

**BEFORE THE COMMISSIONERS APPOINTED BY
THE OTAGO REGIONAL COUNCIL**

In the Matter of application under
RM19.151

Between **BSTGT Ltd and A P
McQuilkin, N J McQuilkin,
K L Skeggs, S A
McQuilkin and G M Todd
being Trustees of the A P
McQuilkin Family Trust**

Consent Application

RM19.151

Applicants

OPENING SUBMISSIONS OF COUNSEL FOR THE APPLICANTS

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OPENING SUBMISSIONS OF COUNSEL FOR THE APPLICANTS

SCOPE OF SUBMISSIONS

1. The Applicants largely agree with the recommendations of the section 42A report prepared by Alexandra King. The outstanding issues are:
 - (a) The use of default limits.
 - (b) Ecological values and residual flow conditions;
 - (c) Efficiency of Use including Aqualinc recommendations and Base Flow; and
 - (d) NPS FM 2020 and PC7.
 - (e) The standing of Glencoe Station Limited (**GSL**).
 - (f) The LOFTS scheme.
 - (g) The relevance of alleged water quality effects.

PROPOSED AND DRAFT DEFAULT LIMITS

2. The *Draft Guidelines for the Selection of Methods to Determine Ecological Flows and Water Levels*¹ (**Draft Guidelines**) and the proposed National Environmental Standard for Ecological Flows and Water Levels 2008 (**proposed NES**) are incomplete tools developed 12 years ago as a framework for setting ecological flows and water level limits in regional plans. Both were designed for use in the absence of specific data relating to the hydrology and ecology of waterbodies.
3. Mr Hickey who was a technical peer reviewer on that document, explains the proposed NES originally intended to set interim default limits which would be replaced using the methods in the Draft Guidelines. However, this is not what occurred. Instead both

¹ Beca. 2008. *Draft Guidelines for the Selection of Methods to Determine Ecological Flows and Water Levels*. Report prepared by Beca Infrastructure Ltd for MfE. Wellington: Ministry for the Environment.

documents languished unconfirmed and accordingly Council has not defined default limits.²

4. Even though these default limits have not been implemented, the section 42A Report incorporates them into its recommendations and conclusions about:
 - (a) Rate and volume of take³;
 - (b) Minimum flows⁴;
 - (c) Residual flows⁵; and
 - (d) Ecological values⁶.
5. Counsel submits that it is poor practice to apply default limits that presume a complete absence of information when considerable technical assessment, ongoing gauging data and video/photo monitoring of both Royal Burn and New Chums Creek has been provided within the evidence of Hilary Lennox.
6. It is submitted that the stream-specific technical assessment of the hydrology and ecological values made available to the ORC for both Royal Burn and New Chums Creek⁷ provides a better foundation for assessing the Application than default limits in the Draft Guidelines and Proposed NES.

Proposed NES

7. The proposed NES proposes interim limits to apply where environmental flows have not been set. These proposed limits were necessarily conservative because they were intended to apply to all streams and protect all ecological values where no information about the streams existed.⁸

² Evidence of Matthew Hickey at [14] – [15]

³ Section 42A Report of Alexandra King (**Section 42A Report**) at page 43.

⁴ Section 42A Report at page 36.

⁵ Section 42A Report at page 36.

⁶ Section 42A Report at page 36,40-43.

⁷ Evidence of Hilary Lennox at [39], Evidence of Matthew Hickey at [24]-[39]. Evidence of Dean Olsen at [14]-[32].

⁸ Evidence of Matthew Hickey at [17].

8. Aukaha Limited prefers allocation be determined with reference to the proposed NES criteria:
- (a) *“For rivers and streams with mean flows less than or equal to 5m³/s*
 - (b) *A minimum flow of 90% of the mean annual low flow (MALF) as calculated by the regional council and an allocation limit of, whichever is greater of:*
 - (i) *30% of MALF as calculated by the Regional Council*
 - (ii) *the total allocation from the catchment on the date that the national environmental standard comes into force less any resource consents surrendered, lapsed, cancelled or not replaced.”*⁹
9. Mr Hickey identifies three reasons why these proposed NES criteria do not fit the Application:
- (a) Policy 6.4.2 of the RPW sets allocation limits and the proposed NES interim limits were not intended to apply where environmental flows have been set¹⁰.
 - (b) The proposed NES itself prefers limits based on specific technical assessment or stream specific information where these are available¹¹.
 - (c) The proposed NES assumes national and regional implementation which has not occurred¹².
10. It is submitted that the proposed NES was never intended to replace actual information about a stream where this is available. It is further submitted that the proposed NES is particularly unsuited to ad hoc application since the framework was designed to be systemically applied.

