

IN THE MATTER OF: **the Resource Management Act 1991**

AND **the hearing of application APP-20169132 by
Island Escape Cruises Limited for a Coastal
Permit to undertake commercial activities
on the surface of the Coastal Marine Area
adjacent to Fiordland National Park.**

Decision of the Hearing Committee

1 Introduction

This is the decision of a hearing committee comprising Councillors Neville Cook and Maurice Rodway and Dr Brent Cowie (chair) appointed by the Southland Regional Council (the Council) to hear and decide an application by Island Escape Cruises Limited (IEC, the applicant) to undertake commercial activities on the surface of the coastal marine area adjacent to Fiordland National Park.

The hearing was held in Te Anau on Monday, 10 October 2016. We adjourned the hearing at about 1620 hours on that day having heard from the applicant, submitters, reporting officers and having heard the applicant's right of reply. At that time the applicant had agreed to provide further information about the proposed sewage treatment on the new vessel. This was duly provided on 17 October 2016, and we closed the hearing on 21 October 2016.

We did not see the need to carry out a site inspection as we could understand the application and the submissions without doing so.

We appreciate the constructive approach of all parties who attended the hearing, and we thank them for that.

2 The Proposal

The proposed operation involves one vessel up to 49 metres in length and with up to 15 crew¹ and 34 passengers and covers the area between from Febrero Point to Puysegur Point, which we refer to in this decision as the southern fiords. The applicant proposes to exercise this consent in conjunction with its existing coastal permit (AUTH-301129-V2), which covers what we will call the northern fiords (such as Doubtful and Milford Sounds). The application is for a discretionary activity under Rule 16.1.7 of the Operative Regional Coastal Plan for Southland

¹ The actual application was for up to 12 crew, and for up to three associated tender boats up to 8 metres long. At the hearing the applicant sought these be changed to up to 15 crew and tender vessels up to 9m long. For reasons discussed in Section 6.2 below, we have agreed to accept these changes in the scope of the application.

2013 (“the RCP”). Other activities associated with the proposal, such as helicopter transfers to the IEC vessel, are provided for as permitted activities in the Plan. We have taken some limited account of the effects of these permitted activities in this decision because as Mr Chapman, the solicitor for the applicant, said, they do form part of the overall proposal.

The proposal was detailed in the application dated 3 May 2016 and the Officer’s s42A Report dated 10 October 2016. In summary the vessel may be used for trips at any time of the year, but most are anticipated to be during October to May, and typically of 5-6 nights duration. Prior to the vessel entering the Fiordland Marine Area the hull will be inspected by a diver and scraped as necessary to ensure that no marine exotic pest species are present. The applicant is aware of the proposed Fiordland Marine Pathways Plan and will adhere to any rules imposed by it. Passengers and supplies will be taken to the vessel by helicopter. The vessel also carries up to three tender vessels, of which up to two are proposed to be used at one time, and kayaks, of which a maximum of three are proposed to be used at one time.

The vessel has facilities to store up to 28 cubic metres of sewage. This will be treated on-board to an A grade standard and is proposed to be discharged to coastal waters at least two kilometres from the shore line in accordance with Regulations 11 and 12 of the Resource Management (Marine Pollution) Regulations 1998. The applicant proposes that rubbish will be stored on board, taken from the vessel and disposed of outside of Fiordland National Park, consistent with Regulation 13.

The vessel proposes to anchor at one or more locations in each of Dagg Sound, Breaksea Sound, Dusky Sound, Chalky Inlet and Preservation Inlet, all of which are south of Doubtful Sound.

The application was lodged with the Council on 6 May 2016. The Council sought further information pursuant to Section 92(1) of the Resource Management Act 1991 (the RMA, the Act) on 20 May 2016,² and that information was provided on 31 May and 2 June 2016.

The application was publicly notified on 10 June 2016. The reasons for full public notification, which was made under delegated authority, are listed in Section 2.4 of the Officer’s Report. Thirteen submissions were received, of whom 10 wished to be heard at that time. Three submitters subsequently withdrew their right to be heard, and we heard from five submitters at the hearing.

3 The Evidence for the Applicant

The applicant gave legal submissions and called three witnesses. Their expert evidence was circulated in advance of the hearing and we read this fully, so only a summary was given at the hearing.

The applicant’s evidence had also included a report by Acoustics and Vibrations Investigation, a Tahiti based company, who had measured noise close to the existing IEC boat. Only raw data were provided, with no interpretation. For this reason we asked an officer of the Council to contact the applicant, and request that further interpretation of these data be provided for the hearing. We received a letter dated 4 October 2016 from Malcolm Hunt Associates, which fully met our expectations in interpreting the original noise report.

