

BEFORE INDEPENDENT COMMISSIONERS APPOINTED BY THE SOUTHLAND REGIONAL COUNCIL

IN THE MATTER of the Resource Management Act 1991

AND IN THE MATTER of various resource consent applications for periodic openings of Waituna Lagoon Waipārera by Te Rūnanga o Awarua, the Department of Conservation and the Southland Regional Council (Environment Southland) [the Applicants]

Application No. **APP-20242456**

Legal Submissions on behalf of the Applicants

Dated: 22 July 2025

Department of Conservation | *Te Papa Atawhai*

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TĒNĀ E NGĀ KAIKOMIHANA, NEI RĀ KA MIHI, IF IT MAY PLEASE THE COMMISSIONERS

Mana oranga: Mana Tangata: Mana ki uta: Mana ki tai: Mana Waituna

Ensuring the wellbeing of the people, the land, the waters, the ecosystems and the life-force of the Waituna catchment and lagoon, now and for future generations through a partnership approach

Introduction

1. The Applicants – Te Rūnanga o Awarua, the Department of Conservation (Te Papa Atawhai) and the Southland Regional Council (Environment Southland) – have jointly applied for resource consents to periodically open Waituna Lagoon/ Te Waipārera (Waituna Lagoon) to the sea as follows:

Water and discharge permits for

- the diversion and discharge of water and sediment from Waituna Lagoon to the coastal marine area – Te Ara a Kiwa
- the diversion and discharge of seawater and sediment from the coastal marine area, Te Ara a Kiwa, into Waituna Lagoon
- earthworks and disturbance of the bed of Waituna Lagoon and its margins

Land use and coastal permits for

- bed disturbance
- disturbance of the coastal marine area Te Ara a Kiwa
- discharge to the coastal marine area Te Ara a Kiwa
- incidental indigenous vegetation clearance

2. The applications are in support of the Applicants' joint aspiration to improve the cultural and ecological health of Waituna Lagoon, its hauora, in accordance with Te Mana o te Wai, and achieve the Applicants' purpose of wetland maintenance and restoration.
3. The application proposes a new opening regime for Waituna Lagoon based on three different triggers¹ as follows:
 - a. **Water level transitional regime**, applicable when water levels in Waituna Lagoon exceed certain levels as measured at the Waghorn Bridge gauge. This regime, as revised, has 4 stages, starting in the first 5-year stage where water levels are at 2.3m for 7 consecutive days (in winter)/ 2.4m for three consecutive days (summer) and ultimately moving to water levels at 2.5m for 7 consecutive days in the final 5-year stage

¹ Evidence of Lisa Thorne dated 11 July 2025, Appendix 1B, proposed conditions 4, 5, and 6

- b. **Water quality and ecosystem health**, with a mix of primary and secondary indicators of Waituna Lagoon to be assessed by the Science Advisory Group (SAG) who make recommendations regarding opening the lagoon to the consent holders
 - c. **Fish passage**, this provides for lagoon opening to allow indigenous diadromous (migratory) fish species to travel to and from the sea – Te Ara a Kiwa, where the lagoon has not been opened within the past 24 months, or the opening was not at a time supporting the upstream migration of threatened or at risk fish species. Again, the SAG would make recommendations regarding opening the lagoon to the consent holders
4. These submissions address the following matters to assist ngā Kaikomihana, the Commissioners (Hearing Panel) in making decisions on this application:
- a. Brief context about the applicants and the application
 - b. The community's concerns for Waituna Lagoon
 - c. The complex ecosystem and multiple significant values of Waituna Lagoon
 - d. Consenting requirements in relation to Southland District Council
 - e. Why no Reserves Act 1977 authorisation is required
 - f. The Resource Management Act 1991 planning framework:
 - i. Section 104D re non-complying activity status
 - ii. The existing environment
 - iii. Te Mana o te Wai in the National Policy Statement for Freshwater Management 2020
 - iv. Waituna Lagoon's status under the National Environmental Standards for Freshwater and the partially operative Southland Water and Land Plan
 - g. Submitters' concerns:
 - i. proposed water trigger levels and transition to 2.5m over the term of the consent
 - ii. accuracy of water inundation modelling
 - iii. water quality/ nutrient inputs
 - iv. fish passage concerns
 - v. impact on fringing vegetation communities
 - vi. impact on ecologically important aquatic vegetation, especially ruppia
 - vii. increased numbers of Canada geese and black swans
 - viii. impacts on other avifauna
 - ix. access to public and private property
 - x. consultation and community involvement going forward
 - h. Conclusion

Context about the Applicants

5. The Applicants all have statutory roles and interests in Waituna Lagoon:
 - a. **Te Rūnanga o Awarua** (Awarua) are mana whenua and kaitiaki for Waituna Lagoon and the wider wetlands area, as the lagoon is within the takiwa of Awarua and the rūnanga is part of ngā papatipu rūnanga of Te Rūnanga o Ngāi Tahu (TRONT). Waituna Lagoon opens to Te Ara a Kiwa/ Foveaux Strait. Under the Ngāi Tahu Claims Settlement Act 1998, the interests of Ngāi Tahu Whānui in both the Waituna Wetlands and Rakiura/ Te Ara a Kiwa are recognised through statutory acknowledgements.²
 - b. The **Department of Conservation Te Papa Atawhai** (Department, DOC) administers the Waituna Wetlands Scientific Reserve under the Reserves Act 1977 on behalf of the Crown. This scientific reserve covers Waituna Lagoon, the land surrounding the lagoon including the barrier beach bar (apart from one small area in private ownership), and the isthmus of land between the lagoon and Awarua Bay to the west. The Department also administers the Waghorn Waituna Scientific Reserve (which contains the Waituna loop track) adjacent to the lagoon, as well as other scenic reserves and conservation areas in the vicinity of Waituna Lagoon. Most of these areas are part of the Awarua Wetlands Ramsar Site³ recognised as a wetland of international significance under the Ramsar Convention on wetlands.⁴ The Department is the lead agency for the Government of New Zealand on the Ramsar Convention on Wetlands.⁵
 - c. The **Southland Regional Council (Environment Southland, Council)** has responsibility to regulate activities within the Waituna catchment under the Resource Management Act 1991 and the Soil Conservation and River Controls Act 1941. The Council's roles include the preparation and administration of the Southland Regional Policy Statement, Regional Coastal Plan and partially operative Southland Water and Land Plan. The Council also supports the Waituna Catchment Liaison Committee⁶ which provides advice to the Council on its river control and land drainage work.
6. The Applicants have been working together (alongside the community, Southland District Council, Fonterra, and Whakamana Te Waituna Charitable Trust) to improve the hauora,

² See Ngāi Tahu Claims Settlement Act 1998, Schedules [73](#) and [104](#)

³ Refer evidence of Dr Hugh Robertson for the Applicants dated 11 July 2025 at para 37 and Figure 1

⁴ The Convention on Wetlands of International Importance is known as the 'Ramsar Convention' and entered into force in New Zealand in 1976 with the inclusion of 3 Ramsar sites one of which was Waituna Lagoon. The Convention is an intergovernmental treaty that provides the framework for national action and international cooperation for the conservation and wise use of wetlands and their resources, with 172 contracting parties as at 2023. The Ramsar Convention is the only global environmental treaty that deals with a particular ecosystem.

⁵ [Ramsar Convention on Wetlands: DOC's international agreements](#)

⁶ Environment Southland has established 8 catchment liaison committees to provide local context and support development of its annual maintenance programmes: [Catchment liaison committees - Environment Southland](#)

ecological and cultural health of Waituna Lagoon and the Waituna catchment to achieve a ki uta ki tai approach (from the mountains to the sea).⁷ This application is a significant step to achieving this goal by having consents for a lagoon opening regime which prioritises the restoration of Waituna Lagoon.

