

BEFORE THE SOUTHLAND REGIONAL COUNCIL

IN THE MATTER OF

APP-20158099, a land use consent to establish a new dairy farm, a water permit to take and use groundwater, a land use consent to construct an effluent pond, a discharge permit to discharge effluent to land, and a land use consent to construct a bore at 514 Rimu-Seaward Downs Road.

APPLICANT

Schrader Mains Limited

REPORT AND DECISION OF HEARING PANEL

Mike Freeman (Chair), Neville Cook and Peter Jones

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Abbreviations

FEMP	Farm Environmental Management Plan
N	Nitrogen
NPSFM	National Policy Statement Freshwater Management 2014
Overseer	OVERSEER® Nutrient Budgets
P	Phosphorus
RELAP	Regional Effluent Land Application Plan
RMA	Resource Management Act 1991
RWPS	Regional Water Plan for Southland
SRPS	Southland Regional Policy Statement

1. Introduction

1. We have been delegated and appointed as decision-makers by the Southland Regional Council (SRC) under Section 34A (1) of the Resource Management Act 1991 (RMA) to decide on resource consent applications by Schrader Mains Limited. This decision sets out our findings on the applications, focusing on the principal issues in contention and the reasons for our decision.
2. In addition to the evidence, section 42A report(s) and submissions provided by the applicant, reporting officer and submitters at the hearing, we have all read and taken full account of the application documents, including the Assessments of Environmental Effects and all of the written submissions. Because all the information that we have been provided with has been made available to all parties we have endeavoured to minimise any repetition of this information.
3. In accordance with Section 113(3) of the RMA, we have cross-referenced and adopted parts of the Assessment of Environmental Effects, the Section 42A Officer Reports, and written evidence throughout this decision as appropriate.
4. To assist the reader, we have listed the acronyms and abbreviations used throughout this decision at the front of the decision.

2. Description of the proposal

5. The applicant proposes to establish a dairy farm, to discharge effluent to land, to install a bore, to take and use water, and to construct an effluent pond. The applications have been collectively referred to as APP-20158099. The location of the property is 514 Rimu-Seaward Downs Road and is in the catchment of the Waituna Lagoon. Where relevant, the applicant has sought varying durations of resource consent, from five to fifteen years.
6. We will not repeat the details of the application or Rule 17A of the RWPS which requires a resource consent application for the establishment of dairy farm, because they have been detailed in the application and the Section 42A report. We discuss the planning framework and its significance later in this report.

3. Notification, submissions and hearing

7. The applications for resource consents for the proposal were publicly notified on 18 September 2015. Three submissions were received with two parties submitting in opposition, Fish and Game New Zealand Southland Region, and Te Ao Marama Inc, specifying an intention to present evidence at the hearing. The Department of Conservation made a submission neither supporting nor opposing the applications.
8. The hearing on the applications was held on Friday 15 January 2016. At the adjournment of the hearing at the end of that day we indicated that we would obtain

legal advice on issues relating to the lawfulness of long-term conditions relating to farm management practices for a land use consent to establish a dairy farm and related matters. Parties were given an opportunity to contribute to the legal questions. These questions were finalised and the legal advice from Mr Philip Maw, Wynn-Williams was made available to all parties on 29 January 2016.

9. At the adjournment of the hearing we also indicated the procedure to be followed for the applicant to finalise their proposed conditions and for the reporting officer and parties to provide comment on those conditions. The timetable for this was subsequently set out in our third minute. The final suite of conditions and comments were received by us on schedule on 12 February 2016 and we received the right of reply from the applicant's solicitor, Ms Irving on 19 February 2016.
10. We appreciated the efforts by all those involved to ensure that the timetable prescribed in our third minute was followed. We closed the hearing on 22 February 2016.

4. Appearances

For Schrader Mains Limited:

Ms Bridget Irving, Gallaway Cook Allan, legal counsel for the applicant.

Ms Miranda Hunter, Roslin Consultancy Limited, a farm consultant specialising in OVERSEER® Nutrient Budgets (Overseer) and farm environmental plans

Mr Hank Schrader, director and shareholder of Schrader Mains Limited, clarified the reasons for the proposed conversion.

Ms Kate Scott, Landpro Limited, an environmental/planning consultant, provided: a broad overview of the proposal, assessment of environmental effects, an outline of proposed conditions and a planning analysis.

Ms Karen Wilson, Landpro Limited, a senior environmental scientist, provided evidence on water quality effects of the proposal.

Submitters

Mr Jacob Smyth, Fish and Game New Zealand, Southland Region, provided evidence on behalf of Fish and Game New Zealand.

Mr Dean Whaanga, Te Ao Marama Inc., provided evidence on behalf of Te Ao Marama Inc.

Environment Southland officers

Ms Joanna Gilroy, the Section 42A reporting officer.

Mrs Jan Brown, Executive Assistant, took notes of the hearing, which were provided to all parties.

Section 41C report

Ms Nicole Phillips, Irricon, an environmental consultant, reviewed the Overseer modelling undertaken by the applicant.

5. Site visit

11. We undertook a site visit travelling by car from Invercargill to the property on the afternoon of Thursday 14 January 2016.
12. We paid particular attention to the topography of the property, the current land use, general visible farm management practices, and location of surface water bodies running through the property.
13. We considered that the site inspection was valuable because it enabled us to better understand the context of the application and the specific characteristics of the property.

6. Summary of the evidence heard, the section 42A and the section 41C reports

14. As noted in paragraph 3 we have cross referenced and adopted significant parts of the reports and evidence that we were provided with and as a consequence our summaries of the evidence heard and the section 42A and section 41C reports are brief.

Applicant's submission and evidence

15. **Ms Bridget Irving**, Gallaway Cook Allan, legal counsel for the applicant, provided an outline of the applicant's case including a summary of the application, the evidence provided by the applicant, a summary of our section 104(1)(a) responsibilities, her perspective on the existing environment and the permitted baseline, a summary of the planning framework, and a commentary on the scope of resource consent conditions. She concluded that "*...the proposal enables a clear management framework to be put in place and implemented on the property. It will provide a degree of certainty regarding the nature of activities on this property that will not exist if consent is declined.*"
16. **Ms Miranda Hunter**, Roslin Consultancy Limited, a farm consultant specialising in OVERSEER® Nutrient Budgets (Overseer) and farm environmental plans outlined the results of Overseer modelling of the current and proposed farm systems. She highlighted the Overseer estimated N loss to water would decrease from 35 to 29 kg N/ha/year and the P loss to water would increase from 0.4 to 0.6 kg P/ha/year, and in

her evidence and in response to questions at the hearing elaborated on her understanding of the reasons for this.