⁹ Submission on behalf of Aukaha Ltd at paragraph 5.17.

¹⁰ Evidence of Matthew Hickey at [19].

¹¹ Evidence of Matthew Hickey at [21].

¹² Evidence of Matthew Hickey at [20].

11. In assessing the Application, counsel submits, the Commission need not resort to default limits in the face of the ample hydrological and ecological data and expert analysis provided about Royal Burn and New Chums Creek.¹³

Draft Guidelines

12. The Draft Guidelines provide a methodology for establishing ecological flow requirements. One aspect of the methodology is to categorise flows which may impair ability of trout to access spawning and rearing grounds to be a high risk of deleterious effect. This categorisation assumes a vacuum of information about a stream's hydrology.
13. Conversely, the data shows that Royal Burn is naturally intermittent.¹⁴ Therefore intermittency is not caused by the Application or the existing abstraction.
14. Mr Hickey says the trout identified were most likely introduced illegally and are prevented from travelling upstream by a natural barrier.¹⁵
15. Counsel submits illegally introduced trout separated by a natural barrier are unlikely to be the type of situation intended to be addressed by the high-risk categorisation. Though the risk may be as 'high' under the Draft Guidelines, in the Royal Burn this is a result of the hydrology of the stream not the existing allocation or the Application.
16. Mr Hickey, Dr Olsen and the ORC's Resource Science Unit (**RSU**) have assessed the ecological values in the Royal Burn and New Chums Creek and this analysis has been incorporated into the amended conditions of the Application.
17. It is submitted that where catchment specific assessment is available, the Commission should prefer that information and associated recommendation over the default indicators in the Draft Guidelines.

¹³ Evidence of Hilary Lennox at [39], Evidence of Matthew Hickey at [24]-[39]. Evidence of Dean Olsen at [14]-[32].

¹⁴ Evidence of Matthew Hickey at [24]

¹⁵ Evidence of Matthew Hickey at [37]

Ecological Values and RSU Residual Flow Condition

18. The North Branch of the Royal Burn has a perennial gaining reach. Although the stream is intermittent, below the proposed monitoring site flows substantially increase through groundwater upwelling.
19. A residual flow condition was initially suggested by Pete Ravenscroft of the RSU in his June 2019 assessment of the Application. Mr Ravenscroft's residual flow condition required that all three points of take adhere to any further minimum flow set for the Arrow River and that water is not taken from any point of take when a connected visible flow immediately downstream for a distance of no less than 50 m cannot be maintained.¹⁶
20. Mr Ravenscroft and Ross Dungey from the ORC, Mr Hickey and Dr Olsen for the Applicant and Daniel Jack from the Department of Conservation (**DOC**) agreed a survey method which confirmed that there are no native fish present in either the North Branch of the Royal Burn or New Chums Creek. This finding was consistent with a previous survey undertaken by Ross Dungey on behalf of ORC.
21. This same survey recorded small trout in the Royal Burn downstream of the confluence with the South Branch.
22. Mr Hickey considers these trout too small to be of recreational value. Further these trout are likely separated from the Arrow River by the intermittent reach of the North Branch resulting in fish-free reaches upstream.
23. DOC was satisfied with the 50 m residual flow proposed by ORC and provided their unconditional written approval in April 2020.
24. None of the experts identified any threatened invertebrates within New Chums Creek or the North Branch of Royal Burn.

¹⁶ RSU assessments of BTSGT Limited water take RM19.151 to take water from the Royal Burn and New Chum Creek, Pete Ravenscroft, 13 June 2019. Evidence of Hilary Lennox at [26].

25. The experts were agreed on the effects on ecological values, fish and instream ecology and that the proposed condition sufficiently addressed these effects.
26. Reflecting this agreement, Ms King's Notification Assessment concludes effects of fish and instream ecology to be no more than minor.¹⁷ In light of this finding it is difficult to see how the increase in suggested flows fairly relates to the maintenance of ecological values since this finding has not been disturbed in the section 42A Report.

