

IN THE MATTER OF

The Resource Management Act 1991

AND

IN THE MATTER OF

An application by Offspring Travel 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, Offspring Travel Limited

Ms B. Aitken, Planner, Bonish Environmental

Mr J. Engel, Manager, Bonish Environmental

Submitters:

Te Rūnaka o Oraka Aparima and Te Rūnanga o Ngāi Tahu

- Dr L. Murchison, Senior Environmental Advisor, Te Rūnanga o Ngāi Tahu (by telephone)

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 partly **GRANT** and partly **REFUSE** Coastal Permit APP-20202433 by Offspring Travel 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 Offspring Travel 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 23 September 2020.
3. Further information was requested by the Council under section 92 of the Act on 12 October 2020. The Applicant provided further information on 29 October 2020.
4. The application was publicly notified on 21 August 2020. Four submissions in opposition to the application were received within the submission period.
5. A pre-hearing meeting was held on 29 January 2021. At the meeting, the Applicant amended the application by removing day trip Options 3 and 4, and agreeing to limit the proposed support vessel to 14.3 metres (**m**) overall length. Following the meeting, the Applicant confirmed the amendments and provided further information (dated 5 February 2021).
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 part of the application seeking to increase the number of early day tours and day trips should be declined; but that the part of the application seeking to add an additional double kayak and replace the existing 10m safety vessel with a 14m vessel could be granted. Attached to the Report were copies of the application documentation (Attachment 1), request for information (Attachment 2), submissions (Attachment 3), pre-hearing meeting report (Attachment 4), additional information from the Applicant following the pre-hearing (Attachment 5) and draft conditions (Attachment 6).
7. The Staff Report, Applicant’s evidence and submitter expert 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. Prior to the hearing, I was also provided with a copy of the additional information dated 29 October 2020, which had inadvertently been missed from the Staff Report attachments.
9. The hearing commenced at 2.30 pm on Wednesday 3 March 2021 and was adjourned at 4.45 pm the same day, to enable the Applicant to provide a written right of reply and final set of proposed conditions.
10. I did not consider a site visit was necessary given my familiarity with the Doubtful Sound area and the commercial surface water activities undertaken.
11. A revised set of proposed conditions and a written right of reply was provided on 10 March 2021.
12. I formally closed the hearing on 10 March 2021.

THE APPLICATION

13. This application is for a new resource consent to replace Coastal Permit AUTH-203196, which authorises commercial day trips and backcountry trip activity involving guided kayak tours, supported by a 10 m motorized vessel, within a number of the principal arms of the Doubtful Sound/Patea complex, including Hall Arm, Crooked Arm (east of Turn Point), Doubtful Sound and Thompson Sound.
14. Coastal Permit AUTH-203196 currently authorises:
 - (a) a full day tour consisting of up to five double kayaks and a single kayak operating any day per month during the period September to April, and 10 days per month during May each year (with activity prohibited during the period June to August);
 - (b) an early day tour consisting of up to four double kayaks and a single kayak operating up to 8 days per month during the period November to April (with activity prohibited during the period May to October);
 - (c) a two day tour consisting of up to four double kayaks and a single kayak operating up to 8 days per month during the period October to April (with activity prohibited during the period May to September); and
 - (d) a total number of full day tours and early day tours not exceeding 190 days during the period September to May and a total of 20 two day tours during the period October to April.
15. Coastal Permit AUTH-203196, which this application seeks to replace, expires on 20 March 2023.
16. In addition to replacing Coastal Permit AUTH-203196, this application also seeks to:
 - (a) increase the number of early-day tours and day trips in Doubtful Sound and Hall Arm;
 - (b) maintain the current number of two-day trips, including the allocated backcountry trips in Hall Arm;
 - (c) add an additional double kayak to the operation; and
 - (d) change the safety vessel to a new 14.3 m long vessel.
17. A 25-year consent term is sought.
18. I have assessed the application, as amended after the pre-hearing, which seeks day trip Options 1 and 2 and backcountry trips Options 1 and 2, as set out in Table 2 of the Staff Report.