Context for making the Joint Application

7. Waituna Lagoon is a taonga, a special place to many that is not only nationally important but internationally important.
8. The Applicants have been working with other partners to improve the health of Waituna Lagoon since 2001 with increased effort from 2011, due to concern the lagoon was being impacted by increased nutrient inputs in the catchment and may 'flip' to a eutrophic state. This led to the Waituna Partners Group and a working group⁸ being set up, and formalisation of the lagoon technical advisory group to support this work. Many of the experts for the Applicants are members of the lagoon technical advisory group (also known as the science advisory group) and have been working in the Waituna catchment since 2013.
9. The Waituna Partners Group consulted widely with the community and interested stakeholders to come up with a strategy and action plan for Waituna Lagoon in 2015⁹ which follows a ki uta ki tai approach. Actions include:
 - a. Fonterra and DOC Living Waters Partnership 2013-2023 which focused on trialling tools and methods to enable farming, freshwater and healthy ecosystems to thrive alongside each other
 - b. Establishment of Whakamana Te Waituna Charitable Trust in 2018 to continue the work of ensuring the wellbeing of the people, the land, the waters, the ecosystems and the life-force of Waituna¹⁰
 - c. Land purchases (funded by the Ministry for the Environment Freshwater Improvement Fund) to retire land at risk of higher water levels from farming, to create a buffer area
 - d. Establishment of Te Wai Pārera Trust in 2019 to manage lands retired from farming, including setting up a mahinga kai pā¹¹
 - e. Reducing nutrient inputs at a farm and catchment level by taking practical steps and implementing good farming practices

⁷ The concept of "ki uta ki tai" and its application in the context of Southland Murihiku and the proposed Southland Water and Land Plan is discussed in *Aratiatia Investments Ltd v Southland Regional Council* [2019] NZEnvC 208 at [40]-[59]

⁸ The Waituna Partners Group was made up of the Applicants together with TRONT and Southland District Council. The working group included all these parties as well as Fonterra and DairyNZ.

⁹ [Strategy & Action Plan for Waituna - Environment Southland](#)

¹⁰ [Home - Whakamana te Waituna](#)

¹¹ As discussed in the evidence of Dean Whaanga dated 11 July 2025 at paras 63-65

- f. Improving creek bank stabilisation to reduce sediment and restore riparian and instream habitat
 - g. Ongoing research and monitoring, including regular ruppia surveys
 - h. Support from Southland Fish and Game Council, including annual trout surveys
 - i. Investigating options for long term management of the lagoon opening regime
10. The last action above has led to this application. In recognition of their shared interests in Waituna Lagoon, the Applicants have come together to make and progress this joint application. They are committed to working together in the future as consent holders if the application is granted to achieve long term hauora for Waituna Lagoon. This acknowledges all their respective roles – Awarua as mana whenua and kaitiaki, the Department as manager of the scientific reserve and Ramsar site, and Environment Southland in both its regulatory and catchment management roles.

The Applicants acknowledge the community highly values Waituna Lagoon

11. The Applicants acknowledge submitters for their passion and care for Waituna Lagoon. The community highly value Waituna Lagoon as was expressed in many submissions and in the pre-hearing meeting on the application.¹²
12. Several submitters state they are committed to continuing their good work to change previous farm practices to reduce nutrient inputs in the catchment.¹³ In the long-term these actions by the Waituna catchment community should contribute to improvements in the water quality of Waituna Lagoon.
13. The Applicants have considered concerns raised by submitters opposing the application including from the Waituna catchment community. The Applicants provided further information¹⁴ to respond to some concerns, and they have made changes to the proposed lagoon opening regime and other proposed consent conditions.¹⁵ These include:
- a. Revising the proposed transitional water level regime from the original application. This now has 4 stages proposed instead of 3.¹⁶ The Applicants also sought advice to address the environmental impact of the new 2.4m maximum level proposed to apply over summer in revised stage 1 and year-round in new stage 2.

¹² See Section 42A Report, Appendix D, p 13

¹³ See e.g. submissions of N de Haan, J Koenig, L Paddon, N Paterson, B Pirie, Southern Star Farms Ltd, on APP-20242456

¹⁴ Applicant Further Info Response 26 June 2025

¹⁵ Consent Application Update – Changes to Proposed Conditions 14.05.2025 and Evidence of Lisa Thorne – Appendix 1B

¹⁶ The original transitional regime proposed in the Application had three stages, years 1-5 winter openings if levels at or exceed 2.3m and summer openings when levels at or exceed 2.5m for 24 hours, years 6-15 year-round openings if levels at or exceed 2.3m for 3 days, and years 16-20 year-round openings if levels at or exceed 2.5m for 7 days

- b. Completing a proposed Communication Management Plan in consultation with community representatives.
 - c. Proposing a Consent Implementation Plan, including a decision-tree to address concerns about how the Applicants would work together to implement the consent if granted.
14. The Applicants are committed to continuing to work with the community and other stakeholders to ensure the hauora of Waituna Lagoon, whatever the outcome of this application. I discuss specific submitter concerns later in these submissions.

Waituna Lagoon is a complex ecosystem with multiple significant values

15. The evidence for the Applicants shows that Waituna Lagoon is a place with a complex ecosystem and having multiple values to be managed:
- a. for Awarua, and more broadly Ngāi Tahu Whānui, Waituna Lagoon has immense cultural significance. This is shown by the statutory acknowledgement, Ngāi Tahu's history in the area, and the establishment of the Mahinga Kai Pā – Pikiraurahi as discussed in the evidence of Dean Whaanga.¹⁷
 - b. it is one of the only remaining examples of large coastal waterbodies on the New Zealand mainland that regularly supports extensive submerged macrophytes that are dominated by the *Ruppia* plant assemblage as discussed in the evidence of Mary de Winton.¹⁸
 - c. it is a productive freshwater environment supporting a diverse freshwater native fish community with strong representation of taonga species as discussed in the evidence of Dr Robin Holmes.¹⁹
 - d. over 90 different species of birds have been recorded at Waituna Lagoon, which provides habitat for Arctic migratory species, waterfowl, waders and wetland species some of which are of conservation concern, as discussed in the evidence of Sean Jacques.²⁰
 - e. it is a place people go to recreate, including to appreciate its significant ecological values with DOC recreational assets in place as discussed in the evidence of Jono Airey.²¹

¹⁷ Evidence of Dean Whaanga for the Applicants dated 11 July 2025

¹⁸ Evidence of Mary Dorrington de Winton for the Applicants dated 11 July 2025

¹⁹ Evidence of Dr Robin Holmes for the Applicants dated 11 July 2025

²⁰ Evidence of Sean Jacques for the Applicants dated 10 July 2025

²¹ Evidence of Jono Airey for the Applicants dated 10 July 2025

- f. it is the only remaining coastal lagoon on the east coast of New Zealand in a largely natural ecological condition, and it is at risk of crossing an ecological tipping point without action being taken as discussed in the evidence of Dr Marc Schallenberg.²²
 - g. as it is at the bottom of the Waituna catchment, Waituna Lagoon is at risk of nutrient build-up from excessive contaminant loads in the catchment impacting its water quality as discussed in the evidence of Ash Rabel.²³
 - h. opening the lagoon can have a positive impact on nearby properties in the lower Waituna catchment that are inundated or have reduced drainage capacity at higher lagoon levels. Various scenarios have been modelled and the inundation model validated as discussed in the evidence of Richard Measures.²⁴
 - i. it meets 8 out of 9 criteria for a Ramsar site and is considered an endangered ecosystem type in New Zealand. The complex multiple values present all need to be assessed in deciding the optimal lagoon opening regime as discussed in the evidence of Dr Hugh Robertson.²⁵
 - j. any resource consent granted for a lagoon opening regime needs to recognise all of these matters as well as the interests of the community in restoring the hauora of Waituna Lagoon as discussed in the evidence of Lisa Thorne.²⁶
16. The Applicants have proposed revised consent conditions which are intended to provide for these multiple values and preserve and restore the cultural and ecological health of Waituna Lagoon.

