

IN THE MATTER OF

The Resource Management Act 1991

AND

IN THE MATTER OF

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

REPORT AND DECISION OF INDEPENDENT HEARING COMMISSIONER

Sharon McGarry

29 March 2021

Heard on the 3 March 2021

Council Chambers, Environment Southland, corner of North Road and Price Street, Invercargill.

Representations and Appearances

Applicant:

Mr C. Tauri, Fiordland Cruises Limited

Ms B. Aitken, Planner with Bonish Environmental

Mr J. Engel, Manager, Bonish Environmental

Submitters:

None in attendance

Section 42A Reporting Officers:

Mr G. Gericke, Consents Officer, Southland Regional Council

It is the decision of the Southland Regional Council, pursuant to sections 104, 104B, and 104D, and subject to Part 2 of the Resource Management Act 1991, to **REFUSE** Coastal Permit APP-20202246 by Fiordland Cruises Limited to carry out commercial surface water activities in the coastal marine area of Fiordland, between Yates Point and Puysegur Point, including the Doubtful Sound/Patea complex, for the reasons set out in this decision.

BACKGROUND AND PROCEDURAL MATTERS

1. This is the report and decision of independent Hearing Commissioner Sharon McGarry. I was appointed by the Southland Regional Council (**SRC** or 'the Council') to hear and decide an application by Fiordland Cruises Limited ('the Applicant') pursuant to the Resource Management Act 1991 (**RMA** or 'the Act') for resource consent to carry out commercial surface water activities in the coastal marine area of Fiordland, between Yates Point and Puysegur Point, including the Doubtful Sound/Patea complex.
2. The application was lodged on 19 June 2020.
3. Further information was requested by the Council under section 92 of the Act on 1 July 2020. The Applicant provided further information on 6 August 2020.
4. The application was publicly notified on 21 August 2020. One submission in opposition to the application was received from the Director-General of Conservation within the submission period.
5. A pre-hearing meeting was held on 19 November 2020. The Applicant provided further information requested by the Department of Conservation (on behalf of the Director-General) at the pre-hearing meeting on 26 November 2020.
6. Prior to the hearing, a report was produced pursuant to section 42A of the Act by the Council's Reporting Officer, Mr George Gericke. This 'Staff Report' provided an analysis of the matters requiring consideration and recommended that the application should be declined. Attached to the Report were copies of the application documentation (Attachment 1), the submission (Attachment 2), pre-hearing meeting notes (Attachment 3), the response to further information requested by DOC (Attachment 4), and draft conditions (Attachment 5).
7. The Staff Report and the Applicant's evidence were pre-circulated prior to the hearing in accordance with section 103B of the Act. This evidence was pre-read by me prior to the hearing and was 'taken as read' at the hearing.
8. The hearing commenced at 11.00am on Wednesday 3 March 2021 and was adjourned at 1.35 pm the same day, after the Mr Engel gave an oral right of reply on behalf of the Applicant.
9. I did not consider a site visit was necessary given my familiarity with the Doubtful Sound area and the commercial surface water activities undertaken.
10. I formally closed the hearing on 10 March 2021.

THE APPLICATION

11. This application is for a new resource consent to operate one commercial day trip per day using a vessel of approximately 20 metres for up to 40 passengers, within a number of the principal arms of the Doubtful Sound/Patea complex, including Crooked Arm (east of Turn Point), Doubtful Sound and Thompson Sound.
12. The vessel proposed to be used has been operating within the Doubtful Sound/Patea complex for the past 10 years for backcountry charter trips under existing Coastal Permit AUTH-201180. A change to the conditions of this existing resource consent was granted on 14 February 2020 to allow for the temporary operation of day trips in the Doubtful Sound/Patea complex during the Milford Road

closure due to flood damage. Authorisation to allow the temporary operation of day trips expired on 30 June 2020.

13. This application is to enable the Applicant to operate day trips in the Doubtful Sound complex on a year round basis. The Applicant seeks to undertake 3-6 hour long sightseeing day trips commencing from and returning to Deep Cove. Four different trip options were outlined, excluding Hall Arm, Crooked Arm (west of Turn Point), First Arm and Bradshaw Arm (as shown in Table 1 and Figure 1 of the Staff Report).
14. The application originally sought a 15-year consent term, but this was reduced to 5 years at the hearing.