DESCRIPTION OF THE ENVIRONMENT

19. 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.
20. 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 Maori cultural values, estuaries and marine.
21. 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.

SUBMISSIONS

22. The Staff Report summarised the issues raised in the submissions from the Fiordland Marine Guardians, the Director-General of Conservation, Te Ao Marama Incorporated (**TAMI**) on behalf of Te Rūnanga o Oraka Aparima and Te Rūnanga o Ngāi Tahu (**TRONT**). I adopt¹ the summary of the submissions received as set out in Table 8 of the Staff Report (pages 10 -11).
23. An email received on 15 February 2021, from Mr Mark Peychers on behalf of the Fiordland Marine Guardians, stated support for the recommendations of the Staff Report and advised that on this basis the group no longer wished to be heard at the hearing.
24. A letter dated 23 February 2021 advised the Director-General of Conservation no longer wished to be heard at the hearing based on the further information provided and the recommendations of the Staff Report.
25. A letter dated 24 February 2021, from TAMI on behalf of Te Rūnanga o Oraka Aparima and TRONT stated that the recommendations of the Staff Report mitigated the concerns raised in their submissions; and that they were tabling a statement of expert planning evidence from Dr Lynda Murchison. They advised they would not be presenting at the hearing, but that Dr Murchison would be available to respond to any questions, if necessary.

THE HEARING

Applicant's Case

26. **Mr Clint Tauri**, owner and operator of Offspring Travel Limited, referenced his statement of evidence provided for the Fiordland Cruises Limited hearing for application APP-20202246. He considered that the changes made to the application had addressed submitters' concerns.
27. **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 described the three types of tour options and noted the main part of the application formed part of the existing environment. She considered the scale of the proposed changes was no more than minor. She noted the definition around what constitutes a day trip and backcountry activity was not clear and that depending on interpretation, it was possible that the additional trips sought were fewer than initially thought. She highlighted the amendments made to the application following the pre-hearing meeting to address submitter concerns, including reducing the size of the proposed support vessel, excluding accommodation facilities, removing trip Options 3 and 4, and prohibiting non-kayaking passengers on the support vessel.
28. Ms Aitken 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.

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

29. Ms Aitken focused her assessment on cumulative effects on visitor experiences and landscape and natural character. She stated that existing operators accepted that surface water activity needs to be controlled, but considered that there was scope for activities classified as non-complying without causing significant adverse effects. She considered that due to lack of reasoning as to how the allocation limits were derived and the lack of monitoring, it was difficult to accurately determine a suitable level of adverse effects. She concluded that the application passed both gateway tests in section 104D of the Act and that the consent sought should therefore be granted.
30. **Mr John Engel**, a Manager with Bonish Environmental, attended the hearing in support of Ms Aitken and assisted in answering questions.
31. **Dr Lynda Murchison**, a Senior Environmental Advisor for TRONT, provided a written statement of evidence on behalf of Te Rūnanga o Oraka Aparima and TRONT which focused on the allocation limits and definitions of the RCP. She outlined the status of TRONT as the iwi authority over the subject area and the relationship between Te Rūnanga o Oraka Aparima and TRONT. She agreed with the Reporting Officer that the operation of the support vessel falls within the definition of a 'Commercial Day Trip Activity', 'Commercial Day Trip' and 'Commercial Backcountry Activity' depending on the duration of the trip. Overall, she supported the conclusions and recommendations of the Staff Report.
32. In response to questions, Dr Murchison emphasised that effects on marine ecosystems had not been assessed and that there was a very real risk of adverse cumulative effects that the allocation limits of the RCP seek to avoid.

