

BEFORE THE SOUTHLAND REGIONAL COUNCIL

Under the Resource Management Act 1991

In the matter of applications by Capil Grove Limited for resource consents under section 88 of the Act to discharge agricultural effluent to land from up to 840 cows, to take 85,800L/day of groundwater and to use land for two winter barns, a new agricultural effluent storage facility, and to establish a new dairy farm at 444 Springhills-Tussock Creek Road

CLOSING SUBMISSIONS ON BEHALF OF THE APPLICANT

31 July 2023

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INTRODUCTION

1. These closing submissions support Capil Grove Limited's (**Applicant**) application under section 88 of the Resource Management Act 1991 (**RMA**) for resource consents to discharge agricultural effluent to land from up to 840 cows, to take 85,800L/day of groundwater and to use land for two winter barns, a new agricultural effluent storage facility, and to establish a new dairy farm at 444 Springhills-Tussock Creek Road (**Application**).
2. The Hearing Panel has now had the opportunity to hear and consider the submissions from the parties, expert and other evidence, and representations. The Applicant's position on the Application remains as set out in the opening submissions, dated 30 June 2023. These closing submissions rely on (rather than repeat) those opening submissions.
3. These submissions are confined to addressing certain issues that remain outstanding at the conclusion of the hearing, namely:
 - (a) consideration of the date in Regulation 24 of the National Environmental Standards for Freshwater 2020 (**NESFM**);
 - (b) consideration of the pasture exclusion test in relation to natural inland wetlands;
 - (c) the relevance of tile drains;
 - (d) riparian planting;
 - (e) climate change and greenhouse gas emissions;
 - (f) irrigation under the NESFM;
 - (g) nutrient losses; and
 - (h) conditions.

CONSIDERATION OF THE DATE IN REGULATION 24 NESFM

4. Regulation 24 of the NESFM requires, in summary, that dairy conversions (among other activities) must not result in an increase in contaminant loads in the catchment "*compared with the loads as at the close of 2 September 2020*". As discussed at the hearing, it is not immediately apparent how to practically apply the specified date when considering that regulation. There was no data collection snapshot as at 2 September 2020 (either at a farm or

catchment level), and in any event, given stocking fluctuations depending on conditions it would not be practical to take the data of a single day as a benchmark.

5. Given these practical considerations, regulation 24 must be interpreted as referring to the annualised effect of the activities present as at that date. As such, the regulation will be satisfied where it can be demonstrated that a proposed activity will not increase contaminant loads leaching to a catchment relative to the annualised effect of the activities present on the relevant site as at 2 September 2020.
6. As Mr Lowe confirmed at the hearing, the assessment in the Overseer FM modelling took 2020 as the baseline year for the farming operation. Therefore, the Overseer modelling, along with the additional mitigation measures proposed by the Applicant provide confidence that the test in Regulation 24 is met by the Application.

NATURAL INLAND WETLAND – PASTURE EXCLUSION

7. In a further information request of 19 July 2022, Ms McRae asked the Applicant for (among other things) details about a potential wetland at what has been referred to as the 'gorse block'. The Applicant responded on 6 September 2022 providing photos and a description of the area. This information demonstrated that vegetation cover of exotic pasture species is well over 50%, meaning that it was not a 'natural inland wetland' for the purposes of the NESFM.
8. There was no follow-up communication about this matter and no specific remarks made about the 'gorse block' in the s42A report or evidence for the Council.
9. Nevertheless, at the hearing Ms Badenhop stated that further assessment of the area should be undertaken to determine whether there is any area that is a natural inland wetland. Ms McRae stated in her closing remarks that the 'gorse block' area should be left to revert to a wetland. Subsequently, in the conditions provided post-hearing by Ms McRae to the Applicant, Ms McRae went further, proposing a wetland restoration plan for the 'gorse block'.
10. The Applicant acknowledges that the definition of 'natural inland wetland' was amended in January 2023 to require an assessment in accordance with the *Pasture Exclusion Assessment Methodology* before the pasture exclusion can be applied. Accordingly, the Applicant proposes a condition requiring an

assessment by a suitably qualified expert in accordance with that methodology prior to any application of effluent to the 'gorse block' area under the discharge consent sought. If any area of the 'gorse block' is determined to be 'natural inland wetland', then grazing must cease and no effluent may be applied within 100m of that area unless consent is obtained in accordance with the NESFM.