DESCRIPTION OF THE ENVIRONMENT

15. The application documentation and Staff Report provided a description of the existing environment at Doubtful Sound. This is not contested and is not repeated here.
16. Relevantly Appendix 4 and 5 of the Regional Coastal Plan for Southland 2013 (**RCP**) identify the area as having high inherent value, and outstanding wilderness qualities; and as an Area Containing Significant Values (**ACSV**) including Māori cultural values, estuaries and marine.
17. Te Mimi o Tu Te Rakiwhanoa (Fiordland Coastal Marine Area) is a statutory acknowledgement area under Schedule 102 of the Ngāi Tahu Claims Settlement Act 1998. The Crown has acknowledged Ngāi Tahu's significant cultural, spiritual, historic and traditional association with the area.

SUBMISSION

18. The Staff Report summarised the issues raised in the submission from the Director-General of Conservation. I adopt¹ the summary of the issues raised in the submission for the purpose of my assessment.
19. A letter dated 23 February 2021, received prior to the hearing, advised the Director-General no longer wished to be heard at the hearing. The letter stated that:
 - (a) Should the Commissioner consider granting the consent, the draft conditions generally satisfy the Director General's concerns;
 - (b) The detailed information provided by the Applicant following the pre-hearing should be attached to the consent;
 - (c) The Council has recently commissioned a Fiordland Vessel Carrying Capacity Study; and
 - (d) Given this study is underway and a full plan review is being undertaken, a shorter-term consent would be appropriate.
20. As I noted at the hearing, the Director-General's submission in opposition to the application remains, as lodged, and I have had regard to both the submission and the letter received.

¹ In accordance with section 113(3) of the Act.

THE HEARING

Applicant's Case

21. **Mr Clint Tauri**, owner and operator of Fiordland Cruises Limited, provided a pre-circulated written statement of evidence and spoke at the hearing. He outlined the background to the company and their operations on the Doubtful Sound area. He asked that regard be given to the need for his company to survive in the face of global travel restrictions over the next 3-5 years and the importance of flexibility to achieve this. He noted concern that one operator in Doubtful Sound effectively held the rights to the discretionary allocation for day trips and that there was very little scope for any other operator to provide a different service or experience. He considered some of the allocated day trips were currently 'parked' by the consent holder and were not available for use, resulting in significantly less use than what is possible. He noted that carrying out an assessment as to the appropriate level of activity to avoid significant adverse effects was beyond the resources of one operator; and that the lack of any meaningful information was hindering the ability of the operators to grow to meet client demand and expectations. He considered the change from minor effects to significant effects was not a fine line and that exceeding the RCP discretionary allocation limits does not automatically mean the effects will be more than minor.
22. In response to questions, Mr Tauri confirmed that the company would operate separate vessels for the day drip under this consent and backcountry trips under the existing consent. He also confirmed they had sufficient berthage available at Deep Cove for 2-3 vessels.
23. **Ms Bridgett Aitken**, a Planner with Bonish Environmental, provided a written statement of evidence addressing the proposed activity, potential adverse effects, an analysis of the statutory documents, and the relevant objectives and policies of the RCP. Ms Aitken noted that currently there were no day trips available on smaller vessels and that this would be an alternative option for visitors seeking a different experience. She considered that some of current activity (such as supervising kayaking activity) did not meet the definition of a day trip, but was currently included in the day trip allocation. She highlighted that access to Hall Arm was no longer sought to reduce potential effects on kayakers. She considered the most significant impact of the proposed activity was visual, but that the enhanced public access would be of positive benefit. She acknowledged that given the area's outstanding natural landscape and outstanding natural features, section 6 of the Act was relevant. She considered impacts on significant habitats of indigenous fauna would be avoided by not visiting certain areas; and that other potential effects (navigation and safety, noise, bio invasion, rubbish and waste, and hazardous substances) were avoided by compliance with the provisions of the RCP and the imposition of conditions.
24. Ms Aitken focused her assessment on cumulative effects on visitor experiences and landscape and natural character. She stated that it was the Applicant's intention to operate the day trips outside of the scheduled times of the larger operators, to avoid congestion at Deep Cove and to provide visitors with the best experience possible. She noted there was a relatively low concentration of vessels operating day trips (three existing vessels) and that the Applicant had the flexibility to avoid other operators' departure times. She considered that the cumulative impact on landscape and natural character would be minimal given the vastness of the land and seascapes in the area. She concluded that the application passed both gateway tests in section 104D of the Act; and could be granted without significantly detracting from the natural character of the immense land and seascape.