Consents are not required from the Southland District Council, as the Department is a co-applicant

17. In Minute 6 dated 16 July 2025, the Hearing Panel asked:
- b) *In addition to the regional consents' triggers identified in the application, section 42A Report and Applicants' evidence, does the proposal trigger any land use consents from the District Council? If yes, which consents, if not, why not?*
18. Section 4 of the Resource Management Act 1991 (RMA) relevantly states:
- 4 Act to bind the Crown**
- (1) This Act binds the Crown, except as provided in this section.
 - ...
 - (3) [Section 9\(3\)](#) does not apply to any work or activity of the Crown within the boundaries of any area of land held or managed under the [Conservation Act 1987](#) or any other Act

²² Evidence of Dr Marc Schallenberg for the Applicants dated 10 July 2025

²³ Evidence of Ash Rabel for the Applicants dated 11 July 2025

²⁴ Evidence of Richard Measures for the Applicants dated 11 July 2025

²⁵ Evidence of Dr Hugh Robertson for the Applicants dated 11 July 2025

²⁶ Evidence of Lisa Thorne for the Applicants dated 11 July 2025

specified in Schedule 1 of that Act (other than land held for administrative purposes) that—

- (a) is consistent with a conservation management strategy, conservation management plan, or management plan established under the Conservation Act 1987 or any other Act specified in Schedule 1 of that Act; and
- (b) does not have a significant adverse effect beyond the boundary of the area of land.

...

19. Section 9(3) of the RMA states:

- (3) No person may use land in a manner that contravenes a district rule unless the use—
 - (a) is expressly allowed by a resource consent; or
 - (b) is allowed by section 10; or
 - (c) is an activity allowed by section 10A.

20. Pursuant to s4(1) the Department is bound by the RMA other than as set out in that section. Subsection (3) then provides an exception to the application of s9(3) for work or activity of the Department on public conservation land – including land held by the Department under the Reserves Act 1977, which is one of the Acts specified in Schedule 1 of the Conservation Act 1977. The Department is a co-applicant and is a part of the Crown for the purposes of the RMA. Any lagoon opening activity undertaken as an exercise of the consent if granted to the Applicants will be a work or activity of the Crown.

21. The s4(3) exception is subject to two requirements that: the activity be consistent with the relevant conservation statutory planning document, and it does not have a significant adverse effect beyond the boundary of the land. The relevant conservation statutory planning document is the Southland Murihiku Conservation Management Strategy (CMS) which is discussed in section 10.9 of the Application.²⁷ While the assessment is in terms of s104(1)(c) of the RMA, this is also relevant to the assessment under s4(3)(a) and confirms the application, and the proposed lagoon opening regime is consistent with the CMS.²⁸

22. The Application, further information and evidence for the Applicants assesses there will not be any significant adverse effects of opening the lagoon beyond the boundary of the scientific reserve – which would be in the coastal marine area (CMA) adjacent to the reserve. The s42A report writer also agrees there will be no significant adverse effects in the CMA.²⁹

23. The exception in s4(3) means the Department is not required to obtain resource consents for land use activities on public conservation land that contravene a district rule (unless the land

²⁷ Resource Consent Application and Assessment of Environmental Effects for Te Rūnanga o Awarua, Department of Conservation Te Papa Atawhai and Environment Southland dated July 2024, pp 129-130.

²⁸ This assessment the proposed activity is consistent with the CMS is accepted by the s42A Report Writer at section 3.8.1.2

²⁹ Section 42A Report, sections 2.8.4.9 (water quantity), 2.8.5.14-15 (water quality), 2.8.9.5 (natural character outstanding natural landscape etc), 2.8.10.5 (public access) and overall assessment that adverse effects of proposed activity are largely temporary and no more than minor at 2.8.12.1

is being held for administrative purposes such as staff offices) provided the two requirements are met.³⁰

24. I submit these requirements are satisfied, and the Department as co-applicant and a part of the Crown is not required to obtain consents from the Southland District Council for land use activities that would otherwise breach a district rule.
25. For these reasons if consent is granted to the Applicants with the Department as a joint consent holder, then the works authorised by the consent will be work of the Crown and the application can proceed without district consents.
26. This is not to disregard the District Plan, and in particular its identification of Waituna Lagoon and the associated wetland complex as an outstanding natural feature/ landscape. Landscape effects are addressed by the application³¹ and the section 42A report writer,³² who agree these are temporary and acceptable.

A Reserves Act authorisation is not required where the Department is a partner in opening the lagoon

27. Some submitters have raised concerns there is no current Reserves Act 1977 authorisation in place and suggest this should be obtained before the consent is sought or granted.³³ Previous consent holders have required an authorisation, which is a decision made under the Reserves Act 1977 and not by the Hearing Panel.
28. Submitters appear to be concerned the Department could act independently under the Reserves Act 1977 to refuse access to the reserve, thereby undermining the ability of the joint consent holders to act under the resource consents (if granted).
29. The Department is working together with Awarua and Environment Southland in the spirit of collaboration, trust, and collective integrated decision-making towards the goal of improving the mana, environment and hauora of Waituna Lagoon. For the Department to act in the way proposed by submitters would be contrary to the principles the Applicants have agreed between themselves, as well as contrary to their joint aspirations and purposes in making this application. Accordingly, this concern is misplaced.

³⁰ See *Jasper v West Coast Regional Council* Environment Court, Christchurch, C082/97, 5 August 1997, [1997] ELHNZ 285

³¹ Application, section 9.8

³² Section 42A report sections 2.3.3, 2.7.4 and 2.8.9 with conclusion in 2.8.9.5

³³ E.g. submissions of L McCallum, M van Rossum

30. In my opinion no authorisation is required under the Reserves Act 1977 for a lagoon opening regime where the opening is facilitated by the Department jointly with Awarua and Environment Southland.
31. The purpose of scientific reserves is to protect and preserve these areas “... *in perpetuity for scientific study, research, education, and the benefit of the country, ecological associations, plant or animal communities, types of soil, geomorphological phenomena, and like matters of special interest.*”³⁴
32. The scientific reserve includes the gravel barrier beach bar between Waituna Lagoon and Te Ara a Kiwa/ Foveaux Strait. The boundary of the reserve is the mean high-water mark along the sea coast (apart from a small area of freehold land).³⁵ Accordingly, any actions taken to open the lagoon through the barrier bar involve disturbance within the scientific reserve and the adjacent land is the coastal marine area, Te Ara a Kiwa.
33. Where reserves are administered by the Department, authorisations for any person to undertake activities in reserves are generally granted by the Minister of Conservation as concessions.³⁶ Any concession must be consistent with and preferably ensure the primary scientific purpose of the reserve is maintained. The Department worked with Environment Southland to ensure authorisations were in place to enable the two emergency openings of Waituna Lagoon in 2024 which were undertaken by the Council.³⁷
34. As the administering body for the reserve the Department is able to do such things “... *as may be necessary or desirable for the proper and beneficial management, control, and administration of the reserve*”.³⁸ The purposes of the proposed lagoon opening regime are consistent with the proper and beneficial management, control and administration of the scientific reserve, as this is intended to maintain and restore the hauora of Waituna Lagoon.
35. The proposed Consent Implementation Plan requires an application for the authorisation within 3 months of the consent being granted.³⁹ I do not consider an authority under the Reserves Act 1977 is needed where the activity – opening the lagoon – is a joint undertaking of the Applicants including the Department, where the purpose is to maintain and preserve

³⁴ Reserves Act 1977, s21(1)

³⁵ Refer Application, Appendix G Survey Plan, SO 10326

³⁶ Ibid s59A

³⁷ Reserves Act authorisations were also granted to previous resource consent holders.