11. Ms McRae's alternative proposal, requiring wetland restoration, would reflect a requirement to provide a betterment which is not related to the effects of the proposal or otherwise directed by the NESFM.
12. The area is currently grazed and has fertiliser applied, as has been the case for many years. The effects of the proposal on the 'gorse block' area are largely the same as the existing environment. Accordingly, the imposition of a condition requiring wetland restoration would be invalid as it does not fairly and reasonably relate to the effects of the Project.

TILE DRAINS

13. The network of tile drains on the application site was a particular focus of the evidence for the Council at the hearing. This was a change from the original evidence of the Council, which scarcely mentioned the tile drains. Rather, in her s42A report, Ms McRae considered the Application was 'broadly consistent with' Farm Effluent Management Policy 9, which relates to tile drains.
14. In respect of the tile drains, the Applicant's case is that:
 - (a) Tile drains are not a unique feature of this property or effluent application areas, but rather are prevalent across farms in the region. Tile drains are crucial to the functioning of the farms in order to prevent surface ponding (which would lead to increased nutrient loss through surface run-off).
 - (b) The Applicant is not purporting that there will be no nutrient losses as a result of the tile drains. However, as explained by Mr Lowe, this is minimised by the fact that during times of effluent application, the soils will act as a sponge to absorb a large proportion of the nutrients. As such, any leaching to the tile drains will first have some treatment from the soil.

- (c) The assessment of this Application is a relative one based on the changes between the current and proposed farming systems. This has been accounted for by Overseer, which factors in the presence of tile drains,¹ and nevertheless demonstrates that there will be a reduction in nutrient losses as a result of the proposal. Further, soil categories as used to define effluent application rates, which are reflected in standard consent conditions, also consider the presence of artificial drainage.²
- (d) When asked by Commissioner Sullivan, Mr Reuben Edkins (for the Council) did not refer to the tile drains as a particular limitation relevant for this property in terms of Overseer.
15. For these reasons, the Applicant considers that nutrient losses as a result of the tile drains will be minimised and that overall nutrient losses (taking into account the tile drains) will be reduced under the proposed system. Nevertheless, to provide further comfort, the Applicant now proposes that the Farm Environment Management Plan condition includes requirements to identify and consider management of the tile drains to minimise nutrient losses (condition 39(g)).

RIPARIAN PLANTING

16. Ms McRae stated at the hearing that she considered the proposed amount of riparian planting proposed by the Applicant was minimal considering the number of waterways present on the site.
17. As Mr Lowe explained in response, the Applicant has focused on identifying key areas for riparian planting which would provide habitat opportunities. The purpose of the planting was not so much for managing nutrient loss (although the proposed planting will still assist with this), but for habitat creation. As noted by Mr Lowe, grass is one of the better means of slowing down overland flow and reducing associated nutrient losses (particularly compared to trees). Under the proposal, all waterways will be fenced, with the fencing setback increased along the main waterways through the use of controlled grazing buffers. As Mr Lowe explained, the grassed filter-strips would be effective for reducing sediment losses to the drains from overland flow.

¹ As the Overseer Farm Summary Report submitted with the AEE notes under the heading 'Wetlands & Artificial Drainage Systems', 268.7ha of mole tile drainage is assumed.