17. Ms Hunter also highlighted the fact that Overseer did not provide for modelling the effects of many P loss reduction strategies, and outlined the published research that has been undertaken to estimate the effects of various strategies on P loss to water. She concluded that: *“There is a significant opportunity to reduce the P loss through targeted good management practices that can not be modelled through Overseer. Those measures have been incorporated into the Farm Environmental Management Plan that will be implemented on the Schrader Mains Farm.”*
18. **Mr Hank Schrader**, director and shareholder of Schrader Mains Limited, clarified the reasons for the proposed conversion. He provided a personal account of how the farm is currently run and the long-term plans that included conversion of the current farm to dairying.
19. **Ms Kate Scott**, Landpro Limited, an environmental/planning consultant, provided: a detailed but broad overview of the proposal, assessment of environmental effects, a summary of issues raised by submitters, an outline of proposed conditions and a planning analysis. She concluded that: *“that granting consent to the proposal, subject to conditions will achieve the purpose of the Act whilst achieving the aims of sustainable management and avoiding, remedying or mitigating potential or actual adverse effects.”*
20. **Ms Karen Wilson**, Landpro Limited, a senior environmental scientist, provided evidence on the context and water quality issues associated with the Waituna Lagoon and its tributaries together with an outline of the responses to these issues by various parties to date. She noted the complexity of the Lagoon ecosystem with a significant and complex interplay between lagoon openings and nutrient inputs that have a significant influence on overall lagoon water quality.
21. Ms Wilson endeavoured to estimate the effects of the proposed development on catchment water quality by using a ‘risk-based assessment’, and concluded that *“there will be a negligible change in water quality as a result of the proposal, however there is some risk that increased phosphorus loss could contribute to additional periphyton growth if management techniques to reduce losses from critical source areas are not adopted.”*

Submitters’ evidence

22. **Mr Jacob Smyth**, Fish and Game New Zealand, Southland Region, provided evidence on behalf of Fish and Game New Zealand. He provided a summary of the application and identified the fish and game values associated with the Waituna Lagoon and its tributaries. He noted the scientific reserve status of the wetland and that the wetland is subject to a statutory acknowledgement under the Ngai Tahu Claims Settlement Act.
23. Mr Smyth provided an overview of the lagoon water quality issues, summarised information on existing water quality and evidence and reports provided to the hearing. He also provided a comprehensive analysis of the proposal in the context of the relevant statutory and planning provisions. He concluded, among other matters, that: *“/*

am not confident that the potential adverse effects on water quality from the establishment of a new dairy farm and discharge of effluent would be sufficiently avoided or mitigated.”

24. **Mr Dean Whaanga**, Te Ao Marama Inc., provided evidence on behalf of Te Ao Marama Inc. He clarified that Te Ao Marama Inc. represents Nga Runanga ki Murihiku, which in turn is made up of representatives of the four Murihiku runanga papatipu. He explained that Te Runanga o Awarua has kaitiaki responsibilities for the Waituna wetlands and lagoon.
25. Mr Whaanga explained the Ngai Tahu values relevant to the lagoon and associated wetland and tributaries. In particular, he emphasised the Maori understanding and application of the term Kaitiakitanga and therefore its importance. He explained the significance of the Waituna Wetland Statutory Acknowledgement, and the overall significance of the Waituna Lagoon for local Maori. He then explained the actual and potential significance of the reduction in water quality of the lagoon to local Maori. He outlined his concerns about the proposal and concluded, among other matters, that: *“We wish to ensure that the activities as outlined in the application and the suggested improvements and consent conditions are able to be enforced to allow Iwi the confidence this conversion does not compromise our values.”*

The reporting officer’s Section 42A reports

26. **Ms Joanna Gilroy**, the primary Section 42A reporting officer provided a comprehensive section 42A report and an addendum Section 42A report. These reports covered all the relevant information about the application, its context, and relevant statutory and planning framework analysis. Ms Gilroy concluded, at least at the stage of the resource consent conditions proposed before, during and after the day of hearing, that the application was finely balanced, and concluded, among other matters, that:

“The above are reasons as to why the application is so finely balanced and why my recommendation to grant the consents is tentative. This is because the suitability of granting the consents rests solely on the cross-pollination of conditions onto permits which they are not typically on and to control the use of land in an ongoing way which Council’s plans do not anticipate, nor support.

In the absence of the above conditions relating to the ability to ensure that the conversion as well as the farm is operated in accordance with the application then I do not consider that the effects of the activities will be as described in the application. If the Hearing Panel agrees with this then I consider that the application should be declined.”

Section 41C report

27. **Ms Nicole Phillips**, Irricon, an environmental consultant, reviewed the Overseer nutrient budgets provided by the applicant. She presented that review and answered questions via video conferencing. Ms Phillips provided a thorough independent review of the Overseer modelling undertaken by Ms Hunter and concluded that “...I consider that the robustness of the nutrient loss estimates for the proposed scenario are low, whilst the robustness of the nutrient loss estimates for the current scenario is

medium-high." Ms Phillips also concluded that "...I do not consider that the proposed scenario modelling does represent a long-term viable farming system."

