

# OTAGO REGIONAL COUNCIL

## Report and Decision of the Hearing Commissioners

Hearing held at the Mercure Queenstown Resort, Queenstown

between 4 November – 7 November 2019

Independent Hearings Commissioners Dr Rob Lieffering (Chair), Ms Sharon McGarry, and Mr Philip Milne were appointed by the Otago Regional Council to hear and determine Queenstown Lakes District Council's application to discharge untreated wastewater to various receiving environments via overflows from wastewater infrastructure throughout the Queenstown Lakes District. The application, made in accordance with the Resource Management Act 1991, was lodged with the Otago Regional Council on 5 April 2019 and referenced as Application No. RM19.051.

## Representations and Appearances

### Applicant:

**Ms J. Campbell and Ms J. Beresford**, Counsel, Meredith Connell

**Mr P. Hansby**, General Manager Property and Infrastructure, Queenstown Lakes District Council

**Mr U. Glasner**, Chief Engineer, Queenstown Lakes District Council

**Mr M. Baker**, Asset Manager – Three Waters, Strategy & Asset Planning, Queenstown Lakes District Council

**Ms E. Moogan**, Infrastructure and Operations Manager, Queenstown Lakes District Council

**Mr A. Collins**, General Manager Urban Development, Harrison Grierson Consultants Limited

**Dr D. Olsen**, Environmental Scientist, Ryder Environmental Limited

**Dr N. Hudson**, Environmental Chemist, National Institute of Water and Atmospheric Research Limited

**Submitters:**

**Central Otago District Council:**

**Ms S. Nicol**, Planning Consultant, Southern Land and Water Planning Limited

**Mr Q. Adams**, Three Waters Manager, Central Otago District Council

**Te Rūnanga o Oraka Aparima, Hokonui Rūnanga, and Waihopai Rūnaka; Kāti Huirapa Rūnaka ki Puketeraki and Te Rūnanga o Ōtākou; and Te Rūnanga O Ngāi Tahu**

**Ms S. McIntyre**, Planning Consultant, Schema Limited

**Mr D. Higgins**

**Otago Fish & Game Council**

**Ms H. Trotter**, Fish and Game Officer

**Mr N. Paragreen**, Environmental Officer

**Mrs J. Stevenson**

**Ms T. Fraser and Mr B. Farmer**, for **Sustainable Glenorchy**

**Mr S. Skilton**

**Ms S. Scott**

**Mr N. Loughnan**

**Ms D. Townsend**, for **The Lake Hayes Estate and Shotover Country Community Association**

**Mr R. King**, for **Kelvin Peninsula Community Association**

**Ms C. Walthew**

**Mr R. Grubb**

**Mr J. Bohm**

**Ms N. Latham**

**Ms N. Gladding**, for **Aotearoa Water Action Incorporated**

**Mr D. Shepherd**

**Mr M. Farrier**

**Ms F Clements** (via Skype), for **Sustainable Dunedin City**

**Mr S. Darling**, supported by **Mr P. Vernon**, for **Ettrick Fruit Growers Association**

**Mr P. Hunt**, Otago Federated Farmers

**Mr A. Flett**

**Mr B. Farmer**, including **Dr P. Chapman**

**Mr J. Dicey**

**Mr W. Kent**, for **Ms R. Hamilton** and himself

**Mr G. Eckhoff**

**Mr J. Glover**

**Ms K. Hoera**, for **Guardians of Lake Dunstan**

**Dr D. Robertson**, for **Guardians of Lake Wanaka, Guardians of Lake Hawea, and Upper Clutha Lakes Trust Board**

**Otago Regional Council:**

**Mr D. Randall**, Counsel, Buddle Findlay

**Mr P. Christophers**, Principal Consents Officer, Otago Regional Council

**Dr M. Greer**, Senior Freshwater Scientist, Aquanet Consulting Limited

**Ms K. Bagnall and Ms R. Jackson**, Hearing Administrators

**In attendance:**

**Ms J. Gilroy**, Manager Consents, Otago Regional Council

**Mr R. Saunders**, General Manager Regulatory, Otago Regional Council

## BACKGROUND AND PROCEDURAL MATTERS

1. This is the report and decision of independent Hearings Commissioners. Dr Rob Lieffering (Chair), Ms Sharon McGarry, and Mr Philip Milne were appointed by the Otago Regional Council (**the ORC**) to hear and decide the application for resource consent lodged by the Queenstown Lakes District Council (**the Applicant**) to discharge untreated wastewater to various receiving environments via overflows from wastewater infrastructure throughout the Queenstown Lakes District (hereafter referred to as **overflows**).
2. The Applicant operates five wastewater schemes throughout the Queenstown Lakes District which involve conveying wastewater from private, commercial, and industrial properties through piped reticulation systems to wastewater treatment plants. Wastewater can overflow from the reticulation system due to a variety of causes including obstructions (blockages), pipe breakages, mechanical malfunctions, or during wet weather. These overflows occur either via manholes, breakage points, or at pump stations and, once discharged, they can enter a variety of receiving waterbodies including rivers, streams, and lakes via overland flow and/or the stormwater system.
3. Under section 15 of the Resource Management Act 1991 (**RMA**) no person may discharge a contaminant to water or discharge a contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water unless the discharge is expressly allowed by a national environmental standard or other regulations, a rule in a regional plan, or a resource consent. The Applicant does not hold a resource consent for such discharges and the discharge of untreated wastewater into water or onto land in circumstances that it may enter into water is not permitted under the ORC's Regional Plan: Water (**RPW**) and therefore requires a resource consent, namely a discharge permit, under the RMA.
4. The hearing commenced at 9:00 am on Monday 4 November 2019. Evidence was heard over four days and the hearing was adjourned at 6:15 pm on Thursday 7 November 2019, pending the Applicant's written Right of Reply. The hearing was held at the Mercure Queenstown Resort, Queenstown.
5. Prior to the hearing, a report was produced pursuant to section 42A of the RMA (**the Staff Report**) by the ORC's Reporting Officer<sup>1</sup>, Mr Christophers, a Principal Consents Planner employed by the ORC.
6. The Staff Report provided an analysis of the matters that we must consider under the RMA in making our decision. The Staff Report also included a recommendation that the

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<sup>1</sup> The Staff Report was co-authored by Mr Horrell, however we were advised that Mr Horrell no longer works for the ORC. The Staff Report included attached evidence from Dr Greer, however Dr Greer was not strictly an author of the Staff Report.

- application should be refused<sup>2</sup>. After hearing the evidence presented during the hearing, Mr Christophers advised us that his position remained unchanged and that the application should be refused.
7. Prior to the hearing we issued three Minutes addressing: 1) procedural matters and directions to ensure a smooth hearing process; 2) a change to the 'normal' order of business; and 3) a request from the Applicant to delay the start of the hearing by one day.
  8. The Staff Report, the Applicant's briefs of evidence, and expert evidence from submitters were pre-circulated to us and the parties prior to the hearing in accordance with the requirements of section 103B of the RMA. The application documentation, submissions, Staff Report, and pre-circulated evidence were pre-read by us and we directed that this material be 'taken as read' during the hearing.<sup>3</sup>
  9. During the hearing the Applicant provided a number of iterations of its proposed conditions (referred to by us as a 'running dog'). Such an iterative process of revising proposed conditions is common in such proceedings. During the hearing a number of submitters requested the opportunity to review, and provide comments on, the Applicant's latest set of proposed conditions. We considered these requests to be appropriate and after the adjournment of the hearing we issued Minute #4 which outlined the timetable for the provision of comments on the Applicant's latest set of proposed conditions and the Applicant's written Right of Reply.
  10. On day four of the hearing we were advised that Dr Robertson, for the Guardians of Lake Wanaka, Guardians of Lake Hawea, and the Upper Clutha Lakes Trust Board, was in attendance. He advised us he had not been notified of the hearing despite having indicated he wished to be heard. He had also not been provided with the pre-circulated evidence. The ORC reviewed its files and confirmed it had incorrectly identified Dr Robertson as a 'not heard' submitter, which explained why he had not been notified of the hearing or received the pre-circulated evidence. We provided Dr Robertson an opportunity to speak to his submission – he was appreciative of being provided with this opportunity despite not really being fully prepared to speak. We thank Dr Robertson for being so understanding in terms of this procedural error.
  11. During the hearing Commissioner Milne advised the hearing that he was currently acting for a local authority applicant in a case which involved the interpretation of the term 'temporary' as it relates to section 107 of the RMA – this being a matter which was the subject of opposing legal submissions on behalf of the Applicant and the ORC. Although there was no strict conflict of interest, the Chair advised the parties that when the Panel was in

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<sup>2</sup> The Staff Report used the term 'decline', however section 104B of the RMA uses the term 'refuse'.

<sup>3</sup> As provided for by section 41C(1)(b) of the RMA.

deliberations that Commissioner Milne would not be involved in any determinations or findings in respect of the application in terms of the relevance of the term 'temporary' under section 107 of the RMA. Mr Randall, for the ORC, advised us that he had no issues with our suggested approach. Ms Campbell, for the Applicant, stated that she would need to discuss the matter with her client, however we heard nothing further from her on this matter and have therefore assumed the Applicant has no issues with our suggested management of Commissioner Milne's potential conflict in this regard.

12. We undertook a site visit on Friday 8 November 2019. During our site visit we noted a number of matters which we wished to have clarified by the Applicant. We issued Minute #5 and requested these matters be addressed in the Applicant's written Right of Reply.
13. We received the Applicant's revised set of conditions on 15 November 2019, comments from submitters<sup>4</sup> on those conditions on 22 November 2019, and comments from Mr Christophers on those conditions on 29 November 2019.
14. We received the Applicant's written Right of Reply on 6 December 2019, which included its final set of proposed conditions. Having satisfied ourselves that we had sufficient information to make a decision, we formally closed the hearing on 9 December 2019.
15. We would like to thank Ms Bagnall and Ms Jackson for the excellent assistance they provided throughout the hearing process. We would also like to acknowledge the submitters who spoke to their submissions, many of whom had to travel to Queenstown to appear in front of us. We would also like to thank those submitters who agreed to our rescheduling of their appearances during the hearing.

## THE APPLICATION

16. The nature of the activity for which a discharge permit is sought was described in the application documents, the Staff Report, and the Applicant's evidence and we do not repeat that information here. In summary, a discharge permit has been applied for to discharge untreated wastewater into water and onto land in circumstances that it may enter into water (groundwater and surface water) as a result of overflows from any point in the wastewater networks throughout the Queenstown Lakes District.<sup>5</sup> Key points regarding the application are:

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<sup>4</sup> Comments were received from the Otago Fish and Game Council, Mr Shepherd, Mr Glover, Mr Farrier, Mr Kent, and Ms McIntyre (on behalf of Te Rūnanga o Oraka Aparima, Hokonui Rūnanga, and Waihopai Rūnaka; Kāti Huirapa Rūnaka ki Puketeraki and Te Rūnanga o Ōtākou; and Te Rūnanga O Ngāi Tahu). Comments were also received from Dr Robertson (for the Guardians of Lake Wanaka, Guardians of Lake Hawea, and the Upper Clutha Lakes Trust Board), however these were not accepted as they were one week late and no request was made beforehand for late submission of such comments.

<sup>5</sup> Commonly referred to as a 'global network consent'.

- The wastewater networks covered by the application are the existing networks of Queenstown, Wanaka, Lake Hawea, Luggate, and Cardrona. In addition, the application seeks authorisation to discharge overflows from future networks which either do not exist or are not currently owned and/or operated by the Applicant but could be in the future, these being limited to<sup>6</sup>:
  - Queenstown;
  - Wanaka;
  - Kingston;
  - Glenorchy;
  - Cardrona;
  - Hawea Flat;
  - Glendhu Bay;
  - Luggate;
  - Jacks Point and Village;
  - Hanley Farms;
  - Coneburn (industrial zoned area and special housing area); and
  - Millbrook Resort area.
- Overflows can occur due to obstructions (blockages), pipe breakages, mechanical malfunctions, or during wet weather. Most of the obstructions and breakages are as a result of third parties and overflows as a result of wet weather are uncommon;
- Overflows have occurred in the past and the Applicant has been prosecuted by the ORC on two occasions for such overflows;
- No overflows occur within the Applicant's networks a result of capacity issues;
- Overflows are inevitable but unpredictable and only a small percentage of overflows reach water;
- The overflows have the potential to enter into water directly via overland flow or via overland flow to the stormwater system which then discharges to waterbodies;

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<sup>6</sup> The application initially sought an unlimited number of future areas, however during the hearing the Applicant amended the application so that it would be restricted to those listed here.

- Because overflows can occur anywhere within a network there are a wide range of potential receiving waterbodies, namely large lakes, medium lakes, streams, small-medium rivers, medium-large rivers, and very large rivers;
  - The potential adverse effects within any receiving waterbody depends on the rate of untreated wastewater discharged relative to the available dilution within the receiving waterbody;
  - Potential adverse effects can result in respect of:
    - Ecological effects;
    - Public health (including drinking water and health risk to recreational water users);
    - Amenity effects;
    - Cultural effects; and
    - Cumulative effects.
  - A qualitative risk assessment was undertaken in respect of ecological effects. Thirty-five existing pump stations or engineered overflows and 12 possible future overflow points were assessed in respect of the probability of untreated wastewater entering nearby waterbodies and the resultant ecological risk associated with any overflow from each site;
  - Implementing appropriate response plans is considered by the Applicant to be the best approach to minimise public health risks and amenity effects;
  - Cumulative effects were assessed to be insignificant; and
  - The Applicant considers the overflows to be generally consistent with, and not contrary to, the relevant statutory planning documents.
17. The application initially sought a 35-year duration. However, during the course of the hearing the Applicant proposed a reduced term of consent and in its written Right of Reply it confirmed it was seeking a duration of '*at least 20 years*'.
18. We discuss the Applicant's proposed conditions of consent in various parts of this decision, however consider it appropriate here to present the Applicant's final position in respect of defining the 'scope' of the overflows that would be authorised by consent if granted. The application, as lodged, did not provide any restrictions on the location, frequency, duration, volume, quality, or effects for the overflows – that is, it sought to authorise all overflows from existing and future networks under the control of the Applicant. However, during the hearing the Applicant presented us with several iterations of conditions which limited the types of

overflows which would not be authorised (referred to by the Applicant as ‘Unauthorised Discharges’) and, conversely, those overflows that the consent would authorise.