Staff Report

25. **Mr George Gericke**, a Consents Officer for SRC, tabled his Staff Report at the hearing and responded to matters discussed. Having heard the evidence, Mr Gericke confirmed his original

recommendation to decline the application on the basis of potential cumulative effects on remoteness and wilderness values. He stated that he was not satisfied that the adverse effects of the proposed activities on the environment would be minor, or that the proposal would not be contrary to the relevant objectives and policies of the RCP. In response to questions, he considered the proposed shorter 5-year consent term would not address the inherent uncertainty and would not be in line with a precautionary approach.

Applicant's Right of Reply

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

ASSESSMENT

27. In assessing the application, I have considered the application documentation and AEE, further information provided by the Applicant, the Staff Report, the submission received, and the evidence provided during and after the hearing adjournment. I have summarised this evidence above. I record I have considered all the issues raised in making my determination.

Status of the Application

28. The starting point for my assessment of the application is to determine the status of the activities under the statutory planning provisions.
29. There was agreement between the parties that the application activities should be considered as a **non-complying activity** under Rule 16.2.1 of the RCP. I agree.

Statutory Considerations

30. In terms of my responsibility for giving consideration to the application, I am required to have regard to the matters listed in sections 104, 104B and 104D of the Act.
31. Pursuant to section 104(1), and subject to Part 2 of the Act, which contains the Act's purpose and principles, I must have regard to-
 - (a) *Any actual and potential effects on the environment of allowing the activity;*
 - (ab) *Any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity;*
 - (b) *Any relevant provisions of a national environmental standard, other regulations, a national policy statement, a New Zealand coastal policy statement, a regional policy statement or a proposed regional policy statement, a plan or proposed plan; and*
 - (c) *Any other matters the consent authority considers relevant and reasonably necessary to determine the application.*
32. Section 104(2) states that when forming an opinion for the purposes of section 104(1)(a), I may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect. This is referred to as consideration of the 'permitted baseline'. No party drew my attention to any relevant permitted activities. I record I have not applied any permitted baseline in making my assessment.

33. Section 104(3)(a)(i) states that when considering the application, I must not have regard to trade competition or the effects of trade competition.
34. Section 104(3)(a)(ii) states that when considering the application, I must not have regard to any effect on a person who has given written approval to the application. I note no written approvals were provided.
35. Section 104B states that after consideration of an application for a non-complying activity, I may grant or refuse the application; and if granted, I may impose conditions under section 108.
36. In making my assessment under section 104D(1) of the Act, I can only grant consent for a non-complying activity, if either or both of the following 'gateway tests' is passed:
 - (a) *The adverse effects of the activity on the environment will be minor; **or***
 - (b) *The application is for an activity that will not be contrary to the objectives and policies of –*
 - (i) *the relevant plan, if there is a plan but no proposed plan in respect of the activity; or*
 - (ii) *the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity; or*
 - (iii) *both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.*
37. Under section 108, if I grant consent, I may impose conditions under section 108.
38. I consider each of these sections of the RMA separately below.