Legal advice on resource consent conditions

28. As indicated at the hearing and detailed in our Third Minute, legal questions, on resource consent conditions and the Augier principle, were developed in consultation with the parties and the resulting legal advice from Mr Philip Maw, and Ms Kirstie Wyss, Wynn Williams, was provided to all the parties on 29 January.
29. The questions that we asked of Wynn Williams were:
 - a) *Would conditions, proposed by an applicant, on a land use consent granted under Rule 17A, for "the establishment of a new dairy farm" that require specific ongoing controls on farm practices to manage the loss of contaminants from the ongoing use of that land, including nitrogen and phosphorus to water, be lawful?*
 - b) *Does section 138(2) of the Resource Management Act limit the ability of the consent authority to refuse the surrender of the whole of a resource consent, e.g. after a new dairy farm has become established? If the answer to this is yes, could an appropriately worded condition proposed by the applicant lawfully override this provision?*
 - c) *Would a condition, proposed by an applicant, on a discharge permit to discharge dairymshed/feedlot effluent to land that requires that such a resource consent "only be exercised concurrently" with a related land use consent, be lawful (taking account of the Augier principles)?*
 - d) *Would conditions, proposed by an applicant, on a discharge permit to discharge dairymshed/feedlot effluent to land, that require specific ongoing controls (for the duration of the permit) on farm practices not directly related to this discharge to manage the loss of nitrogen and phosphorus to water be lawful (taking account of the Augier principles)?*
30. We will not repeat or attempt to summarise all the aspects of that advice. However, we do note that later in this decision we will highlight relevant aspects of this advice.

Ms Irving's Right of Reply

31. **Ms Irving** responded to a number of matters raised by Mr Smyth in his evidence and considered that we did not need to concern ourselves with whether or not all animal discharges, including the deposition of dung and urine directly onto the ground from animals, required authorisation under Section 5 of the RMA. We address this matter later in this decision. Ms Irving also suggested that we should not give any 'meaningful weight' to the recommendations of the Lagoon Technical Group. We also address this matter later in this decision.
32. Ms Irving also commented briefly on the legal advice provided by Wynn Williams. She appeared to accept the majority of the points made and noted that various conditions were being proposed in accordance with the *Augier Principle*. However, despite that clear advantage of including a 'non-surrender condition' outlined in the Wynn Williams

advice, one was not proposed by the applicant.

7. The existing environment

33. The key environment that is potentially affected by this proposal is the Waituna Lagoon and its tributaries that pass through the property. We were provided with evidence on, a number of original technical reports on, and summaries of, the water quality of the Waituna Lagoon and its tributaries. We will not attempt to summarise that body of information apart from noting that there did not appear to be any disagreement with the following basic summary:
- The water quality of the lagoon appears to have deteriorated in the last 15 years with increased loading of nitrogen and phosphorus occurring over that period with consequential increases in nitrogen and phosphorus concentrations in the lagoon water column.
 - There is concern about nitrogen and phosphorus contributing to increases in phytoplankton in the lagoon.
 - Nitrogen and phosphorus losses from rural land in the catchment contribute significantly to the loading and eventual concentrations of these nutrients in the lagoon.
 - There is significant concern by experts about the implications for the uses and values of the lagoon and its tributaries if nutrient losses to the catchment aren't reduced.
34. The existing environment incorporates the effects of current land use activities on water quality. Later in this report we will discuss the implications of the existing environment for assessing the effects of the proposed development.

8. Activity status and a single proposal

35. There was no debate about the overall status of the activity with both the applicant and the reporting officer agreeing that it is discretionary. We agree with those conclusions.
36. We have not considered each separate resource consent application to determine whether each could be granted in isolation from the other consent applications which grouped together make up the proposal before us. Our approach has been to consider the whole proposal and determine if the proposal made up of the individual resource consent applications before us should be granted or not.
37. We gained further support for this approach from the proposed condition set provided by the applicant. They are directed at a single proposal as distinct from separate resource consent applications.

38. The applicant did not suggest that resource consents were being sought individually. It was clear to us that resource consents are being sought for one combined proposal.

9. Planning framework

39. There was general agreement between the applicant and the principal Section 42A reporting Officer, Ms Joanna Gilroy on the relevant planning framework. There were however, some differences in interpretation of some key provisions and the weighting we should place on the various planning documents relevant to this proposal.
40. In this section so as to provide context for later evaluations, we identify what we consider to be the relevant policy statements, regulations, standards and plans.
41. One other issue we address in this part of the decision is the issue of status of the activities.

National Policy Statement Freshwater Management 2014 (NPSFM)

42. The NPSFM sets out objectives and policies to manage water in an integrated and sustainable way while providing for economic growth within set limits relating to quantity and quality. There did not appear to be any significant disagreement between the applicant's representatives, the submitters and the reporting officer on the relevant provisions of the NPSFM. Therefore, we will not repeat the detailed provisions but we will briefly highlight those that we consider to be particularly relevant.
43. The relevant objectives and policies relating to water quality are objectives A1 and A2 and policies A1 and A4. Integrated management is provided for in Objective C1 and Policy C1 and Tangata Whenua roles and interests in Objective D1 and Policy D1.
44. Objective A1 seeks to "*safeguard the life-supporting capacity, ecosystem processes and indigenous species including their associated ecosystems, of fresh water; and the health of people and communities, in sustainably managing the use and development of land, and of discharges of contaminants.*"
45. Objective A2 focuses on the need to maintain or improve the overall quality of fresh water in a region while protecting the significant values of outstanding freshwater bodies, values of wetlands and improving water quality in degraded water bodies. It states:

Objective A2

The overall quality of fresh water within a region is maintained or improved while:

- a) protecting the significant values of outstanding freshwater bodies;*
- b) protecting the significant values of wetlands; and*
- c) improving the quality of fresh water in water bodies that have been degraded by human activities to the point of being over-allocated.*

46. The policies related to these objectives require that fresh water quality limits are established for regions and also methods are established to avoid over-allocation.
47. Policy A1 is relevant in that it sets the scene for a regional council's plan process under which resource consent applications are considered.

Policy A1

By every regional council making or changing regional plans to the extent needed to ensure the plans:

- a) *establish freshwater objectives in accordance with Policies CA1-CA4 and set freshwater quality limits for all freshwater management units in their regions to give effect to the objectives in this national policy statement, having regard to at least the following:*
 - i. *the reasonably foreseeable impacts of climate change;*
 - ii. *the connection between water bodies; and*
 - iii. *the connections between freshwater bodies and coastal water; and*
 - b) *establish methods (including rules) to avoid over-allocation.*
48. While Policy A1 is aimed at the development of regional plans, Environment Southland has changed the RWPS to address aspects of the NPSFM.
 49. Policy A2 also appears to have some relevance to this resource consent process, even though it appears to be primarily aimed at the planning process.