Additional Information triggering additional technical review

27. Ms King engaged Bryony Miller to undertake another technical review even though by this point there had been:
 - (a) thorough technical assessment,
 - (b) ecological values defined and agreed by experts for the Applicants, ORC and DoC;
 - (c) agreement on the RSU's residual flow condition; and
 - (d) notwithstanding her own conclusion as to effects on ecological values in New Chums Creek and the North Branch of Royal Burn.
28. Ms King in her section 42A report says further information provided by submitters and the Applicant caused Council to reconsider its recommendation.¹⁸ We are left to infer that this information was also the reason for Ms Miller's review.
29. Unfortunately, the report does not state what the additional information was. More importantly, whatever it was does not appear to have disturbed Ms King's Notification Assessment conclusion that effects on fish and instream ecology are no more than minor.¹⁹

¹⁷ Notification Assessment, Alexandra King, 13 November 2020 page 15.

¹⁸ Section 42A Recommending Report dated 25 May 2021 page 30.

¹⁹ Notification Assessment, Alexandra King, 13 November 2020.

Fundamental errors undermine Ms Miller's recommendations

30. Ms Miller's report suggests that she may not have had all of the information that was available to the ORC including recent flow gauging data and the photo/videos over the period November 2020 to March 2021 showing effects on the losing and gaining reaches of Royal Burn²⁰.
31. This lack of information is evident in the material errors that follow.
32. Ms Miller asserts there is an "...absence of certainty regarding the alternation of a creeks hydrology from permanent to intermittent...it [the Draft Guidelines and Proposed NES] is considered an appropriate proxy to provide some level of guidance for ecological stability."
33. While this may be the case for 'a creek' generally²¹ in the present circumstances, Ms Miller had to discount or dismiss the considerable technical assessment referred to in her evidence at [5] and [6] which establishes the Royal Burn is naturally intermittent to find this 'uncertainty'.
34. Instead, Ms Miller overestimates the weight to be placed on the evidence of Glenn and Kerry Russell. Based on their submission, Ms Miller identifies Brodie Creek to create potential for unidentified aquatic values²². However, Brodie Creek does not exist. Although Brodie Race, a man-made waterway, does. It is entirely possible that the Russell's children did once catch koura in the Brodie Race, but this is not an ecological value of the Royal Burn.
35. Ms Miller also misidentifies the proposed cut-off monitoring location by some 380 m thereby considering the location to be below the groundwater upwelling area rather than within it.²³ This error affected her calculation of what would happen downstream of the cut-off and led her to underestimate the impact on flows of increased groundwater in the gaining reach.

²⁰ Evidence of Hilary Lennox at [39].

²¹ See discussion above at [10] – [26].

²² Evidence of Bryony Miller at [8].

²³ Evidence of Hilary Lennox at [42]

36. Ms Miller asserts that there are 'unquantified abstractions'²⁴. However take was calculated by subtracting a measurement just downstream of each take from a measurement just upstream of each take. Calculated in this way, all abstractions were quantified.
37. Ms Miller states that the Applicants can maintain abstraction rates during periods of low flow.²⁵ However, Ms Lennox notes she is not confident that the existing infrastructure would be able to convey sufficient water to stock under these conditions.²⁶
38. Ms Miller was engaged for reasons unspecified to consider matters already resolved, which Counsel submits makes her errors relating to the nature of the Application and the hydrology and ecological values of New Chums Creek and Royal Burn all the more regrettable.
39. For these reasons, it is submitted that little weight can be placed on Ms Miller's evidence or upon the recommendations that have flowed from her evidence into the section 42A Report. We address the specific conditions below.

Low Flow Cut-off Condition

40. The 5 l/s cut-off condition was intended to avoid potential adverse effects on the reliability of water available to downstream users. However, Mr Hickey assessed the cut-off to have the effect of protecting instream values below the swamp.
41. Having undertaken no further assessment of ecological values Ms Miller, concluded it was necessary to change from a 5 l/s residual flow to a 10 l/s residual flow *"to reduce the likelihood of potential for stagnancy in the 'swamp' and reductions in water quality required to support ecological values such as dissolved oxygen and changes to water temperature, as well as increased stretches of creek intermittency."*²⁷

²⁴ Evidence of Bryony Miller at [48].

²⁵ Evidence of Bryony Miller at [17].

²⁶ Evidence of Hilary Lennox at [37].

²⁷ Page 31 of the Section 42A report of Ms Alexandra King.