² Details are in Section 2.3 of the Officer’s Report

3.1 Mr Rex Chapman, Cruickshank Pryde

Mr Chapman presented brief legal submissions, in which he mainly addressed the matter of trade competition. He pointed out that s308B of the Resource Management Act 1991 (the RMA) limits the ability of a trade competitor from making a submission under s96. In particular he stated that *“if the person is a trade competitor and that person is directly affected by an adverse effect on the environment which relates to trade competition or the effects of trade competition, then that person may not make a submission.”*

This provision has been in place since 2009. Mr Chapman referred us particularly to a 2011 decision by the Environment Court. We discuss this matter in Section 6.1 of this decision.

The applicant agrees to a condition that limits them to using one boat in Fiordland at one time under their existing consent and the consent granted by this decision.

In relation to Mr Chisholm’s evidence, we noted that it included evidence from Mr Alan Rackham to another hearing, which we considered we could not take into account as we couldn’t question Mr Rackham, and we asked Mr Chapman if he had any comment. He said he would address this in his right of reply, and he provided us a copy of Mr Rackham’s evidence (which we note was presented on behalf of the Council). Although we have read this with interest, we have taken little account of what Mr Rackham had said in the report as he was not present as an expert witness and Mr Chapman did not provide any further reasoning as to why we should take Mr Rackham’s evidence into account.

In response to questions Mr Chapman said:

- as Southern Helicopters is a not a trade competitor, we can take full account of their submission;
- he accepted that the scope of the application had changed slightly, with up to 15 crew and 9 metre tender vessels now being proposed, but said that the test we had to consider is would anyone else have submitted if these changes in scope were in the application. He suggested that this would not be the case. We discuss this matter in Section 6.2 of this decision.

3.2 Mr Peter Bissett

Mr Bissett is the owner of IEC. His evidence focussed on the company and its existing and proposed new operation in Fiordland. He said that the company had undertaken 16 five night cruises using its current 42m vessel in the northern fiords since December 2013. It targets the high end of the market, and many of its customers are elderly.

Mr Bissett said that the applicant was “well along the track” of building a new vessel which would be 49m long and which would also carry two tenders, each up to 9m long.

In answer to questions Mr Bissett said that:

- the new vessel would have a similar silhouette to the existing 42 m long vessel as they both have three decks. The new vessel would be slightly narrower;

- in response to a comment that 9m is quite long for a tender vessel, he said that the existing tenders are 7.5m long, but the new boats will be jet propelled, and will be quieter as a result;
- he recognised that both the existing tender vessels, and those larger vessels to be carried on the new boat, would need to meet noise standards in the Plan. He also said that the generators on the existing vessel are fully enclosed and so very quiet, and that “you cannot hear them on the deck”;
- the new vessel will have what he called a “fail safe” sewerage system;
- asked about transfers to vessels he said that in the northern fiords a helicopter was used to get passengers to the boat, but that they are driven back from Milford. The proposed operation in the southern fiords would involve helicopter transfers both ways, but with the larger Kawasaki helicopter proposed to be used for most transfers, there would be few additional flights.

3.3 Mr John Henderson

Mr Henderson is licensed as a Fiordland and Stewart Island pilot and is contracted to pilot vessels such as cruise ships of all sizes around these waters. He had previously worked for South Port and its antecedent organisation for 20 years, and had also piloted Cook Strait ferries.

In August 2008 he had travelled around Fiordland, including the area for which consent is now being sought on the applicant’s vessel, the Island Escape. He considered that the boat was “fit for purpose” and highly manoeuvrable, and that the crew were of a “high professional standard”. During this trip he looked at where possible anchorages were, and he said that there are many more suitable anchorages in southern Fiordland than in northern Fiordland.

Mr Henderson considered that there are “sufficient sites within the application area for safe anchorage in virtually all situations”, and that would apply equally to the proposed new 49m vessel as well as the present boat. He disagreed with some of what Mr Abernethy said about some anchorages not being suitable, and said that congestion at anchorages was not something he had experienced for charter cruise vessels in the application area. While he supported restrictions on anchoring in sensitive areas (such as “china shops”), he was strongly of the view that other restrictions on where the applicant’s vessel could anchor were not justified, particularly on safety grounds.

3.4 Mr Bill Chisholm

Mr Chisholm’s written brief of evidence outlined the applicant’s present activities in the northern fiords, and the process leading up to the present application and the requests for further information. He outlined his discussions with submitters, and described what he saw as the positive effects of the application on the well being of local and regional communities.

He also discussed biosecurity, asserted that any effects on natural character and landscape values were temporary and outlined how these would be mitigated. He then discussed other potential effects.

As much of what he said is covered elsewhere in this decision we do not need to summarise it further here.

3.5 Right of Reply

Mr Chapman gave his right of reply in writing at the hearing.

He considered that the evidence of each of Mr Lemin for Deep Cove Charters and Mr Abernathy for Fiordland Expeditions should be discounted, as they dealt primarily with the effects of trade competition from IEC on their operations in the southern fiords. He also questioned aspects of what each of Mr Norris and Mr Lamb said.