Policy A2

Where freshwater management units do not meet the freshwater objectives made pursuant to Policy A1, every regional council is to specify targets and implement methods (either or both regulatory and non-regulatory), in a way that considers the sources of relevant contaminants recorded under Policy CC1, to assist the improvement of water quality in the freshwater management units, to meet those targets, and within a defined timeframe.

50. Policy A4 which is incorporated into the RWPS appears to apply to all discharges, point source or diffuse.
51. Objective B4 seeks to protect significant values of wetlands and of outstanding freshwater bodies.
52. Objective D1 and Policy D1 seek to provide for the involvement of iwi and hapū and to ensure that tangata whenua values and interests are identified and reflected in the management of freshwater including associative ecosystems and decision making.
53. Finally, in terms of the NPSFM, Appendix 1 of that document specifies the compulsory national value on ecosystem health. This states that "the freshwater management unit supports a healthy ecosystem appropriate to that freshwater body type. In a healthy freshwater ecosystem ecological processes are maintained, there is a range and adversity of indigenous flora and fauna, and there is a resilience to change."

Southland Regional Policy Statement (SRPS)

54. Ms Gilroy provided a clear summary of the key relevant objectives and policies in the Operative and Proposed Southland Regional Policy Statements (SRPS). Her summary of these provisions was not contested by the applicant's representatives. We will not repeat all of those provisions here apart from those relating to water quality which we think are particularly critical to this overall application.

Operative SRPS

- Objective 5.1 To sustain the quality of the region's water resources so as to meet the needs of a range of uses, including the reasonably foreseeable needs of future generations and safeguard the life-supporting capacity of water and related ecosystems.*
- Objective 5.2 To ensure that in the use and development of water and land resources, and the discharge of contaminants, water quality is maintained and wherever practicable enhanced.*
- Objective 5.3 To ensure the taking, use, damming, diversion of water and the discharge of contaminants into water does not compromise water quality standards established for the region.*
- Objective 5.4 To recognise the relationship of Maori with water.*
- Policy 5.5 In considering resource consents, local authorities shall assess the effects of land use and development on ground water and surface water quality, including both point and non-point source discharges, and provide for any adverse effects to be avoided, remedied or mitigated.*
- Policy 5.8 Manage the region's water resources in ways that recognise and provide for the values that Maori place on water.*

Proposed SRPS

- Objective WQUAL.1 Water quality in the region: safeguards the life-supporting capacity of water and related ecosystems; safeguards the health of people and communities; is maintained, or improved in accordance with freshwater objectives formulated under the NPS for FM 2014; is managed to meet the reasonably foreseeable social, economic and cultural needs of future generations.*
- Objective WQUAL.2 Halt the decline and enhance water quality in lowland water bodies and coastal lakes, lagoons, tidal estuaries, salt marshes and coastal wetlands in accordance with freshwater objectives formulated in accordance with the NPS 2014.*
- Policy WQUAL.1 Identify values of surface water, groundwater, and water in coastal lakes, lagoons, tidal estuaries, salt marshes and coastal wetlands, and formulate freshwater objectives in accordance with the NPS for FM 2014; and Manage discharges and land use activities to maintain water quality, or improve it, to ensure freshwater*

objectives are met.

- Policy WQUAL.2 In managing water quality, particular regard will be had to the following contaminants: nitrogen; phosphorus; sediment; microbiological contaminants.*
- Policy WQUAL.3 Identify and protect the significant values of wetlands and outstanding freshwater bodies.*
- Policy WQUAL.4 Improve water quality by: identifying water bodies that are not meeting freshwater objectives; specifying targets to improve water quality within these water bodies and implementing management frameworks to meet the targets within defined timeframes taking into account; the values supported by the water body/ies; national or legislative standards and requirements; the benefits and costs associated with achieving improvement in water quality.*
- Policy WQUAL.6 Recognise the social, economic and cultural benefits that may be derived from the use, development or protection of water resources.*
- Policy WQUAL.7 Prefer discharges of contaminants to land over discharges of contaminants to water, where: a discharge to land is practicable; the adverse effects associated with a discharge to land are less than a discharge to water.*
- Policy WQUAL.8 Avoid the direct discharge of sewage, wastewater, industrial and trade waste and agricultural effluent to water unless these discharges have undergone treatment.*
- Policy WQUAL.9 Where practicable, manage the siting and operation of activities that result in point source discharges of contaminants to land to ensure that adverse effects on groundwater, surface water and coastal water quality are avoided, remedied or mitigated.*
- Policy WQUAL.11 Integrate the management of land use, water quality, water quantity, coast and air, and the use, development and protection of resources wherever possible to achieve the freshwater objectives formulated in accordance with Policy WQUAL.1.*
- Policy WQUAL.12 Continue to improve knowledge and understanding of water resources, and the relationship of land use activities with water quality values in water bodies, in Southland to promote the sustainable management of water.*

Regional Water Plan for Southland

55. Ms Gilroy has briefly discussed the RWPS objectives and policies. Because of the importance of these provisions, we have included those here together with the full wording of Policy 13A.

Objective 3 To maintain and enhance the quality of surface water bodies.