19. In its final set of proposed conditions, the Applicant excluded the following overflows by way of a section entitled ‘Unauthorised Discharges’ preceding the conditions:

*An overflow is not authorised under this consent if the overflow reaches any surface water body and any of the following circumstances or combination of circumstances apply:*

- a) *The discharge reached water for 24 hours or more; or*
- b) *The discharge, after reasonable mixing (\*see note 1 below), resulted in:*
  - (i) one-day minimum dissolved oxygen concentration of less than 4mg/L; or*
  - (ii) ammoniacal nitrogen concentration of more than 2.2mg/L (adjusted for pH and temperature); or*
  - (iii) any significant adverse effects on aquatic life or public health; or*
- c) *The Consent Holder’s response did not result in the ceasing of the discharge to water within 6 hours of the Consent Holder being notified (or otherwise first becoming aware of) the discharge; or*
- d) *The overflow was caused by the action or inaction of the Consent Holder as a result of:*
  - (i) a lack of maintenance of the wastewater network; or*
  - (ii) a lack of investment in the capacity of the wastewater network.*

## REGIONAL PLAN RULES AFFECTED

20. The discharge of untreated wastewater into water and onto land in circumstances that it may enter into water is classified under the RPW as follows:

Activity	Classification
<ul style="list-style-type: none"> <li>▪ The discharge of human wastewater to water and to land in circumstances that it may enter water.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Classified by Rule 12.A.2.1 as a <b>Discretionary Activity</b>.</li> </ul>
<ul style="list-style-type: none"> <li>▪ The discharge of hazardous substances (from industrial sites) to water and to land in circumstances that it may enter water.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Classified by Rule 12.B.4.2 as a <b>Discretionary Activity</b>.</li> </ul>

Activity	Classification
▪ The discharge of any other contaminant (stormwater and other associated waste) to water and to land in circumstances that it may enter water.	▪ Classified by Rule 12.C.3.2 as a <b>Discretionary Activity</b> .

21. Mr Christophers advised us that the discharge of hazardous substances and other contaminants form a small portion of the overflows. He was of the view that the application, as a whole, should be assessed as a **discretionary** activity. Mr Collins (a planner engaged by the Applicant) agreed with Mr Christophers's assessment on the relevant rules and the overall discretionary activity status.

## NOTIFICATION AND SUBMISSIONS

22. The application was publicly notified on 15 June 2019. The Staff Report stated that 193 submissions were received during the submission period and a further seven submissions were received following the close of submissions. We were advised the ORC had accepted the late submissions with that decision having been made under delegated authority prior to our appointments. A table was appended to the Staff Report which summarised the submissions received. We were advised that the submission of Mr Michael Laws was subsequently withdrawn, meaning there were 199 submissions for us to consider.
23. Two of the submissions were in support, one was neutral, and 196 were opposed to the application. We were provided with, and have read copies of, all of the submissions received and consider these were accurately summarised in the Staff Report. We adopt that summary for the purposes of our decision, as provided for by section 113(3)(b) of the RMA. We discuss the key concerns and objections later in our report as many of them relate to the matters which were in contention and had very similar themes.

## CONSIDERATION OF THE APPLICATION

24. In assessing the application, we have considered the application documentation, the Staff Report, all submissions received, the evidence, and the legal submissions provided during the hearing process.
25. We record that the findings we have made and the decision we have arrived at are based on all the evidence before us and our consideration of that material within the context of the statutory framework.

## Statutory Considerations

26. Section 104(1) of the RMA states that when considering an application for resource consent and any submissions received, we must, “*subject to Part 2*” of the RMA, have regard to:
- (a) *any actual and potential effects on the environment of allowing the activity; and*
  - (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; 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.*
27. In terms of section 104(1)(b) of the RMA, we were advised that the relevant statutory planning documents for this application are:
- The operative Regional Policy Statement for Otago (**RPS**);
  - The partially operate RPS (**PORPS**);
  - The RPW;
  - The National Policy Statement for Freshwater Management 2014, amended February 2017 (**Freshwater NPS**);
  - The National Policy Statement for Urban Development Capacity 2016 (**Urban Development NPS**); and
  - The National Environmental Standard for Drinking Water Supplies (**Drinking Water NES**).
28. In terms of section 104(1)(c) of the RMA, Mr Christophers, Mr Collins, and Ms McIntyre (a planner engaged by Te Rūnanga o Oraka Aparima, Hokonui Rūnanga, and Waihopai Rūnaka; Kāti Huirapa Rūnaka ki Puketeraki and Te Rūnanga o Ōtākou; and Te Rūnanga O

Ngāi Tahu) all agreed that the following documents were also relevant 'other matters' for us to consider for this application:

- The Water Conservation (Kawarau) Order 1997 (**WCO**);
  - The Lake Wanaka Preservation Act 1973 (**LWPA**);
  - The Ngāi Tahu ki Murihiku Natural Resource and Environmental Iwi Management Plan 2008 – Te Tangi a Tauira (**Te Tangi**); and
  - The Kāi Tahu ki Otago Natural Resource Management Plan (**NRMP**).
29. Ms McIntyre considered the Ngāi Tahu Freshwater Policy 1991 (**NTFP**) to also be relevant under section 104(1)(c) of the RMA.
30. Section 104(2) of the RMA states that, when forming an opinion for the purposes of section 104(1)(a), we *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 the application of the 'permitted baseline'. We heard no evidence regarding whether this section had any relevance to this application and, as such, we assume it does not.
31. Section 104(3)(a)(ii) states that we must not have regard to the effect on any person who has given written approval to the application. No written approvals were provided so this section is not relevant to our considerations.
32. Section 104B of the RMA applies in this case as we are dealing with discretionary activities. This section states that we may grant or refuse the application sought and, if granted, we may impose conditions under section 108 of the RMA.
33. Section 105 of the RMA states that, when considering section 15 RMA matters (discharges), we must, in addition to section 104(1), have regard to:
- (a) *The nature of the discharge and the sensitivity of the receiving environment to adverse effects; and*
  - (b) *The applicant's reason for the proposed choice; and*
  - (c) *Any possible alternative methods of discharge, including discharge to any other receiving environment.*

34. Section 107(1) of the RMA states that we are prevented from a discharge permit allowing any discharge into a receiving environment which would, after reasonable mixing, give rise to all or any of the following effects, unless the exceptions specified in section 107(2) apply<sup>7</sup>:
- (c) *The production of any conspicuous oil or grease films, scums or foams, or floatable or suspended material:*
  - (d) *Any conspicuous change in the colour or visual clarity:*
  - (e) *Any emission of objectionable odour:*
  - (f) *The rendering of fresh water unsuitable for consumption by farm animals:*
  - (g) *Any significant adverse effects on aquatic life.*
35. Section 217 of the RMA is relevant for our consideration because an operative WCO applies to some of the receiving waterbodies. Section 217(2) of the RMA states:
- (2) *Where a water conservation order is operative, the relevant consent authority—*
    - (a) *shall not grant a water permit, coastal permit, or discharge permit if the grant of that permit would be contrary to any restriction or prohibition or any other provision of the order:*
    - (b) *shall not grant a water permit, a coastal permit, or a discharge permit to discharge water or contaminants into water, unless the grant of any such permit or the combined effect of the grant of any such permit and of existing water permits and discharge permits and existing lawful discharges into the water or taking, use, damming, or diversion of the water is such that the provisions of the water conservation order can remain without change or variation:*
    - (c) *shall, in granting any water permit, coastal permit, or discharge permit to discharge water or contaminants into water, impose such conditions as are necessary to ensure that the provisions of the water conservation order are maintained.*
36. Our assessment of the application considers each of these sections of the RMA.

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<sup>7</sup> The exceptions being: (a) that exceptional circumstances justify the granting of the permit; (b) that the discharge is of a temporary nature; or (c) that the discharge is associated with necessary maintenance work – and that it is consistent with the purpose of this Act to do so.

## **PRINCIPAL ISSUES IN CONTENTION**

37. Section 113(1)(ac) of the RMA requires our decision to state the principal issues that were in contention and section 113(1)(ae) requires us to state our findings on these issues.
38. We consider the principal issues that were in contention in this case are:
  - (a) The actual or potential effects on the environment of the overflows that are sought to be authorised;
  - (b) The adequacy of the Applicant's proposed measures to avoid or minimise overflows and to avoid, remedy, or mitigate adverse effects on the environment;
  - (c) The potential availability of alternative methods of discharge;
  - (d) The restrictions on the grant of consent under section 107 of the RMA; and
  - (e) The restrictions on the grant of consent under section 217 of the RMA (which relates to the WCO).
39. Accordingly, we focus our decision and make our findings on these matters in the remainder of this decision.

## **SECTION 104(1)(a) – ACTUAL AND POTENTIAL EFFECTS ON THE ENVIRONMENT**

40. The Staff Report identified several key issues associated with the application, many of which related to the '*incompleteness or unavailability*' and '*lack*' of information required to assess the likely adverse effects on the environment, consistency with relevant statutory instruments, and the restrictions outlined in section 107 of the RMA. The Staff Report stated '*The effects of the activity have not been quantified and, based on the limited information provided, the application is overwhelmingly inconsistent with all relevant planning documents, including Section 107 and Part 2 of the Resource Management Act 1991*'.
41. In his Statement of Reply, Mr Christophers clarified to us that it was the '*lack of detail regarding the specific effect of the discharge*' which he considered to be the key issue with the application. In particular, he considered the lack of detail on the location of the discharge points, the maximum volumes of untreated wastewater proposed to be discharged, and the frequency of discharge at each location were key issues with the application.
42. Mr Randall stated a consent application must include adequate information to enable us to understand the effects of allowing the proposed activity. He considered that the Applicant had not provided us with sufficient detail in this case, despite the further information it had provided by way of response to the section 92 RMA requests made by the ORC and in the

evidence provided to us. Mr Randall pointed us to the following information gaps that remained:

- The location of potential discharges and the receiving environment for each;
- The frequency of discharges from any one point within the network;
- The duration of each discharge;
- The quantity of wastewater discharged during each overflow incident; and
- The quality of the discharges.

43. Mr Randall stated the above information gaps mean that we have a difficult task in determining likely effects from the information available to us. He submitted, that the overflows pose a very real risk of:

- Giving rise to significant adverse environmental effects; and
- Not meeting the restrictions in section 107 of the RMA or the WCO, even if an overflow that reaches water is responded to and resolved by the Applicant within the timeframes it proposes.

44. The Staff Report identified that section 104(6) of the RMA provides discretion to a consent authority to decline an application on the grounds that there is 'inadequate' information to determine the application. The Staff Report stated the use of this section should be reserved for instances where an applicant has not provided all reasonable information. Mr Christophers considered the Applicant had provided all reasonable information to enable an assessment to be made, but was of the view that the information did not provide sufficient evidence to quantify the effects of the overflows

45. Ms Campbell stated *'In my submission, the data and evidence presented to assist you in evaluating the potential effects of this application is unusually good'* and *'Because the discharges are already occurring, there is data from those existing discharges and there are also the results of broader environmental monitoring, which show the impact of those discharges cumulatively with all other events occurring in these catchments'*. She also stated *'Put another way, the potential future effects of this application are far more certain than is ordinarily the case in applications that have not yet commenced'*.

46. Mr Glasner (for the Applicant) advised us that the overflows are inevitable and unpredictable. He stated that such overflows can occur due to obstructions (e.g. from fats, oil, grease, foreign objects, and tree roots), breakages, and mechanical malfunctions. He highlighted that there were currently no overflows as a result of insufficient capacity within the network. He advised us that the Applicant has separated wastewater and stormwater networks and

there had previously been no overflows related to inflow and infiltration from either stormwater or groundwater entering the network.

47. Mr Hansby (for the Applicant) advised us that the wastewater reticulation network had been deliberately designed to incorporate 'fuses', which were typically manholes or pump stations, whereby wastewater can exit the system. He noted that without these fuses there was a risk that wastewater would back up behind any blockage and discharge within private property, either at gully traps or within dwellings. He advised us that overflows as a result of wet weather events were 'uncommon'.
48. The application stated "*Overflows typically occur at manholes (most common) and pump stations, and can flow overland directly into waterbodies, or overland into catch pits and into the stormwater network to the final discharge point of the discharge, being a waterbody. This is reflective of all wastewater networks and illustrates that overflows cannot be entirely prevented, or their locations known prior to their occurrence*".
49. Mr Baker (for the Applicant) stated that the causes of previous overflows were mostly due to actions of third parties and that there was no clear pattern of where the overflows occur. He advised us that the majority of overflows are onto land, with only a small percentage being to water.
50. Messrs Hansby, Baker, and Glasner all advised us that it was not possible to know where or when the overflows may occur, how long any overflow may occur, or the volume of untreated wastewater that might be discharged. Dr Olsen (an environmental scientist engaged by the Applicant) stated that all these unknowns made "*...the typical approach to assessing the effects difficult*". Instead, he assessed the risk of adverse ecological effects based on the risk of overflows entering water and the actual and potential effect(s) within the receiving waterbodies. His risk assessment was based on 35 identified existing sites, most of which were pump stations, which had the potential to result in overflows entering water, as well as 12 possible future sites. In answers to questions, Dr Olsen advised that he was not involved in selecting these sites for the risk assessment. Mr Hansby advised us that overflows from these identified sites had not typically occurred, but that the sites were used for the assessment as they represented low points in the network that were in close proximity to waterbodies.
51. As discussed earlier in this decision<sup>8</sup>, the Applicant amended its proposed conditions to specify which types of overflows would not be authorised by the consent if granted (all other overflows would be authorised).
52. Dr Olsen advised us that his initial ecological risk assessment was not based on any specific discharge volume or rate, but that it had assumed a relatively long duration of discharge of

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<sup>8</sup> At paragraph 19 of this decision.

around 24 hours. His risk assessment found that several of the identified sites assessed had 'moderate to high' risks of ecological effects, and others where there were 'moderate, but high locally' risks.