42. Dr Olsen sees no stream specific technical basis for this change arising from his observations of the conditions on the ground.²⁸ Moreover, protecting instream values was considered unnecessary due to the perennial nature of the stream.²⁹
43. Dr Olsen concludes the 5 l/s cut off residual flow condition is appropriate:
- "Based on my observations of the North Branch of the Royal Burn and New Chums Gully and the ecological values the supports, it is my opinion that the proposed residual flow conditions will provide for the life supporting capacity of these systems."*³⁰
44. Mr Hickey observes that the LOFTs take of 0.2684 l/s is adequately provided for by the 5 l/s cut off condition for residual flow.³¹
45. Despite this uncontested specific technical evidence about ecological values, Ms King adopted Ms Miller's recommendation into the section 42A Report. The proposed condition is also inconsistent with the Ms King's finding within the notification assessment that the proposal would have no more than minor effects on ecological values. We note Ms King does not undertake any further assessment of ecological values in the section 42A Report.
46. Counsel submits that Dr Olsen's and Mr Hickey's specific observation-based assessments of Royal Burn and New Chums Creek are to be preferred. Indeed, they are largely uncontested.
47. In light of the robustness of this evidence and the fundamental errors in Ms Miller's report it is submitted that the recommended increase in cut-off to 10 l/s in the section 42A Report is not justified or necessary.

EFFICIENCY OF USE

48. Ms Lennox calculates the annual demand for the Applicants to be 1,329,742 m³/yr.³² The Application seeks 1,214,683 m³/yr. Therefore,

²⁸ Evidence of Dean Olsen at [29].

²⁹ Evidence of Hilary Lennox at [38].

³⁰ Evidence of Dean Olsen at [27].

³¹ Evidence of Matthew Hickey at [44].

³² Evidence of Hilary Lennox at [124].

the total volume being applied for is only 91.3% of the calculated annual demand.

49. The section 42A Report recommends splitting the allocation between the irrigation season and outside the irrigation season.
50. Splitting allocation in this way would increase compliance costs for both the Consent Holder and Council's Compliance Team because it would require both to manage, and report on two sets of allocation and flows rather than one.
51. Additionally, a split regime prevents the Consent Holder from operating responsively. For example, by harvesting flood flows in late winter or adjusting timing of take to account for unanticipated seasonal variations generated by climate change.
52. Counsel submits that this is an unnecessarily rigid approach likely to result increased administration and cost with no discernible benefit.

Aqualinc: 90th percentile?

53. Ms King refers to "*Water Requirements for Irrigation Throughout the Otago Region*" a report prepared for Council by Aqualinc Research Limited (**Aqualinc**) in October 2006 later updated in 2017 (**Aqualinc 2017**).
54. Ms King accurately records that:

"Aqualinc provides recommended seasonal volumes based on an average year; a one in two-year drought (80th Percentile); a one in ten-year drought (90th Percentile) and a maximum situation."
55. This is correct, Aqualinc does recommend values on this basis. However Ms King goes on to conclude:

"For Otago it is considered that a one in ten-year drought or 90th percentile is the most appropriate when considering efficient water use."
56. This does not reflect the Aqualinc recommendations which do not establish a hierarchy of preference as between the percentiles.

57. Further there is no operative policy in the RPW or any proposed policy in PC7 that identifies a preference for using the 90th percentile. Indeed PC7 simply contemplates a rollover of existing maximum volumes from take data.
58. In the absence of any policy reason or indeed any reason in Aqualinc 2017 itself, Ms King's view that the 90th percentile is preferable to the maximum for the Application is without policy support.
59. Conversely, Ms Lennox clarifies that the annual volumes sought are highly unlikely to be available in a 1:10 year drought situation. The water in the Royal Burn and New Chum catchments is just not reliable enough for that. So the only effect of the 90th percentile constraint is to limit the Applicants supply when water is plentiful since it is most likely unavailable when not.³³
60. Having stated her view, Ms King expresses concern about the precedent effect of allowing the Application with the maximum and the risk of locking up supply.
61. Counsel submits, since the Application seeks less volume than has been historically used as calculated by the ORC, the risk of unused volume being locked up, that is unused and unavailable, for further allocation is low.
62. Counsel further submits the Aqualinc maximum is most appropriate in these circumstances because it is necessary to provide for the Applicants' irrigation purposes as well as being a considerable reduction on the actual use assessed.
63. Finally, Ms King also suggests conditions of consent to avoid water being wasted in an average year on a maximum allocation. Counsel submits that this recommendation would cover any efficiency risk.