- Objective 4 To manage discharge of contaminants and encourage best environmental practise to improve water quality in surface water bodies as classified in the plan.*
- Objective 8 Maintain groundwater quality in aquifers that already meet the drinking water standard, and enhance the groundwater quality in aquifers degraded by land use and discharge activities to ensure general compliance with the drinking water standards for NZ 2000, by the year 2010.*
- Policy 1 Recognise the different characteristics of the surface water body classes when managing discharges and apply water quality standards established under any Water Conservation Order.*
- Policy 4 For surface water bodies outside Natural State Waters, manage point source and non-point source discharges to meet or exceed the water quality standards referred to in Rule 1 and specified in Appendix G "Water Quality Standards".*
- Policy 6 Use non-regulatory methods, to maintain and enhance surface water and groundwater quality, and to avoid, remedy or mitigate adverse effects on soil quality.*
- Policy 7 Prefer discharges to land over discharges to water where this is practicable and the effects are less adverse.*
- Policy 13 Avoid the point source discharge of raw sewage, foul water and untreated agricultural effluent to water.*
- Policy 13A Transitional policy relating to the establishment of new dairy farms*
- (a) Recognise that the establishment of new dairy farms poses risks to water quality, including the quality of water in coastal lakes, lagoons, tidal estuaries, salt marshes and coastal wetlands, that need to be addressed when establishing a new dairy farm.*
- (b) Manage the risk posed by the establishment of new dairy farms by requiring resource consent and requiring the documentation of risks and measures to avoid or mitigate them in a Conversion Environmental Plan.*
- (c) Consideration should be given to, but not be limited to, the following matters;*
- (i) the assimilative capacity and drainage characteristics of the soil and consequential effects on water quality;*
- (ii) the risks posed by the establishment of a new dairy farm to the water quality of water bodies, coastal lakes, lagoons, tidal estuaries, salt marshes and coastal wetlands;*
- (iii) the extent to which those risks can be avoided or mitigated through measures proposed in the Conversion Environmental Plan;*

- (iv) the likely effectiveness of the measures contained in the Conversion Environmental Plan;
- (v) how, and within what timeframe, those measures will be implemented.

(d) Where the risks to the water quality of water bodies, coastal lakes, lagoons, tidal estuaries, salt marshes and coastal wetlands cannot be avoided or mitigated, the Council may decline consent for the establishment of a new dairy farm.

Policy 25 To avoid, remedy or mitigate the adverse effects arising from point source and non-point source discharges so that there is no deterioration in groundwater quality after reasonable mixing, unless it is consistent with the promotion of the sustainable management of natural and physical resources.

56. Because of the significance of Policy 13A for the land use consent application under Rule 17A which was implemented under Policy 13A we consider that it is also appropriate to highlight the key part of the explanation for Policy 13A which states:

The Council notes that State of the Environment monitoring shows that water quality at a number of surface water and groundwater monitoring sites in Southland is below standards referred to in Rule 1 and specified in Appendix G "Water Quality Standards" for nitrogen, phosphorus, and clarity. Risks to water quality in the region remain, from a combination of historical and current land uses. These land uses give rise to both point source and non point source discharges that can affect water quality.

The Council recognises that intensive agriculture, particularly an increase in the number of dairy farms, has the potential to pose risks to water quality in the region, including the quality of water in coastal lakes, lagoons, tidal estuaries, salt marshes and coastal wetlands. The risks are particularly acute on heavy and very light soils in the region, and arise primarily from non point source discharges of contaminants, including fine sediment, phosphorus, nitrates and faecal bacteria.

The Council acknowledges that expansion of the dairy sector in Southland through the establishment of new dairy farming will be a significant contributor to the regional economy. However the environmental effects of the establishment of new dairy farms are a matter of general public interest, and effects on water quality require management for the sustainability of the sector in the region.

57. We also note that the RWPS includes Policy A4 from the NPSFM.

Policy A4 of the National Policy Statement for Freshwater Management 2014

1. When considering any application for a discharge the consent authority must have regard to the following matters:

- a. the extent to which the discharge would avoid contamination that will have an adverse effect on the life-supporting capacity of fresh water including on any ecosystem associated with fresh water and*
- b. the extent to which it is feasible and dependable that any more than minor adverse*

effect on fresh water, and on any ecosystem associated with fresh water, resulting from the discharge would be avoided.

2. When considering any application for a discharge the consent authority must have regard to the following matters:

- a. the extent to which the discharge would avoid contamination that will have an adverse effect on the health of people and communities as affected by their secondary contact with fresh water; and*
- b. the extent to which it is feasible and dependable that any more than minor adverse effect on the health of people and communities as affected by their secondary contact with fresh water resulting from the discharge would be avoided.*

3. This policy applies to the following discharges (including a diffuse discharge by any person or animal):

- a. a new discharge or*
- b. a change or increase in any discharge – of any contaminant into fresh water, or onto or into land in circumstances that may result in that contaminant (or, as a result of any natural process from the discharge of that contaminant, any other contaminant) entering fresh water.*

58. This policy appears to apply to all types of discharges regardless of whether some discharges such as animal urine and dung depositions onto land require authorisation via a permitted activity or resource consent as raised at the hearing by Mr Jacob Smyth for Fish and Game New Zealand.

Regional Effluent Land Application Plan

59. The relevant objectives and policies were summarised by Ms Gilroy. We consider it appropriate to specify the complete most relevant objectives and policies.

Objective 4.1.2 - Water

To ensure that water quality and the life supporting capacity of the water ecosystem is safeguarded from the adverse effects of discharges of effluent and sludge onto or into land which may enter water.

Policy 4.2.2 - Discharge to land

Utilise land treatment of effluent and sludge where this can be undertaken in a sustainable manner and without significant adverse effects.

Policy 4.2.3 - Avoid where practicable, remedy or mitigate adverse effects on water

Avoid where practicable, remedy or mitigate adverse effects on water quality, water ecosystems and water potability from effluent and sludge discharges onto or into land.

Other relevant documents

60. Ms Wilson, for the applicant, noted that the Waituna Lagoon Technical Group have made various recommendations about the reductions in nutrient loading in the Waituna

lagoon catchment and that there are ongoing technical reviews, but also made the point that none of the technical investigations or recommendations have been taken forward yet and incorporated into policies. We think that it is relevant that the clear thrust of all of this technical work is that significant reductions in N and P are needed to improve the quality of water in the lagoon to bring it into line with statutory requirements and community expectations. However, we also note that this document has no statutory force and therefore we do not give any significant weight to it.

61. Ms Gilroy and Ms Wilson noted that Environment Southland has published a *Strategy and Action Plan for Waituna*. This document identifies 11 actions including a number specifically aimed at long-term reductions in nutrient losses to water in the catchment. However, the document does not include any quantitative nutrient actions or objectives. However, we also note that that this document has no statutory force and therefore we do not give any significant weight to it.