53. In answers to questions, Dr Olsen confirmed that his risk assessment had not specifically considered acute toxicity risks associated with ammonia that would be present in the untreated wastewater discharges. He tabled a corrected risk assessment table including ammonia toxicity in his Statement of Supplementary Evidence, which showed that three identified existing sites and two proposed sites were assessed as 'high' risk of ecological effects.
54. Dr Olsen concluded that the overflows could result in some short-lived ecological effects in the immediate vicinity of any discharge, but that the overflows would not result in significant adverse ecological effects after 'full mixing'; and that the water quality requirements of the WCO would be maintained. He subsequently requested that his evidence be changed so that the term 'full mixing' was replaced by 'reasonable mixing'.
55. In answers to questions, Dr Olsen was of the view that the ecological risk at most identified sites would in fact be 'high' if there was a high rate of discharge of untreated wastewater for the duration limit now being proposed by the Applicant, even after reasonable mixing.
56. No information was provided in the application on what constituted an appropriate zone of 'reasonable mixing'. The first use of this term was in Mr Collins's recommended conditions, however it was not defined. There were other conditions recommended by Mr Collins (requiring various surveys to be undertaken), which referred to a 50 metre (**m**) distance downstream of any discharge point.
57. Ms Campbell, in her opening legal submissions, stated '*While it is not possible to identify the zone of reasonable mixing for any future discharge in any location within the QLDC district at this point in time, it will of course be possible to determine a zone of reasonable mixing for any particular discharge that does occur. This is not something that needs to be done in advance, it is a matter of exercising judgement in relation to a particular overflow*<sup>9</sup>.
58. Dr Olsen subsequently advised us that he favoured an approach based on the physical characteristics of the receiving water and recommended specifying a mixing zone for flowing waters of seven times the wetted channel width, up to a maximum of 200 m, and a 'minimum' mixing zone of 50 m from the point of discharge for lakes.
59. The Applicant's final set of proposed conditions included the following definition of what would constitute the zone/area of reasonable mixing:

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<sup>9</sup> We commented that this approach seemed to delegate a critical matter to after the hearing and would mean that there was uncertainty as to which overflows are covered by the consent.

*Note 1: Reasonable mixing – the area of “reasonable mixing” shall be:*

1. *For rivers and artificial watercourse locations with flowing water present at all times:*
    - a) *seven times the wetted bed width at the time of the discharge up to a maximum of 200 metres downstream of the point of discharge along the longest axis of zone; and.*
    - b) *Occupies no greater than two-thirds of the wetted channel width for that location (for a braided river, the wetted channel width is the width of water in the braid receiving the discharge),*
  2. *For river and artificial watercourse locations with intermittent flows: No longer than 20 metres at times of flow.*
  3. *For lake locations: an arc with a radius of 50 metres from the point of discharge at lake water edge*
  4. *There shall be no reasonable mixing zone applicable where any discharge occurs at a location within 100 metres of a community drinking water intake.*
60. Mr Christophers advised us that the RPW provided definitions of ‘mixing zone’ and ‘reasonable mixing’, but that these definitions did not define what the length or area should be. The definition of reasonable mixing included states it is ‘...at some point between the point of discharge and the point at which the effluent is completely mixed within the receiving water’.
61. Dr Greer, for the ORC, stated that defining a mixing zone for each potentially impacted stream, at all possible points of discharge, was a ‘very large task’. He considered a generic approach should be applied for setting reasonable mixing zones for rivers and streams based on a wetted channel width factor and maximum length.
62. In response to the Applicant’s final definition of the area of reasonable mixing, Mr Christophers and Dr Greer stated:

*We support adding a definition for reasonable mixing however we believe that it is inappropriate to have one mixing zone standard for this district wide discharge permit; given the variability of discharge volumes as well as the varied outstanding values (cultural, social, recreational aesthetic, ecological ) contained by the various lakes and waterways including those with values protected by a Water Conservation Order or the Lake Wanaka Preservation Act. For example we do not believe a 50 m mixing zone in Frankton Arm of Lake Wakatipu is appropriate given the values this iconic section of Lake Wakatipu contains. As such, we consider it appropriate for site specific mixing zones to be adopted for each discharge location.*

*The mixing zone definition has been based upon the Environment Canterbury Land and Water Regional Plan mixing zone definition.*

*This requires a suitably experienced and qualified person to estimate the wetted channel width. The restriction to the discharge occupying no more than two-thirds of the wetted channel should also be included as this allows instream biota a refuge from effects such as DO caused by the discharge.*

63. Dr Hudson advised us that the risks to human health for recreational users associated with pathogenic organisms in the overflows can be assessed using a process known as Quantitative Microbial Risk Assessment (**QMRA**). He noted that to undertake a QMRA specific information is required to be available. He stated that several key data and information requirements were not available for areas in the Queenstown Lakes District, which made it impossible to accurately predict the human health risk associated with the overflows using QMRA methodology.
64. The AEE included a report prepared by Dr Hudson which presented a 'reverse' QMRA, where certain assumptions were made and determined the amount of dilution required to achieve accepted health risk thresholds. The results of this reverse QMRA indicated a potential for significant health risk arising from the discharge of untreated wastewater in the conditions assumed in each scenario modelled. In answers to questions, Dr Hudson advised us to put little weight on the outputs of the reverse QMRA due to the high level of uncertainty.
65. Dr Hudson stated that while the required information was lacking to predict risks to human health, it did not mean that possible risks could not be managed. He noted that the only way to avoid or minimise adverse human health consequences would be to eliminate or reduce exposure of humans to contaminated materials and that this was largely dependent on the adequacy of the emergency response implemented by the Applicant.
66. Dr Hudson stated the risk of infection or illness may be relatively large in some circumstances but that an appropriate response would substantially reduce the overall risk of illness. He considered the Applicant's proposed response to overflow events outlined in its draft Wastewater Overflow Response Procedure was '*fit for purpose*' and that it '*...will adequately protect recreational water users, consumers of potable water, as well as communities considerable distances from the likely discharge sites*'. We note the Wastewater Overflow Response Procedure was subsequently renamed in the proposed conditions as the Wastewater Overflow Response Management Plan (**WORMP**).
67. The Applicant acknowledged that overflows could also result in adverse amenity effects within the receiving waterbodies, including odour and visual effects and other reductions in amenity values including public perceptions. The AEE considered the odour effects were likely to be short-term and localised, a point which Mr Christophers agreed with.

68. In terms of visual effects, the Applicant acknowledged that these effects could not be avoided but that the implementation of the WORMP would mitigate such effects so that they would be more than minor but not significant.
69. Dr Robertson, for the Guardians of Lake Wanaka, Guardians of Lake Hawea, and the Upper Clutha Lakes Trust Board, stated the discharges carry significant risks for water quality, with consequential human health risks and potential environmental/ecosystem impacts that would be more than minor.
70. Ms Trotter, for the Otago Fish and Game Council, outlined the highly significant sports fish values found in various waterbodies in the district. Mr Paragreen, also for the Otago Fish and Game Council, stated the overflows could result in significant adverse effects on the ecological and recreational values in the district.
71. Of the submitters we heard from during the hearing, Mrs Stevenson, Ms Fraser and Mr Farmer (for Sustainable Glenorchy and Mr Farmer also for himself), Mr Skelton, Ms Scott, Mr Loughnan, Ms Townsend (for The Lake Hayes Estate and Shotover Country Community Association), Mr R. King (for Kelvin Peninsula Community Association), Ms Walthew, Mr Grubb, Ms Latham, Ms Gladding (for Aotearoa Water Action Incorporated), Mr Shepherd, Mr Farrier, Ms Clements (for Sustainable Dunedin City), Mr Flett, Mr Dicey, Mr Eckhoff, Ms Hoera (for Guardians of Lake Dunstan), and Mr Darling (for Ettrick Fruit Growers Association) all raised concerns regarding the overflows and how they could result in actual and potential adverse effects on the environment, amenity values, and public health. The concerns raised related not only to the immediate receiving environments, but also downstream effects, including as downstream as Lake Dunstan. Many of these submissions highlighted the resultant negative perception that such overflows create within an area which is one of New Zealand's foremost tourist areas. Many of the other written submissions raised similar concerns.
72. Mr Hunt, for Otago Federated Farmers, expressed concern about the disparity between how urban and rural wastewater is treated, with there being a notable leniency towards urban discharges. Mr Flett stated that the Applicant should be treated like any farmer and prosecuted for effluent discharges or spills. Mr Kent also stated that the Applicant should be dealt with no differently to the rural section and he highlighted a number of cases where farmers had been prosecuted for discharging animal effluent into waterbodies. The overall message from these three submitters was that the rules need to be applied equally and fairly between rural and urban dischargers – *'one rule for all'*.
73. The application acknowledged the overflows could potentially affect municipal and private drinking water supplies. The ORC requested further information from the Applicant on the potential effects of the overflows on drinking water supplies. The response provided confirmed there are 10 community water supplies (consisting of 13 intake sites across the

district) that are managed in accordance with the New Zealand Drinking Water Standards and the Health Act 1956. The Applicant acknowledged that individuals may be accessing water privately for potable supply throughout the district. For both the municipal and private water supplies, the Applicant proposes to notify all supply operators/owners if an overflow occurs that may have a 'significant adverse effect' on any water supply. The Applicant stated this notification would involve placing notices in public areas or door knocking and leaving a notice; or in some cases providing an alternative drinking water source. Overall, the Applicant considered the likelihood of an overflow significantly adversely affecting a private supply was low on the basis that they were likely to be located in areas where there is no wastewater reticulation system.

74. Ms Nicol and Mr Adams, for the Central Otago District Council (**CODC**), expressed concerns on how these discharges may affect the CODC's community drinking water supplies, some of which are located downstream of the potential overflow discharge points.
75. The Applicant assessed the effects of the overflows on Māori cultural values in response to a request made by the ORC under section 92 of the RMA. The response acknowledged that discharging untreated wastewater into waterbodies is unacceptable to iwi and that such discharges would have an immediate effect in terms of the values that are important to Kāi Tahu. The Applicant acknowledged that these effects could only be avoided by preventing overflows reaching water and the effect could be mitigated by reducing likelihood of overflows occurring over time and minimising the duration of any overflows which do occur.
76. Mr Higgins presented evidence on the cultural and spiritual associations that Kāi Tahu has with the lakes and rivers into which the overflows can flow. He also outlined that the impact of the overflows on cultural values, beliefs, and uses. Mr Higgins stated any discharge of human waste to any water is offensive, but that discharges to Statutory Acknowledgement areas (Lake Hawea, Lake Wakatipu, Lake Wanaka, and the Clutha River/Mata-au) is particularly offensive, as these waters have the highest level of purity. He stated that such discharges alter and destroy mahika kai sites and that access to these sites would be restricted and use of these sites would diminish. He stated that the overflows could also significantly negatively impact on the use of both traditional and non-traditional nohoanga.
77. Ms McIntyre stated the Applicant's assessment did not include any reference to effects on the cultural values that have been documented as Statutory Acknowledgements and nohoanga in Schedule 1D of the RPW and in the Cultural Values Statement (**CVS**) that was produced.
78. Section 3 of the RMA defines 'effect' as including both positive and adverse effects, and under section 104(1)(a) of the RMA we must consider whether there will be any positive effects on the environment. Mr Collins stated that he did not consider that the application, in itself, would lead to positive effects on the environment. He stated the benefits of granting

consent were more to do with providing a more robust and transparent framework for the reduction of overflows and adverse effects over time.

79. Ms Campbell referred to Mr Collins's evidence and stated that it '*...details the significant environmental benefits of the proposed approach in conditions that would occur in addition to the status quo approach*'. She stated it was appropriate to evaluate all matters which related to effects, including any benefits from the activity. Ms Campbell stated in this case the benefits to the Queenstown Lakes community of having a properly operating reticulated wastewater network were '*...easily taken for granted but cannot be overstated*'. She stated '*...the positive effect of enabling QLDC's wastewater network to continue to provide these benefits to the District needs to be the starting point for your assessment of effects...*'.
80. Mr Randall stated that '*...a distinctive feature in this case is that allowing the application will not, in itself, give rise to any environmental benefits, to be considered 'in the mix' with the adverse effects of the proposed discharges*'. He considered neither the AEE, nor Mr Collins's evidence supported Ms Campbell's view that enabling the wastewater network was a positive effect of allowing the application that could be taken into account.
81. Mr Randall stated that a potential benefit (positive effect) of allowing the application could be putting in place a condition regime that is likely to lead to reductions in the frequency, duration, and volumes of overflows to water from the network. He noted that we had explored with the Applicant's witnesses whether there was an opportunity to put in place conditions that might materially benefit the environment by achieving such a reduction in overflows over time. Mr Randall observed that the Applicant's witnesses had accepted that those benefits could not be guaranteed or demonstrated in a measurable way. He therefore concluded that, based on the conditions being proposed by the Applicant, we should not weigh any such benefits in our decision making.

### **Findings – Actual and Potential Effects on the Environment**

82. We find that the Applicant has not provided sufficient information to allow us to determine what the actual and potential effects of the overflows on the various receiving environments would be. We disagree with Ms Campbell that the data and evidence presented to us from the Applicant is '*unusually good*'.
83. We acknowledge the randomness of the overflows and differences in potential receiving environments makes it very difficult for that information to be provided. However, despite this, we find that the Applicant could have provided better information on the likely locations where overflows could discharge to the various receiving waterbodies, such as via manholes where untreated wastewater can flow overland directly into waterbodies, or over impervious surfaces and catch pits and into the stormwater network, with the final discharge point being into a waterbody. We consider the Applicant must know the location of the stormwater

- outlets, and that these are the most likely points where the overflows will discharge into the receiving waterbodies.
84. We consider such locations could be assessed for potential overflow concentrations and volumes to demonstrate the range and scale of likely environmental effects.
85. We find the Applicant's ecological risk assessment to be of limited value because it is based on broad or high-level considerations and only assesses a limited number of possible discharge locations and was not based on the most likely scenarios of discharge volumes at any particular location.
86. We note that the final proposed conditions do include a detailed definition of reasonable mixing that would overcome our concerns regarding uncertainty as to what constitutes the zone of area reasonable mixing. However, we find we have insufficient information to be able to be satisfied that the proposed mixing zones will in fact be "reasonable" in every situation, a point raised by Mr Christophers and Dr Greer. We find that the Applicant's definition of the zone of reasonable mixing and its application within the proposed conditions to be too simplistic given the high sensitivity of the receiving waterbodies and the large differences in the nature and characteristics of the receiving waterbodies, including their uses, values, and sensitivities. It is clear to us that the Applicant has only very recently considered how such a zone is to be established and codified in its conditions and note that there was no discussion on this matter in the AEE and the definition was only considered during the hearing process. The end result is essentially a 'one size fits all' approach which uses a formula for all flowing waterbodies and a 50 m radius arc for lakes.
87. We note that there are many matters that need to be considered in setting appropriate mixing zones, these being outlined in Policy 7.B.6 of the RPW, including (amongst other things):
- (a) The sensitivity of the receiving environment;*
  - (b) The natural and human use values, including Kāi Tahu values;*
  - (c) The natural character of the water body; and*
  - (d) The amenity values supported by the water body*
88. We were not provided with any evidence show that the proposed mixing zone(s) have taken into account these matters and that the zone(s) will provide appropriate protection for all the uses and values (in particular cultural and amenity values) of all the potential receiving waterbodies. We note that the proposed exclusions and the suggested mixing zones are only directed at ecological and public health effects.
89. We received no evidence to confirm whether a 50 m radius mixing zone for Lakes Wanaka, Hawea, and Wakatipu would be 'reasonable' or appropriate in relation to public health risks. Accordingly, we cannot be satisfied that overflows into to these highly valued and well used

lakes, for up to 24 hours, would not give rise to unacceptable adverse effect on public health outside of the proposed mixing zone. Further, we received no evidence that would allow us to conclude that the proposed 50 m mixing zone is consistent with the protections provided by the WCO.