We discuss this matter in Section 6.1 of this decision.

4 The Evidence for the Submitters

4.1 Mr Paul Norris

Mr Norris is the Director of Operations of Real Journeys Limited, a company with extensive operations in and around Fiordland and the southern lakes. He presented written evidence. After raising concerns about cumulative effects he sought two specific conditions of consent – that the applicant not be able to exercise their two consents in Fiordland (for the northern and southern fiords respectively) at the same time, and that there be a prohibition on transfer of the consent we have granted here. We note that Real Journeys is a trade competitor of IEC (see Section 6.2 below).

4.2 Mr Chris Lemin

Mr Lemin is a Director of Deep Cove Charters, and he has lived and worked commercially in Fiordland for the last 40 years. He presented written evidence. After listing vessels that had operated at different times in the last few decades he asserted that the numbers of boats visiting the southern fiords had increased in recent years and that granting consent to IEC would be “another nail in the coffin for diminishing the wilderness values of the fiords”. He wanted the numbers of vessels operating in the southern fiords capped by the Council, and said that if the Council keeps granting consents it will eventually become overcrowded.

For the reasons discussed in Section 6.2 below we consider Mr Lemin’s submission was driven very largely by trade competition, and so we have taken little account of what he said to us.

4.3 Mr Richard Abernathy

Mr Abernathy read his submission on behalf of Fiordland Expeditions. In this he listed seven reasons why he thought the application should be declined. Most of the more substantive reasons he listed were driven by trade competition, and for the reasons discussed in Section 6.2 we have taken little account of what he said to us.

In response to a question about anchorages, he said some proposed to be used by the applicant were not practicable. He has operated a 40m catamaran in the area, and said that Stick Cove and Luncheon Cove could not be used by the applicant's vessel. He said that in extreme conditions there could be competition for space as there are few safe anchorages. In this same context Mr Henderson said that with modern weather forecasting when extreme conditions are forecast most vessels would sail away.

4.4 Mr Nigel Lamb

Mr Lamb spoke to his submission, saying that he had long been self employed, with vast experience in Fiordland. He presently owns a 24m fishing boat and was on the Fiordland Conservation Board for three years. He neither supported nor opposed the application.

His main concern related to the size of the vessel. He opposed proposed Condition 7, saying that the skipper needs to make the choice where the vessel can be safely anchored, and that there are plenty of places where you can anchor outside of the exclusion zones (e.g. china shops).

We thank Mr Lamb for his comments, which were made constructively.

4.5 Mr Lloyd Matheson

Mr Matheson has been the Operations Manager for Southern Lakes Helicopters Ltd, which is based in Te Anau, for the last 14 years. The company holds consents from the Regional Council, and a concession from DoC for its operations around and in the National Park. Mr Matheson gave written evidence in support of the application.

Southern Lakes Helicopters takes passengers to and from the current IEC vessel in the northern fiords, and will continue to do so in the southern fiords. The present helicopters can carry five passengers, but a new Kawasaki helicopter will be able to carry nine, reducing the number of flights necessary to take passengers to the Island Escape (which has a helipad on its deck).

Mr Matheson considered that there were very few adverse environmental effects from the type of tourism operated by the applicant. He noted many of the company's passengers were elderly, that they could experience the Fiordland wilderness in a safe way and that they enjoyed the experience and many were keen to go back.

In answer to questions Mr Matheson said:

- his company is presently flying about 1,000 hours per year in the National Park. They have a concession from DOC for about 5,000 landings per year;
- they also work for companies such as Real Journeys and Fiordland Expeditions;
- asked how much additional flying they would do verses the northern fiords (where passengers are taken by bus from Milford) he said that there would be more flights with the current helicopters, but about the same number if the larger Kawasaki helicopter is used.

4.6 The Public Interest Submitters

Three submitters who did not attend the hearing clearly represent the public interest or elements of the public interest. In this section we address the main matters they raised, with our responses in italics.