² That is, Category A soils (and applicable standards) are defined by the presence of artificial drainage such as tile drains. See FDE Design Code of Practice (2015) at Table 1: <https://www.dairynz.co.nz/media/2793698/fde-design-standards-and-cop-2015.pdf>

CLIMATE CHANGE

18. The Applicant concurs with the summation of the law provided by Mr Mike Doesburg, Counsel assisting the Hearing Panel, as it applies to the consideration of the effects of the discharge of greenhouse gas emissions of the Application. In particular:
- (a) Greenhouse gas emissions are not a 'contaminant' that regulation 24 of the National Environmental Standards for Freshwater 2020 is concerned with. In particular, that is clear from the statutory framing of that regulation, which relates to consents for discharges into or onto land³ associated with dairy activities.
 - (b) The climate change amendments introduced through the Resource Management Amendment Act 2020 do not apply to the Application as it was submitted prior to the effective date of those amendments (30 November 2022).⁴
19. Accordingly, the previous body of RMA case law relating to greenhouse gas emissions applies, including that the assessment of an activity under s104 does not extend to the impact on climate change of the discharge to air of greenhouse gases resulting from that activity. The Supreme Court in *West Coast ENT Inc v Buller Coal Ltd* considered such a limitation was consistent with the clear legislative policy that addressing effects of activities on climate change lay outside the functions of regional and territorial authorities.⁵ The Supreme Court in *Buller Coal* also found that the direction in Section 7(i) is "*a direction to plan for the anticipated effects of climate change, not a direction to seek to limit climate change.*"⁶
20. Policy 4 of the NPSFM, which provides that "*Freshwater is managed as part of New Zealand's integrated response to climate change*", must be considered in light of the above caselaw. In any event, that policy relates to climate change in the context of the management of freshwater, so is not relevant to the emissions from the Application, which derive from the biological emissions of cows.

³ Including in circumstances that may result in the contaminant (or any other contaminant emanating as a result of natural processes from the contaminant) entering water – see Regulation 19(2)(b).

⁴ In accordance with Schedule 12, clause 26 RMA.

⁵ [2013] NZSC 87, at [172]-[173].

⁶ At [130].

21. In summary, following the decision in *Buller Coal*, the Panel should not consider the greenhouse gas emissions that may result from the Application.

IRRIGATION UNDER THE NESFM

22. During the hearing, Commissioner Sullivan queried whether Regulations 20 and 21 of the NESFM might be applicable to the Application. Those regulations relate to the irrigation of dairy farm land, but also encompass discharges of contaminants "*associated with the irrigation of a farm's dairy farm land*". 'Irrigation' is defined by the NES as meaning "*the activity of applying water to land by means of a constructed system for the purpose of assisting production of vegetation or stock on that land.*" (emphasis added)
23. While the ambiguity in these provisions is acknowledged, it is respectfully submitted that those regulations do not apply to the Application, namely because:
- (a) the irrigation of water, as it is generally understood to refer to, does not encompass the application of effluent;
 - (b) the application of effluent as proposed in the Application is not 'associated' with the irrigation of water; and
 - (c) such an interpretation is supported by the way that these activities are regulated separately in the Regional Plans – that is, the irrigation of land is regulated separately to the application of effluent to land.
24. Nevertheless, in any event, if Regulation 20 did apply, it would not materially affect the applicable planning framework. This is because the Application is already bundled as discretionary and the specific directions under Regulation 24 for discretionary activities apply equally to consents under Regulation 19 (which is triggered by the Application) and Regulation 20 (which is not considered to be triggered).

NUTRIENT LOSS

25. As described in the opening submissions and discussed at the hearing, the Application will result in a significant reduction in nutrient losses from the site. In particular:
- (a) Overseer modelling shows that the proposal is predicted to have a significant reduction in nitrogen loss (from 33 kg N/ha/y reducing to

28 kg N/ha/y) and a slight reduction in phosphorus (from 639 kg P/y to 637 kg P/y) compared to existing operations.⁷

- (b) Additional mitigation measures beyond those taken into account through the modelling provide additional confidence that there will be material reductions in nutrient loss. In respect of the Application, these measures are extensive, including:
 - (i) detention structures to allow temporary ponding and to provide for sediment to drop out of the water column;
 - (ii) sediment traps, which slow water velocity, allowing sediment to settle out of the water column; and
 - (iii) riparian planting and buffer strips beyond the buffer areas assumed in Overseer.