90. We find we have insufficient information to be able to conclude that the exclusions and the proposed WORMP will adequately address the risk that overflows may have on private drinking water supplies. In this regard we are not satisfied that the Applicant's proposed response plan and notification procedures will adequately manage the risks to private water supplies that may be impacted.
91. The Applicant proposed, in its final set of proposed conditions, that the consent would authorise overflows of less than 24 hours duration and less than six hours from when the Applicant is notified (or otherwise first becomes aware of) of the discharge. However, we received no evidence as to what the scale of the volume or rate that untreated wastewater could be discharged over such periods. The only evidence in front of us, in this regard, relates to the volumes that were estimated to have been discharged in 2017 for the two overflows for which the Applicant was prosecuted. Ms Campbell stated data from the existing discharges was available and that these show the likely impact of future discharges. We are unsure of which data Ms Campbell is referring to, as the only evidence we received in respect of actual monitoring data was from the ORC in respect of the two prosecutions. We consider that those results indicate that those particular overflows had resulted in unacceptable water quality effects.
92. We find that we have insufficient information for us to be satisfied that the proposed overflow duration limitation proposed by the Applicant would avoid unacceptable significant adverse effects on contact recreation, drinking water supplies, cultural values, amenity effects, and ecological values within the receiving waterbodies.
93. In relation to ecological values, we accept that the amended exclusions and other conditions would avoid authorising discharges that would have significant adverse effects on aquatic life beyond the zone of reasonable mixing. However, we are not satisfied that the proposed reasonable mixing zones are have been justified.
94. For reasons which we will discuss later in this decision, we find that the Applicant's final set of proposed conditions, which include conditions that define which overflows are authorised and which are not authorised and the manner in which such decisions are to be made, to be insufficient. In addition to our finding earlier on the appropriateness of the proposed zone of reasonable mixing, we find that the proposed conditions are too uncertain and leave too much discretion with the Applicant (or its agent(s)) on critical matters, such as the determination of whether a 'significant adverse effect' on aquatic life or public health has occurred or not. As discussed earlier, the exclusions are directed at excluding significant

adverse effects on aquatic life and public health and do not exclude significant adverse effects on amenity and cultural values. Those values are clearly very high for most parts of the District.

95. We find that granting the application would not result in positive effects on the environment. We consider the correct comparison must be made between the proposal and the existing lawful environment. We consider any previous overflows were unlawful (with the exception of any discharges within section 330 of the RMA). We therefore find that the grant of consent would not reduce the effects of existing *lawful* discharges.
96. We agree with Mr Collins and Mr Randall that positive effects could be considered under section 104(1)(c) of the RMA, if the Applicant could show that the granting of consent would demonstrate a reduction in the frequency, duration, and volumes of overflows into water from the network. However, the Applicant is not putting forward any conditions to this effect nor is there any commitment to reducing overflows over the term of the consent. In this context, we observe that the exclusions proposed by the Applicant would limit the overflows authorised by the consent but would not provide any guarantee that reductions in discharges will occur.
97. We accept that the exclusions and the proposed management plan conditions would, in combination, be likely to result in a reduction of the frequency and duration of overflows and in particular those that reach water. However, those benefits would not derive from the granting of consent because the Applicant could, and should, take these steps irrespective of whether there is a consent in place.
98. We note that the Applicant suggests that the granting of consent would result in other positive effects (e.g. transparency, partnership, community engagement, education etc). We discuss these suggestions later in this decision (under section 104(1)(c) 'other matters' of the RMA as they are not relevant to our considerations under section 104(1)(a) of the RMA as positive effect on the environment.

## THE ADEQUACY OF THE APPLICANT'S PROPOSED MEASURES TO AVOID OR MINIMISE OVERFLOWS AND TO AVOID, REMEDY, OR MITIGATE ADVERSE EFFECTS ON THE ENVIRONMENT

99. The Applicant's final set of proposed conditions is essentially its proposed measures to "avoid, remedy or mitigate adverse effects on the environment"<sup>10</sup>. It is necessary for us to determine whether these proposed measures are sufficient.
100. The key elements of the Applicant's mitigation measures are:
- (a) The exclusion of some types of overflows by way of a "unauthorised discharges" definition clause<sup>11</sup>;
  - (b) The development of a WORMP<sup>12</sup>;
  - (c) The development of a Wastewater Education and Awareness Management Plan (**WEAMP**)<sup>13</sup>;
  - (d) The development of a Network Improvements Management Plan (**NIMP**)<sup>14</sup>;
  - (e) A review condition<sup>15</sup>; and
  - (f) Provision for an independent technical review of some matters<sup>16</sup>.

### ***The Exclusion Clause***

101. We have set out the proposed exclusion clause earlier in this decision. The clause would exclude discharges which are subsequently found to:
- (a) Have not been responded to within 6 hours of notification of the overflow; or
  - (b) Entered surface water for more than 24 hours; or
  - (c) Result in one of the listed types of effect occurring after reasonable mixing; or
  - (d) Are shown to have occurred as result of the Applicant's failure to properly invest in the network or to carry out adequate maintenance.
102. The consent would therefore authorise overflows which reach surface water and occur for up to 24 hours, unless one of the other exceptions apply. The proposed exclusion clause does not contain any limit on the volume or quality of the overflows. Accordingly,

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<sup>10</sup> Section 5 of the RMA.

<sup>11</sup> "Unauthorised discharges" clause at the commencement.

<sup>12</sup> Proposed condition 7.

<sup>13</sup> Proposed condition 11.

<sup>14</sup> Proposed condition 13.

<sup>15</sup> Proposed condition 6.

<sup>16</sup> Proposed condition 16.

notwithstanding the exclusion of some effects, there remains potential for significant adverse effects on the environment.

103. The proposed conditions do not limit the number of overflows that may occur in any one year or the frequency of overflows from the same discharge points in the network. Accordingly, while the Applicant is aiming to reduce the frequency of overflows, there is no requirement for such reductions or any requirement to avoid repetitions of overflows at 'repeat' failure points. As such, there is potential for cumulative effects on the receiving waters.
104. The proposed limitations do not include any exclusion of more sensitive discharge locations, such as the Wanaka, Queenstown, and Frankton foreshore areas, nor does it exclude discharges which are found to be avoidable<sup>17</sup>.
105. The consent would exclude discharges which are found to have '*significant adverse effects*' on aquatic life and/or on public health, but only if those effects are proven (by the ORC) to have occurred '*after reasonable mixing*'. The initial assessment of 'significance' would be left to the consent holder. In other words, such effects would be authorised by the consent provided the effect in question is contained within the defined area of reasonable mixing zone or cannot be proven to have extended beyond that zone<sup>18</sup>. As discussed earlier we consider that we have insufficient information to be able to be satisfied that the area of reasonable mixing proposed would be appropriate in every situation and that accordingly, the effects within the suggested mixing zone would be acceptable.
106. The proposed exclusion clause would not preclude discharges which have significant (albeit temporary) adverse effects on cultural and/or amenity values.
107. Having identified what remains after the exclusions, we are required to consider whether the other mitigation measures sufficiently avoid, remedy, or mitigate the potential residual effects.

### ***The Management Plan Conditions***

108. The Applicant's latest set of proposed conditions regarding its three suggested management plans, namely the WORMP, NIMP, and WEAMP, now includes objectives<sup>19</sup> and a process that allows for some limited consultation. The inclusion of clear objectives is essential and that has now been achieved. We find that the objectives are in generally appropriate terms.

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<sup>17</sup> For example, overflows from pump stations where there is insufficient storage or where there are direct flow paths into water.

<sup>18</sup> We appreciate that the Applicant is not required to establish that the proposal will not result in significant adverse effects. Nevertheless, we are required to consider the potential significance of adverse effects under section 104 of the RMA.

<sup>19</sup> These objectives were introduced late in the hearing.

109. The most critical of the three proposed management plans is the NIMP in proposed condition 13, which states:

**13. Network Improvements Management Plan**

- (a) *Within eight months of the commencement of this consent the Consent Holder must prepare a draft Network Improvements Management Plan which has the objective of ensuring that a review of its entire current wastewater network (excluding wastewater treatment plants) is undertaken and that the combination of measures that collectively is the best practicable option to prevent or minimise overflows reaching water is identified. The review must prioritise those parts of the network within 20 metres of a waterbody specified in Schedule 1A (Natural Values), 1B (Water Supply Values) or 1D (Kai Tahu Values) of the Regional Plan: Water for Otago and shall also prioritise Bullock Creek, Luggate Creek, Horne Creek and Mill Creek. Preventative or minimisation measures could include, but are not limited to:*
- (i) *Providing or increasing storage capacity;*
  - (ii) *Providing standby generators at pump stations;*
  - (iii) *Preventative inspection programme including CCTV inspections with priority areas and frequencies specified;*
  - (iv) *Installing alarms which notify a potential problem in the network;*
  - (v) *Constructing overflow ponding areas or diversion flow paths which particularly direct or hold an overflow away from waterbodies or public places.*
- (b) *The draft Network Improvements Management Plan must contain the following details:*
- (i) *A summary of the methodology undertaken for the review of the network;*
  - (ii) *The combination of measures that the Consent Holder regards as the best practicable option to prevent or minimise overflows reaching water, including details of the infrastructure locations where it is practicable to implement preventative measures, what these are, and the proposed timeframe for implementing them, and whether or not the implementation is subject to funding approvals via the public consultation through the Long Term Plan process;*
  - (iii) *The reasons why preventative maintenance is not appropriate or practicable in any areas.*
- (c) *The Consent Holder must provide the draft Network Improvements Management Plan to the Consent Authority, Public Health South and Kāi Tahu (via Aukaha and Te Ao Marama Incorporated), along with an invitation to meet to discuss and then provide feedback within a period of three months, The Consent Holder shall must take into*

*account any feedback received when finalising the Network Improvements Management Plan and must then forward it, within one month of receiving feedback, to the Consent Authority, Public Health South and to Kāi Tahu (via Aukaha and Te Ao Marama Incorporated) along with an explanation of any changes that it has made, or not made, after considering any feedback received.*

- (d) *If satisfied that the objective in clause (a) is met and that the Network Improvements Management Plan contains the information required by clause (b), the Consent Authority's Manager Compliance shall certify that it meets the requirements of this Condition.*

*Note 1: The Consent Authority's certification of the Network Improvements Management Plan will confirm, amongst other things, that the Consent Holder has identified in the Plan a combination of measures that collectively it considers to be the best practicable option to prevent or minimise overflows reaching water. While this condition allows for the Consent Authority and other specified stakeholders to review and have input into the draft Plan, the subsequent certification by the Consent Authority is not able to be used as part of any defence of a prosecution in relation to any unauthorised discharges.*

110. We accept that the Applicant's move to a best practicable option (**BPO**) objective would go a long way towards ensuring that the best options would likely be adopted. However, we do not have any particular BPO proposals before us. We consider that the BPO for particular categories and locations of overflow could have, and more importantly should have, been included in the application so that those options could be commented on by submitters, considered by us, and incorporated as consent conditions.
111. The NIMP would set out the priority for action. Those priorities may be generally appropriate; however, we were not provided with sufficient evidence be certain that it includes all areas which should be given high priority. This approach leaves the Applicant to determine how priorities are to be set between each of the groups listed in the proposed condition.
112. We consider that the list of potential measures to be generally appropriate. However, the detail of where, when, and what measures are to be put in place is left to the future NIMP process. The proposed approach leaves the formulation of priorities and measures to the Applicant albeit in consultation with the tangata whenua and Public Health<sup>20</sup>. The final NIMP is to be certified by officers of the ORC, however the certification role does not provide the ability to require more restrictive measures or quicker implementation of the identified BPO measures.

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<sup>20</sup> Under the proposed condition the Consent Holder would be required to provide the draft NIMP to the ORC, Public Health South, and Kāi Tahu (via Aukaha and Te Ao Marama Incorporated), along with an invitation to meet to discuss and then provide feedback within a period of three months.

113. In our view, the Applicant should have included the NIMP (or equivalent details) in the application because the contents of the NIMP will contain critical information in respect of deciding appropriate priorities for avoiding as many overflows as possible, minimising the duration of those overflows which are unavoidable, and mitigating and remedying the effects of those overflows which are unavoidable. These are key matters which we consider we should have had in front of us and we find it is inappropriate to leave such key matters to the Applicant to decide. We note that the proposed conditions would require these measures to be drafted within 8 months of the commencement of consent. However, we were not provided with any reasons as to why this could not have occurred prior to the application being lodged or at least as part of the preparation of evidence.
114. We have similar concerns regarding the proposed WEAMP and WORMP. We consider that these plans could, and should, have been put before us as part of the application. In combination, the three proposed management plans are at the heart of the Applicant's proposal. The contents of the WORMP are critical in terms of implementation of the Applicant's measures to reduce the duration, volume, and effects of overflows which may occur. While we do have a draft plan before us, we note the final contents of the plan will be left to the Applicant to decide, after consultation with Kāi Tahu and certification by the officers of the ORC. Again, we consider the contents of the WORMP are too important to be left to a later process which excludes most of the other submitters.
115. The proposed WEAMP is also very important because it would address the critical aspect of community education and associated measures (e.g. improvement and enforcement of trade waste bylaws) aimed at reducing the incidence of blockages. We heard evidence from the Applicant that blockages from inappropriate materials being flushed is the most frequent cause of overflows.
116. Mr Bohm presented evidence which confirmed that education was a key instrument to reducing overflows from blockages and that the Applicant was currently doing little community education (a few pamphlets) to address such important issues. He considered there were significant gaps in the Applicant's current approach to ensuring behavioural change and that this should be addressed. He outlined a number of changes that should be made to the Applicant's proposed conditions. We note that many of Mr Bohm's suggestions have been incorporated into the Applicant's final set of proposed conditions, however, again we think that this plan is too important to be left to be finalised at a later date.
117. In summary, we consider that it would be an inappropriate delegation of the ORC's decision-making role to leave the final contents of these three key management plans to be determined after consent is granted. The suggested approach leaves us with insufficient information to be able to determine whether the Applicant's proposed mitigation measures

are sufficient and sustainable in terms of adequately avoiding, remedying, or mitigating adverse effects<sup>21</sup>.