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

The Existing Environment

39. In making my assessment, I am required to consider the actual and potential effects of the activities on the existing environment. The existing environment is that which exists at the time this determination is made and includes lawful existing activities, permitted activities and activities authorised by existing resource consents. I must consider the existing environment includes all consented activity operating to the fullest extent possible under the conditions of consent.
40. I confirm I have taken into account the existing environment as it exists with the full implementation of the existing consents for commercial surface water activities in Doubtful Sound and permitted activities such as recreational use and use of Doubtful Sound as a thoroughfare.
41. I note Ms Aitken's view that some of the current commercial surface water activity should not be included as part of the day trip allocation on the basis of the definitions in the RCP. However, I consider it is up to the Consent Authority to determine what commercial surface water activity constitutes a day trip or back country trip. I accept that a group of kayaks supported by a motorised vessel constituent a day trip activity operating in the areas specified in the RCP. I have relied on the evidence of the Reporting Officer regarding the consented numbers of day trips. I acknowledge these do not reflect actual use, which may be less than that consented, as some existing consents may not be exercised to the fullest extent possible.

Actual and Potential Environmental Effects

42. The Staff Report considered the following actual and potential effects:
- (a) Public access and navigational safety;
 - (b) Wildlife, habitats and ecosystems;
 - (c) Wake effects;
 - (d) Noise;
 - (e) Cultural and historical values;
 - (f) Bio-invasion;
 - (g) Rubbish and waste; and
 - (h) Natural character, remoteness and wilderness values.
43. Overall, I agree with the conclusions reached in the Staff Report that any actual and potential adverse effects on the environment are likely to be minor or less than minor, with the imposition of conditions, in relation to navigational safety, wake effects, noise, bio invasion, and rubbish and waste. I therefore adopt the conclusions reached in the Staff Report in relation to these matters. I accept that the application will have a positive effect on public access to the coastal marine area.
44. I have focused my assessment of actual and potential cumulative effects on cultural values, wildlife, habitats and ecosystems (including intrinsic values); and natural character, remoteness and wilderness values.
45. While Ngāi Tahu have not lodged a submission on the application, I am required to consider potential cumulative effects on cultural values and relationships. Given the cultural significance of the area to tangata whenua, I find that there is insufficient evidence to conclude that any cumulative effect on cultural values and relationships will be less than minor or minor.
46. The Staff Report concluded that *'...the addition of a relatively small vessel is not expected to add significantly to the cumulative effects of vessel presence on wildlife, habitats and ecosystems in the fiords'* (page 10). I questioned Mr Gericke as to his use of the term 'significantly' and whether this was the appropriate threshold given the non-complying status of the activity. He agreed this was not correct and confirmed that any cumulative effect was not expected to be 'more than minor'. However, he acknowledged there was some uncertainty as to when any cumulative effect on wildlife, habitats or ecosystems may be more than minor or in fact significant; and that there was insufficient information to determine this.
47. Mr Gericke acknowledged that the focus of his assessment had been on potential cumulative effects on wilderness and remoteness values, and the maintenance of high quality visitor experiences. However, he agreed that Objective 16.1.3 of the RCP seeks to ensure commercial and private recreational surface water activities do not adversely affect intrinsic values and that it did not contain a 'significant' threshold. He agreed that any cumulative adverse effect on these intrinsic values was unknown given the lack of information. He agreed it was reasonable to conclude that the allocation limits set in the RCP linked back to achieving protection of these intrinsic natural values from surface water activities.
48. I consider the protection of intrinsic values of ecosystems and the extremely high quality of the natural values of this area are outcomes to be achieved by the allocation limits set in the RCP. I find that there is insufficient evidence to conclude that the increase of commercial day trip activity above these limits will have a minor or less than minor adverse cumulative effect on the intrinsic values of the coastal environment.

49. The Staff Report concluded that the proposed increase in day trip activity could lead to more than minor adverse effects on natural character, remoteness and wilderness values. It stated that potential adverse effects were uncertain, unknown and little understood, and were potentially significantly adverse.
50. I find that an increase in day trips above current levels has the potential to lead to more than minor adverse cumulative effects on natural character, remoteness and wilderness values. Without additional information on actual use (extent, number and frequency) of commercial and recreational use, I consider it is simply not possible to adequately assess the potential effect on these significant values.