³⁸ Reserves Act 1977, s59(2)(b) and s62 re powers of Commissioners in relation to reserves administered by the Department for the Crown

³⁹ Evidence of Lisa Thorne – Appendix 1B, condition 7 Lagoon Opening Process, Appendix 4 Consent Implementation Plan, clause 8.

the values of the scientific reserve. For these reasons I submit this undertaking is unnecessary.

36. I reiterate the Applicants are acting jointly to improve the mana, environment and hauora of Waituna Lagoon, and there are virtually nil prospects of the Department deciding not to exercise its powers under the Reserves Act should the Applicants (as joint consent holders) decide to act under the resource consent if granted.

RMA Planning Framework

Section 104D restrictions on non-complying activities

37. Consents for the proposed activity are sought under the Southland Regional Coastal Plan (RCP), the partially operative Southland Water and Land Plan (SWLP), the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (NES-F) and section 14 RMA.⁴⁰ Lisa Thorne, the planner for the Applicants and the section 42A Report Writer, Ms Petricevich both agree the application should be bundled as non-complying, being the most stringent activity status applicable.⁴¹
38. The non-complying status arises from the application of Rule 49(d) of the SWLP for the taking and diversion of surface water from the lagoon to the coastal marine area Te Ara a Kiwa. Rule 49 deals with abstraction, diversion and use of surface water. As noted in the application, the volume of water likely to be released (i.e. 'taken' and 'diverted') and the 'rate of take' from the lagoon once opened exceeds the amounts in Rule 49(a)-(c), and Rules 50 (community water supply), 51 (minor diversions of water), 52 (Waiau catchment) and 52A (Manapōuri Hydro-electric Generation Scheme) do not apply.⁴²
39. As stated by Ms Petricevich in the s42A Report, the SWLP is focused on discharge and water take activities, and "*... the SWLP does not provide fulsome coverage of this proposal as a unique activity*".⁴³ There are no similar waituna-type lagoons in the Southland region where there is a proposal to have a consented managed opening regime.⁴⁴
40. Non-complying activities are first to be considered under s104D of the Resource Management Act 1991 (RMA), which sets out the 'gateway' test. Under this test the Hearing Panel must be satisfied the adverse effects of the proposal are no more than minor or that the application is not contrary to the objectives and policies of the relevant plan. Provided

⁴⁰ Section 42A Report at section 2.5

⁴¹ Application at section 4.5 and Section 42A Report at section 2.5.8

⁴² Application at section 4.2.2, p29

⁴³ Section 42A Report at section 2.8.2

⁴⁴ Evidence of Dr Robertson at para 42, and Evidence of Dr Schallenberg at para 17

one gate is satisfied, even if the other is not, then the Hearing Panel can move on to consider the application under s104 RMA.

41. It is submitted the proposed activity passes both gateways under s104D. The Application contains an effects assessment in section 9 and assesses the relevant planning framework in section 10, concluding the adverse effects of the proposed activity on the environment are minor, and the proposed activity is not contrary to the objectives and policies of the relevant plans (in this case both the RCP and the SWLP).⁴⁵ This conclusion that both s104D gateways are passed was confirmed in expert caucusing by Ms Petricevich the section 42A Report Writer and Ms Thorne as planner for the Applicants.⁴⁶
42. For these reasons, it is submitted the application is eligible for consideration by the Hearing Panel under s104 RMA.

Assessment under s104(1)(a) – what is the existing environment?

43. To assess the effects of the proposed activity on the environment, it is necessary to decide what the existing environment is.
44. This concept has been the focus of much caselaw, including that developed from *Queenstown Lakes District Council v Hawthorn Estate Limited*⁴⁷ and discussed in *Port Gore Marine Farms v Marlborough District Council*⁴⁸, and in *Ngāti Rangī Trust v Manawatu-Whanganui Regional Council*.⁴⁹ I submit some principles have developed:
 - a. The existing environment includes consented activities provided they are likely to be implemented⁵⁰
 - b. The existing environment does not include the activity sought to be consented by the application⁵¹
 - c. The existing environment does not include water take permits⁵²
45. In this instance I submit the environment to be assessed is Waituna Lagoon and its surrounds including the barrier beach and the CMA – Te Ara a Kiwa Foveaux Strait. This environment is natural and unmodified, with no development proposed consistent with its scientific reserve

⁴⁵ Application at section 12, p132

⁴⁶ Section 42A Report at section 2.7.4., and Evidence of Ms Thorne at paras 55-56

⁴⁷ [2006] NZRMA 424 (CA)

⁴⁸ [2012] NZEnvC 72

⁴⁹ [2016] NZHC 2948

⁵⁰ *Hawthorn*, supra at [84]

⁵¹ *Port Gore*, supra at [140]

⁵² *Ngāti Rangī*, supra at [62]

status and as a Ramsar site. The current activities in the scientific reserve are limited to scientific, restoration and recreational activities⁵³.

46. The natural processes impacting the Waituna catchment and Waituna Lagoon must be included within this existing environment. This includes rainfall, storm surges etc. which result in higher water levels. The existing environment does not include the previous (expired) consents to open the lagoon which were primarily for land drainage purposes. As set out in the Application and the evidence for the Applicants,⁵⁴ the outcome of these previous consents was to maintain the lagoon at water levels which were artificially low.⁵⁵
47. For these reasons, I submit the environment to be considered and assessed for effects is the natural unmodified state of Waituna Lagoon, with no consent in place providing for lagoon openings.
48. Environment Southland acted twice under the RMA emergency provisions in 2024 – once to address water quality and once to address high water levels in the lagoon.⁵⁶ The threshold for opening the lagoon under these emergency provisions is a high one, requiring the Council to be satisfied there is an adverse effect on the environment requiring immediate preventive or remedial measures, or that a sudden event could cause serious damage to property.⁵⁷
49. These emergency openings responded to concerns about water quality and high lagoon levels – two of the three triggers proposed by the Applicants. The Applicants prefer to have a resource consent in place including on the proposed conditions sought, which provide for review and a more timely response without having to wait for immediate action to be necessary.

Application of Te Mana o te Wai – NPSFM 2020 (as amended October 2024)

50. The NPSFM is one of the documents required to be considered under s104(1)(b) RMA. Since the application was lodged, s104(2F) has come into force which states:
 (2F) When considering an application and any submissions received, a consent authority must not have regard to clause 1.3(5) or 2.1 of the NPSFM 2020 (which relates to the hierarchy of obligations in the NPSFM 2020).
51. Accordingly, the hierarchy of obligations is not a matter for the Hearing Panel to consider. Otherwise, the NPSFM remains relevant, in particular the fundamental concept of Te Mana o

⁵³ I understand there is one guiding concession currently in place for the reserve.

⁵⁴ Application section 7

⁵⁵ Evidence of Dr Schallenberg at paras 30-31

⁵⁶ Evidence of Mr Rabel at para 8

⁵⁷ Resource Management Act 1991, s330(1)(d), (e) or (f)

te Wai. The Environment Court discussed this concept in the Southland context in *Aratiatia Investments Ltd v Southland Regional Council*⁵⁸ where the Court stated⁵⁹ in relation to the 2017 amended version of the NPSFM 2014⁶⁰ that:

“Under the National Policy Statement for Freshwater Management (NPS-FM), it is a matter of national significance that fresh water is managed through a framework that considers and recognises Te Mana o te Wai as an integral part of freshwater management. When we speak about Te Mana o te Wai we are referring to the integrated and holistic wellbeing of a freshwater body. Upholding Te Mana o te Wai acknowledges and protects the mauri of water. While mauri is not defined under the NPS-FM, ... the mauri of water sustains hauora (health): the health of the environment, the health of the waterbody and the health of the people. As a matter of national significance the NPS-FM requires users of water to provide for hauora and in so doing, acknowledge and protect the mauri of water.”