118. The approach taken by the Applicant means that we, submitters, and the ORC officers have no details of the proposed upgrades to the wastewater network and timing of such upgrades in terms of avoidance and mitigation measures for particular types or locations of overflows. In the absence of mitigation details, we are unable to properly consider whether there might be more appropriate alternative means of discharge available. Although not determinative, that is a matter for our consideration under section 105 of the RMA. Nor can we judge whether what will be proposed will in fact be the BPO which is the threshold now advanced by the Applicant.
119. Finally, we note that if these three key management plans were before us now and were incorporated into the consent conditions, these measures would be requirements that the Applicant would be obliged to fund and achieve. This would enable the ORC to take enforcement action to require the specified measures to be put in place, if necessary. We consider such an approach would have allowed us to be confident of the outcomes advanced by the Applicant would be achieved.

#### ***The Review Condition***

120. In our view, the proposed review condition is generally appropriate but does not overcome our concerns as outlined earlier. A consent review is a rarely used tool and is usually used to address matters which were not foreseen at the time the application was determined. It is not a means of addressing matters which could, and should, have been assessed and addressed within the application.

#### ***Other Proposed Conditions***

121. We have discussed the proposed conditions which form the primary basis of the Applicant's mitigation measures. There is no need for us to discuss the other conditions, since those are immaterial to our decision.

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<sup>21</sup> We note that we have not been provided with any reason why the application could not have been delayed until the NIMP was finalised. Furthermore, unlike the WORMP, we have not been provided with a draft of the NIMP.

## RESTRICTIONS UNDER SECTION 107 OF THE RMA

122. Section 107(1) of the RMA states that a consent authority must not grant a discharge permit:

*if, after reasonable mixing, the contaminant or water discharged (either by itself or in combination with the same, similar, or other contaminants or water), is likely to give rise to all or any of the following effects in the receiving waters:*

- (c) the production of any conspicuous oil or grease films, scums or foams, or floatable or suspended materials:*
- (d) any conspicuous change in the colour or visual clarity:*
- (e) any emission of objectionable odour:*
- (f) the rendering of fresh water unsuitable for consumption by farm animals:*
- (g) any significant adverse effects on aquatic life.*

123. Section 107(2) of the RMA does however provide for certain exceptions whereby a consent authority may grant a consent which results in any of the effects listed in clauses (c) to (g) of section 107(1) of the RMA (listed in the previous paragraph). Section 107(2) of the RMA states:

*(2) A consent authority may grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 or section 15A that may allow any of the effects described in subsection (1) if it is satisfied—*

- (a) that exceptional circumstances justify the granting of the permit; or*
- (b) that the discharge is of a temporary nature; or*
- (c) that the discharge is associated with necessary maintenance work—*

*and that it is consistent with the purpose of this Act to do so.*

124. Section 107(3) of the RMA states:

*In addition to any other conditions imposed under this Act, a discharge permit or coastal permit may include conditions requiring the holder of the permit to undertake such works in such stages throughout the term of the permit as will ensure that upon the expiry of the permit the holder can meet the requirements of subsection (1) and of any relevant regional rules.*

125. In contrast to the original application, the 'exclusion clause' provision introduced by the Applicant through the revised proposed conditions would exclude overflows which result in the effects prohibited by section 107 of the RMA after reasonable mixing, irrespective of whether the overflow reaches water for more than 24 hours. Accordingly, we are satisfied that in most instances it would be *unlikely* that overflows authorised by the consent would have the effects described within section 107(1) of the RMA after reasonable mixing.

126. Nevertheless, as discussed earlier, we have concluded that we do not have sufficient evidence before us to decide whether the proposed zones of reasonable mixing (being areas of authorised non-compliance with the section 107 RMA requirements) would in fact be “reasonable” and appropriate. It follows that we cannot be confident that the section 107 RMA effects will be “unlikely” to occur after reasonable mixing for those overflows that would be authorised by the consent. That leads us to consider whether either of the relevant exclusions in section 107(2) of the RMA apply.

***Are there exceptional circumstances which would justify the granting of the consent?***

127. Ms Campbell submitted that “*exceptional circumstances*” exist in this case because if consent was not granted then the Applicant could not make ‘*lawful use of its wastewater network*’ because future overflows would be unauthorised (unlawful). Mr Collins advised us that in his opinion exceptional circumstances did not apply in this case. Mr Randall was of the same view.

128. We have concluded that we cannot determine in advance whether all future discharges which may breach the section 107 RMA requirements would be ‘exceptional’. We note that case law cited by Ms Campbell describes ‘exceptional’ as meaning ‘*out of the ordinary*’<sup>22</sup>.

129. We heard evidence from the Applicant that overflows are generally unavoidable and are a necessary part of operating the network. However, the evidence before us is insufficient to enable us to conclude that all or even most of the potential overflows are in that category.

130. We consider that refusing consent does not prevent the wastewater network from continuing to be lawfully operated. Any overflows will continue to be unauthorised and this is the situation which currently applies in the Queenstown District and in many other districts around New Zealand. We doubt that it can be said that the circumstances for which the Applicant seeks consent are out of the ordinary as compared to other districts. We acknowledge that some consents have been granted for overflows in other districts, but consider these have been assessed within the context of those particular situations and receiving environments.

131. We conclude that the exceptional circumstances provision of section 107(2) of the RMA is not applicable in this case. We are also of the view that the *Paokahu* decision does not assist the Applicant. That decision related to a continuous discharge from the Gisborne City Wastewater Treatment Plant which was deemed to be unavoidable during in the short term. In that case, the Environment Court granted consent for a very short term and required that, before the end of the consent, the consent holder was to lodge an application for an upgrade to ensure compliance with the section 107 RMA restrictions. In contrast, in the present case

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<sup>22</sup> Paokahu Trust and Ors v Gisborne District Council A162/2003.

we are dealing with multiple potential discharge points into various receiving environments and various potential causes of discharge.

***Would non-compliant discharges be of a temporary nature?***

132. The question here is whether all of the overflows for which consent is being sought (i.e. excluding the unauthorised overflows), which may not meet the section 107 RMA restrictions, can be regarded as being of a ‘*temporary nature*’. Ms Campbell submitted that they can be and that was also the opinion of Mr Collins. However, Mr Randall and Mr Christophers submitted to the contrary. We were not provided with any case law of assistance on this point and neither Mr Collins or Mr Christophers explained the basis for their differing opinions.
133. Mr Christophers relied on the fact that there was (at the time of writing the Staff Report) no restriction proposed on the frequency and duration of each discharge and that therefore the overflow may not be temporary.
134. Ms Campbell noted that the evidence was that there had been approximately five discharges per year, on average, which had reached water and that these were responded to relatively quickly. She noted that the evidence was that the Applicant has a median response time of 17 minutes (after notification) and 151 minutes to restoration of the service (i.e. overflow cessation). She submitted that it was clear from this that the discharges were in fact temporary.
135. Mr Randall pointed us to the common meaning of temporary as ‘*lasting for only a limited period of time; not permanent*’<sup>23</sup>. He noted that:

*The Applicant’s change in approach to condition 11 would have the effect of enabling a discharge of any duration, provided that it is “resolved” within six hours of notification. In theory, a cracked pipe leaking to a watercourse could create a discharge that endures for a prolonged period, but still be enabled by the consent. That is problematic in a section 107 sense.*

In our view, this has now been resolved by the Applicant’s proposed 24-hour limit of the duration of authorised discharges to water.

136. Mr Randall also submitted that:

*In any case, it is questionable whether a consent that enables ongoing discharges from the wastewater network for a term of 20 years – including, in theory, periodic discharges to the same waterbody and indeed repeated discharges from any one*

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<sup>23</sup> [www.lexico.com/en/definition/temporary](http://www.lexico.com/en/definition/temporary).

*discharge point – is temporary in the sense usually employed in section 107, to apply to a one-off event or a limited construction period (for example).*

137. In our view the ‘temporary’ exception is not directed at the question of whether the overall consent is of a temporary nature. It seems to us that section 107(2)(a) of the RMA is directed at the overall circumstances of an application but that clause (b) is directed at particular discharges. Accordingly, in our view the fact that the consent, if granted, may allow repeated (but likely very infrequent) overflows from the same point does not prevent each of those overflows from being of a “*temporary nature*”.
138. Furthermore, evidence and the reworded exclusion clause leads us to conclude that the vast majority of overflows would not breach section 107 of the RMA. Overflows which are not responded to within 6 hours of notification along with those which reach water for more than 24 hours or which breach the suggested standards would be excluded. Furthermore, a likely outcome of the proposed consent would be a program which is intended to, and would likely, further reduce the frequency of overflows, with priority given to those which are more likely to breach the section 107 RMA restrictions.
139. We find that the exclusion now advanced by the Applicant would mean that any overflow which breaches the section 107 RMA restrictions would be of a temporary nature.<sup>24</sup>

***Would it be “consistent with the purpose of this Act” to grant consent for those discharges which are likely to breach the section 107 RMA restrictions?***

140. We have concluded that with the conditions and exclusions now proposed by the Applicant, section 107 of the RMA does not preclude the grant of consent. We do not regard the proposed approach to section 107 of the RMA as being inconsistent with Part 2. These conclusions are however immaterial to our overall decision. We address wider Part 2 considerations later in this decision.

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<sup>24</sup> This was the issue in respect of which Commissioner Milne offered to exclude himself. However, this proved unnecessary since all three of us reached the same conclusion which is in any event immaterial to our decision.

## RESTRICTIONS UNDER THE WCO

141. The WCO covers the Kawarau River (including some of its tributaries) and all of Lake Wakatipu. Section 217(2) of the RMA states:

(2) *Where a water conservation order is operative, the relevant consent authority—*

(a) *shall not grant a water permit, coastal permit, or discharge permit if the grant of that permit would be contrary to any restriction or prohibition or any other provision of the order:*

(b) *shall not grant a water permit, a coastal permit, or a discharge permit to discharge water or contaminants into water, unless the grant of any such permit or the combined effect of the grant of any such permit and of existing water permits and discharge permits and existing lawful discharges into the water or taking, use, damming, or diversion of the water is such that the provisions of the water conservation order can remain without change or variation:*

(c) *shall, in granting any water permit, coastal permit, or discharge permit to discharge water or contaminants into water, impose such conditions as are necessary to ensure that the provisions of the water conservation order are maintained.*

142. Schedule 2 of the WCO outlines water quality classes from Schedule 3 of the RMA which apply to specific waterbodies. A note to Schedule 3 of the RMA provides that '*The standards listed for each class apply after reasonable mixing of any contaminant or water with the receiving water and disregard the effect of any natural perturbations that may affect the water body*'.

143. Lake Wakatipu is subject to classes AE (aquatic ecosystem), CR (contact recreation), F (fisheries), and FS (fish spawning). We do not need to set out all of the relevant restrictions but note that Class AE precludes the grant of consent for the discharge of contaminants which after reasonable mixing would have '*an adverse effect on aquatic life*'. We note that, unlike section 107 of the RMA, this does not need to be a '*significant*' adverse effect. It also precludes discharges which cause a pH change or which increases deposition of matter on the bed of the water body. Class CR precludes the grant of consent for discharges of contaminants which render water unsuitable for bathing purposes. The Class CR standard applies to the Kawarau River.

144. The effect of the WCO is that we cannot grant consent for any overflow which is likely to cause the water quality standards to be breached after reasonable mixing. It is clear from the evidence, that there is a high potential that an overflow of untreated wastewater to Lake

- Wakatipu would render the immediate area unsuitable for bathing and may well have some adverse effects on aquatic life, albeit that those would probably be temporary.
145. The Applicant has endeavoured to overcome this restriction by way of its suggested exclusion clause which would exclude discharges which have '*significant adverse effects*' on aquatic life or public health after reasonable mixing.
146. As discussed earlier, while the RPW includes a qualitative definition for reasonable mixing it does not prescribe what that area or distance should be. The definition of what constitutes the area of reasonable mixing was proposed by the Applicant late in the hearing. We were not provided with any evidence about the basis on which the Applicant's experts had concluded that the proposed mixing zones would be 'reasonable' within the context of the WCO or otherwise.
147. Leaving that aside, we have some reservations regarding this approach. Our understanding is that a reasonable mixing zone needs to be determined within the context of a particular discharge point taking into account the sensitivity of the receiving environment, natural and human values, physical processes, discharge characteristics, the provision of cost effective infrastructure and water quality limits. Such a case by case approach is consistent with the Policy 7.B.6 of the RPW.
148. We are concerned that proposed discharges, which may potentially contaminate Lake Wakatipu for up to 24 hours, may infringe the WCO standards and in particular the Class CR water quality standard. We accept that the additional requirements that the discharge not have any of the effects listed after reasonable mixing will reduce the risk of breaches<sup>25</sup>. However, that depends upon us finding that a 50 m mixing zone would be reasonable for Lake Wakatipu. We also note that the proposed restrictions in the proposed exclusion clause are not the identical to those in the WCO water quality classes. In particular they do not exclude less than significant adverse effects on aquatic life.
149. We have concluded that because of the high sensitivity of Lake Wakatipu, for the Class CR water quality standard, a 50 m mixing zone may not be reasonable at least for those parts of the lake such as around the Queenstown and Frankton foreshores or other areas likely to be used for contact recreation. Accordingly, we have concluded that even if we could grant consent for other locations, we may be precluded from granting consent for the discharges of overflows to Lake Wakatipu, as now proposed.
150. We acknowledge that this difficulty could potentially be overcome by way of limiting the discharges to Lake Wakatipu to a shorter duration and/or reducing the mixing zone to a

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<sup>25</sup> b) The discharge, after reasonable mixing (\*see note 1 below), resulted in:  
(i) one-day minimum dissolved oxygen concentration of less than 4mg/L; or  
(ii) ammoniacal nitrogen concentration of more than 2.2mg/L (adjusted for pH and temperature); or  
(iii) any significant adverse effects on aquatic life or public health;

shorter distance, at least for the particularly sensitive areas such as the Queenstown and Frankton foreshores. However, it is not for us to frame such conditions.