NPS FM 2020 and Plan Change 7

64. The 42A officer's description of the NPS FM 2020 is accepted (pages 46-48). It would be wrong to second-guess the outcome of the NOF

³³ Response to Commissioners Questions, 4 June 2021 at page 4.

process for the Royal Burn and New Chums catchment. Section 128 contains a specific power to align consent conditions with limits and attribute targets adopted by the ORC that may be relevant.

65. PC7 has been adopted as an interim framework to enable the Land and Water Regional Plan to be progressed. Counsel appears for a number of submitters on PC7. The matter is being heard by the Court, and hearings will continue into July. At the present time, counsel can report that not even the ORC now supports the notified version of PC7, as Wynn Williams will be able to confirm. This goes to the weight that might be attributed to PC7 in the current process.
66. In any event, the applicants acknowledge and accept the Commissioner's approach in his *Enfield Limited* decision RM19.345, which is why a 15 year term is sought.

GLENCOE STATION LIMITED

67. The Application does not seek to replace water allocation related to any shares held by GSL.
68. GSL was notified by the ORC as an affected party. It is submitted that was an error. Although the Commissioner does not have jurisdiction to undo the notification decision, you may still find as a matter of fact and law that GSL is not affected by this application.
69. For GSL to be an affected person pursuant to section 95E of the RMA requires:
 - (a) the ORC to assess the application's adverse effects on GSL; and
 - (b) there to be an adverse environmental effect on GSL that is minor or more than minor (but not less than minor).
70. The ORC has assessed GSL to be an affected person as a result of an adverse effect which it considers to be minor:

'As the applicant has proposed a residual flow condition, this may mean when Glencoe Station come to replace its 20%

*share it will not have surety of water supply for continuous use.*³⁴ **(Effect)**

What interest does GSL have in the activity?

71. GSL has until 1 October 2021 to take:

- (a) 20% of 300,000 l/h for the purpose of irrigation (95696 New Chums).
- (b) 20% of 50,000 l/h for the purpose of irrigation and stock water (96285 Royal Burn).

(Water Take)

72. GSL's Water Take is not a property right nor is it real or personal property, a consent authority's assessment is in relation to actual or potential effects is on the environment, not on the economic interests of others who may come later to apply for access to a fully allocated resource.³⁵ Thus Ms King's concern for GSL's ability to apply later to access water is misplaced.

GSL does not use the Water Take

73. GSL does not own any interest in land with access to the authorised point of take. GSL's existing permits cannot be exercised.

74. The only land in the catchment associated with GSL is legally described as Lots 1 and 2 Deposited Plan 398297 owned by Glencoe Land Development Limited (**GLDL**).

75. Figure 1 below shows GLDL's land in red hatching and the location of the New Chums Take on BSTGT's land in yellow hatching.

³⁴ Section 42A Report page 21.

³⁵ Section 122(1) RMA and *Hampton v Canterbury Regional Council* [2015] NZCA 509, [2016] NZRMA 369.

