

**BEFORE THE INDEPENDENT HEARING COMMISSIONERS**

**IN THE MATTER** of the Resource Management Act 1991

**AND**

**IN THE MATTER** of applications by Woldwide companies for land use consents, water premits and discharge permits for farming activities

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**LEGAL SUBMISSIONS IN SUPPORT OF THE REPORTING OFFICER**

**4 OCTOBER 2019**

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## MAY IT PLEASE THE COMMISSIONERS

- 1 These submissions address the three questions of law identified on 2 October 2019, being:
- (a) Does the reference in pSWLP Rule 20 to “cows” mean all cows or just milking cows?
  - (b) Can the holder of a consent for which s127 RMA change has been granted choose not to rely on that change?
  - (c) What is required for a land use consent for farming activities to be given effect to? This includes the sub-issue of: can a resource consent be surrendered by virtue of the action of a consent holder or does it require a formal surrender and acceptance under RMA s138?

### What is a cow?

- 2 The relevant parts of Rule 20 of the pSWLP provides:
- (a) The use of land for a farming activity is a permitted activity provided the following conditions are met:
    - ...
    - (ii) where the farming activity includes a dairy platform on the landholding, the following conditions are met:
      - (1) the dairy platform has a maximum of 20 cows; or
      - (2) the dairy platform had a dairy effluent discharge permit on 3 June 2016 that specified a maximum number of cows; and
      - (3) cow numbers have not increased beyond the maximum number specified in the dairy effluent discharge permit that existed on 3 June 2016; and
    - ...

- 3 The *Collins Online Dictionary* defines cow as:

**Cow**

*1. the mature female of any species of cattle, esp domesticated cattle*

4 The *Oxford Online Dictionary* defines cow as:

**Cow**

*1. a fully grown female animal of a domesticated breed of ox, kept to produce milk or beef:*

*1.2 (in farming) a female domestic bovine animal which has borne more than one calf. Compare with heifer*

5 Turning to the context of the pSWLP, the words “cow” or “cows” are used 17 times. They are used:

- (a) in Policies 5, 9, 10, 11 and 12 in the context of decision makers generally not granting resource consents for additional dairy farming of cows;
- (b) in Policy 16(1)(a) in reference to discouraging the establishment of new dairy farming of cows near wetlands and sensitive waterbodies;
- (c) in Policy 16(1)(c) in relation to the treatment of applications to establish new or intensify dairy farming of cows, after the FMU process is undertaken;
- (d) three times in Rule 20 (as noted earlier);
- (e) in Rule 35 in relation to discharges of agricultural effluent to land from a dairy shed servicing a maximum of 20 cows;
- (f) twice in the definition of “dairy farming of cows”, which provides:

**Dairy farming of cows**

The farming, including grazing, of milking cows on land during the milking season.

- (g) in the definition of “dairy platform”, which provides:

**Dairy platform**

An area of a landholding where dairy cows being milked on a daily basis are kept during the milking season.

(h) in the definition of “stock”, which provides;

**Stock**

Farm animals kept for use or profit such as horses, dairy cows, cattle, deer, pigs, goats and sheep.

(i) in Table L.3 of Appendix L.4 for calculating water use for Dairy – lactating cows.

6 The factual issue relating to the number of cows will be clarified through the coming expert conferencing.

**Giving effect to a section 127 change of conditions**

7 I have been unable to find any authority for the proposition that a change to conditions of a resource consent under section 127 of the Act must be exercised before they take effect. For completeness, I have been unable to find any authority for the contrary position.

8 In my submission, a change to conditions of a resource consent that has already been exercised does not itself need to be exercised before taking effect.

9 Section 127 of the Act enables an application to be made to change or cancel resource consent conditions. It provides that sections 88 to 121 of the Act apply to the application, as if it were an application for resource consent as a discretionary activity and the references in those sections are amended accordingly.

10 The grant of a section 127 application does not result in a new resource consent issuing. It is a change to the existing consent. The change is subject to section 116, which relates to commencement, but (by exclusion) is not subject to section 125, which relates to lapse and whether a consent is given effect to. Once the change commences under section 116, the resource consent is amended and must be complied with.

11 This is consistent with the Environment Court’s conceptualisation of the seven stages of a resource consent’s life:<sup>1</sup>

(a) a resource consent comes into existence when it is granted;

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<sup>1</sup> *Fordyce Farms Ltd v Queenstown Lakes District Council* C208/2001, at [9].

- (b) notwithstanding grant, a resource consent does not “commence” until a later date – commencement is when a consent may be acted upon;
  - (c) a resource consent may then be exercised;
  - (d) a resource consent may be given effect to and, if not given effect to within 5 years of commencement then;
  - (e) will lapse unless an application is made and granted to extend the lapse period;
  - (f) may be cancelled under section 126 if not exercised for 5 years; and
  - (g) may be surrendered.
- 12 In my submission, the suggestion that a change to conditions must be exercised before it takes effect (and that the consent subject to the change can be implemented as unchanged) imports an unnecessary and unnatural gloss to the RMA.
- 13 An issue might arise if a consent holder is granted a change to conditions that it does not entirely support. However, that is remedied by the consent holder having an appeal right under section 120 of the Act.

### **Giving effect to a land use consent**

#### *Orthodox approach*

- 14 I have been unable to find any real authority for when a resource consent is “exercised” as opposed to “given effect to”. In my submission, a similar approach as “given effect to” is appropriate. That involves an evaluative, factual assessment, having regard to the steps taken towards implementing the resource consent.<sup>2</sup>
- 15 In this case, the steps taken under the 2017 consent include:
- (a) The silage leachate system has been constructed, which allows the collection and discharge of silage leachate as authorised by the 2017 discharge permit.

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<sup>2</sup> *Biodiversity Defence Society Inc v Solid Energy NZ Ltd* [2013] NZHC 3283.

- (b) The SH96 and Marcel blocks have been altered to add infrastructure for dairy pasture, including fencing, laneways and water troughs.
  - (c) Slurry from WW2 appears to have been spread on the Horner Block, as authorised only by the 2017 discharge permit.
  - (d) An underpass has been constructed between SH96/Marcel and WW1.
- 16 In my submission, those are sufficient steps to conclude that the 2017 land use consent has been given effect to. Importantly, the 2017 land use consent does not, of itself, require that the 2011 consent be surrendered.
- 17 It is the 2017 discharge permit and water permit that requires that the 2011 counterpart is surrendered. In my submission, asking whether the 2011 discharge and water permits have been surrendered is not the right question – an evaluative analysis of the facts is required to determine whether steps towards implementing the 2017 consents were taken.

*Surrender of consent*

- 18 I have been unable to find any authority under the Act that suggests that a resource consent can be surrendered by action. In *Fordyce Farms Ltd v Queenstown Lakes District Council*,<sup>3</sup> the Environment Court suggested that certain applications could impliedly surrender previous consents. The bounds of those comments have not been tested since.

**M J Doesburg**

Counsel supporting the Reporting Officer

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<sup>3</sup> *Fordyce Farms Ltd v Queenstown Lakes District Council* C208/2001, referring to *Sutton v Moule* (1992) 2 NZRMA 41 (CA).