10. Statutory considerations

Sections 104, and 104B RMA – consideration of resource consent applications

62. Section 104(1) RMA sets out the matters we must have regard to in our consideration of the applications. The relevant matters are as follows:
- “(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.
63. The balance of s 104 RMA contains a range of other matters that appear to be potentially relevant to our consideration, including Section 104(2) which provides us with the discretion to disregard an adverse effect on the environment if the plan permits an activity with that effect (the permitted baseline).
64. We note Section 104(1) RMA provides that the matters listed are subject to Part 2 RMA, which includes Sections 5 through to 8, inclusive. We consider Part 2 RMA matters subsequently.
65. Section 104B clarifies that a resource consent application for a discretionary activity can be granted subject to conditions or declined.

Section 105 RMA – discharges

66. Section 105 requires us to have regard to:
- (a) *the nature of the discharge and the sensitivity of the receiving environment to adverse effects; and*
 - (b) *the applicant's reasons for the proposed choice; and*
 - (c) *any possible alternative methods of discharge, including discharge into any other receiving environment*
67. We consider the effects of all discharges later in this report. For completeness we consider “discharges” in its broadest concept and note that the NPSFM Policy A4 indicates that both point source and non-point source discharges should be considered by regional councils. That policy explicitly applies to all discharges “*including a diffuse discharge by any person or animal*”.
68. We consider the adverse effects of all discharges within our wider considerations of the effects of the proposal.
69. Ms Scott, for the applicant, identified the applicant's reasons for the effluent discharges and possible alternative methods of discharge. Within the relatively narrow definition of discharges used by Ms Scott, we understand the applicant's reasons for the proposed effluent discharges. However, we consider these section 105 matters later in this report in the wider context of the proposed conditions.

Section 107 RMA

70. Section 107 of the RMA is relevant to the discharge permit application. The section sets out a number of restrictions on the granting of certain discharge permits. In our view none of the circumstances listed in subsections (c) to (g) will arise in relation to the proposed discharge of effluent onto land on the property.

Part 2 matters RMA

71. Section 104(1) RMA states that our consideration of the applications is subject to Part 2 RMA, which covers sections 5 – 8, inclusive. Sections 6, 7 and 8 contribute to, and will inform, our evaluation under Section 5 RMA.
72. The overall purpose RMA is “*to promote the sustainable management of natural and physical resources*”. In turn, “*sustainable management*” means:
- “... managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while –*
- (a) *Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
 - (b) *Safeguarding the life-supporting capacity of air, water, soil and ecosystems; and*
 - (c) *Avoiding, remedying, or mitigating any adverse effects of activities on the environment”.*

73. Section 6 identifies the following matters of national importance that we must “recognise and provide for” when making our decision:
- (a) *The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use and development.*
 - (b) *The protection of outstanding natural features and landscapes from inappropriate subdivision, use and development;*
 - (c) *The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna;*
 - (d) *The maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers;*
 - (e) *The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga;*
 - (f) *The protection of historic heritage from inappropriate subdivision, use and development.*
74. Section 7 lists the following other matters that we shall “have particular regard to”:
- (a) *Kaitiakitanga:*
 - (aa) *The ethic of stewardship:*
 - (b) *The efficient use and development of natural and physical resources:*
 - (ba) *The efficiency of the end use of energy:*
 - (c) *The maintenance and enhancement of amenity values:*
 - (d) *Intrinsic values of ecosystems:*
 - (e) *Repealed.*
 - (f) *Maintenance and enhancement of the quality of the environment:*
 - (g) *Any finite characteristics of natural and physical resources:*
 - (h) *The protection of the habitat of trout and salmon:*
 - (i) *The effects of climate change:*
 - (j) *The benefits to be derived from the use and development of renewable energy.*
75. Finally, Section 8 requires that we shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

11. Principle Issues in Contention including assessment of effects and planning provisions

76. In this section of our decision, we consider the effects of the proposal on the environment, and relevant objectives and policies of the relevant plans. We adopt this approach because there is such a strong linkage between effects and the relevant objectives and policies within the significant number of relevant planning provisions.
77. When undertaking our assessment of effects, we have paid careful and close regard to

the permitted baseline and the existing environment and the proposed conditions proffered by the applicant in closing.

Principle Issues in Contention

78. The following is our summary of what we consider to be the principal issues in contention.

- The permitted baseline and the existing environment.
- The Overseer modelling
- The proposed conditions for the proposal
- The potential effects of the proposal on the existing environment.
- Consistency with planning provisions
- Precedent effects

The permitted baseline and the existing environment

79. Ms Irving and Ms Gilroy have adequately described the permitted baseline concept and its incorporation into the RMA in Section 104(2). The RWPS does not control many land uses that can have adverse effects on water quality, and the permitted baseline extends beyond that explicitly provided for in section 104(2).

80. We recognise that there are a wide range of land uses that occur in the Waituna Lagoon catchment that cumulatively have significant adverse effects on water quality and are currently not subject to any regional rules under the RWPS. We recognise that current and likely foreseeable land uses could continue to result in adverse effects on Waituna Lagoon and its tributaries.

81. Ms Wilson summarised information on the quality of Waituna Lagoon and its tributaries, particularly Waituna Creek. This summary highlighted that Waituna Creek frequently did not comply with the RWPS water quality standards. Ms Wilson highlighted the complexities in monitoring and reporting the status of the Waituna Lagoon given the complexities and effects of the opening regime on water quality of the Lagoon. We conclude from this and the evidence provided to us by the parties that the water quality of both Waituna Creek and Waituna Lagoon are frequently degraded and don't comply with a number of relevant standards and/or guidelines.

82. Section 104(2) provides that we may disregard an effect if "...the plan permits an activity with that effect...". However, a critical consideration for us is the potential cumulative effects of the proposal. This is largely dependent on the conditions proposed by the applicant. This is addressed in a later section.

83. We agree with the broad conclusions made by both the applicant's representatives and the reporting officer and find that the existing receiving environment is degraded and frequently does not comply with relevant standards largely as a consequence of contaminant losses from rural land in the catchment.