Staff Report

33. **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 to increase day trip activity 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. He also confirmed his recommendation to grant consent for the additional double kayak and replacement 14m support vessel, which he concluded would have only minor effects.
34. In response to questions, Mr Gericke outlined the conditions of Coastal Permit AUTH-203305 held by Go Orange Limited and explained that this activity was not subject to the day trip allocation because there was no use of a support vessel as part of the operation. He noted that the use of a vessel was only authorised in emergency situations and not as part of the activity itself.

Applicant's Right of Reply

35. The Applicant provided a written right of reply by way of rebuttal evidence by Mr Engel recording the oral points made at the hearing addressing the RCP definitions and term of consent. Attached to the reply was a schedule of proposed consent conditions.

ASSESSMENT

36. In assessing the application, I have considered the application documentation and AEE, the Applicant's further information, the Staff Report, submissions 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

37. The starting point for my assessment of the application is to determine the status of the activities under the statutory planning provisions.
38. Ms Aitken considered the proposed activities did not fit easily within the definition of commercial day trips and backcountry trips as outlined in the RCP given the intended use of the support vessel was to operate in a safety/supervision capacity and not for the transport of passengers for a sightseeing tour. She noted there would be no embarkation and disembarkation of passengers from the vessel at the wharf at Deep Cove, as is typical on sightseeing day tours. She highlighted the operation was the only one where the sole intention was kayaking activity and that the tours could not operate without a support vessel for safety purposes.
39. Ms Aitken considered that the proposed activities (as amended) were discretionary activities under Rule 16.2.1(5). She considered the overnight trips in and around Crooked Arm, with the use of a support vessel was within the definition of a backcountry activity, but that because of the areas used, it not constrained by the allocation limits specified in Rule 16.2.1(5).
40. Mr Engel considered that the RCP definition of 'Commercial Day Trip Activity' had four elements and that all four elements must be present to fit within the definition. In this case, he considered there was no 'point of embarkation and back' from the same point and therefore this element was missing from use of the support vessel.
41. Dr Murchison applied the ordinary meaning of the words in the definition as set out in the Oxford English Dictionary to conclude that the support vessel fell within the definition of 'Commercial Day Trip Activity', but for different reasons to those outlined in the Staff Report. She considered the actions of embarkation and disembarkation were key components and that the support vessel would be used for transportation, and lunch and toileting facilities involving passengers embarking and disembarking from the support vessel. She noted there was no requirement that embarkation or disembarkation of passengers occurs from a wharf facility.
42. The Staff Report stated that operating guided kayaking tours with a motorised support/safety vessel for one day tours and two day tours would be classified as a 'Commercial Day Trip' and Commercial Backcountry Trip' under the RCP because:
 - (a) The explanation to Rule 16.2.1 acknowledges that not all commercial activities will fit neatly into the definitions;
 - (b) It uses the word 'involves' in the definitions;
 - (c) The effects of a motorised vessel were the same regardless of whether passengers were embarking or disembarking; and
 - (d) The support vessel is central to the tours offered and is used as a base for lunch and toileting facilities.
43. I agree that the current definitions in the RCP are open to interpretation and that not all commercial activities will fit neatly within the definition. In considering consistent administration of the RCP I must put some weight on how these definitions have previously been interpreted and applied by the Council. I note that the existing consented activities under the current consent are counted in the allocation limits for day trips and backcountry trips. I also note that despite departing as two separate kayaking groups, the use of one support vessel results in these groups being counted as one day trip activity for the purposes of the allocation limits. This is consistent with the RCP focus on the motorised support vessel activity.

44. I consider the use of the support vessel is an integral part of the guided kayaking operation for safety purposes, transporting passengers and kayaks (when required), and for lunch and toileting facilities. I consider the operation involves all the elements of the definitions, albeit the point of embarkation and disembarkation of passengers on and off the support vessel may not be at the same point. I note this is not specifically stated in the 'Commercial Day Trip Activity', but rather 'a point of embarkation and back'. I consider the key point is that kayakers can, as the operator sees fit, embark and disembark passengers to and from the support vessel and transport them to and from points within the area. I do not consider it is relevant whether the support vessel is used for sightseeing or not, as it is part of the operation.
45. I note that the application was lodged as a non-complying activity, but that the Applicant's thinking has evolved during the processing of the application.
46. I consider that under the definitions of the RCP the proposed activities should be considered as a **non-complying activity** under Rule 16.2.1(2) and 16.2.1(3).