4.6.1 Forest and Bird

- a) Affected parties were not correctly identified – *the application was publicly notified which enabled all parties with an interest in the application to make a submission if they wished.*
- b) The applicant is not seeking a concession from DoC – *the applicant was asked about the need for a concession and they said that as any passengers going ashore were not guided, no concession was required. In addition this is not a matter that the Council has jurisdiction over.*
- c) The size of the vessel is unclear – *the size of the vessel is no more than 49m long, and this was clearly stated in the application.*
- d) Size and noise of tender vessels – *the noise issue from both the main vessel and the tenders is dealt with in Section 8 of this decision. The applicant must comply with the provisions of the RCP. It has provided evidence that it will comply for its current vessel, and is required to provide evidence confirming this for any new passenger vessel and the tender vessels before the consent can be exercised.*
- e) Number of trips carried out daily by tender vessels – *we accept that this may vary depending on passengers' wishes but any adverse effects are avoided, or mitigated by the controls on the size, number and permitted noise levels of the tender vessels.*
- f) Impacts on marine mammals and penguins – *there are not expected to be any adverse effects on marine mammals and penguins and controls are provided for by Conditions 4 and 5 of the consent we have granted.*
- g) Degradation of fish stocks – *this and similar submissions were made by a number of submitters but the harvesting of fish is subject to marine fishing regulations administered by Ministry of Primary Industries. It is not a matter that the Council can control.*
- h) Helicopter landings – *dealt with elsewhere in decision.*
- i) Congestion at anchorages and some anchorages not suitable, list suitable ones – *we have discussed this matter in several places in this decision.*
- j) Clarify details about sewage treatment – *while this matter is controlled by the Marine Pollution Regulations 1998 the applicant provided evidence that sewage will be treated to Grade A standards which are set out in Schedule 6 of the Marine Pollution Regulations. The Applicant has advised that the treated sewage will not be discharged to inshore waters, so we are satisfied that any such discharge will not have adverse effects on the coastal marine area or other users.*
- k) Clarify how the vessel will be refuelled – *containing and cleaning up fuel spills are controlled by condition 13 of the consent that we have granted. Mr Bissett stated in evidence that the vessel does not need to be refuelled in Fiordland as it is fuelled in Nelson or Whangarei.*

- l) Activity will degrade natural character – *we discuss this in Section 7.3 of this decision where we conclude that any effects on natural character will only be transient, and that there is no evidence that the southern fiords are at carrying capacity.*

4.6.2 Department of Conservation

- a) The applicant should identify who inspects the hull when the vessel leaves Auckland and what qualifications they have for identifying any fouling that is found, particularly with regard to *Styela clava* (clubbed tunicate/sea squirt), *Sabella spallanzanii* (Mediterranean fanworm) and *Undaria pinnatifida* (edible seaweed) - *the applicant intends to comply with the Fiordland Pathways Plan (FPP) which requires that hulls are clean and are not carrying any exotic pest species.*
- b) The applicant should identify who inspects the hull after its presence in the FMA after six weeks, including the qualifications of that person and what the hull inspection entails - *Condition 16 of the consent requires regular inspection of the hull to ensure marine pests are not present and we believe this clause will provide the biosecurity appropriate for this activity.*
- c) The applicant should consider placing more than one bait station on-board the vessel to control rodent incursions - *Condition 17 of consent is intended to ensure rodents cannot live on board the vessel. Also condition 10 of the consent prohibits the applicant from mooring within 400m of any rat free island.*
- d) That some of the anchorages listed in the application would not be suitable for a vessel 49 metres in length; and that it is unclear as to whether the applicant will avoid anchoring in marine reserves altogether or just avoid china shops - *see response to the Forest and Bird submission above.*
- e) That while the applicant does not let clients take fish home, a large vessel with 34 passengers and staff operating up to 52 weeks per year could result in a significant recreational catch being taken and that the applicant should provide further information on the amount of fishing that occurs on their trips, and that it should provide an assessment of the impacts that the fishing activity will have - *we have no control over recreational fishing. We also note that Mr Bissett said that typically few clients fish in any case.*

The Department of Conservation also raised a number of other points over which we either have no jurisdiction or which relate to the carrying capacity of the southern fiords. We comment on the matters relating to carrying capacity in Section 7.3.4 of this decision.

4.6.3 Fiordland Marine Guardians

This submitter raised two main issues. The first related to the use of anchorages, with the points raised being whether some anchorages listed in the application were suitable, pressure on particular anchorages and the health and safety implications of this. We discuss this matter in Section 8 of this decision.

The second issue relates to cumulative effects, which we discuss in Sections 7.3.2 and 7.3.4.

5 The Reporting Officers

5.1 Mr Kevin O’Sullivan

Mr O’Sullivan is the harbourmaster employed by the Council. He gave a brief statement of evidence at the hearing.

He considered that the applicant should not be restricted as where they can anchor in the southern fiords as safe anchorages are needed during all possible weather conditions. He said where the vessel is anchored should be left to the discretion of a “prudent mariner”, and that the current skipper employed by IEC meets this test, and is a “very good operator”.

5.2 Mr Matthew Hoffman

Mr Hoffman was the author of the s42a report prepared by the Council, which had been pre-circulated and was taken as read.

He presented a supplementary report to the hearing, which focussed on matters that had arisen on the day. The main matters he covered were:

- he agreed that the applicant’s current passenger vessel will meet the permitted activity thresholds for noise in the RCP as specified in Rules 5.3.4 and 5.3.6;
- having heard more about the use of anchorages, he now recommended to us that his proposed Condition 7 be removed from the recommended conditions of consent, and he provided reasons for this;
- he considered that the application was for 12 crew and 8 metre tender vessels, which may have been an oversight by the applicant, but Mr Hoffman noted it was at our discretion to accept the changes now proposed by the applicant.