52. I submit the Court’s findings on Te Mana o te Wai are still applicable to the concept as stated in the NPSFM 2020, where clause 1.3(1) states:

Te Mana o te Wai is a concept that refers to the fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment. It protects the mauri of the wai. Te Mana o te Wai is about restoring and preserving the balance between the water, the wider environment, and the community.

53. The SWLP gives effect to Te Mana o te Wai (NPSFM 2017 version), with the preamble to the plan concluding:⁶¹

“... Te Mana o te Wai is fundamental to the integrated framework for freshwater management in Southland. It provides a way of expressing Southland’s aspirations for freshwater, now and into the future.”

54. This application is about restoring Waituna Lagoon to a state of hauora and protect the mauri of the wai. By doing so this will protect the health and wellbeing of the wider environment and preserve the balance between this waterbody and the wider environment for the community.

55. The application discusses Te Mana o Te Wai at section 10.3.1 – 10.3.3. As above, I accept the hierarchy of obligations in clause 1.3(5) and Objective 2.1 NPSFM do not apply. I submit the application’s discussion on the concept of Te Mana o te Wai and the applicable NPSFM policies remain relevant to the Hearing Panel’s decision.

56. I acknowledge there are currently proposals to further amend the NPSFM, with consultation closing on 27 July 2025.⁶² As the High Court has recently reiterated, the Hearing Panel are

⁵⁸ [2019] NZEnvC 208 – the 1st interim decision on the proposed Southland Water and Land Plan

⁵⁹ Supra, at [17], footnote references deleted

⁶⁰ See [nps-freshwater-amended-2017_0.pdf](#) at page 7 – National significance of freshwater and Te Mana o te Wai

⁶¹ SWLP (May 2024), Preamble – Te Mana o te Wai p11

⁶² [Freshwater national direction - Ministry for the Environment - Citizen Space](#)

required to apply the law as it stands at the time of your decision.⁶³ I submit this principle extends to potential changes to the NPSFM, and until such time as any changes take effect you should disregard them.

Waituna Lagoon is both a regionally significant wetland and a sensitive water body under the SWLP

57. The SWLP lists Regionally Significant Wetlands and Sensitive Water Bodies in Southland in Appendix A.⁶⁴ Their locations are shown in Map Series 7, with corresponding water body ID numbers.
58. Waituna Lagoon appears in Appendix A twice – first in the initial list under the subheading “*Awarua Plains – Southland Estuaries*” as “(3) *Waituna Scientific Reserve*”. It appears again under the heading “*Sensitive Water Bodies in Southland*” as “(3) *Waituna Lagoon*”. While recorded slightly differently, the use of the same waterbody ID number confirms that both entries refer to Waituna Lagoon which is entirely contained within the scientific reserve. The scientific reserve includes not only Waituna Lagoon but also many fringing wetlands⁶⁵ and in my opinion these wetlands must also be included in the Appendix A list of regionally significant wetlands.
59. Appendix A is relevant to policy 16 of the SWLP (which deals with farming activities that affect water quality), ensuring that no new or further intensification of farming activities occurs in close proximity to these water bodies. The rules⁶⁶ implementing this policy apply more stringent controls, such as greater setbacks, for intensive farming activities that may affect water quality in regionally significant wetlands and sensitive water bodies.
60. I submit Waituna Lagoon is properly considered to be all of – a natural inland wetland (as defined in the NPSFM for the purposes of the NES-F), a regionally significant wetland, and a sensitive water body.
61. The application and section 42A Report⁶⁷ discuss the relevant provisions of the NPSFM, SWLP and NES-F that apply to wetlands and which the Hearing Panel should consider.

Submitter’s concerns

62. The Applicants attended a pre-hearing meeting with submitters in March 2025 where submitters’ concerns were discussed. Following this meeting, the Applicants reconsidered

⁶³ *Box Property Investments Ltd v The Expert Consenting Panel* [2025] NZHC 1773 (1 July 2025) at [35] and as further discussed in [36]-[37].

⁶⁴ SWLP (May 2024) Appendix A pp134-137

⁶⁵ Application at section 9.5.2, and evidence of Dr Robertson at para 48 and Table 2

⁶⁶ SWLP (May 2024) Rules 20A, 20B, 35B, 51, and 70

⁶⁷ Application at sections 4.4, 10.3.1, 10.3.5 and 10.6.3, section 42A report at section 2.8.4.2 and 2.8.6.1

parts of the application and have proposed revised conditions: including revising the draft Communication Management Plan to show how the community and other interested stakeholders will be kept informed, and providing a draft Consent Implementation Plan including a decision-tree to show how the Applicants would work together to implement the consent if granted.⁶⁸

63. The next section of these submissions discusses various matters raised by submitters, including at the pre-hearing meeting, in more depth.

Proposed consent water level opening thresholds and proposed transitional regime

64. Many submitters oppose the proposed water trigger levels, seeking the lagoon be opened at 2.2m asl or lower. Some submissions sought a 5-year consent term at a maximum level of 2.2m applies, and several submissions opposed the 20-year term sought by the Applicants.⁶⁹ Many of these submitters also sought it be “compulsory” to open the lagoon once a certain water trigger level was reached.
65. While submitters state they are concerned that higher levels will have detrimental environmental impacts on Waituna Lagoon, they have not provided technical advice in support of their concerns in submissions.
66. The Applicants relied on a comprehensive technical assessment to develop the proposed transitional lagoon opening regime. Based on that technical review, the application seeks to reduce the frequency of spring/ summer opening events noting previous thresholds of 2.0m and 2.2m had not been sufficient to prevent this.⁷⁰ This technical review summarised the threshold level considerations, recommending the 2.5m level proposed in the application.⁷¹
67. The technical review considered the hydrological model developed by Environment Southland to assess various scenarios and estimate average openings per year and annual average days at levels above 2.0m – 2.4m.⁷²
68. The Applicants accepted the recommendation of a water threshold (trigger) of 2.5m for 7 days to apply for the final 16-20 years of the proposed consent. The transitional regime proposed by the application to achieve this final water level threshold had an initial stage for years 1-5 with different winter and summer thresholds (summer at 2.5m for 24 hours), and

⁶⁸ Consent Application Update – Changes to Proposed Conditions dated 14.05.25

⁶⁹ e.g. submissions of L & B Ballantine, M Blackler, C McCrostie, R McCrostie, L McKenzie, B Pirie, E Pirie, D Simms, Southern Star Farms Ltd, Waituna Catchment Group, W Tuckey, M van Rossum

⁷⁰ Application, Appendix B – Technical review of conditions for opening Waituna Lagoon, section 5.3 p 26

⁷¹ Supra, section 6.3 Table 5, p28

⁷² Supra, Table 6 p 29

then an interim stage for years 6-15 applying the proposed maximum 2.5m threshold for a shorter period of 3 days at any one time.⁷³

69. The Applicants heard the concerns of submitters at the pre-hearing meeting, including whether there is a difference between opening trigger levels of 2.3m, 2.4m or 2.5m. The Applicants also heard concerns the proposed transitional regime was too fast, with insufficient time for the environment to adjust.
70. The Applicants sought technical advice which confirmed that 2.5m remained the recommended maximum trigger, while applying a 2.4m maximum would: *"... likely have some minor negative impacts on target ecological and cultural values and result in a slightly less natural opening regime."*⁷⁴
71. As stated by Dr Robertson:⁷⁵

"While a 2.5m maximum trigger level is more appropriate for the long-term restoration of Waituna Lagoon, given it provides greater opportunity for water levels to recede naturally to avoid unnecessary opening events, the application of a 2.4m trigger level will enable many human-induced opening events to be avoided. ..."
72. The Applicants accepted this technical advice and revised the transitional regime proposed in consent conditions to reduce the maximum summer threshold in the first stage (years 1-5) of the proposed consent, and to introduce a new interim stage (years 6-10).⁷⁶ This results in 4 stages over the 20-year term now being sought as follows:⁷⁷
 - a) for the first five years from the grant of consent (years 1-5), being to [day month year]:
 - i. summer openings (1 September to 30 April) may occur if water levels are at or above 2.4masl for three consecutive days; and
 - ii. winter openings (1 May to 30 August) may occur if water levels are at or above 2.3masl for seven consecutive days;
 - b) for the next five years of the consent (years 6-10), being from [day month year] to [day month year], openings may occur if water levels are at or above 2.4masl for three consecutive days; and
 - c) for the next five years of the consent (years 11-15), being from [day month year] to [day month year], openings may occur if water levels are at or above 2.5masl for three consecutive days; and
 - d) for the final five years of the consent (years 16-20), being from [day month year] to [day month year] openings may occur if water levels are at or above 2.5masl for seven consecutive days.