Statutory Considerations

47. 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.
48. 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.*
49. 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.
50. 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.
51. 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.
52. 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.
53. 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.*
54. Under section 108, if I grant consent, I may impose conditions under section 108.
55. 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

56. 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.
57. 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.
58. I note Ms Aitken and Mr Engel’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. I consider it is within the Council’s general discretion 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 constitutes a day trip activity or backcountry activity when operating in the areas specified in the RCP. I consider the support vessel is an integral part of the guided kayaking operation.
59. I have relied on the evidence of the Reporting Officer regarding the consented numbers of day trips and backcountry trips in the various areas. 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. However, I must consider that the existing environment includes all consented activity operating to the fullest extent possible under the conditions of consent.
60. I note Dr Murchison disagreed with the Staff Report that the existing consented activity forms part of the baseline for assessing effects from the new activity, once the existing consented activity expires; and she noted that this would prevent a consent authority addressing the effects of over allocation from past decision making. She referenced the Court of Appeal decision in *Queenstown Lakes District Council v Hawthorne Estates Ltd* [2006] NZRMA 424 (CA) and considered the consent sought would replace the existing consented activity.
61. In this case, I note that Coastal Permit AUTH-203196 will not expire until 20 March 2023. I therefore consider that the correct approach is to consider the activity authorised by Coastal Permit AUTH-203196 forms part of the existing environment for approximately two more years.

Actual and Potential Environmental Effects

62. 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 risk;
 - (g) Rubbish and waste; and
 - (h) Natural character, remoteness and wilderness values.
63. 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.
64. 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.
65. The submission from TAMI emphasised the cultural significance of the area and the potential for adverse cumulative effects on the mauri of the internal waters, ecology, natural character, landscape, amenity and cultural values. The submission from TRONT set out their interests and kaitiakitanga and whanaungatanga responsibilities.
66. I accept the views of Te Rūnanga o Oraka Aparima and TRONT that the potential adverse cumulative effects on cultural values and their interests and relationships, from increasing day trip activity above the RCP allocation limits, may be more than minor.
67. The Staff Report stated that the kayak tours were unlikely to have more than a minor effect on wildlife and their habitats. However, in response to questions Mr Gericke 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.
68. Dr Murchison noted that the assessment did not address the extent to which the 'quieter times' are important to mitigate the impact of the busier season on marine ecosystems, natural character and cultural and amenity values.
69. 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.
70. 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 current consented levels will have a minor or less than minor adverse cumulative effect on the intrinsic values of the coastal environment.

71. 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.
72. I find that an increase in day trips above currently consented 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.
73. I find that the replacement of the existing consent with a new consent for the same level of currently consented activity, but with an additional double kayak and a slightly larger support vessel, is likely to have only minor environmental effects, with the imposition of conditions.

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

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

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

75. 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.
76. 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.
77. 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.
78. 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.
79. 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 and cultural values is also achieved through limiting the extent and number of commercial surface water activities.

80. 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. I agree with Dr Murchison that regardless of how these allocation limits were derived that they have been set over a defined space to manage cumulative effects of many small scale activities.
81. I noted the submission from the Fiordland Marine Guardians emphasised the importance of upholding the current allocation limits of the RCP to protect the significant values at risk from cumulative effects or ‘death by a thousand cuts’.
82. 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 increase in commercial surface water activity is appropriate without adverse cumulative effects on the recognised significant environmental values of the area.
83. 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 cultural values, natural and intrinsic values, peoples’ experiences, and remoteness and wilderness values.
84. Overall, I agree with Mr Gericke that the application to increase day trips 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.
85. 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.
86. 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.
87. I find that the replacement of the existing consent with a new consent for the same level of currently consented activity, but with an additional double kayak and a slightly larger support vessel, is consistent with the relevant provisions of the NZCPS, RPS and RCP.