151. We consider that the maximum of 200 m reasonable mixing zone for the Kawarau River may be appropriate given its relatively higher flow rates. We note that the WCO does not affect the application so far as it relates to overflows which do not reach water or which enter waterbodies not covered by the WCO.

### **SECTION 104(1)(ab) - ENVIRONMENTAL OFFSETS AND COMPENSATION**

152. Section 104(1)(ab) of the RMA requires us to have regard to 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.
153. The Applicant is not proposing any offsetting or compensation for any adverse effects.

### **SECTION 104(1)(b) OF THE RMA - RELEVANT PLANNING PROVISIONS**

154. We are required to have regard to the relevant objectives and policies of the RPS, PORPS, RPW, Freshwater NPS, Drinking Water NES, and Urban Development NPS.
155. We note that the PORPS provisions were prepared after the Freshwater NPS became operative whereas the RPS and RPW were prepared prior to the Freshwater NPS. The Staff Report stated that the policies in the PORPS and RPW 'generally' meet the requirements of the Freshwater NPS; and that a full review of the RPW is yet to be completed, but that this relates to the water quantity provisions.
156. Mr Paragreen noted that the regional policy framework was fragmented and incomplete, and that the RPS and RPW do not give effect to the Freshwater NPS. He pointed out the PORPS had been subject to commentary from the Environment Court noting it was not consistent with the direction of *King Salmon* in that it seeks to allow an overall subjective judgement. He noted the ORC website stated that the policies of the Freshwater NPS would be implemented in the future.
157. We acknowledge the regional planning framework may not give full effect to the provisions of the Freshwater NPS. In the event of any inconsistency, we consider it appropriate to give the higher order provisions more weight.
158. An analysis of the relevant planning provisions was provided in the Appendix F of the AEE, in the Staff Report, and in evidence by Messrs Christophers and Collins, Ms McIntyre, and Mr Paragreen. Ms Nicol also provided some commentary on planning provisions.

159. Mr Paragreen commented on the Staff Report and the planning evidence and noted support for the conclusions of the Staff Report. He noted it was not a matter of whether issuing a consent was more consistent with the policy framework, but whether the proposed discharge itself would be consistent with the policy framework.
160. We agree with Mr Paragreen that it is the environmental effects of the proposed overflows that must be assessed against the statutory planning framework; not whether the grant of consent is 'likely' to have a greater reduction in overflows, as suggested by Mr Collins.
161. We have had regard to all of the relevant provisions outlined in evidence and briefly discuss the key provisions in the following sections, which are separated into key themes rather than into the different statutory planning documents. It should be noted that we do not necessarily discuss all the relevant provisions, but that does not mean we have not had regard those which we do not specifically discuss.

### **Water Quality and Discharges**

162. The Staff Report stated the RPW and RPS encouraged adaptive management and innovation to reduce the level of contaminants in discharges. It concluded the Applicant was seeking to continue discharging unquantified volumes of untreated wastewater to land in a manner that it would enter high value waterbodies. The Staff Report noted that it was not unreasonable to expect the Applicant to implement the upgrades proposed, annual monitoring reporting, education programme, and response plan without a resource consent given the ongoing and sporadic overflows.
163. Mr Collins adopted Appendix F of the AEE and concluded that authorising overflows that could not be practically avoided would not be contrary to the relevant objectives and policies of the RWP, RPS, and PORPS. He considered the proposed conditions would result in a 'greater likelihood' of leading to reduced overflows and improved environmental outcomes compared to the status quo. He therefore concluded that the grant of consent was more consistent with the planning provisions than the status quo.
164. Mr Collins considered the proposed conditions of consent would ensure the overflows authorised by the consent would be short-term with short-term effects, which is consistent with RPW Policy 7.B.3. He highlighted the direct relevance of RPW Policy 7.C.2 and the requirement to have regard to the sensitivity of the receiving environment, financial implications relative to alternatives, and the current state of technical knowledge. He also discussed RPS Policy 6.5.5 and highlighted the evidence of Messers Hansby, Glasner, Baker and Ms Moogan that he considered confirmed the Applicant had made many investments to reduce overflows and achieve desired environmental outcomes.
165. Ms McIntyre noted that the health of a water body is a crucial part of protection of Kāi Tahu cultural values associated with that water body; and that there is significant overlap between

the water quality characteristics required to maintain cultural values and those that are important to ecological, recreational, and water supply values. She noted there had been no assessment of the potential scale of effects or of the context of the sensitivity of different areas. She submitted that even short-term localised effects could be significant depending on location and timing of the discharge. She considered the application was inconsistent with the planning provisions that seek to maintain water quality and prevent more than minor adverse environmental effects.

166. Mr Paragreen noted Otago Fish and Game considered the application was inconsistent with the policy framework, despite the updated conditions proposed, because they do not address timing, location, and frequency of the overflows or the impact of cumulative effects. He provided a discussion on a small number of 'critical' provisions in Appendix 1 of this statement of evidence. He considered that, given the uncertainty that improvements would be implemented or reductions in overflows would occur, RPW Policy 7.B.3 would suggest a maximum term of five years would be appropriate. He stated Freshwater NPS Objective A2 is a bottom line below which water quality should not fall and that without limits the application could degrade water quality. He also noted PORPS Policy 4.4.3 (precautionary approach) and RPW Policies 7.B.3 and 7.C.4. He considered there was potential for long-term adverse effects and that no mechanism had been proposed in the conditions to ensure the consent would progressively meet the relevant water quality standards. He stated that the consent conditions did not require investment or limits that enable improving discharge performance over the life of the consent, and there was no certainty this would occur. He considered the scope of the consent sought would not address the impact of timing, sensitive receiving environments, frequency, or cumulative effects.
167. At the hearing, Mr Christophers confirmed his view that the effects of overflows on ecological, recreational, and cultural values remained potentially significant. He considered the application was therefore generally inconsistent with the planning provisions and was contrary to some of the key provisions of the Freshwater NPS.

### **Findings**

168. The RPS, PORPS, and RPW all seek the maintenance or enhancement of water quality so that it is suitable for certain specified purposes. For lakes, rivers, and streams the purposes in RPW Objective 7.4.1 include aquatic ecosystems, contact recreation, and cultural purposes. RPW Schedule 15 sets water quality characteristics and limits to be met for certain water classifications.
169. We note that some sections of the operative RPS have been revoked and replaced by the PORPS (14 January 2019). However, we record we have considered RPS Policy 6.5.5 which seeks to promote a reduction in adverse effects of contaminant discharges through methods (a) to (f), while considering financial and technical constraints.

170. We note PORPS Policies 1.1.1, 1.1.2, 2.1.2, 2.2.1, 2.2.2, 3.1.1, 3.2.13, 3.2.14, 3.2.15, 3.2.16, 4.4.3, and 5.4.2. We particularly note Policy 4.4.3, which requires us to apply a precautionary approach to activities where adverse effects may be uncertain, not able to be determined, or poorly understood but are potentially significant. We consider it is appropriate to apply a precautionary approach due to all these circumstances applying here.
171. Schedule 1A of the RPW identifies natural values and significant recreational values including swimming, water sports, fishing, rafting, kayaking, and jet boating. Many submissions from individuals and groups such as Otago Fish and Game Council, Lake Wakatipu Anglers Club, Southern Lakes Swimming Club, and the New Zealand Deer Stalkers Club raised concerns regarding potential adverse effects on recreational values. We accept that these effects are closely aligned with effects on water quality and human health. We find that, although there is a low risk of a discharge occurring in any particular, some likely points of discharge could potentially result in significant adverse effects on recreational values.
172. In managing activities involving effects on water, RPW Policy 5.4.2 requires us to give priority to avoiding, in preference to remedying and mitigating, adverse effects on identified values. We accept this means that to 'not allow' or 'prevent the occurrence' must take priority.
173. The RPW identifies a number of groundwater protection zones<sup>26</sup> where aquifers have been identified as particularly sensitive to discharges. There is potential for wastewater overflows within the identified groundwater protection zones for Wakatipu Basin Aquifer, Cardrona Alluvial Ribbon Aquifer, and the Wanaka and Hawea Basin Aquifer. We accept that these aquifers are particularly sensitive to discharges and that there are many water existing users that rely on groundwater for their potable water supply.
174. RPW Policy 5.4.3 requires us to give priority to avoiding adverse effects on existing lawful uses and existing lawful priorities for use. This includes a number of identified drinking water supplies and a number of unknown domestic drinking water supplies and stock water supplies. We remain unconvinced that a requirement to notify existing users would sufficiently avoid adverse effects on existing water users and consider this would only mitigate adverse effects rather than avoid. We do not accept that notification procedures give priority to avoiding adverse effects on drinking water supplies. We find the application is contrary to this policy.
175. We do not consider the Applicant has sufficiently demonstrated that the grant of consent, under the conditions proposed, would avoid adverse effects on identified natural values, recreational values, existing water users (drinking water supplies), and cultural values. While

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<sup>26</sup> A groundwater protection zone is defined under the RPW as 'An area of land in which land use and water use activities are managed to protect the underlying groundwater resource.'

we accept that some discharges may be unavoidable, we do not accept that the current wastewater system sufficiently avoids discharges from overflows into the stormwater system and directly into waterbodies.

176. RPW Policy 7.B.3 allows discharges that have minor effects, or that are short-term discharges with short-term adverse effects. While we accept the conditions proposed would ensure only short-term discharges are authorised by the consent, there is insufficient information to conclude any adverse effects would be short-term. We note that relatively short-term discharges into some waterbodies and small streams may have significant adverse effects and that some adverse effects may be long-term or cumulative. We therefore find the application is inconsistent with this policy.
177. RPW Policy 7.B.6 requires us to have regard to the need for and the extent of any zone for physical mixing, within which water will not meet the characteristics and limits described in Schedule 15, by taking into account of matters (a) to (f). We have taken into account all of these matters. However, we are unable to take account of (f) '*the particular discharge, including contaminant type, concentration and volume*' – without taking into account potential wastewater concentrations and volumes in various receiving environments it is impossible to determine a reasonable mixing zone. In some receiving environments where drinking water supplies are sourced it may be appropriate to have a very small or even no zone of reasonable mixing to ensure water quality standards are appropriately protected. This is discussed further in relation to section 107 of the RMA.
178. We also draw on our findings in relation to section 105 of the RMA in terms of the sensitivity of the receiving environments (both in terms of groundwater and surface water) and conclude that, in general, they are highly sensitive to wastewater contamination. While we accept that discharges to relatively large waterbodies would be subject to dilution, we have concerns that some relatively small discharges to some small streams (particularly during low flows) and degraded waterbodies could have significant ecological and cumulative effects. We also consider some potential (and known) discharge points could have significant adverse effects on public health and amenity.
179. RPW Policy 7.C.2 requires us to have regard to the nature of the discharge and the sensitivity of the receiving environment; the financial implications and effects of the proposed method of discharge compared to alternative means; and the current state of technical knowledge and likelihood the proposed method of discharge can be successfully applied. The method of discharge – overflows from known 'fuses' – could result in significant financial implications and adverse effects to the community and existing users, including commercial operators. We find the application is inconsistent with this policy.
180. RPW Policy 7.C.3 requires us to have regard to the relevant standards and guidelines in imposing consent conditions. We have considered the Applicant's proposed conditions in

relation to the relevant water quality standards and the requirements of the Freshwater NPS. Given the potential range of overflows and various receiving environments, we find there is no certainty that all relevant standards and guidelines will be achieved.

181. Overall, we find that the application in its present form, is inconsistent with the policy provisions that seek to avoid discharges of human waste to water. We record that, if the three key management plans had been included in the application and the exclusion clause been made more restrictive, our conclusion on this point may well have been different.

***Relationship of Māori and their Culture with Natural and Physical Resources***

182. Separate submissions in opposition to the application were received from Te Rūnanga Ōraka Aparima, Hokonui Rūnanga and Waihōpai Rūnaka; Kāti Huirapa Rūnaka ki Puteteraki and Te Rūnanga o Okākou; and Te Rūnanga of Ngāi Tahu. Ms McIntyre presented evidence at the hearing on behalf of these submitters (collectively referred to as Kāi Tahu in her evidence).
183. Ms McIntyre stated that it is a cultural offense to discharge human effluent (particularly untreated) to water and that the application could have potential for adverse effects on the mauri and significant cultural values of the Queenstown Lakes District. She concluded there was too much uncertainty as to whether the application would minimise or reduce overflows or give sufficient priority to preventing overflows reaching water to grant consent. She considered the application failed to recognise cultural values and the particular needs of sensitive receiving environments.
184. Ms McIntyre highlighted the PORPS Policy 2.1.2(c) and (d) in relation to Treaty Principles and noted the emphasis on environmental outcomes that are achieved in regard to cultural values and not just engagement with mana whenua. She also drew our attention to RPW Policy 5.4.2 and Policy 7.C.2 and concluded the application was inconsistent with these provisions because it did not provide for any prioritisation of measures to reduce the risk of overflows in waterbodies with identified values.
185. Ms McIntyre disagreed with Mr Collins that any management improvements of overflows was good enough given the overarching duty to avoid, remedy or mitigate effects that are more than minor.
186. Mr Collins responded to Ms McIntyre's assessment in rebuttal, and stated he agreed with several aspects of it which had resulted in further amendments to the proposed conditions. He noted the Applicant's aim is to prevent or avoid overflows. He highlighted RPS Policy 6.5.5(e) and the words '*...while considering financial and technical constraints*', and noted the Applicant's efforts to prevent overflows and confine them to land, where possible. He also made changes to the proposed conditions to prioritise those parts of the network in

'proximity' to sensitive habitats and identified values; and to provide for more meaningful input and oversight from Kāi Tahu.