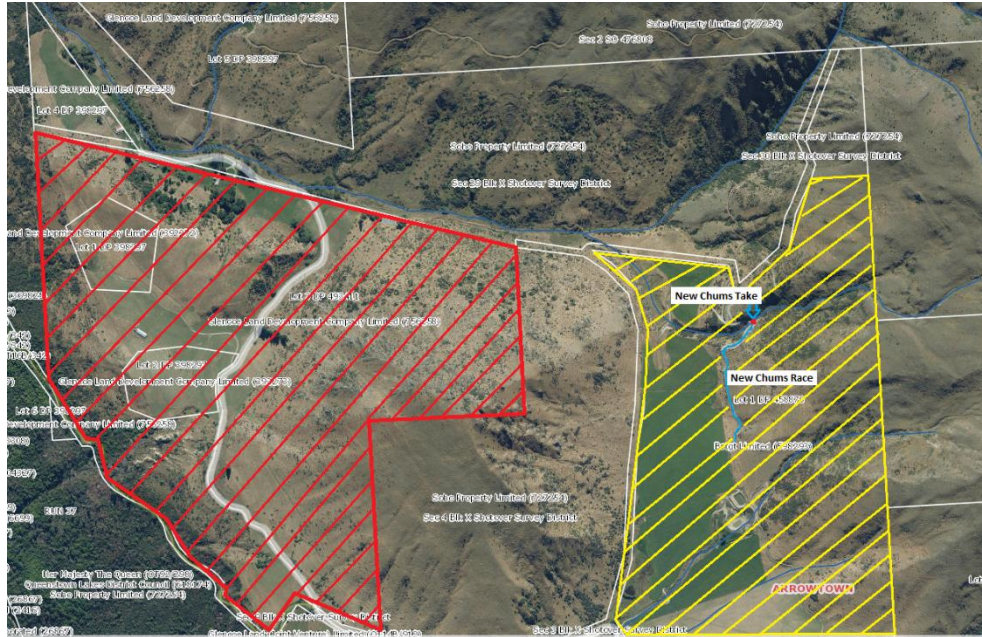


Figure 1

76. GLDL does not have legal frontage to New Chums Creek.
77. GLDL was included as an affected party in relation to the potential for minor groundwater effects on bore F41/0307.
78. The GLDL land is located diagonally across from the section³⁶ containing the New Chums Water Take.
79. The GLDL land is approximately 1 km from the New Chum Take and over 5 kilometres away from the Upper and Lower RBNB Takes.
80. There is no existing infrastructure connecting the GLDL land with any of the points of take.
81. GSL admits it made no effort to retain its ability to access the Water Take when it disposed of land crossed by the Brodie Race connecting to Royal Burn.³⁷
82. The scale of expenditure and infrastructure required for GSL to secure access and exercise its Water Take before it expires on 1 October 2021 is such that it borders on fanciful.

³⁶ Legally described as Section 29 Block X Shotover SD.

³⁷ Page 3 of GSL Submission.

83. Counsel submits neither GSL nor GLDL (together the **Glencoe Companies**) use the Water Take.
84. The applicants made enquiry of the ORC for any records of GSL's records of water take and none were found. This is important because Policy 6.4.2A of the RPW is a "sinking lid" policy, a primary allocation permit may be granted for no more water than has been taken in the preceding 5 years. If there is no record of take, then GSL's permit for primary allocation water cannot be renewed.
85. It is submitted GSL does not have 'continued use' to lose because it is not using the Water Take. The Glencoe Companies cannot lose a benefit they do not have.
86. For this reason, counsel submits the Water Take is best characterised as a paper allocation. Counsel adopts Ms Lennox's conclusion that the policy framework supports surrender of paper allocation.³⁸

Is the Effect environmental?

87. It is well settled that adverse effects must be in an environmental sense to be considered. In *Northcote Mainstreet Inc v North Shore City Council* [2006] NZRMA 137 Lang J says:

"[188] I consider that, in order to qualify as a person capable of being adversely affected under s 94, it is necessary for that person to have the potential to be adversely affected, either directly or indirectly, by the proposed activity. Eligibility need not be derived from the ownership or occupation of land that is proximate to that activity, although that will often be the case. Persons are generally likely to be adversely affected by a proposed activity because they live or carry on an activity on land that is proximate to the proposed activity. Eligibility will, however, only extend to persons who are adversely affected in an environmental sense. As Blanchard J noted in the Supreme Court at para [109], s 94 only applies to persons who may suffer adverse environmental effects, because the Act "simply does not regulate activities generating only non-environmental effects".³⁹

88. A person can only be adversely affected in an environmental sense.

³⁸ Evidence of Hilary Lennox at [134].

³⁹ Also see *Progressive Enterprises v North Shore CC* (2005) 11 ELRNZ 421; [2006] NZRMA 72 and *Auckland RC v Rodney DC* (2009) 15 ELRNZ 100.

89. GSL's paper allocation forms part of the consented baseline, assuming that it has not lapsed, but will expire on 1 October 2021. However, GSL does not take any water so the extent to which its permission to do so can be affected by this application will turn on whether the ability to take water until 1 October 2021 is an "effect" in an environmental sense. It is submitted that this is not an environmental effect as contemplated by *Northcote Mainstreet*. It follows that GSL is not affected by the application for the purposes of s 95E of the Act.
90. Further, any future take applied for beyond 1 October 2021 does not form part of the existing environment for the purposes of s 104 and there is no certainty as to whether it will be applied for at all.
91. Counsel submits, an effect on a paper allocation which occurs after the expiry of that paper allocation cannot constitute an effect on the environment or on GSL. Any potential 'loss' of an economic opportunity is a non-environmental effect.
92. Should the Commissioner have any residual concern about potential adverse effects on GSL up to 1 October 2021, then the Commissioner can deal with that by imposing a commencement date of 1 October 2021.