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

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

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

52. An analysis of the relevant provisions of the New Zealand Coastal Policy Statement 2010 (**NZCPS**), the Regional Policy Statement 2017 (**RPS**) and the RCP was provided in the Staff Report and the evidence of Ms Aitken.
53. I have considered all the relevant provisions of the NZCPS, RPS and RCP, which must give effect to Part 2 of the RMA. It is agreed and acknowledged the activity engages section 6 (a), (b) (c), (d) and (e) matters of national importance, which I must recognise and provide for. The application also engages section 7 other matters that I must have particular regard to; and section 8 which requires me to take into account the Treaty of Waitangi/Te tiriti o Waitangi.
54. I accept that the NZCPS gives effect to these provisions of the RMA in relation to the coastal environment. I note that the RPS and RCP have been reviewed and updated to give effect to the NZCPS. I note the relevance of NZCPS Objective 2, 3 and 4 and Policies 1, 2, 3, 7, 13 and 15.
55. The RCP is the operative plan to give effect to the RPS and NZCPS, and Part 2 matters. Objective 16.1.1 seeks to maintain the essential characteristics of the pristine coastal marine area adjoining Fiordland National Park that contribute to a range of high-quality experiences in the natural coastal environment. Objective 16.1.2 seeks to preserve remoteness and wilderness values of the internal waters of Fiordland. Objective 16.1.3 seeks to ensure that the commercial and private recreational surface water activities do not adversely affect the intrinsic values of the Fiordland coastal environment. The objectives are to be achieved through Policies 16.2.1, 16.2.2, 16.2.8, 16.2.9 and 16.2.10; and Rule 16.2.1.
56. I agree with Mr Gericke that Rule 16.2.1(4) of the RCP sets a threshold where I can be satisfied that the cumulative adverse effects of more commercial surface water activity within Doubtful Sound on remoteness and wilderness values will be no more than minor. I agree there is less certainty about the scale of effect above these limits. I consider these limits have been set to achieve Objectives 16.1.1, 16.1.2 and 16.1.3. While the focus mainly seems to be on maintaining high quality experiences and the preservation of remoteness and wilderness values, I consider the protection of intrinsic values of the natural ecosystem is also achieved through limiting the extent and number of commercial activities.
57. While I note that evidence of Ms Aitken that the explanation to Rule 16.2.1 does not provide any justification or reference for the limits and numbers specified, I accept that they have been set

through a statutory planning process with input from tangata whenua, the Department of Conservation, Southland District Council, commercial operators, and the public.

58. I note that Policy 16.2.10 of the RCP requires the Council to monitor surface water activities (both commercial and recreational) and effects of use on visitor perceptions; and that this has not been undertaken. I accept that the provision of such information is extremely onerous for a consent applicant to provide. However, I find that in the absence of such information it is not possible to determine what level of commercial surface water activity is appropriate without adverse cumulative effects on the recognised significant environmental values of the area.
59. I agree that a non-complying activity should not in effect be a prohibited activity; and that such activities require careful consideration on their merits and on a case by case basis. It is acknowledged that such activities require a high level of scrutiny and sufficient evidence to demonstrate that any minor effects do not contribute to adverse cumulative adverse effects on natural and intrinsic values, peoples' experiences, and remoteness and wilderness values.
60. Overall, I agree with Mr Gericke that the application is contrary to the clear direction of the NZCPS Policy 13 and 15 to preserve natural character and protect natural features and natural landscapes from inappropriate use and development; RPS Policy COAST 2 and 3 to protect indigenous biodiversity, natural character and natural features and landscape values; and RCP Objectives 16.1.1, 16.1.2 and 16.1.3.
61. I note that Mr Gericke's concerns regarding uncertainty and the need to take a precautionary approach in accordance with NZCPS Policy 3, related to potential cumulative effects on natural character, and remoteness and wilderness values of the Doubtful Sound/Patea complex. I agree that given the significance of the environmental values present, the potential for adverse effects and the vulnerability of the area to cumulative effects, that a precautionary approach is warranted.
62. I find that the proposed increase in commercial surface water activity above the limits set in the RCP would not protect these significant values in accordance with the clear policy direction of preservation, protection and avoidance of adverse effects. Overall, I find the application is contrary to the key relevant provisions of the NZCPS, RPS and RCP.