### **Findings**

187. The Ngāi Tahu Claims Settlement Act (1998) identifies the Clutha River/Mata-Au, Lake Wakatipu, Lake Hawea and Lake Wanaka as areas subject to Statutory Acknowledgement. We note that many of the rivers subject to this application are tributaries of these waterbodies. In making our assessment, we have recognised these interests in accordance with RPW Policy 5.4.4.
188. The Cultural Values Statement prepared by Aukaha describes the cultural significance and significant values associated with the receiving environments. Schedule 1D of the RPW identifies cultural and spiritual values for lakes and river throughout Otago in relation to mauri (life force), waahi tapu (sacred places), and waahi taoka (treasured place/valued possession). We have had regard to these identified values and the evidence of Mr Higgins.
189. We conclude that, in the absence of the three key management plans in their finalised form, authorising unknown overflows at unknown locations into potentially sensitive receiving waters will not provide for the social and cultural wellbeing or the health and safety of the community; the protection of cultural relationships and values; and the protection of natural values and the quality of the environment. We therefore find that overall the application, in its current form, will not achieve the key objective of maintaining existing water quality. We note the evidence of Ms McIntyre that many cultural values are intrinsically linked to water quality and life supporting capacity. The RPW identifies that the discharge of untreated wastewater to waterbodies is offensive to Ngāi Tahu. RPW Policy 7.B.2 requires us to avoid objectionable discharges of contaminants to water to maintain natural and human use values, including Kāi Tahu values. We accept that the application is contrary to this environmental outcome

### **Freshwater NPS**

190. The Freshwater NPS requires improved freshwater management in New Zealand by directing regional councils to establish objectives and set limits for freshwater in regional plans. The Staff Report set out Objectives A1, A2, and C1, and Policies A1, A2, and A3. Mr Christophers concluded that the application was inconsistent with the relevant provisions of the Freshwater NPS.
191. A significant number of submitters commented in their written submissions on the relevance of the Freshwater NPS and considered the application to be inconsistent with or contrary to its objectives and policies.
192. Mr Collins set out the relevant Freshwater NPS provisions and included Policy A4 in recognition of the fact that the ORC has yet to establish freshwater management units,

values, attribute states, and limits. He noted that clause (3) of the policy stated it only applies to new discharges and agreed that because the overflows had never been authorised, they should be regarded as new discharges. He noted the evidence of Dr Olsen that the overflows authorised would be occasional and temporary; and the evidence of Dr Hudson that the proposed response plan would adequately protect recreational water users, consumers of potable water, and communities considerable distances from the likely overflow locations. On this basis, he concluded the application was consistent with Objective A1, Objective A2, and Policy A4 (Clause 1 and 2) '*...given the increased rigour imposed by the proposed consent conditions*'.

193. Ms McIntyre stated that for the most part she agreed with the conclusions reached in the Staff Report regarding the application's general inconsistency with the relevant objectives and policies of the planning documents. She considered the Freshwater NPS Policies A4, C1, and D1 were also relevant. In relation to Policy A4, she noted that the effects of the overflows could be more than minor in particular circumstances (such as timing of the discharge and proximity to sensitive habitats) and that this must be had regard to. In relation to Policy C1, she considered the application would not improve integrated management of freshwater and land use; and did not reflect *ki uta ki tai* (as required by Policy C1(a) because the values and sensitivities of the specific receiving environments had not been taken into account. She considered that *tangata whenua* values and interests had not been adequately reflected in the application, as required by Policy D1. She therefore concluded the application was inconsistent with the most relevant policies of the Freshwater NPS.
194. Ms Nicol considered the application was inconsistent with the requirements of the Freshwater NPS due to potential adverse effects on public health from degraded water quality without reducing the frequency and volume of the discharge over the term of the consent.
195. Mr Collins responded to Ms Nicol in rebuttal evidence that a limit of 'zero overflow' incidents was not practically achievable but noted that the vast majority of the initiatives and investments by the Applicant were aimed at preventing and avoiding overflows from occurring.
196. In his statement in reply at the hearing, Mr Christophers amended his assessment to include Policy A4 of the Freshwater NPS in line with the views of Mr Collins and Ms McIntyre. He considered the overflows as 'new' discharges (given any previous overflows were unauthorised) and concluded the application was inconsistent with Policy A4(1) and (2). In response to questions, he concluded that overall the application was contrary to the provisions of the Freshwater NPS, which differed from his conclusion in the Staff Report that it was 'inconsistent'.

## **Findings**

197. We have assessed the potential overflows as new discharges. Overall, we agree with Mr Christophers that the application in its current form is inconsistent with achieving Objective A1, A2 and C1 of the Freshwater NPS. We also agree with Ms McIntyre that the approach taken to the application does not adequately reflect tangata whenua values and interest and is therefore inconsistent with Policy D4.

## **Drinking Water NES**

198. The Staff Report drew our attention to regulations 7 and 8 of the Drinking Water NES, which need to be considered when assessing discharge permits that have potential to affect drinking water supplies that provide for 501 or more people with drinking water for 60 or more calendar days each year; and regulations 11 and 12 which requires councils to place an emergency notification condition on relevant consent holders if it is assessed the activity could pose a risk to the drinking water supply in the case of an unintended event.

199. The Staff Report stated that because there was insufficient evidence to qualify the frequency and duration of the potential discharges, it must be assumed that discharges in close proximity to drinking water supplies could give rise to significant adverse effects. The Report concluded that the effects on human drinking water supplies could be more than minor and potentially significant.

200. The application assessed the potential effects on 16 community drinking water supplies that are recognised as registered supplies in accordance with the Drinking Water NES, most of which are owned and operated by the Applicant. The Applicant assessed the risk of contamination of water sourced for community supply based on proximity to a potential overflow site and concluded the risk of contamination following an overflow event was low to nil with implementation of Water Safety Plans for registered water supplies. To mitigate and avoid adverse effects on human health, the Applicant proposes to cease abstraction and if necessary, provide contingency supply. In the cases where a community supply is not operated by the Applicant, the water supply operator would be notified.

201. Mr Collins highlighted the evidence of Dr Hudson regarding potential adverse effects on drinking water sources and the evidence of Ms Moogan regarding response protocols. He noted the proposed conditions of consent require wastewater pipes, manholes, and pump stations are not located in proximity to community drinking water takes from lakes and rivers.

202. Ms Nicol considered the application was inconsistent with the requirements of the NES Drinking Water due to potential contamination of drinking water supplies. She noted there was potential for adverse effects on water supplies operated by the CODC.

## **Findings**

203. In assessing the application, we have considered potential effects on community drinking water supplies and requirements for notification of drinking water suppliers in the event of contamination. Given the proximity of some community drinking water takes to potential overflow points, we remain unconvinced that the notification procedures required by proposed conditions would avoid adverse effects on public health. In the absence of finalised management plans and sufficient exclusions, we consider there is potential for inconsistency with the Drinking Water NES.

## **SECTION 104(1)(c) - OTHER RELEVANT MATTERS**

204. Section 104(1)(c) requires us to have regard to any other matters that are relevant and reasonably necessary to determine the application. In this case we consider there are other matters that are relevant to our consideration, namely the various iwi management plans, precedent effects, and the Applicant's assertion that the granting of this application results in non-environmental positive effects in respect of transparency. We discuss these matters in the following subsections.

### ***Lake Wanaka Preservation Act 1973***

205. One of the purposes of the LWPA is to '*maintain*' and, as far as possible, '*to improve the quality of water in the lake*'.<sup>27</sup> The LWPA provides for the appointment of Guardians of the Lake to report on and make recommendation to the Minister on any matters affecting the purposes of the LWPA.

206. The application stated that the proposed response procedures would provide for protection of natural resources and would therefore be consistent with the LWPA by maintaining, as far as possible, improving water quality in the lake through management of overflows.

207. The Staff Report stated that unrestricted discharge of wastewater into Lake Wanaka for 35 years would be inconsistent with the purpose of the LWPA.

208. The submission from the Guardians of Lake Wanaka and One New Zealand noted concern that overflows could adversely affect water quality, biodiversity and ecosystems.

209. We consider that the application, as proposed, does not provide sufficient certainty that water quality in Lake Wanaka will be maintain.

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<sup>27</sup> Lake Wanaka Preservation Act 1973 Section 4(d).

### ***Iwi Management Plans***

210. We heard evidence from Messrs Christophers and Collins, and Ms McIntyre that the non-statutory iwi management plans were relevant for our considerations.
211. The Staff Report set out the relevant objectives and policies of the NRMP and Te Tangi.
212. The Staff Report stated Te Tangi expressed the attitudes and values of the four Rūnanga Papatipu o Murihiku – Aarua, Hokonui, Ōraka/Aparima and Waihōpai. We note Te Tangi policies set out in the Staff Report focus on avoiding discharges to water, applying the highest environmental standards, and the development of contingency plans to deal with faults, breakdowns, natural disasters or extreme weather. In taking into account the views of tangata whenua, we find the application is contrary to achieving these outcomes.
213. The Staff Report stated that the NRMP expressed the attitudes and values of the four Papatipu Rūnaka – Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puteteraki, Te Rūnanga o Okākou and Hokonui Rūnanga. We note the NRMP objectives and policies set out the Staff Report and the focus on avoiding the discharge of human waste directly to water, reducing contaminants in water, the protection and restoration of the mauri of all water, and to discourage discharges near waahi tapu. We find this application is overall contrary to these objectives.
214. Mr Collins acknowledged the submission in opposition from Rūnanga Papatipu o Murihiku – Awarua, Hokonui, Oraka/Aparima, and Waihopai and that any discharge of untreated wastewater to waterbodies is culturally offensive. He noted that any occurrence was avoided to the greatest extent possible by conditions ensuring good response protocols, incident notification, investigations, reporting, reviews and associated preventative and remedial actions. Again, he concluded that that granting consent would ensure a greater likelihood of reduced overflows and improved environmental outcomes and would therefore be more consistent than the status quo.
215. Ms McIntyre noted the Applicant's AEE failed to consider the application against the provisions in the iwi planning documents or to recognise the well documented values of the Statutory Acknowledgements and nohonga.
216. Ms McIntyre provided additional assessment of the application against the relevant provisions of the NTFP and the iwi management plans in Attachment 1 of her statement of evidence. She concluded that the conditions proposed did not adequately recognise and provide for cultural values, and for the exercise of kaitiakitanga by mana whenua. In her assessment, she highlighted there had been no recognition or assessment of sites documented in the RPW Schedule D1 and the Cultural Values Statement, or on identified waahi tapu, nohoanga, and mahinga kai sites. She noted the conditions did not make provision for monitoring of cultural indicators and input into response procedures.

217. We have considered the analysis by Ms McIntyre and agree the application is contrary to the environmental outcomes sought by the iwi management plans due to potentially significant adverse effects on cultural values and relationships. We agree that the conditions proposed do not adequately provide for the exercise of kaitiakitanga by mana whenua nor do they sufficiently recognise the cultural sensitivity of some of the receiving waters. In the absence of finalised key management plans we are unable to be satisfied that future discharge to water would be avoided so far as is reasonably practicable or that the duration, volume and effects of such discharges would be minimised to the greatest extent possible.

#### **Precedent Effects**

218. The submission in opposition by Mr Peter Hamilton noted that the grant of consent would create a precedent in the sense that the ORC would then be compelled to grant similar applications if they were lodged by other territorial authorities.

219. Precedent issues are not an adverse effect on the environment but may be a relevant consideration which may, in some cases, justify declining consent. Usually, but not always, precedent issues arise where a consent is granted for a non-complying activity and the grant of consent is clearly at odds with relevant policies.

220. We find that the grant of consent would not give rise to any unacceptable precedent issues. If consent was granted that would not dictate the outcome of any future similar applications to the ORC by other territorial authorities. If consent was granted it would be on the basis of the particular mitigation measures proposed by the Applicant. Each application would be determined on a case by case basis and on its own merits. If we grant consent we consider that this would not create any wider precedent for other regional and unitary councils. Other councils are not bound in any way by our decision.

#### **Non-Environmental Positive Effects**

221. The Applicant suggested that the grant of consent would provide for a greater level of accountability and transparency. It submitted the consent was necessary in order enable the Applicant to continue to meet its statutory obligations and to provide and operate a wastewater system for the health and safety of the community.

222. A large number of submissions in opposition considered there were no positive effects and that the grant of consent would effectively be a 'free pass' to pollute; and would reduce the Applicant's accountability and the ORC's ability to take enforcement action.

223. Mr Collins considered a resource consent would provide for better environmental protection in comparison to the status quo

224. Mr Christophers considered the main positive effect would be the ability for discharges to be better managed and potentially for a reduction in the frequency of discharges. However, he

noted that these actions could be taken voluntarily by the Applicant without the consents sought and therefore were not positive effects of the application. He noted that the Applicant would continue to operate the wastewater under its current consent without the need for the overflow consent. He considered there was no barrier to transparency now and that scrutiny and accountability to the ORC and the community would not be any greater under a resource consent.

225. In the Right of Reply Ms Campbell summarised the Applicant's position regarding the benefits of the proposal as follows:

*It is pertinent to note the benefits to QLDC being able to legally operate its wastewater network. Notwithstanding the comments in the ORC legal submission that QLDC as a local authority should choose to self-report all overflows to water, QLDC is under no legal obligation to do so (and is of course entitled to put the regulator to the proof in any prosecution proceedings). In that context the openness, transparency, reporting, audit obligations and accountability provided by the proposed conditions of consents are important benefits of granting consent. As explained above, QLDC considers that there is additional benefit in allowing the lawful operation of the reticulated wastewater network. It cannot be acceptable from a rule of law perspective to put a public body in a position where it must choose which of its statutory obligations it must breach.*

226. We summarise the potential or claimed positive (non-environmental) effects as follows:

- (a) Being able to legally operate the network;
- (b) Provision of the three management plans within a short period of time;
- (c) Implementation of the three management plans would lead to a reduction in overflows generally and in particular those which reach water;
- (d) Improved reporting and monitoring requirements;
- (e) Increased transparency and accountability; and
- (f) Much greater certainty for the Applicant in terms of which discharges are authorised and attendant reduction in the risk of enforcement action.

227. We do not agree that the grant of consent is necessary in order to allow for the legal operation of the network. We accept that granting the application would allow lawful operation of the network in the sense that it would allow unavoidable overflows, however it would also authorise overflows which may well be avoidable. In our view, that is neither necessary nor appropriate.

228. There was no suggestion that refusing consent would prevent the Applicant from continuing to operate the network. We are unable to conclude that the grant of consent in the form

currently proposed by the Applicant would result in any environmental benefits in comparison to the existing situation.