The Overseer modelling

84. Ms Hunter, for the applicant, provided a number of Overseer modelling results during

the process leading up to the hearing. We acknowledge that there were some issues with earlier modelling done with Overseer version 6.2.0 that appeared most likely to be the result of a bug/defect in the Overseer software, and we also recognise that there was acceptance at the hearing by the experts that the pasture production estimates with Overseer version 6.2.1 appeared higher than would normally be expected for this farm system in this location.

85. Ms Phillips reviewed the Overseer modelling undertaken by Ms Hunter and concluded that "...the robustness of the nutrient loss estimates for the proposed scenario are low, whilst the robustness of the nutrient loss estimates for the current scenario is medium-high." Ms Phillips provided a detailed breakdown of the reasons for this rating. We consider that there appears to be scope for some of the reasons for the low robustness rating to be addressed, for example, if the reason(s) for the anomalously high pasture production can be identified.
86. We recognise the complexity of Overseer modelling and the assumptions and limitations of the model. For example, we note the apparent agreement between experts that there are significant uncertainties associated with Overseer estimates and there are some sources of nutrient loss to water that are not modelled by Overseer. However, even with all those caveats we accept that Ms Hunter has largely demonstrated that with the application of appropriate farm management practices the proposed conversion has the potential to result in a reduction in N loss to water compared to the current farm system.
87. Ms Hunter also noted that while the Overseer modelling indicated a small increase in P loss to water, there are a range of established practices that are currently not modelled by Overseer that if carefully implemented can significantly reduce P loss to water. We accept both this evidence and the potential for these practices to be implemented to effectively reduce P losses to water compared to the current farm system.
88. Ms Hunter concluded by stating that all the measures required to reduce N and P losses to water compared to the current farm system have been incorporated into the FEMP and will be implemented. After careful examination of the proposed conditions we do not accept that these final steps have been accomplished. We will cover this critical issue in the next section.

The proposed conditions for the proposal

89. We thank the applicant, the reporting officer and the submitters for their input into issues relating to resource consent conditions. We appreciate the applicant responding to matters raised by the reporting officer and submitters during the hearing and during the subsequent process of commenting on draft conditions. However, we do not consider that important issues raised by Ms Gilroy in her Section 42A report in relation to the key land use consent application to establish a dairy farm, discussed at the hearing and again raised by Ms Gilroy in her response to the draft conditions have been adequately addressed by the applicant. We consider this to be a critical failing of the proposal. We identify the specific concerns as follows:
 - Critical farm management practices are referred to in the FEMP as observations or statements of practice, rather than certain and enforceable requirements. Therefore, they are not mandatory, and as such a consent holder would not be

bound to implement those practices, and a consent authority could not enforce those practices. In contrast, proposed condition 7 is worded as a reasonably clear and mandatory requirement.

- The FEMP 'statements of practice' frequently have provisos such as 'where possible' with no specification of when or where such provisos would apply.
 - The FEMP can be changed by the applicant with no clear certification requirement against transparent appropriately worded standards and no ability for the consent authority to prevent inappropriate changes.
 - Wording that provides for a very broad level of interpretation of 'requirements' by a separate person with no provision for certification by an appropriately qualified/ experienced person with reference to clear standards.
 - The description or "scope" of the dairy farm is worded as a description not as a requirement.
 - No proposed condition about not surrendering the land use consent as clearly suggested in the legal advice. This means that there is nothing to prevent the surrender of any land use consent granted for the establishment of a dairy farm, and all such land use consent conditions would effectively disappear.
90. The legal advice provided to all the parties highlighted the potential significance of a 'non-surrender condition'. The legal advice stated:
- "The consent authority cannot refuse the surrender of the whole of a resource consent. However, it is arguable that any conditions in respect of the land use consent to allow the establishment of the new dairy farm would endure and be enforceable if the resource consent was surrendered. To reduce risk and provide greater certainty, we consider that an appropriately worded condition proposed by the applicant (in accordance with the elements in Frasers) could provide that the applicant would not surrender the land use consent, unless agreed to by Council."*
91. Despite this legal advice, the applicant chose not to propose a 'non-surrender condition'.
92. The result of these major deficiencies is that we must consider the proposed activity as potentially occurring with only a few mandatory good management practices such as the riparian buffer requirement specified in the relevant proposed condition 7. Significantly, in the absence of a 'non-surrender condition' if a land use consent was granted to establish a dairy farm, there would be nothing to prevent the consent holder from immediately surrendering the resource consent on completion of the establishment. This would of course nullify all associated conditions.
93. This also means that the Overseer modelling showing that the conversion could result in a reduction in N loss from the property cannot be given any significant weight because the resource consent conditions would not bind the applicant to undertake the measures needed to result in the reduction of N loss.
94. In addition, the Overseer modelling showed a small increase in P loss from the

property that the lack of effective mandatory controls on farm practices would further exacerbate and leads us to conclude that the increases in P loss resulting from a conversion could be significantly greater than the Overseer modelling indicated.

95. For completeness we note that we have no significant concerns about the proposed Effluent Management Plan. This is because that plan is complemented by significantly more certain and enforceable proposed conditions that clearly would control the discharge of effluent onto land and that plan focuses more on how those mandatory requirements would be complied with.
96. Overall, these major deficiencies in proposed conditions for the land use consent application for the establishment of a new dairy farm mean that we cannot be certain about the extent of nutrient and other contaminant losses from the property. However, we do find that it is likely that they would allow for an increase in nutrients and other contaminant losses from the property to water.
97. We highlight that all of the issues we have summarised above were identified during the hearing and/or in the subsequent legal advice. Methods to address those issues were also identified in the section 42A report and discussed at the hearing. However, the applicant has chosen to proceed with the application before us.

The potential effects of the proposal on the existing environment.