⁷³ Supra, section 6.7 p35

⁷⁴ Further Information Response dated 23 June 2025 – Appendix F: Advice on application of 2.4m or 2.5m trigger level for transitional lagoon opening

⁷⁵ Evidence of Dr Robertson at para 83

⁷⁶ Consent Application Update – Changes to Proposed Conditions dated 14.05.25

⁷⁷ Evidence of Ms Thorne, Appendix 1B

73. The Applicants acknowledge, despite these changes, many submitters will still not agree with the proposed water level triggers. They have taken expert advice in putting forward the transitional regime proposed and have sought a 20-year term to provide time for the lagoon and surrounding environment to adjust to the changed lagoon opening regime sought.
74. The Applicants seek a 5-yearly review condition⁷⁸ to ensure the proposed lagoon opening regime is on the best pathway to achieving their aspirations to improve the cultural and ecological health of Waituna Lagoon. This is in addition to any consent review undertaken by the Council in accordance with ss 128 and 129 RMA.⁷⁹

The hydrological modelling used in the application has been validated

75. Many submitters have concerns about the hydrological model and inundation maps provided in the application.⁸⁰ Comments include this had not been ‘ground truthed’ against actual high water level events and the model underestimated the potential impact on land drainage in the catchment.
76. The Applicants provided further information in November 2024 including a peer review of the lagoon water balance model used in the application, and validating the inundation and land drainage modelling using real-life data from the elevated water levels in the catchment in September 2024.⁸¹ As Mr Measures states in his evidence, the validation of predicted inundation against the observed inundation: “... *demonstrates that the predicted inundation extent associated with a 2.5m water level is very accurate.* ...”⁸²
77. For the water balance model relied on by the Applicants, Mr Measures considers the modelling approach sound, noting two sources of uncertainty: change in the barrier seepage rate and climate change.⁸³
78. Mr Measures noted in the November 2024 peer review that once more data is available, a new barrier seepage function will likely be able to be refined.⁸⁴ In assessing potential climate change effects, Mr Measures considers this is likely to increase the rate at which the lagoon fills, likely resulting in more frequent openings of the lagoon.⁸⁵ These changes would apply to

⁷⁸ Evidence of Ms Thorne Appendix 1B, proposed condition 23

⁷⁹ Supra, proposed condition 28

⁸⁰ E.g. submissions of M van Rossum, I Welsh

⁸¹ Review of Waituna Lagoon water balance modelling dated 21 November 2024 and Validation of Waituna Lagoon inundation and land drainage modelling dated 20 November 2024, both by Richard Measures – NIWA

⁸² Evidence of Mr Measures at para 39

⁸³ Supra at paras 50-51.

⁸⁴ Review of Waituna Lagoon water balance modelling at p5.

⁸⁵ Evidence of Mr Measures at para 54

all modelled scenarios and accordingly are unlikely to impact the relative merits of different opening thresholds.⁸⁶

79. As acknowledged by one submitter⁸⁷, higher water levels in Waituna Lagoon come from inputs higher up the catchment from rainfall events and the like. I submit Waituna Lagoon is the receiving environment for such events and higher water levels are a natural occurrence which would be alleviated by exercise of the proposed consent.
80. For these reasons, the Applicants have confidence in the hydrological models used to support the application and the inundation maps provided.

Water quality concerns are addressed by the proposed consent conditions

81. Many submitters also have concerns about the water quality of Waituna Lagoon, including that annual openings are required to ‘flush out’ nutrient inputs from the catchment.⁸⁸
82. As noted above, one of the purposes of the SWLP is to reduce nutrient inputs to sensitive water bodies and regionally significant wetlands including Waituna Lagoon, and some submitters have stated they are doing their bit to improve farming practices in the catchment. I submit the implementation of the SWLP, along with the introduction of the requirement for certified Farm Plans by 2026⁸⁹ should continue to reduce nutrient inputs and lead to improvements in water quality in Waituna Lagoon.
83. Mr Rabel’s evidence considers the proposed water quality consent condition.⁹⁰ He states water quality improves when the lagoon is in an open phase and is effectively “flushing” accumulated contaminants out to sea. Closed phases can lead to deteriorating water quality; however, the closed lagoon state supports other ecosystem health attributes of the lagoon which are dependent on freshwater-dominant conditions.⁹¹
84. The proposed water quality consent condition applies primary indicators (Chlorophyll-*a*, Cyanobacterial biovolume, and Bottom-water dissolved oxygen) directly linked to water quality, combined with secondary indicators which provide early warning and help to understand water quality trends (Total phosphorus, Total nitrogen, and water clarity). Mr Rabel assesses the proposed indicators and their proposed warning and critical levels, along

⁸⁶ Supra at para 54

⁸⁷ Submission of D Simms

⁸⁸ E.g. submissions of L & B Ballantine, N de Haan, T Fogarty, B McKenzie, B Pirie, D Simms, M van Rossum, Waituna Investments Ltd

⁸⁹ [Southland Farm Plans - Environment Southland](#)

⁹⁰ Evidence of Mr Rabel dated 11 July 2025

⁹¹ Supra at paras 22-23 and Tables 1 and 2

with the proposed monitoring regime.⁹² Compared with the existing no consent environment, he concludes: “... *The proposed consent, with its structured monitoring, thresholds, and expert advisory process, is more likely to protect lagoon health under current and future conditions.*”⁹³

85. Dr Schallenberg’s evidence⁹⁴ also assesses the proposed lagoon opening regime as a “*key mitigation tool*” for preventing excessive nutrient buildup in the lagoon,⁹⁵ while acknowledging: “... *frequent openings and prolonged low water levels have negative consequences for other lagoon values.*”⁹⁶ He supports the proposed water quality triggers as safeguarding the water quality and ecological health of the lagoon “... *providing mechanisms to avert potential adverse effects due to elevated nutrient concentrations under closed conditions ...*”.⁹⁷
86. For these reasons, the Applicants consider water quality and nutrient input concerns have been adequately addressed by the proposed conditions of consent.

Submitters’ fish passage concerns are addressed by the proposed consent conditions

87. Several submitters had concerns about diadromous fish passage being impeded by the proposed lagoon opening regime, as discussed by Dr Holmes.⁹⁸ Some submitters sought annual lagoon openings for diadromous fish passage.
88. The Application proposes a condition requiring opening Waituna Lagoon for fish passage if there has not been a lagoon opening within the previous 24 months at a time supporting the upstream migration of threatened or at-risk fish species.⁹⁹
89. Dr Holmes provides comprehensive evidence in support of this proposed condition, assessing the requirements of different fish species: giant kōkopu – noting the Waituna catchment is a stronghold for this taonga species¹⁰⁰, common smelt, common bully, banded kōkopu, giant bully, redfin bully and black flounder, Īnanga, longfin and shortfin eels/ tuna, lamprey/ kanakana, and others.¹⁰¹ He then compares the existing environment (no consent to open the lagoon) against the proposed consent lagoon opening regime, concluding that proposed

⁹² Supra, paras 24-34

⁹³ supra at 42

⁹⁴ Evidence of Dr Schallenberg dated 10 July 2025

⁹⁵ Supra at para 28

⁹⁶ Supra at para 29

⁹⁷ Supra at 37-38

⁹⁸ Evidence of Dr Holmes at paras 13-14

⁹⁹ Proposed consent condition 6

¹⁰⁰ Evidence of Dr Holmes at para 19

¹⁰¹ Evidence of Dr Holmes at paras 36-55 and Table 3

condition 6 in combination with the 5 year review condition:¹⁰²

“... enables ocean migratory native fish community values to be appropriately balanced against other management objectives, such as promoting the growth and recruitment of healthy beds of Ruppia spp. and other native macrophytes, establishing a more natural hydrological regime and increasing the resilience of the giant kōkopu population.”