6 Legal Considerations

6.1 Trade Competitors

As pointed out by Mr Chapman for the applicant, s104(3)(a)(i) of the Act explicitly prevents us from considering trade competition or the effects of trade competition. He also noted that a number of the submitters (e.g. Real Journeys and Fiordland Expeditions) are trade competitors of IEC.

Mr Chapman referred us specifically to recent case law on this matter.³ We note particularly the following paragraph 19:

The strength of the new provision lies in requiring a would-be submitter, if challenged, to demonstrate that it is directly affected by an adverse effect on the environment created by the proposal and that the adverse effect does not relate to (i.e. has no connection with) trade competition or its effects.

In his right of reply Mr Chapman discussed the submissions of each of the four submitters who are trade competitors of the applicant. He was particularly dismissive of the submission made by Mr Abernethy, and to a lesser extent that made by Mr Lemin. In relation to the verbal submission of Mr Norris, Mr Chapman noted that the applicant had already consented to a condition that only one of their passenger carrying vessels would operate in Fiordland at any one time, and that there was no valid RMA basis for making the consent personal to the applicant.

We accept what Mr Chapman said about these trade competitors, and we have taken no regard of any written or verbal comments they made that related to the effects of trade competition. We include the submissions of Thomas Fishburn, Gendy Fishburn and Leanne and Stephen Fishburn in this category. However we do think Mr Lamb in particular did raise some matters of public interest which we discuss later in this decision.

We also note that three submitters, none of whom appeared at the hearing, do represent the public interest or elements of the public interest. These are the Department of Conservation, Fiordland Marine Guardians and the Royal Forest and Bird Protection Society. For this reason we have explicitly discussed the relevant matters of public interest that they raised in Section 4.6 of this decision.

Finally in relation to trade competition, we observe that there could be some question as to whether some of the submissions from trade competitors should have been accepted by the Council under the provisions of s308B of the Act. We think the Council made the right decision to accept them, and leave it us to decide the extent to which each submission should be taken account of.

6.2 Changes in the Scope of the Application

The other legal matter we had to consider was whether we could accept some changes in the scope of the application. We note that this often occurs during the processing and hearing of consent applications. The relevant case law is that it is gist of the application that is important, not necessarily all the detail with it, and that an application needs to provide sufficient details and information to provide those who might make a submission to assess the effects of the proposed activity on the environment and their interests (rather than have to carry out their own investigations).⁴

We think that is the case here. The changes sought from what was applied for (i.e. from 12 to 15 crew and an increase in the size of the tender boats from 8m to 9m) makes no material difference to the effects generated by the application. Given the application was publicly notified, we strongly doubt that any other party would have made a submission if these slight changes in scope had been provided in the application.

³ General Distributors Limited v Foodstuffs Properties (Wellington) Limited (2011) NZEnvC 212.

⁴ See for example AffCo NZ Ltd v Far North DC (1994) 1B ELRNZ 101

7 STATUTORY ASSESSMENT

7.1 Assessment Criteria

There was no debate at the hearing that the application is one for a discretionary activity made under Rule 16.1.7 of the Regional Coastal Plan.

Decisions on resource consent applications for discretionary activities are made under the criteria listed in Section 104(1) of the RMA. Subject to Part 2 of the Act, we must have regard to the following matters:

- a) any actual and potential effects on the environment of allowing the activity; and
- b) any relevant provisions of:
 - i) a national environmental standard;
 - ii) other regulations;
 - iii) a national policy statement;
 - iv) a New Zealand coastal policy statement;
 - v) a regional policy statement or proposed regional policy statement;
 - vi) a plan or proposed plan; and
- c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

In relation to these matters and the present application:

- we discuss Part 2 RMA matters in Section 7.2 below;
- we discuss the actual and potential effects of the application in Section 7.3 below;
- there are no relevant national environmental standards;
- the only relevant regulation is the Resource Management (Marine Pollution) Regulations 1998. Regulations 11 and 12 provide for the discharge of treated sewage in the marine environment, whereas Regulation 13 prevents the disposal of garbage at sea. Conditions 11 and 12 of the consent we have granted are consistent with these sections of the Marine Pollution regulations;
- the relevant national policy statement is the New Zealand Coastal Policy Statement 2011, which we discuss in Section 7.4 below;
- the operative Regional Policy Statement (RPS) for Southland dates back to 1997. A new proposed RPS for Southland was notified in 2012 and decisions were notified in June 2015, but these are subject to 81 appeals. We discuss the relevant provisions of both the operative and proposed regional policy statements in Section 7.5 below;
- the relevant plan is the operative Regional Coastal Plan for Southland, which was made operative in March 2013 and which incorporates the Fiordland Marine Management Act 2005. We discuss this in Section 7.6 below;
- the wording of Section 104(1)(c) can invite debate as it is very open ended. We have decided the one other clearly relevant matters in this instance is the relevant Iwi Management Plan, which is Te Tangi a Taurira (2008), and which covers the Murihiku area. We discuss this in Section 7.7 below.