Is the Effect within the discretion?

93. The ORC discretion to consider effects is restricted to the following relevant considerations:

12.1.4.8 Restricted discretionary activity considerations

In considering any resource consent for the taking and use of water in terms of Rules 12.1.4.2 to 12.1.4.7 and 12.2.3.1A, the Otago Regional Council will restrict the exercise of its discretion to the following:

(i) The primary and supplementary allocation limits for the catchment; and

...

(vii) Competing lawful local demand for that water; and

...

(xi) Any need for a residual flow at the point of take; and

(xvi) Any adverse effect on any lawful take of water, if consent is granted, including potential bore interference; and

(xvii) Whether the taking of water under a water permit should be restricted to allow the exercise of another water permit; and

...

(xx) The duration of the resource consent; ...

[Emphasis added]

94. The Notification Assessment states at page 16:

“Deemed permits expire 1 October 2021, therefore the effects of the proposed take can only be considered up until 1 October 2021.

95. No adverse effects on values in relation to GSL are identified so the appropriate term for consideration is until 1 October 2021.

96. Speculation about future applications is outside the discretion which is limited to impacts on the ‘lawful take of water’ not the potential future lawful take of water.

97. Considering unmade applications is inconsistent with the priority approach in the allocation of limited resources.⁴⁰

98. GSL’s 20% share is for the uses of irrigation and stock water. The extent to which GSL is affected by the application is linked to its demand, or existing use of the water. However, GSL does not take the water. Since GSL does not lawfully take water it does not have a ‘demand’ to be affected.

99. Consideration of what applications GSL may make in future are outside of the discretion. We note should GSL apply now any application would also be outside the discretion.

100. Counsel submits in addition to not being environmental the Effect is not within the restricted discretion of the ORC.

101. It is submitted that the Ms King has misapplied the section 95E test and considered irrelevant considerations including GSL’s potential future applications and GSL’s non-existent ‘surety of continued use’; whilst failing to consider actual use and the practical barriers to use posed by distance and lack of infrastructure.

⁴⁰ *Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257 at 268.

102. Counsel submits GSL is not properly categorised as an 'affected person' in relation to BSTGT's application.
103. The Commission may appropriately disregard GSL's submissions from its assessment of effects under section 104 of the RMA. The submission does not raise any matter relevant to the Commissioner's function.

Are there broader policy reasons to consider GSL's submissions?

104. Additionally, if the Commissioner should decide to assess effects on GSL, then it should be in the light of the clear policy direction within, the National Policy Statement for Freshwater Management 2020 Policy 11 which states:

Freshwater is allocated and used efficiently, all existing over-allocation is phased out, and future over-allocation is avoided.

105. Plan Change 7 to the Otago Operative Regional Plan: Water (**PC7**) addresses the NPS-FM 2020 by requiring water users seeking to replace deemed permits to demonstrate actual water used.⁴¹
106. The wider policy framework places actual water use at the core of freshwater allocation.
107. Counsel submits the GSL Water Take is the exact opposite. GSL does not and cannot use its paper allocation. As a result, GSL is unable to demonstrate actual use, let alone efficient use.

LOFTS Water Scheme

108. A similar submission to Glencoe may be made in relation to the LOFTS water scheme. The relevant considerations in rule 12.1.4.8 are:

12.1.4.8 Restricted discretionary activity considerations

In considering any resource consent for the taking and use of water in terms of Rules 12.1.4.2 to 12.1.4.7 and 12.2.3.1A, the Otago Regional Council will restrict the exercise of its discretion to the following:

(vii) Competing lawful local demand for that water; and

⁴¹ Evidence of Hilary Lennox at [138] – [141].

...

(xvi) Any adverse effect on any lawful take of water, if consent is granted, including potential bore interference; and...