90. As stated by Dr Holmes, the 2-year period proposed for the fish passage condition balances this environmental value with other ecological objectives for Waituna Lagoon. This period is proposed particularly to address the needs of lamprey/ kanakana, which requires presence of a juvenile cohort to release pheromones to attract adults.¹⁰³
91. For these reasons, the Applicants consider submitters’ fish passage concerns are adequately addressed by the proposed consent conditions if consent is granted.

The impact of higher water levels on fringing vegetation communities

92. Some submitters are concerned about changes in the fringing vegetation communities around Waituna Lagoon arising from the proposed lagoon opening regime. This concern in part arises out of the elevated lagoon levels over winter 2024 causing dieback in manuka shrublands around the lagoon.
93. The Applicants provided a further information response addressing the vegetation communities around Waituna lagoon in June 2025.¹⁰⁴ Dr Robertson discusses this further in his evidence, stating:¹⁰⁵

“... In other wetlands of New Zealand, manuka has established because of altered hydrology (e.g. Whangamarino wetland) and has subsequently declined as the water levels were restored. The proposed transitional regime is supported to allow the native wetland vegetation to transition gradually overtime. ...”
94. Dr Robertson supports the proposed condition for monitoring of fringing vegetation with a baseline assessment, and 5-yearly assessments thereafter. He does not support additional monitoring at year 2, as that time period is unlikely to reliably demonstrate any effect of an altered water level regime on growth and recruitment of fringing wetland vegetation.¹⁰⁶
95. The Applicants rely on this evidence to support the proposed consent, acknowledging the transitional regime proposed will result in changes in the fringing wetland community.

¹⁰² Supra at para 64

¹⁰³ Evidence of Dr Holmes at para 47

¹⁰⁴ Further Information Response dated 23 June 2025, Appendix E: Fringing Wetland Response

¹⁰⁵ Evidence of Dr Robertson at 69, referring to Appendix E response supra

¹⁰⁶ Supra at para 72

Ultimately, these changes should result in a more natural wetland vegetation community surrounding Waituna Lagoon, and its many adjacent fringing wetlands.

The importance of ruppia as an indicator of ecological health

96. Submitters have concerns that elevated water levels within Waituna Lagoon will adversely affect *Ruppia* vegetation which is sensitive to light levels. This concern is addressed by the evidence of Mary de Winton.¹⁰⁷
97. Ms de Winton confirms the ecological importance of submerged macrophytes in waterbodies generally,¹⁰⁸ and that Waituna Lagoon is unusual as it continues to “... *regularly support extensive submerged macrophytes that are dominated by the Ruppia dominated plant assemblage typical of coastal lagoons.*”¹⁰⁹
98. The occurrence of *Ruppia* and other aquatic vegetation in Waituna Lagoon has been monitored annually since 2009, with results supporting provision of closed lagoon conditions for most of the spring-summer growth season.¹¹⁰
99. Ms de Winton notes under the proposed consent conditions prolonged periods at high lagoon levels are not expected and established macrophytes (including *Ruppia*) are likely to persist under insufficient light conditions, potentially up to 4 months.¹¹¹ She continues:
“Proposed openings to disrupt algal blooms would be important to maintain a light climate for macrophyte growth. For instance, under 5a of the draft proposed conditions (4 July 2025), a primary indicator comprising a sustained visible bloom over ≥14 days would allow for openings if recommended by the SAG. This would help to prevent excessive shading of macrophyte communities by dense phytoplankton blooms.”
100. She also discusses the proposed opening locations, noting that *Ruppia* is more affected by openings at The Fence at the eastern end of Waituna Lagoon, and prefers openings at the Walkers Bay location to the west.¹¹²
101. For these reasons, the Applicants say the concerns of submitters, about the persistence of *Ruppia* and other ecologically important aquatic vegetation in Waituna Lagoon under the proposed opening regime, are addressed by the proposed consent conditions.

¹⁰⁷ Evidence of Ms de Winton dated 11 July 2025

¹⁰⁸ Supra at para 19

¹⁰⁹ Supra at para 25

¹¹⁰ Supra, Table 2 and para 45

¹¹¹ Supra at para 57

¹¹² Supra at 60

The status of Canada geese and black swans under the Wildlife Act 1953

102. Several submitters¹¹³ have concerns that the occurrence of large waterfowl, especially black swans and Canada geese, will increase under the proposed lagoon opening regime. They say these birds cause damage to surrounding lands and waterways.
103. The default position under the Wildlife Act 1953 is that all wildlife¹¹⁴ in New Zealand is absolutely protected, unless it is specified in one of the Schedules to that Act.¹¹⁵ Schedule 1 specifies wildlife declared to be game and includes black swans. Canada geese are included in Schedule 5 which covers wildlife that are not protected in New Zealand.
104. Part 2 of the Wildlife Act 1953 provides for game birds such as black swans, and they are managed by the Southland Fish and Game Council in the Southland Region. Swans can be hunted and killed during the gamebird season (colloquially known as the “duck shooting season”) by any person who holds a gamebird licence and who hunts in accordance with the terms of that licence.
105. Outside the gamebird season, any person who wishes to control gamebirds such as black swans must apply to the Director-General of Conservation for a wildlife authorisation. Where land occupiers are concerned that protected wildlife (including gamebirds) are likely to cause damage on their land including to crops, they can apply for an authorisation under section 54(1) which relevantly states:
- (1) *The Director-General, on being satisfied that injury or damage to any person or to any land or to any stock or crops ... has arisen or is likely to arise through the presence on any land of any animals (whether absolutely protected or not), and ... may authorise in writing the occupier of the land, ..., or any other person, to hunt or kill, or cause to be hunted or killed, or to catch alive for any specified purpose any such animals, or to take or destroy the eggs of any such animals, subject to such conditions and during such period as may be specified in the authority.*
106. Where such an authorisation is granted to the occupier of land, it may be exercised by any person they employ or who is acting on their written instruction to control the birds in accordance with that authorisation: s54(1A).
107. Canada geese were removed from Schedule 1 (Game) and added to Schedule 5 (Wildlife not protected) in 2011.¹¹⁶ The effect of this change is that Canada geese are unprotected throughout New Zealand and may be controlled by hunting or killing at any time.¹¹⁷ The

¹¹³ e.g. submissions of K Robertson, N Paterson, T Fogarty, A Egbers and H Amtink

¹¹⁴ defined as “any animal living in a wild state” and which includes “any bird (not being a domestic bird)” s2 Wildlife Act 1953

¹¹⁵ Wildlife Act 1953, s3

¹¹⁶ [Wildlife \(Canada Goose\) Order 2011 \(SR 2011/128\) – New Zealand Legislation](#)

¹¹⁷ Wildlife Act 1953, s7(3)

Animal Welfare Act 1999 applies to how these birds (and other unprotected wildlife) are hunted or killed which must not be done in an inhumane manner.¹¹⁸

108. As stated by Mr Jacques:¹¹⁹

“... Waterfowl foraging upon private land is ... unrelated to [the] water level of the lagoon, being instead a function of opportunistic and preferential feeding by waterfowl, in particular Canada Geese, on nutritious short pasture grass when this is available.”