As the proposal is classified as a Discretionary Activity, section 104B of the Act is also relevant for our decision. Under s104B, we can either grant or refuse the proposal. If granted, we may impose conditions under s108 of the Act.

7.2 Part 2 of the Act

Decisions on resource consent applications are made “subject to Part 2 of the Act”.

In relation to Section 5 – the Purpose of the Act – we consider that granting the application will promote sustainable management consistent with the provisions of s5. In particular, it will help the applicant provide for their social and economic needs by enabling a passenger carrying vessel to operate in the southern fiords, with associated benefits for the local community. Any potential adverse effects of the proposed activity are avoided or mitigated by the conditions on which we have granted consent.

The only section s6 RMA matters of national importance relevant to the present applications are s6(a), the preservation of the natural character of the coastal environment, and perhaps s6(c), the protection of significant ... habitats of indigenous fauna. We discuss the first of these matters in Section 7.3.1 below, where we conclude that any effects on natural character will only be transient. Conditions 9 and 10 of the consent granted ensure effects on significant habitats of indigenous fauna will largely be avoided.

The only s7 matter we need to have regard to is the finite carrying capacity of the inshore waters of Fiordland. For reasons we discuss in Section 7.3.4 below, we have no evidence that finite capacity has been reached.

We heard no evidence that granting the present application would be contrary to any of the principles of the Treaty of Waitangi.

7.3 Actual and Potential Effects

We see these as being actual or potential effects on:

- a. natural character and amenity, including wilderness and remoteness;
- b. other users of the southern fiords;
- c. biological communities, including habitat depletion and biodiversity;
- d. effects of associated activities; and
- e. cumulative effects.

We deal with these in turn. In doing so we also note that there will be positive effects of granting the application, which we have outlined in Section 7.2 above.

7.3.1 Effects on Natural Character and Amenity

There is no doubt that the waters in which the applicant intends to operate have outstanding natural character, with associated outstanding amenity and wilderness values. Fiordland is a world heritage area, with breath taking natural values. It is part of Fiordland National Park, which is managed by the Department of Conservation under the provisions of the Fiordland National Park Management Plan. The associated coastal waters within the fiords are classified as natural state, which means that discharges can have no effect on water quality beyond a zone of reasonable mixing.

Any vessels using the southern fiords will have some effect on these outstanding natural values. However, any such effect is transient, lasting only as long as the vessel is passing

through or anchored in a particular spot. We also observe that for the vast majority of people, the only way they can enjoy the outstanding natural values of the outer fiords is by visiting them by boat or helicopter. While other commercial vessels operate in this area, most of its use is by fishing vessels, which the Council cannot control, and nor can it control incursions by privately operated cruise ships or “super yachts”.

The applicant has stated that the consent sought could be exercised 52 weeks of the year. The consent only allows the applicant to operate one vessel in Fiordland waters at one time, and our expectation is that it will continue to operate commercially in the northern fiords, which will restrict the times the applicant can operate in the southern fiords.

The other companies who offer excursions of up to a week in the southern fiords are all trade competitors of IEC and as already discussed this is a matter that the RMA specifically prohibits us taking account of.

In conclusion, while we accept that granting the application will have effects on the outstanding natural character and associated values of the southern fiords, the transient and short term nature of these effects, together with conditions imposed to restrict the noise from vessels and the effects of any wakes, will ensure that such effects are very largely avoided or mitigated.

7.3.2 Effects on other users of the Southern Fiords

In this category we include navigational safety, public safety and use of anchorages.

We are persuaded by the evidence of Mr Henderson for the applicant and Mr O’Sullivan for the Council that the vessel to be used by the applicant (and presumably any replacement) is fit for purpose, and that the skipper and crew employed by IEC are of a high professional standard. We also accept their evidence that there are sufficient anchorages to ensure that all boats in the area can anchor safely during extreme weather events. For these reasons we consider that any effects on the safety of other users of the southern fiords will be no more than minor.

7.3.3 Effects on Biota

The land, islands and waters in and surrounding Fiordland National Park have some outstanding biological values, including predator free islands, benthic communities in locations such as “china shops” and bird and marine mammal communities.

We are satisfied that the Conditions 8-10 of the consent granted will ensure that any effects on these outstanding biological values will be very largely avoided, and where this is not possible, will be strongly mitigated.

7.3.4 Cumulative Effects

We were not persuaded that there will be any cumulative effects from granting the present application. Our main reasons for this are:

- we were advised that 17 similar permits have been granted for commercial vessels to operate in the northern fiords, but only seven in the southern fiords. We heard no

- convincing evidence that the cumulative effects of granting the present application will be more than minor;
- the applicant can only operate one vessel in Fiordland at any one time, so the cumulative effects along the entire coastline will be no more than exist now (and will arguably be less because the more “crowded” northern fiords will become less so).