SECTION 104(1)(c) - OTHER MATTERS

63. I have considered the relevant policies of Te Tangi a Tauria – the Natural Resources and Environmental Iwi Management Plan for Ngāi Tahu ki Murihiku 2008. I find the application may be inconsistent with the outcomes sought given the proposed use is above the current limits set in the RCP.
64. I have considered the Fiordland National Park Management Plan given the proximity and association the adjacent Fiordland National Park. I find the application may be inconsistent with the outcomes sought by the National Parks Act 1980 given the proposed use is above the current limits set in the RCP.
65. I have considered the Resource Management (Marine Pollution Regulations) 1998 which provides for the discharge of sewage from ships, both treated and untreated, within certain parameters. I find the application can be operated in accordance with these regulations.
66. I have considered matters raised by Mr Tauri with regard to one company effectively holding all of the day trip allocation and find that this is not a relevant resource management matter.

67. I have also considered Mr Tauri's statements that the company (under previous owners) had missed out on day trip allocations for existing operations when the RCP was implemented. I cannot give this assertion any weight, but note that RCP Policy 16.2.6 provided a pathway for obtaining consent for existing use prior to 1997.
68. Overall, I consider that matters relating to fairness, development of allocation limits and the current plan provisions are best addressed through a public process when the RCP is reviewed or through a plan change.
69. I consider that consistent administration and protection of the integrity of the current RCP allocation limits are critical to giving effect to section 6, 7 and 8 of the RMA. In my view, to step outside these allocation limits, without sufficient information on potential cumulative effects, could undermine the integrity and effectiveness of the operative RCP provisions.

SECTION 104D

70. The Reporting Officer concluded that the application did not pass either of the gateway tests of section 104D and that the consent sought could therefore not be granted.
71. Ms Aitken concluded that the application passed both gateway tests of section 104D and that there was no barrier to granting the consent sought.
72. On the basis of my assessment of the actual and potential environmental effects of the proposed activities and the relevant objective and policies of the RCP, I find the application does not pass either section 104D(1)(a) or 104D(1)(b); and that the consent sought cannot therefore not be granted.

PART 2 OF THE ACT

73. I accept that based on the Court of Appeal's *RJ Davidson v Marlborough District Council*² ('Davidson decision'), that recourse to Part 2 of the RMA may be of assistance in trying to assess consistency with objectives and policies where there is conflict or tension between the policies, or they pull in different directions. However, recourse to Part 2 should not render the relevant planning documents ineffective if they give effect to Part 2.
74. I find the relevant objectives and policies of the NZCPS, RPS and RCP are consistent and give clear direction to give effect to the purpose and principles of the RMA. I have found that the application is contrary with the relevant objectives and policies of these statutory documents.
75. I do not consider that reference to Part 2 would add anything to the evaluative assessment I have undertaken under sections 104 and 104D of the Act.

Overall Conclusion

76. On the basis of the evidence before me, I conclude that the environmental effects of the application will potentially be more than minor. I have paid particular attention to actual and potential cumulative effects on intrinsic values of natural ecosystems, natural character, and remoteness and wilderness values.

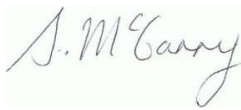
² [2018] NZCA 316

77. I conclude that the application is inconsistent with the promotion of sustainable management of natural and physical resource, as defined in section 5 of the RMA.

DECISION

78. It is the decision of the Southland Regional Council, pursuant to sections 104 104B and 104D, and subject to Part 2 of the Resource Management Act 1991, to **REFUSE**, Coastal Permit APP-20202246 by Fiordland Cruises Limited to carry out commercial surface water activities in the coastal marine area of Fiordland between Yates Point and Puysegur Point, including the Doubtful Sound/Patea complex.

Dated at Christchurch this 29th day of March 2021

A handwritten signature in cursive script, reading "S. McGarry", is displayed on a light green rectangular background.

Sharon McGarry
Independent Hearing Commissioner