109. I have described above the legal status of swans and geese and the framework under which they are controlled in New Zealand. I submit that where people are concerned about the impact of these species, they have options to control them.

Impacts of the proposed lagoon opening regime on other avifauna

110. Other submitters are concerned that higher lagoon levels will also have impacts on favoured bird habitat, especially for wading birds.¹²⁰ Mr Jacques’s evidence discusses the bird communities of Waituna Lagoon and the relationship between water levels and foraging habitat¹²¹ and between water levels and nesting habitat.¹²²

111. Mr Jacques considers functional groups of birds – open water feeders, shallow-water feeders/ waders, and swamp birds. He concludes for shallow-water feeders which are more likely to be affected by the proposed lagoon opening regime that, while:

“[a] transition to longer and deeper freshwater phases with less frequent openings and estuarine periods will reduce overall duration of feeding opportunities for shallow-water specialists, ... this is mitigated by ample availability of suitable habitat in the wider Ramsar site and region.

“Any effects on shallow-water feeding species of conservation concern are not expected to be significant at a population level as they do not contribute to well-known drivers of decline. No adverse impact upon the site’s Ramsar designation (a concern raised by a number of submitters) can reasonably be expected from any birdlife effects arising from this proposal.”¹²³

112. For these reasons, the Applicants say any concerns of submitters about avifauna using Waituna Lagoon are satisfied.

¹¹⁸ Animal Control Act 1999, ss 30A, 30B. This Act is administered by the Ministry for Primary Industries

¹¹⁹ Evidence of Mr Jacques at para 23

¹²⁰ e.g. submissions of L & B Ballantine, L Esler, B McKenzie, and L Paddon

¹²¹ Evidence of Mr Jacques at paras 31-35

¹²² Supra, paras 36-39

¹²³ Supra, paras 63-64

Access to public and private property

113. Some submitters have concerns about access if Waituna Lagoon is managed for higher levels than it has been historically. These concerns include access:
- to the DOC recreational assets¹²⁴
 - over the Waghorn Road bridge and general roading infrastructure¹²⁵
 - to private land on the barrier beach bar, and constraints on access to other nearby private land for farming purposes¹²⁶
114. The Applicants acknowledge the proposed lagoon opening regime sought, contrasted with the previous regime, will likely result in reduced public access for short parts of the year.
115. The Southland District Council submission¹²⁷ supports the application while acknowledging that under the proposed lagoon opening regime there will be impacts on access to and maintenance of road infrastructure, including the Waghorn Road bridge compared to the previous regime. The Council sought an additional water level trigger provided water levels remain at 2.3m or higher for 14 days or more.
116. As set out above, the Applicants have proposed changes to the water trigger levels, including reducing the initial years 1-5 maximum level over summer to 2.4m for 3 days, and introducing a new stage with a maximum level of 2.4m for 3 days at years 6-10. These proposed changes provide a smoother transition from the previous lagoon opening regime and are likely to achieve a similar outcome to the relief sought by Southland District Council.
117. A few submitters¹²⁸ have concerns about access to the Mahinga Kai Pā – Pikiraurahi, which is accessed over the bridge on Waghorn Road. As noted in Mr Whaanga’s evidence, the Mahinga Kai Pā is proposed to transition to a culturally and ecologically appropriate, re-wetted state.¹²⁹ The submission from Te Wai Parera Trust, which owns Mahinga Kai Pā – Pikiraurahi supports the application, saying “*Our Trust is required to adapt to the more natural levels to operate on the property. We believe this will benefit us and our children who follow. mō tatou, ā, mō kā ā mūri ake nei*”¹³⁰

¹²⁴ As discussed in the evidence of Mr Airey

¹²⁵ e.g. submissions of H Amtink, A Egbers, G Hayes, A Lawson, L McKenzie, R McNaughton, L Paddon, G & R Munro, N Paterson, K Robertson, D Simms, K Stanley, Waituna Catchment Group

¹²⁶ e.g. submissions of M Waghorn, T Fogarty, G Hayes

¹²⁷ Submission of Southland District Council on APP-20242456 dated 11 September 2024

¹²⁸ Submissions of B McKenzie, P Duffy

¹²⁹ Evidence of Mr Whaanga at paras 63-65

¹³⁰ Submission of Te Wai Parera Trust – APP-20242456 dated 3 September 2024

118. Mr Airey's evidence suggests the Department's recreational assets at Waituna Lagoon are used by a smaller number of visitors than other sites.¹³¹ The submission of the Southland Fish and Game Council states angling numbers are increasing in Waituna Lagoon and doesn't consider the proposed lagoon opening regime will impact this trend.¹³²
119. The Application's technical review assesses opening scenarios and annual average days above 2.2m for the preferred final water level threshold of 2.5m for 7 days (scenario C), concluding the probability of an annual average total event of 2.2m or above is 1.37. This indicates this event can be expected at least once annually, but less than twice in every year. The probable average duration of events above 2.2m was also calculated at 19.88 days.¹³³
120. Based on this probability analysis, under the proposed lagoon opening regime access to the Department's recreational assets and over the Waghorn Road bridge is likely to be impaired for a period of less than a month, once or twice a year. Of course, this probability may differ to what is observed.¹³⁴
121. The proposed opening lagoon regime will result in access being provided for private landowners and others, compared to the existing environment with no consent in place.
122. For these reasons and having regard to the scientific reserve status of Waituna Lagoon, the Applicants say these concerns are better addressed by having a consent in place.

Consultation and working with the community in future

123. Several submitters had concerns about consultation before the application was lodged, and the community's place under the proposed consent. In the pre-hearing meeting submitters also raised concerns about future communications from the Applicants, and whether there could be assurance of an independent expert on the Science Advisory Group.
124. The Applicants undertook consultation before the application was filed in June 2024 in accordance with their consultation strategy, including with the previous consent holder, Federated Farmers, Fonterra and other stakeholders. The Applicants did letter drops to individual potentially impacted landowners in the Waituna catchment about their application, and requested the application be publicly notified to ensure the members of the

¹³¹ Evidence of Mr Airey at paras 24-25

¹³² Submission of Southland Fish and Game Council

¹³³ Application, Appendix B – Technical review of conditions for opening Waituna Lagoon, section 6.3 Table 6

¹³⁴ I acknowledge Waituna Lagoon remained at elevated levels over Winter 2024. Had the proposed consent been in place, the lagoon would have been able to be opened earlier than when Environment Southland acted under its emergency powers in late September 2024

Waituna catchment community and other stakeholders had an opportunity to have their say.¹³⁵

125. A draft Communications Plan was prepared and provided in November 2024.¹³⁶ Following the pre-hearing meeting, the Applicants liaised with community representatives with a revised Communications Management Plan provided in May 2025.¹³⁷
126. The updated proposed conditions also provide for the Waituna Catchment community to nominate a suitably qualified expert representative to the Science Advisory Group (SAG). This is in addition to the appointment of a suitably qualified and independent Chair of the SAG.¹³⁸
127. The Applicants are prepared to fund these independent and community nominated members of the SAG for the duration of the proposed consent.

Conclusion

128. The Applicants are committed to working together and with the community and other stakeholders when taking actions to protect and preserve Waituna Lagoon, a unique and highly valued coastal water body in Southland Murihiku.
129. For all the reasons outlined above, and in reliance on the application, further information and expert evidence provided, the Applicants seek resource consents be granted for their proposed lagoon opening regime which will restore and maintain the hauora of Waituna Lagoon and its mana.



Pene Williams, rōia ki Nga Kaitono/ counsel for the Applicants

¹³⁵ Application, section 8 and Appendix N Consultation Strategy

¹³⁶ November 2024 – Draft Communications plan prepared in accordance with proposed conditions

¹³⁷ Consent Application Update – Changes to Proposed Conditions 14.05.25 at pp 26-28

¹³⁸ Evidence of Ms Thorne, Appendix 1B conditions 14-15