26. However, in her concluding statements for the Council at the hearing, Ms McRae continued to recommend that the application is declined, in particular because (in her view) there are "*minimal mitigations in relation to nitrogen*" and "*winter barns will not reduce contaminant discharges in summer*". The opening submissions were critical of Ms McRae's s42A report for failing to provide reasoning for her conclusions or to identify the evidence she was relying on. Ms McRae's concluding statements at the hearing suffer from the same issues. The expert evidence of Mr Lowe and Mr Edkins on nitrogen loss should be preferred to that of Ms McRae.

27. At the hearing, Mr Edkins (for the Council) stated that:

- (a) "*For most pastoral farms similar to this, Overseer correctly accounts for most [forms of nitrogen loss]... It can be trusted... you can have some degree of faith in that.*"
- (b) "*Mr Lowe conducted some sensitivity analysis... and it didn't affect the outcomes, so therefore you can have a fair degree of confidence in the margin between the two scenarios.*"
- (c) "*At the underlying level, these two scenarios can be compared reasonably effectively, I consider. Most limitations of Overseer aren't*

⁷ Joint evidence statement of Mr Edkins and Mr Lowe, 29 June 2023, at 4.2.

present in this situation, give or take the overland flow issue." (referring to overland flow in individual intense rainfall events)

28. The 5kg/ha reduction in nitrogen loss as a result of the proposal as modelled by Overseer is brought about by a carefully designed management system which includes the use of wintering barns, low stocking rates, and the use of cull cows brought from off-site rather than replacements reared on-site.

CONDITIONS

29. The Applicant understood the direction from the Panel at the close of the hearing day was that the Applicant should circulate an updated set of proposed conditions for comment by the Council and Te Ao Mārama Inc (on behalf of Waihōpai Rūnaka), to be confined to those condition matters discussed at the hearing and any changes proposed by the Applicant.
30. The process that followed differed from that, beginning with Ms McRae circulating an updated set of amended conditions on behalf of the Council. As that set of conditions was largely acceptable, the Applicant decided to work with those and prepared a table setting out the Applicant's proposed changes to those conditions along with the Applicant's reasoning for those changes. This is shown in the first three columns of the tables attached as **Appendix A**. The Applicant has adopted a number of Ms McRae's post hearing suggestions and notes that there was a high level of agreement on many of those conditions.
31. That table and a set out conditions reflecting the Applicant's proposed changes, was then circulated to the Council and Te Ao Mārama Inc, seeking any final comment which could be attached the Applicant's closing submissions.
32. Both Council and Te Ao Mārama Inc have provided comments on those conditions, and along with a response from the Applicant, these are also shown in the tables in **Appendix A**.
33. The comments received from the Council also separately included further comment from Mr Hamer and Ms Badenhop, and new condition proposals (beyond those proposed by Ms McRae in her post-hearing version of those conditions).
34. The Applicant does not consider such further expert comment or newly proposed conditions from the Council to be within the scope of what can be

presented to the Panel at this stage of the hearing. Nevertheless, in the interests of time and efficiency, the comments from Mr Hamer and Ms Badenhop also appear in the tables attached as **Appendix A**.

35. A final clean set of conditions proposed by the Application is attached as **Appendix B**. The Applicant's reasoning in respect of those conditions remaining in contention (and tracked changes showing the progression of the conditions) is set out in **Appendix A**.

CONCLUSION

36. The Application (and associated proposed conditions):

- (a) will achieve the sustainable management purpose of the RMA;
- (b) is consistent with the objectives and policies of the relevant planning documents; and
- (c) will appropriately avoid, remedy, or mitigate adverse effects on the environment; and

for these reasons, the Application should be granted.

DATED this 31st day of July 2023



Mark Mulholland

Counsel for the Applicant

Appendix A – Post-hearing condition changes and comments from the parties

(overleaf)

**Appendix B – Applicant's proposed conditions
(overleaf)**