The Plan places no restrictions on the number of commercial vessels that can operate in Fiordland. This was raised as a matter of concern by public interest submitters such as the Department of Conservation and the Fiordland Marine Guardians. However no evidence was provided that the southern fiords are approaching carrying capacity for Commercial Surface Water Activities, and nor is the committee aware of other evidence that would suggest this is the case.

We do acknowledge that there could be a pre-determined carrying capacity for CWSAs in parts of Fiordland. This would prevent incremental increases in such activities without any controls. Accordingly we agree with Mr Chapman that if such restrictions are to be imposed in the future, a new Regional Coastal Plan for Southland is the place to do so.

7.3.5 Effects of Associated Activities

A number of ancillary activities are necessary for IEC to undertake its proposed activities in the southern fiords. These include helicopter trips. All these ancillary activities are permitted by the Plan subject to performance standards, and we are satisfied that their effects will be no more than minor.

One matter that we were concerned about is the noise of the existing and new vessel, and that they meet the performance standards in the Plan. While we are satisfied that the existing vessel will do so, we have included conditions on the consent granted to ensure that any new vessel will do so as well (see Section 8 below).

7.3.6 Conclusion

We are satisfied that the conditions on which the consent is granted will avoid or mitigate most actual or potential effects of the activity, and any effects that cannot be avoided will be transient.

7.4 The NZ Coastal Policy Statement 2011 (the NZCPS).

Although the Regional Coastal Plan for Southland was first notified in 1997 it did not become operative until 2013, which was after the NZCPS came into effect. A recent Supreme Court decision has made it clear that in making decisions on resource consent applications, we must “give effect to” the relevant objectives and policies of the NZCPS.⁵

Mr Hoffman suggested to us that Policies 13 and 15 of the NZCPS, which are the provisions most relevant to the present application, are effectively enacted by Objective 5.2.1 and Policy 5.2.1 of the Regional Coastal Plan. We agree that this very much appears to be the case.

⁵ Environmental Defence Soc v NZ King Salmon Co Ltd (2014) NZSC 38, 17 ELRNZ 442.

7.5 The operative and proposed Regional Policy Statements

In his s42A report Mr Hoffman listed the relevant policies from the operative and proposed Regional Policy Statements. We note the latter document is presently subject to 81 appeals, and for this reason we can give it little weight.

He concluded that the objectives and policies of the operative and proposed Regional Policy Statement are “broadly consistent with the application”⁶ and “consistent with the objectives and policies listed above”. We agree with his conclusions.

7.6 The Regional Coastal Plan (RCP)

The s42A report prepared by Mr Hoffman listed the relevant provisions of the operative RCP. While many of those objectives and policies have some peripheral relevance to the present application, we think the most relevant provisions are those that address matters such as conservation, natural character, wilderness and remoteness. These include:

- | | |
|------------------|---|
| Objective 5.1.1 | <i>To preserve the natural character of the coastal marine area.</i> |
| Objective 5.2.1 | <i>To protect outstanding natural features and landscapes in the region's coastal marine area from the adverse effects of use, development, and subdivision.</i> |
| Objective 16.1.1 | <i>To maintain the essential characteristics of the pristine coastal marine area environment adjoining the Fiordland National Park that contribute to a range of high quality experiences in a natural coastal environment.</i> |
| Objective 16.1.2 | <i>To preserve the remoteness and wilderness values of the internal waters of Fiordland.</i> |
| Objective 16.1.3 | <i>To ensure that commercial and private recreational surface water activities do not adversely affect the intrinsic values of the Fiordland coastal environment.</i> |
| Policy 5.2.1 | <i>Identify and protect outstanding natural features and landscapes within the coastal marine area.</i> |
| Policy 16.2.2 | <i>Limit the extent and number of commercial activities that occur within the coastal marine area of Fiordland to a level which does not reduce natural character, landscape and amenity values, specifically remoteness and tranquillity values.</i> |
| Policy 16.2.8 | <i>Protect the opportunity for remoteness and wilderness experiences in all of the principle Arms, Inlets and Fiords of Fiordland apart from Milford Sound</i> |

We consider that the present application is broadly consistent with these (and other) objectives and policies of the RCP when these are read collectively. As already noted in

⁶ He did make one exception in relation to anchorages, but the evidence at the hearing was that there are ample safe anchorages in the southern fiords.

the discussion on actual and potential effects, any effects of the applicant's proposal will be transient. In saying this we note that the RCP does not explicitly limit the extent and number of commercial activities at this time (Policy 16.2.2), and that granting the application will allow passengers to experience remoteness and wilderness experiences consistent with Policy 16.2.8.