- 109. The relevant consideration here is the extent to which the proposed activity has an effect on the lawful take of water by downstream users.
- 110. The LOFTS scheme is operated by LOFTS Water Limited. That company has 10 equal shareholders. Under clause 10.21 of the Company's constitution no shareholder may have an entitled to more than 2,500 l/day.
- 111. The LOFTS constitution is consistent with the Certificate of Compliance in so far as the take is something in the order of 0.4-0.5 l/sec, which is likely to be subsumed by the limit of accuracy of monitoring in any event.
- 112. The Commissioner should not be distracted by complaints from LOFTS shareholders concerning effects on their actual use of water, which might in fact exceed the LOFTS legal limit. An example is the submission of Mr Weldon, who claims to rely on the LOFTS scheme. Yet somehow has sufficient water to maintain a 25m lap pool:





113. As a former Olympic swimmer, Mr Weldon's desire for a pool is perfectly understandable, but it does not engage with what the Commissioner must consider under rule 12.1.4.8.

WATER QUALITY EFFECTS

114. She/he who alleges must prove. If the submitters consider that adverse effects on water quality are relevant, they must provide the evidential basis for that claim. An applicant, while obliged to prepare an AEE that complies with the requirements of the 4th Schedule, is not required to disprove every allegation made by submitters.
115. Counsel generally accepts the background principles in Wynn Williams' memorandum of 24 May, paragraph 8-13. Where we differ is whether the discharge of contaminants is within the scope of Rule 12.1.4.8, and should be disregarded on the permitted baseline principle. In paragraph 14, Wynn Williams offers the opinion that the loss of nutrients to groundwater is relevant. It is not clear what evidence is relied upon for the idea that there will be a nutrient loss to ground water, and if so, to what extent that is not already authorised by the RPW.

116. Rule 12.1.4.8. It is submitted that the rule does not bring the discharge of contaminants into play. That submission is made on the way that Chapter 12 of the RPW is structured. It is noted, too that PC7 is concerned only with take and use consents, not with discharge consents.
117. First, it must be remembered that section 14 of the Act concerns the take, use, damming, or diversion of water. Section 15 deals with the discharge of contaminants, including to water.
118. The index to the rules on page 11-7 of the RPW helpfully explains the structure. Chapter 12 is divided into discrete parts that reflect the structure of the Act:
- (a) 12.0-12.3 manages the take and use of surface water, groundwater, and damming.
 - (b) 12.A-12.C manages the discharge of contaminants.
119. The Principal reason for adopting rules in the 12.1 suite says:
- The taking of surface water within the primary and supplementary allocation limits identified in this Plan will be subject to minimum flows which will protect aquatic ecosystems and natural character. As such, the Council has restricted the exercise of its discretion when considering applications for resource consents under Rules 12.1.4.1 and 12.1.4.2 to 12.1.4.7, to take and use water. Any other activity involving the taking and use of surface water is either a discretionary activity or a non-complying activity in order that any adverse effects can be assessed.*
120. Plainly the effects issues relevant to restricted discretionary takes is intended to be limited to the aquatic ecosystems and natural character of the water body that the primary allocation limit relates to.
121. This is reflected in the Rule 12.A-12.CV rule suite, which manages discharges.
122. The discharge of pesticide and herbicide to land in circumstances where it might end up in water is permitted by rules 12.B.1.2, 12.B.1.3, and 12.B.1.4, subject to conditions. There is no suggestion that the applicants have not being, or will not, comply with the conditions.

123. The discharge of fertiliser to land for production is permitted by Rule 12.B.1.5. There is no suggestion that the applicants will not comply with that rule either.
124. The OVERSEER Nitrogen loss rule suite (12.C) was suspended from operation by Plan Change 6AA on 16 May 2020. The limit of 30 kg/Ha/annum limit does not apply until 1 April 2026. There is no suggestion that the applicants will not comply, or that the ORC proposes to identify Crown Terrace as a nitrogen sensitive zone. In the meantime, nitrogen leaching losses are permitted.
125. When the rules take effect, the applicants must comply with them despite anything that these consents might say, and so there is no relevance to the Commissioner's term decision.
126. Manipulating the scope and function of rule 12.1.4.8 to manage the discharge of contaminants is completely at odds with the structure of Chapter 12 of the RPW. It would render the permitted activity rules in the 12.B suite pointless.
127. The integration of take/use decisions with discharge of contaminants in must await a new Regional Plan. In the meantime, discharges are permitted, and the effects of permitted discharges should be disregarded under section 104(2).

Date: 11 June 2021

A handwritten signature in blue ink, appearing to be 'P J Page', with a stylized, cursive script.

P J Page

Counsel for BSTGT Ltd and A P McQuilkin, N J McQuilkin, K L Skeggs, S A McQuilkin and G M Todd being Trustees of the A P McQuilkin Family Trust