SECTION 104(1)(c) - OTHER MATTERS

88. I have considered the relevant policies of Te Tangi a Taura – the Natural Resources and Environmental Iwi Management Plan for Ngāi Tahu ki Murihiku 2008. On the basis of the submissions received from Te Rūnanga o Oraka Aparima and TRONT, I find the application is contrary to the outcomes sought given the proposed use is above the current limits set in the RCP.
89. I have considered the Fiordland National Park Management Plan given the proximity and association the adjacent Fiordland National Park. On the basis of the submission from the Director-General of Conservation, I find the application is inconsistent with the outcomes sought by the National Parks Act 1980 given the proposed use is above the current limits set in the RCP.
90. 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.
91. Overall, I consider that matters relating to the 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. I agree with Dr Murchison that the appropriate place to challenge the merits of the limits set in the RCP is through a planning process and not a consent application process.
92. 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

93. The Reporting Officer concluded that the application to increase day trip activity did not pass either of the gateway tests of section 104D and that this part of the consent sought could therefore not be granted.
94. Ms Aitken concluded that the application passed both gateway tests of section 104D and that there was no barrier to granting the consent sought.
95. 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 to increase day trip activity does not pass either section 104D(1)(a) or 104D(1)(b); and that the consent sought to increase the number of day trips cannot not be granted.
96. I find that the replacement of the existing consent with a new consent for the same level of currently consented activity, but with an additional double kayak and a slightly larger support vessel, passes both gateway tests of section 104D.

PART 2 OF THE ACT

97. 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

² [2018] NZCA 316

different directions. However, recourse to Part 2 should not render the relevant planning documents ineffective if they give effect to Part 2.

98. 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 to increase day trip activity is contrary with the relevant objectives and policies of these statutory documents.
99. 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

100. On the basis of the evidence before me, I conclude that the environmental effects of the application to increase the number of day trips will potentially be more than minor. I have paid particular attention to actual and potential cumulative effects on cultural values, natural character, and remoteness and wilderness values.
101. Overall, I conclude that the application to increase the number of day trips, over the current level of activity and the allocation limits of the RCP, is inconsistent with the promotion of sustainable management of natural and physical resource, as define on section 5 of the RMA.
102. However, I agree with the Staff Report recommendation that the effects of an additional of a double kayak and the replacement of the existing support vessel with a 14.3m vessel are less than minor and can therefore be granted.

Consent Term

103. The Staff Report recommended a 11-year consent term on the basis that the expiry would align with the 2032 expiry dates of other current consents and that a shorter consent would allow the Council to reassess the cumulative effects at this time.
104. In rebuttal evidence, Mr Engel submitted that the 25-year consent term sought was appropriate given the Applicant is entitled to security of term in the absence of a sound resource management reason to reduce it. He noted that the current consent was granted for 20 years and that other similar consents had been granted for long terms.
105. I note that the current consent Coastal Permit AUTH-203196 was granted for 15 years. I note that there is a wide range of expiry dates for the current consents that are subject to the RCP allocation limits. I consider a 15-year consent term is appropriate to provide certainty of continued operation to the Applicant and reassessment of the cumulative effects of the activity under the RCP. I consider longer term consents are generally appropriate for activities requiring significant capital investment and physical infrastructure to exercise the consent. This is not the case here.

DECISION

106. 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** consent to increase the number of day trips; and **GRANT** Coastal Permit APP-20202433 to replace the existing Coastal Permit AUTH-203196 by Offspring Travel 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, subject to the conditions set out in **Attachment 1**, with the addition of a double kayak and a replacement support vessel of approximately 14.3m in length.

Dated at Christchurch this 29th day of March 2021



Sharon McGarry
Independent Hearing Commissioner