7.7 The Iwi Management Plan - Te Tangi a Taurira (2008)

The s42A report prepared by Mr Hoffman listed the relevant provisions of Te Tangi a Taurira. We note that these deal with a variety of matters, most of which have been discussed elsewhere in this decision. The discharge of treated sewage to open coastal waters is not consistent with two of the policies in this plan, but is provided for in the Marine Pollution Regulations, which are a higher policy instrument. Given this, we consider that the present application is broadly consistent with Te Tangi a Taurira.

7.8 Conclusions

In relation to the statutory assessment criteria we have concluded that the consent sought should be granted, subject to terms and conditions which we discuss in Section 8 below. Our main reasons for this are as follows:

1. the application is not contrary to Part 2 of the Act;
2. most of the effects of the activity for which consent is sought are transient, and the conditions of consent will ensure any potential adverse effects are avoided or mitigated;
3. the matters raised by submitters who represent the public interest and which we have any control over are taken account of in the conditions of consent;
4. most of the other submitters are trade competitors, and this is very clearly not a matter that we can take account of in this decision;
5. the application is not contrary to the objectives and policies of the relevant planning documents, most particularly those in the Regional Coastal Plan for Southland;
6. the granting of the consent has benefits for the economic well-being of elements of the local community, and particularly the operations of Southern Helicopters Ltd.

8 Conditions of Consent

In his s42A report Mr Hoffman recommended a suite of conditions for our consideration. In their submissions and evidence the applicant largely supported these conditions, except for proposed Condition 7 that would have restricted them to using particular anchorages. Mr Henderson was critical of this proposed condition, and its removal was also supported by Mr O'Sullivan, the harbourmaster, and Mr Lamb, one of the submitters. In his report to us at the hearing Mr Hoffman noted these points, and also now recommended to us that this condition be deleted.

We agree that there is no need to restrict the applicant to using specified anchorages, and that such a condition could compromise the safety of the vessel during stormy conditions. We have however included other restrictions, such as on anchoring in sensitive areas or too close to predator free islands.

The applicant also said that they would support a condition that restricted the exercise of their two consents in Fiordland to operating just one vessel at any one time. Mr Norris for Real Journeys also sought such a change. The officer's report had originally recommended this by way of advice note only, although in his report back to us on the day of the hearing Mr Hoffman indicated a condition of consent would be preferable.

We have included the following Condition 2 in the consent to reflect this:

At no time shall this consent be operated concurrently with existing coastal permit (AUTH – 301129 – V2) to operate a vessel in the area of Fiordland between Doubtful Sound and Yates Point.

We have not imposed any condition preventing this consent being transferred to another party as also sought by Mr Norris. This is because we agree with Mr Chapman that there is no resource management reason for doing so given that (the above condition) means only one vessel can operate in Fiordland at any one time under the two consents granted to IEC.

We had one further significant concern, which relates to the noise of the proposed new vessel and the tender boats. While we note that the noise of the motor of the existing vessel meets the noise standards for a permitted activity in the Plan, we have no assurance that either the new vessel, or the associated tender vessels, will meet these performance standards. For this reason we have added the following Conditions 14 and 15 to what was recommended to us by Mr Hoffman:

At least 20 working days before this consent is exercised the consent holder shall provide to the Southland Regional Council evidence that any associated tender vessels will meet the noise performance standards of Rules 5.3.4 and 5.3.6 in the Regional Coastal Plan for Southland Plan in accordance with the provisions of NZS 6801:1991 "Measurement of Sound" and NZS 6802:1991 "Assessment of Environmental Sound".

At least 20 working days before any new vessel is used to take passengers pursuant to this consent, the consent holder shall provide to the Southland Regional Council evidence that this vessel can meet the performance standards of Rules 5.3.4 and 5.3.6 of the Regional Coastal Plan for Southland in accordance with the provisions of NZS 6801:1991 "Measurement of Sound" and NZS 6802:1991 "Assessment of Environmental Sound".

Proposed Conditions 7 and 15 have been deleted, as has advice note 1. All other conditions of consent are as recommended to us by Mr Hoffman.

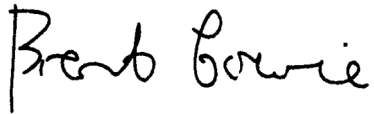
8.1 Term

The applicant's current consent to operate a vessel in Fiordland expires on 9 September 2033. The same expiry date was sought for the proposed consent. This was not opposed by any party to the hearing, and we think it is sensible and efficient that both consents have the same expiry date.

9 Decision

In exercising our delegation under sections 34 and 34A of the RMA and having regard to the foregoing matters, sections 104, 104B, 108 and Part 2 of the RMA, we determine that the application by Island Escape Cruises Limited for resource consent is granted as set out above.

for the **Southland Regional Council**

A handwritten signature in black ink that reads "Brent Cowie". The signature is written in a cursive, slightly slanted style.

Signed by Brent Cowie (Chair)
on behalf of the Hearing Committee

Date: 14 November 2016