229. We agree that the grant of consent could *potentially* result in the other classes of benefits summarised above. In particular, if consent was granted in the context of defined mitigation measures (measures incorporated into the conditions of consent) that would provide certainty to the community, in terms of the Applicant's program to avoid, remedy, and/or mitigate the adverse effects of overflows in the future. However, that potential benefit is considerably weakened where the mitigation measures are not available to be finalised through the current process.
230. Currently, if there is an overflow which reaches water, the ORC has the discretion as to what, if any, action to take. We were advised that before deciding whether to take any enforcement action the ORC has regard to volume of untreated wastewater discharged, the magnitude of adverse effects, and the network operator's actions or inactions. If there is a prosecution, the network operator's actions and inactions will be relevant to the outcome and penalty. As outlined by a number of submitters and in Mr Randall's submissions, we agree that having the risk of prosecution can be seen as a strong incentive for avoidance, reduction/minimisation, and appropriate response.
231. As we have discussed, the three management plans proposed by the Applicant form the basis of its mitigation measures. We consider that these are all measures which the Applicant could implement without holding a resource consent. The adoption of such measures would no doubt be highly relevant in terms of avoiding or defending any future enforcement action. Whilst the management plans are not currently required as a condition of any consent, we consider most of the matters covered in the plans relate to actions which the Applicant could and should be doing in any event.
232. Accordingly, we do not agree with Ms Campbell's submission that: *openness, transparency, reporting, audit obligations and accountability provided by the proposed conditions of consents are important benefits of granting consent*. All of this can be achieved without a resource consent.
233. In summary, we conclude that the grant of consent will not necessarily result in any positive environmental or process outcomes which cannot be achieved if consent is refused. Nor would refusal of consent provide a disincentive to the Applicant to continue with further improvements.
234. We observe that the planning which has gone into the current application and the further improvements through the hearing process provide a strong starting point for the Applicant to further develop the three management plans. That could lead to a more refined application in the future should the Applicant wish to pursue such an application, or these management

plans could be developed and adopted voluntarily by the Applicant in conjunction with the ORC, Kāi Tahu, and the remainder of the community.

### **SECTION 104(6) of the RMA**

235. Whilst we have concluded we have 'insufficient' information in respect of the actual and potential effects, we heard no evidence to suggest that the information provided was 'inadequate' in terms of section 104(6) of the RMA<sup>28</sup>. We consider the two terms have slightly different meanings: insufficient relates to quantity, whereas inadequate relates to quality. However, we note they are often used interchangeably. The primary deficiencies in the information which have influenced our decision are:

- (a) The lack of specificity as to the location of the most likely overflow points for discharges that may enter water and the most likely points of contact with water.(e.g. particular stormwater outlets, overflow pipes or overland flow paths);
- (b) The lack of specificity as to the relative sensitivity of likely receiving waters and resultant priorities;
- (c) The lack of information regarding the type, concentration, and volume of contaminants that could potentially be discharged;
- (d) The generalised nature of the assessment of effects;
- (e) The limited assessment of cultural and amenity effects;
- (f) The absence of a clear outline of the alternatives available to avoid or limit overflows or at least those which would reach water; and
- (g) The lack of baseline water quality information in the receiving waters; and
- (h) The lack of finalised details for three management plans which form the key avoidance/ mitigation measures;

236. Whilst section 104(6) of the RMA might come into play, our decision is based firstly upon our conclusion that we have insufficient information to be able to be confident that granting the application, in its current form, will lead to the reduction of adverse effects on the environment; and secondly upon our view that these key pieces of information could, and more importantly should, have been provided as part of the application.

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<sup>28</sup> We note that the ORC accepted the application as being complete under section 88 of the RMA and accepted that its further information requests had been complied with. We find this somewhat surprising given that Mr Christopher's recommendation to decline is in large part based on claimed insufficiencies in the information provided.

## **SECTION 105 of the RMA**

237. Section 105 of the RMA requires us to have regard to the nature of the discharge, the sensitivity of the receiving environment to adverse effects, the Applicant's reasons for the proposed choice, and any possible alternative methods of discharge, including discharge into another receiving environment. We consider that section 105 of the RMA is particularly relevant to this application.

### ***The Nature of the Discharge***

238. The existing and proposed overflows consist of untreated wastewater which may or may not be diluted with stormwater. There is no contention that the discharge of untreated wastewater to surface water or groundwater is offensive to tangata whenua and indeed to most people. We heard no evidence of the exact nature of the wastewater, but it is clear that it contains a range of contaminants including pathogens (bacteria and viruses), organic matter, nutrients (phosphorus and nitrogen compounds, including ammoniacal-nitrogen), metals, suspended sediment loads, industrial and household chemicals, and endocrine disruptors. There is no contention as to the potential<sup>29</sup> for such discharges to cause more than minor, or indeed significant, adverse ecological, amenity, public health, and cultural effects.

239. As originally lodged, the application did not limit the frequency, duration, or volume of overflows which reach water. While the final set of proposed conditions includes a maximum overflow duration 24 hours, no volumetric or frequency limits are proposed. That is because the volumes will vary depending upon the overflow point and mitigation measure which may be in place; such as storage.

240. The Applicant proposes the development of a NIMP within eight months of the consent commencing, however given that the NIMP is not before us, we cannot draw firm conclusions as to the likely reduction in frequency duration or volumes of discharges in total or from any particular source. Accordingly, we find that there is a lack of information as to the nature of the proposed discharges.

241. We find that the general nature of the discharge (untreated wastewater) is such that overflows which reach water should be avoided, if at all practicable, and that where that is not practicable that the effects should be minimised by reducing the frequency, duration, and volume of such discharges and by remediating contaminated land and water as quickly as possible.

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<sup>29</sup> The definition of "effect" includes actual and potential adverse effects.

### ***The Sensitivity of the Receiving Environments***

242. Most of the potential overflows are to highly sensitive waters, including those covered by the WCO, the LWPA<sup>30</sup>. All of the waterbodies in question have high significance to tangata whenua and most have high amenity values, including their value for domestic and international tourism. We heard from many submitters emphasising these values and the sensitivity is also reflected in the planning documents<sup>31</sup>.
243. However, because the application is generic in nature, there is no point by point assessment of the sensitivity of the potential points of contact with water (most of which are unspecified). The Applicant has sought to overcome this to some extent by providing a qualitative ecological risk assessment prepared by Dr Olsen, which we discuss earlier in this decision. We note that this assessment was primarily focussed on ecological risks but also included odour and scums/foams (being effects on 'aesthetic values'). The assessment was not a direct assessment of "*sensitivity*" in ecological terms and did not include any assessment of proximity to drinking water supplies, or relative cultural, recreational, or amenity values or sensitivity.
244. The proposed NIMP would require the Applicant to review its network and prioritise those parts of the network within 20 m of a waterbody specified in Schedule 1A (Natural Values), 1B (Water Supply Values), or 1D (Kai Tahu Values) of the RPW.
245. It is appropriate that the Applicant prioritises highly sensitivity sites and particularly those which are at higher risk of being affected by overflows. However, as discussed earlier, we are of the view that this is something which could have and should have been done prior to the application being lodged. In part, that is because section 105 of the RMA obliges the us to consider the sensitivity of the receiving environment when making our decision including our decision on conditions if we decide to grant the application. We consider that it would have been appropriate for the Applicant to have specifically identified the more sensitive and higher risk receiving waters (in terms of cultural, ecological, amenity, recreational and other values). Accordingly, we conclude that we have insufficient information on the sensitivity of the proposed receiving environments.

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<sup>30</sup> "An Act to make provision for the preservation of the normal water levels and shoreline of Lake Wanaka, and the maintenance and improvement of its water quality".

<sup>31</sup> Schedule 1A (Natural Values), 1B (Water Supply Values) or 1D (Kai Tahu Values) of the Regional Plan: Water for Otago.

***Any Possible Alternative Methods of Discharge, including Discharge into Another Receiving Environment***

246. We are required to consider the availability (or not) of alternatives<sup>32</sup>. In our view, this includes alternatives which would so far as is practicable minimise overflows and which would so far as is practicable avoid overflows reaching water and minimise their frequency, duration volume, and effects of discharges to water. These are matters which are intended to be covered in the proposed NIMP.
247. The AEE stated that the only possible alternative option to having overflows would be for the Applicant '*...to rebuild the entire wastewater network to the most up to date technology standards*'. The AEE stated this would come at a significant cost to the ratepayers and would not eliminate overflows altogether. Mr Collins suggested that the section 105 RMA matters have been fully addressed in the collective evidence of the Applicant's witnesses and that section 105 RMA considerations '*...present no issues for the granting of consent in this case*'.
248. We agree that it is impractical to avoid all overflows. However, in our view, we are required to consider the suitability of mitigation and the availability of alternatives within the context of particular causes, types, and locations of discharges. The Applicant's evidence and proposed conditions do not detail what particular measures would be put in place to avoid particular types of overflows or particularly sensitive locations. Without the details of the NIMP and the other two management plans, we are not in a position to properly compare what is proposed against possible alternatives for dealing with overflows. For example, we are not in a position to determine whether the Applicant is currently doing all that it can to avoid overflows reaching particularly sensitive locations such as the Hawea, Wanaka, and Queenstown foreshores.
249. In summary we find that in the absence of mitigation details we cannot properly consider the availability of alternatives.

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<sup>32</sup> This is a matter which we are required to consider under section 105 of the RMA. However, it is not our role to decide between alternatives. Rather, as we see it, we are entitled to consider whether it would be appropriate to require alternative mitigation measures.

## PART 2 of the RMA

250. The matters specified in section 104(1) of the RMA that we must have regard to are ‘*subject to Part 2*’ of the RMA. These words, and how they apply to the consideration of resource consent applications, has been the subject of a number of cases heard in the Environment Court, High Court, and more recently the Court of Appeal.
251. The Court of Appeal decision on *RJ Davidson Family Trust v Marlborough District Council*<sup>33</sup> (**the Davidson decision**) provides the latest, and most authoritative, position on this matter. While the Davidson decision specifically dealt with coastal matters in which the New Zealand Coastal Policy Statement (**NZCPS**) was directly relevant, it also provides guidance on whether Part 2 RMA matters need to be considered for applications where the NZCPS is not relevant – this being the case for the current application. The Davidson decision directs that the decision maker needs to determine whether the relevant plan has been ‘competently prepared’ under the RMA – that is, whether it contains a coherent set of policies designed to achieve clear environmental outcomes. If the relevant plan meets these criteria then there is no need to consider Part 2 RMA matters, and if the relevant plan does not meet these criteria then the decision maker should consider Part 2 RMA matters and determine whether they provide assistance in making a decision on the application.
252. All the planning experts provided an analysis of relevant Part 2 RMA matters, presumably because the relevant plan, being the RPW, has not been updated to give effect to the Freshwater NPS. In the absence of such an update and given that the RPW does not specifically address network wastewater overflows, we consider that is necessary for us to refer to Part 2 of the RMA.
253. In terms of Part 2 of the RMA we conclude the following:
- (a) In terms of section 5 of the RMA, the grant of consent is not necessary in order for the community of Queenstown Lakes District to provide for its social, economic, and cultural well-being and for its health and safety. To the extent that the grant of consent would authorise avoidable discharges to water, that would be contrary to these aims;
  - (b) In the absence of specific mitigation measure we cannot be confident that granting the application would: i) safeguard the life-supporting capacity of air, water, soil, and ecosystems; and ii) appropriately avoid, remedy, or mitigate any adverse effects of overflows on the environment;
  - (c) We are not confident that granting the application would sufficiently recognise and provide for the matters outlined in section 6 (a), (b), (c), and (e) of the RMA;

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<sup>33</sup> CA97/2017 [2018] NZCA 316.

- (d) Granting the application, in its current form, would not achieve some of the section 7 RMA matters. In particular, we are not satisfied that the amenity values and the quality of the environment would be maintained or enhanced as a result of granting the application.

254. Overall, we conclude that granting the application, without the certainty of having avoidance and mitigation measures specified in the consent, would not achieve the purpose and principles of the RMA.

## CONCLUSION AND OVERALL DETERMINATION

255. On the basis of the evidence before us, we have determined that the application should be refused for the reasons outlined in this decision. In summary:

- (a) We have insufficient evidence before us to be able to determine the extent of adverse effects from future overflows;
- (b) There is the potential for some overflows to have short lived but significant adverse effects on the environment;
- (c) In terms of section 105 of the RMA, the *nature of the proposed discharges* and the *high sensitivity of the receiving environments* for those which reach water requires that overflows which reach water must be avoided or minimised so far as is reasonably practicable and that the effects are mitigated and remediated so far as is reasonably practicable;
- (d) We have insufficient evidence to allow us to properly assess the availability of alternatives;
- (e) We have insufficient details of the Applicant's mitigation proposals and priorities to enable us to assess whether those proposals are appropriate/sufficient or will achieved the now stated BPO requirement;
- (f) We consider that the three proposed management plans (NIMP, WEAMP, and WORMP) are critical and key documents that provide the foundation for the Applicant's mitigation measures. We find that these three management plans could have, and more importantly should have, been provided with the application so that we could determine whether they would achieve their intended objectives and also to allow submitters and the ORC to comment on their contents;
- (g) We find that the proposed approach of developing these three key management plans after the consent is granted leaves too much discretion with the Applicant in terms of deciding the best mitigation options to implement and prioritising those appropriately.

We conclude that this amounts to an inappropriate delegation of our decision-making responsibilities;

- (h) We are not satisfied that the proposed exclusions (which would be the only proposed limits on the consent) are sufficient and sufficiently certain, particularly in regard to the most sensitive receiving waterbodies;
  - (i) We have insufficient evidence before us to enable us to be satisfied that the proposed overflows to Lake Wakatipu and/or the Kawarau River would not breach the water classification standards under the WCO;
  - (j) We find that the application, in its current form, has little support from the objectives and policies of both the statutory and non-statutory planning documents and, overall, is inconsistent with the relevant provisions of those planning documents; and
  - (k) In so far as Part 2 of the RMA needs to be considered, we conclude that granting the application, in its current form, would not achieve the purpose and principles of the RMA.
256. Although immaterial to our decision, we record here that if we had determined to grant the application, we would not have authorised overflows from any new (future) wastewater networks that would be serviced by new wastewater treatment plants (e.g. Glenorchy). We consider that any overflows from such networks would be best considered at the same time that the discharge from any new wastewater treatment plants was being considered.

## **DECISION**

For the above reasons, it is our decision, pursuant to sections 104B of the Resource Management Act 1991, to **REFUSE** the application lodged by the Queenstown Lakes District Council to discharge untreated wastewater to various receiving environments via overflows from wastewater infrastructure throughout the Queenstown Lakes District.

Dated this 20<sup>th</sup> day of December 2019



**Dr Rob Lieffering**

**Hearing Commissioner (Chair)**



**Sharon McGarry**

**Hearing Commissioner**



**Philip Milne**

**Hearing Commissioner**