissioner