

BEFORE THE SOUTHLAND REGIONAL COUNCIL

In the matter of Sections 88 to 115 of the Resource
Management Act 1991

And

In the matter of applications for resource consents
by:

FAWNA FARMS LIMITED

Applicant

**SUBMISSIONS ON BEHALF OF THE APPLICANT IN REPLY
FRIDAY 24 MARCH 2023**

**CRUICKSHANK PRYDE
SOLICITORS
INVERCARGILL**

INTRODUCTION

1. At the conclusion of the hearing on 21 March 2023, counsel provided an oral reply on behalf of the Applicant with leave being granted by the Commissioners for this to be followed by a written reply. Attached to these submissions are draft consent conditions for the Discharge Permit, Water Permit and Land Use Consent with all changes marked.

General

2. Having heard the submission from Ms Stevie-Rae Blair on behalf of Te Rūnanga o Ōraka Aparima (Ngai Tahu) and Ms Campbell on behalf of Coal Action, it was noted that there is a very strong alignment between the outcomes sought by the Submitters and those that the Applicant is seeking to achieve through this application. All parties wish to see a deintensification of the current land use, reduction in nutrient loss from the land and improvement in the mauri of the waterways in the catchment. The grant of this application will achieve these outcomes.¹
3. Over time, the answer to most of the world's problems have been found in innovation whether that is through technology or just simply finding a better way of doing things. Once again, there is a strong alignment between the Submitters and the Applicant on the need to find a better way of doing things. For the Applicant's part, this proposal provides a new approach to achieve improved environmental outcomes.
4. While Ms Blair acknowledged the additional mitigations that were being proposed, she said² "*we have little faith in the actual outcomes we are seeing on the ground or ways in which to measure this. Because since this has been used whānau are not seeing meaningful improvements across catchments and hence where our precautionary approach comes from.*" While the Applicant accepts the sentiment expressed, it questions the need for a precautionary approach here where detailed and robust expert evidence has been provided to establish that the nutrient losses across the

¹ See also paragraph 7 of Ms Railton's summary of evidence given at the hearing "*therefore, it is highly likely that cumulatively the proposal is beneficial to the mauri, mahinga kai, and taonga species of the waterways.*"

² Paragraph 10, summary of evidence presented at hearing.

combined property will decrease following the grant of this consent. A precautionary approach would only be warranted if there was any doubt in the validity of that assessment.

5. While Ms Blair appeared to acknowledge that offsetting was a pathway to improved environmental outcomes, she said³ “*It does not necessarily have to have an economic gain attached to it.*” While that is undoubtedly true, it is equally true that offsetting that does have an economic gain attached to it is no less effective. There was discussion as to whether or not exotic forestry, as opposed to native planting could be a valid offset. While there is no doubt that native planting brings other environmental benefits in terms of a reduction in biodiversity loss, but in terms of the effects that the planting has on nutrient loss, run-off and water quality, those effects are the same regardless of whether or not the planting is exotic or native. It is the effects that matter, not the species, at least in so far as the present application is concerned.

Reply to Mr Gericke’s position at the conclusion of the hearing

6. Mr Gericke was equivocal as to whether or not the test in Regulation 24(1)(b) of the NES-FW could be satisfied, leaving that issue for the Commissioners to consider and determine.
7. It is respectfully submitted that Mr Gericke may not have correctly interpreted Regulation 24 in two respects.
8. Firstly, as counsel understood it, Mr Gericke considered that because it was only the additional 165.9 hectares that triggered the need for the land use consent then consideration of the test in Regulation 24 should be applied only to that land (165.9 hectares) i.e. that the Consent Authority would need to be satisfied that the granting of the consent for that land would not result in an increase in concentrations of contaminants.
9. With respect, it is submitted that this interpretation is wrong. The application for land use for a new or expanded dairy farming activity was in respect of the ‘farm’ as defined

³ At paragraph 14, summary of evidence presented at the hearing.

in the NES-FW as a landholding whose activities include agriculture, where a 'landholding' means 1 or more parcels of land (whether or not they are contiguous) that are managed as a single operation. Therefore, it is submitted that when applying the test of Regulation 24, the existing dairy farm and the new block together represents the expanded dairy unit. This was clearly the way Environment Southland understood the application also because the draft land use consent conditions, condition 4, provides that "*the use of land for farming shall occur on the land holding at 1620 Ohai Clifden Highway as shown on the plan attached as Appendix 1 and consisting of (the existing block and new block).*" This plan shows the existing dairy platform coloured light green and the proposed additional dairy platform in a brighter shade of green.

10. The forestry block to be retained by IFS is to be legally linked to the expanded dairy farm through the Forestry Right. The land use consent for the expanded dairy farm cannot be exercised if the forestry block does not remain in trees.
11. Mr Gericke's narrow interpretation of how Regulation 24 should be applied, only having regard to the additional land, was on the basis that it was only the additional land that triggered the need for the land use consent. Quite apart from the fact that this is inconsistent with the way in which the application for land use consent has been framed and assessed, this approach is inconsistent with the concept of bundling which is recognised as good practice so that where, as is the case here, an application for consent includes activities that are permitted or already consented together uses which have a different activity status, they are bundled and treated as one overall activity based on the most restrictive activity status.
12. Accordingly, the Applicant says that when interpreting Regulation 24, the first question is what is the activity in respect of which consent is being sought? The Applicant says that the consent being sought is a land use consent to use the existing and the additional land for dairying.
13. The question the Consent Authority has to ask itself under Regulation 24 is whether or not that activity will result in "*an increase in concentrations of contaminants in freshwater or other receiving environments ... compared with the concentrations as at*

the close of 2 September 2020.” That comparison is between the Combined Property (as one planning unit) pre and post consent.

14. Secondly, with respect, Mr Gericke appears to have misconstrued what is meant by the terms “*freshwater or other receiving environments.*”
15. The ordinary and natural meaning of that phrase (in the absence of a definition in the Regulation) must be the catchment, in this case the Orauea Catchment.
16. When Regulation 24 is correctly interpreted, the Applicant submits that the test can be shown to be met because the “*activity*” (the expanded dairy farm and forestry block) will not result in an increase in concentrations of contaminants in the Orauea Catchment.
17. This submission is supported by the evidence that was provided to the hearing in particular by Ms Topham where a reduction in the contaminant load across the combined properties, with all other factors remaining the same, should logically lead to a decrease in concentrations of contaminants in the catchment.
18. The test in Regulation 24 only requires there to be no increase, not a decrease, in concentrations of contaminants.
19. Ms Railton, in the summary of her evidence presented to the hearing said⁴ “*through the proposal and the above mitigations, an extremely small contribution to improvement in water quality is highly likely. This goes a step above just halting the decline as referred to in paragraph 43 of Ms Stevie-Rae Blair’s evidence.*”
20. Based on this, it is submitted that it is difficult to understand how the Consent Authority could conclude that the granting of consent would result in an increase in concentrations of contaminants in the catchment.

⁴ Paragraph 5(e).

The Forestry Right

21. Mr Gericke appeared to be satisfied with the Forestry Right as an effective mechanism to link the properties subject to Council being a party to it.
22. As explained at the hearing, the Council could be a party to the Forestry Right by being included as a Grantee (along with the Applicant) with the Easement Instrument recording that the Forestry Right was “*in gross*.”
23. The opportunity for Council to be included as a party to the Forestry Right is offered by the Applicant but with respect it is submitted that this is unnecessary in view of the proposed amendment to the consent conditions set out at paragraph 38 of the Opening Submissions which will require both the Forestry Right to be registered prior to the commencement of the land use consent and an annual certification that the terms of the Forestry Right have been complied with.
24. Although technically the Applicant and IFS could agree to terminate the Forestry Right, in doing so the Applicant would know that it was no longer compliant with the land use consent and the activity would have to cease. It should be noted that in that extremely unlikely event, within the seven year term of this consent if granted, then the dairy farm operation would have to be discontinued on the additional land, and cow numbers reduced to 900 with the dairy operation continuing under the original land use consent for the remainder of the seven year term. For the reasons explained earlier, this application is for a new land use consent over the existing and expanded area being the total ‘landholding’ at this site. The original consent is not being surrendered and would run in parallel with the seven year term of the new consent.

Groundwater Monitoring

25. A condition requiring groundwater monitoring was discussed at the hearing. There are four existing bores on the property available for groundwater monitoring. If Environment Southland wanted to establish a monitoring bore upstream of the expanded dairy farm for the purposes of groundwater monitoring for the catchment then the Applicant would consent to the establishment of a monitoring bore on its land with access being provided. However, it is submitted there is little value in this being

imposed as a condition of consent, rather an agreement between the consent holder and Environment Southland after the fact.

26. There is nothing unique or different about the discharge to land under this proposed consent. The effects of dairying are well understood. It is submitted that there should be sufficient level of confidence about the overall reduction in nutrient losses, including a decrease in concentration of contaminants through the mitigations proposed that go above the OverseerFM modelled load reduction, and above industry good management practice, without the need for groundwater monitoring to be imposed as a consent condition.

Riparian Planting

27. The Applicant proposes an amendment to the consent conditions to provide for additional riparian planting which is summarised as follows.

28. With reference to the **attached** marked up aerial photographs, the Applicant proposes the following:

- 28.1 Area 1 consisting of 5.5 hectares, which is already fenced, would be planted in both exotics and native species with the native species to be not less than 50% of the planting area. The reason for the choice of some exotics is to establish shelter for the dairy shed. This planting would be completed within the next 18 months.

- 28.2 Area 4 is an ephemeral stream on the area to be added to the dairy farm. The Applicant will fence this within three months of the grant of consent and the area will be planted in natives within two years.

- 28.3 Area 2 is also an ephemeral stream on the existing dairy farm. It is already fenced and will be planted in natives within three years of the grant of consent.

- 28.4 When this planting map was first conceived, the Applicant had not long owned the property and the boundary around Area 3 was unclear. The Applicant has since clarified that this area sits almost entirely on the

neighbouring property and so is for now, excluded from the riparian planting plan.

29. This riparian planting is provided for in the draft Land Use Consent Conditions (see condition 22(a), (b) and (c)).
30. It was noted that riparian planting was a condition of the existing land use consent granted when the farm was converted and all of that riparian planting has been completed on the existing dairy farm.
31. Any other riparian planting would be included in the Farm Environmental Plan.
32. It was noted that apart from Area 4, there are no other open waterways on the area to be added to the existing dairy farm which has sub surface tiled drains.
33. The remaining open waterways on the IFS property will effectively have riparian planting, subject to the setback requirements of the NES plantation forestry through the establishment of the forest on that land.

DATED this 24th day of March 2023



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