98. At the core of our consideration is an assessment of cumulative effects. We understand that cumulative effects can and must be considered when determining resource consent applications. We also understand that cumulative effects include the effects that would result if this proposal is approved, in combination with the effects of other existing activities and/or effects which are likely to arise over time, including permitted activities and activities that are not permitted activities *per se* but do not require resource consent.
99. On the basis of the evidence we heard and the information we were provided with, it appears currently unlikely that significant additional rural land use intensification will occur that does not require a resource consent from Environment Southland.
100. We find that a consequence of the above is that the adverse effects of the proposed activity, with deficient conditions, are likely to be a further cumulative, albeit extremely small, deterioration of the state of the Waituna Lagoon water quality and McMillan/Waituna creeks. We received limited evidence on the potential cumulative effects on the habitats of trout and salmon and are therefore not able to make any finding on that matter.
101. The applicant's representatives noted that there would be some positive effects associated with the proposed conversion in that it would "provide for the social and economic wellbeing of their family". However, we were not provided with any detailed information on the scale or extent of these positive effects. Therefore, we find it difficult to take these into account in any quantitative assessment of net effects.
102. Thus we propose to consider the effects of the proposal as defined by the applicant's final proposed resource consent conditions, but do not consider that we have sufficient information to consider the positive effects of this proposal.

103. We highlight that the adverse effects of a cumulative deterioration of water quality also have a dimension beyond the 'hard science' of measurable contaminant concentrations and the effects of those contaminants on the ecosystem. These can include effects of particular significance to Maori.
104. We do not accept the logic of Ms Irving's contention that we have some responsibility to grant the resource consent applications because that would "...provide a degree of certainty regarding the nature of activities on this property that will not exist if consent is declined." As we have found, the key proposed conditions are deficient and do not provide any degree of certainty.
105. The next step in this consideration is to endeavour to consider the acceptability of the likelihood of a further deterioration of the water quality of McMillan/Waituna creeks and the Waituna Lagoon. We consider this next in the context of the relevant planning provisions.

Consistency with planning provisions

106. There is a very significant collection of provisions starting at the level of the RMA itself (e.g., Part 2 and Section 30(1)(c)(ii)), then moving to the NPSFM, the Proposed and Operative SRPS and the RWPS that all include clear statements about maintaining and enhancing water quality and a number of objectives and policies in the RWPS specific to lowland water bodies and specifically the Waituna Lagoon. We endeavour to highlight the particularly relevant and significant provisions as follows:

NPSFM	Objective A2
Operative SRPS	Objectives 5.2, and 5.3 and Policy 5.5
Proposed SRPS	Objectives WQUAL.1, and WQUAL.2 and policies WQUAL.1, and WQUAL.4
RWPS	Objectives 3 and 4, policies 4 and 13A, and Policy A4.
RELAP	Policy 4.2.3

107. We conclude that the proposal, with the proposed conditions, is clearly not consistent with the central theme of these objectives and policies. We also think it is useful to endeavour to determine if the proposal is so inconsistent to be contrary to any of these provisions. In this context as we understand it, the RMA envisages something that is "opposed in nature, different to, or opposite". Therefore, we find that the evidence strongly indicates that the proposal, with the proposed conditions, is contrary to these key objectives and policies.
108. It is clear to us that our conclusion about the cumulative effects of the proposal, in the context of the significant suite of planning provisions that call for maintenance and improvement of water quality, means that the proposal should be declined.
109. Environment Southland has yet to undertake the process of endeavouring to identify quantitative catchment nutrient loss limits as specified in the NPSFM. While such quantitative limits would be a critical part of catchment management for the Waituna Lagoon and its tributaries, we do not consider that the absence of that detailed

framework in this specific situation changes our conclusion that the application in its current form should be declined.

Precedent effects

110. The grant of consents for this proposal with the proposed conditions in our view would undermine the consistent administration of the RWPS.
111. The grant of such resource consents with the proposed conditions would have an influence on how other similar such applications are considered. Specifically, other applicants could seek to obtain resource consents with similarly deficient conditions in the same manner the applicant proposes. If that were to occur, significant elements of the RWPS could be compromised.
112. We understand that such a precedent effect is not an effect on the environment.

12. PART 2 RMA

113. We have considered matters under section 104(1) and we are conscious of the need to consider the applications subject to Part 2 of the RMA, specifically sections 5, 6, 7 and 8.
114. Considering section 5, particularly the purpose of the RMA, the proposed activity with the proposed conditions would not ensure that the matters provided for in subsection 2 subparagraphs (b) and (c) of section 5 would be met. Therefore, we conclude that the granting of this proposal with the proposed conditions would not result in the sustainable management of water resources and would be inconsistent with the purpose of the RMA.
115. Touching briefly on section 6, we do not consider that the application provides for those matters outlined in subsection (e).
116. In respect of section 7, in our view subsections (a), (d) and (f) would not be satisfied. In respect of section 8 we consider that the principles of the treaty of Waitangi have been taken into account insofar as we received a thorough submission from Te Ao Marama Inc. and we have taken into account the likely adverse effects of the proposal on uses and values of the Waituna Lagoon and the Waituna Creek.

13. Overall decision

117. Under the powers delegated to us by the Southland Regional Council; and for all of the above reasons and under sections 104 and 104B, of the RMA; we are not satisfied that the potentially significant adverse effects of the proposal are acceptable. In our view the applicant has not demonstrated that the adverse effects of the proposed activities would be adequately avoided or mitigated.
118. We consider that the proposal is contrary to a significant number of objectives and

policies of the NPSFM, the Operative and Proposed SRPS and the RWPS. We have identified those objectives and policies in the body of this report.

119. We do not consider that the proposal would achieve the purpose of the RMA.

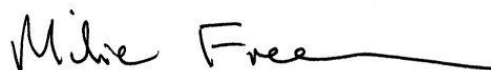
120. Accordingly, we decline to grant the following resource consent applications:

APP-20158099, a land use consent to establish a new dairy farm, a water permit to take and use groundwater, a land use consent to construct an effluent pond, a discharge permit to discharge effluent to land, and a land use consent to construct a bore at 514 Rimu-Seaward Downs Road.

Decision dated: 7 March 2016

Signed by Mike Freeman (Chair) for and on behalf of the Hearing Panel:

Mike Freeman



In accordance with section 120 of the Resource Management Act 1991, the applicant may appeal to the Environment Court against the whole or any part of this decision within 15 working days of the notice of this decision being received. The address of the Environment Court is:

The Registrar
Environment Court
PO Box 2069
Christchurch

Any appeal must be served on the following persons and organisations:

- Environment Southland,
- the Applicant, and
- every person who made a submission on the application.