

**Before Independent Decision Maker
Environment Southland**

In the Matter of the Resource Management Act 1991

and

In the Matter of the strike out application of a
submission on a resource consent application by **Pahia
Dairies Limited APP-20222765**

Decision of Independent Decision Maker 10 July 2023

Independent Decision Maker: Clare Lenihan
Decision date: 10 July 2023 (on the papers)
Application: Strike out submission, s41D Resource Management Act
Decision: **Decline application to strike out NZALA submission**

1 INTRODUCTION

1.1 I have been given delegated authority by the Southland Regional Council (**Environment Southland**) to determine an application by Pahia Dairies Limited (**the Applicant**) to strike out a submission made by the New Zealand Animal Law Association (**NZALA**), pursuant to s41D of the Resource Management Act (1991) (**the Act**).

2 BACKGROUND

2.1 The Applicant applied to Environment Southland for consents to authorise the use of a piece of land known as “Browns Block” for dairy purposes, in particular:

- 2.1.1 to expand a dairy farm by 95ha (with no increase in peak milking herd); and
- 2.1.2 for intensive winter grazing of cattle on 55ha of crop on slopes over 10 degrees
- 2.1.3 to discharge contaminant to land associated with intensive winter grazing.

2.2 The proposal triggers:

Land use consents:

- 2.2.1 Rule 20(e) of the proposed Southland Water and land plan due to the expanded dairy farm (discretionary);
- 2.2.2 Regulation 19(1) of the National Environmental Standards for Freshwater due to the expanded dairy farm (discretionary); and
- 2.2.3 Regulation 27(1) of the National Environmental Standards for Freshwater due to intensive winter grazing over 10 degrees slopes (restricted discretionary).

Discharge permits:

- 2.2.4 Regulation 19(2) of the National Environmental Standards for Freshwater due to the expanded dairy farm (discretionary)
- 2.2.5 Regulation 27(2) of the National Environmental Standards for Freshwater due to intensive winter grazing over 10 degrees slopes (restricted discretionary).

2.3 I understand the activities will be bundled together, so the overall status is discretionary.

2.4 The Application was publicly notified (closing 23 March 2023) and NZALA lodged the only submission (attached as Appendix 1).

NZALA submission

Resource Management Act

2.5 The NZALA submission covered the matters below.

2.6 The purpose of the Act is to promote the sustainable management of natural and physical resources.

- 2.7 “Sustainable management” can be defined as avoiding [remedying sic] or mitigating any adverse effects of activities on the environment.
- 2.8 “Environment” is defined to include all natural and physical resources, which includes cattle, s2(1) of the Act¹.
- 2.9 “Effect” includes potential effects of low probability which have a high potential impact².
- 2.10 As intensive winter grazing is controlled under the Act, the consent authority must consider the potential adverse effects of the proposed intensive winter grazing on cattle.

Animal Welfare Act

- 2.11 The intended operation is likely to be inconsistent with s10 Animal Welfare Act 1999 (**AWA**), by failing to meet the cattle’s physical, health and behaviours needs in accordance with good practice and scientific knowledge, including provision of proper and sufficient food and water, adequate shelter, the opportunity to display normal patterns of behaviour and protection from significant injury or disease.
- 2.12 It is not clear how much space there is for dry lying or how the species will be kept dry - a significant reduction in lying time can lead to acute and chronic stress and possible immunosuppression³.
- 2.13 The land is susceptible to pugging and insufficient drainage will likely impede the cattle’s opportunity to display normal patterns of behaviours and can lead to hoof injury, an increase in mastitis – the applicant has failed to address these adverse effects

Section 104(1)(c) - Code of Welfare for Dairy Cattle under review

- 2.14 NZALA assert it is relevant to consider the Code of Welfare for Dairy Cattle, the fact this is currently under review and a significant part of the review relates to intensive winter grazing (**IWG**) and whether such practises are consistent with the AWA. It is NZALA and the Winter Grazing Taskforce’s position that the standards need to increase in relation to IWG⁴.

¹ Paragraph 5 NZALA submission 22 March 2023

² Paragraph 6 NZALA submission 22 March 2023

³ Paragraph 15 NZALA submission 22 March 2023

⁴ Paragraph 16 NZALA submission 22 March 2023

NZALA Conclusion

- 2.15 NZALA concludes by submitting the effects of the proposed activity on cattle will be more than minor and the Applicant has failed to sufficiently eliminate or mitigate the risk of potential adverse effects on cattle. NZALA seeks the application be declined, or if granted, only for a period of a maximum of three years.

3 STRIKE OUT APPLICATION

Applicant

- 3.1 On 15 May 2023 the Applicant requested Environment Southland strike out the NZALA submission pursuant to s41D on the grounds the submission:
- 3.1.1 Discloses no reasonable or relevant case; and
- 3.1.2 Would be an abuse of the hearing process to allow the submission to be taken further⁵.
- 3.2 The Applicant seeks the submission be struck out in its entirety, and to prevent unnecessary costs to the applicant, a decision be made in advance of any evidence exchange timetable or hearing⁶.

Discloses no reasonable or relevant case

- 3.3 The Applicant submits that to disclose a reasonable or relevant case, a submission must raise issues, which are within the scope of an application under the Act. The sole issue raised by NZALA is animal welfare, which is not an issue with the scope of the Act - this is addressed under the Animal Law Act 1999 (**AWA**).
- 3.4 The Applicant further submits that the issue of animal welfare and the Act was thoroughly traversed in the matter of several resource consent applications to Environment Canterbury (ECan) for intensive indoor dairy farming in the Mackenzie Basin⁷. Legal advice provided to ECan⁸ was effects on animal welfare could not be considered under the Act because these are appropriately addressed under the AWA. The then Minister for the Environment (Nick Smith) and Government officials agreed that animal welfare issues sit outside the Act⁹.

Abuse of the hearing process

- 3.5 The Applicant submits that allowing the NZALA submission to progress to a hearing would amount to an abuse of process and put PDL to unnecessary expense¹⁰. At a

⁵ Applicant Strike out Application 15 May 2023 paragraph 9

⁶ Applicant Strike out Application 15 May 2023 paragraph 17

⁷ Applicant Strike out Application 15 May 2023 paragraph 11

⁸ Not provided by the Applicant and not available on the internet

⁹ Applicant Strike out Application 15 May 2023 paragraph 12.3 - 12.4

¹⁰ Applicant Strike out Application 15 May 2023 paragraph 13

pre-hearing meeting, ES advised the Applicant that if proposed draft conditions were imposed, the officer was minded to grant consent. There would be no need for a hearing, apart from the NZALA submission.

- 3.6 If the submission isn't struck out, the Applicant will need to immediately commence operation of evidence to protect its position, which could include expert animal welfare evidence, feed/supplement nutritional make-up and planning. There are no cost recovery provisions for the Applicant and if the submission is subsequently found to be out of scope, costs will already have been incurred for the hearing.
- 3.7 The Applicant is prejudiced by this process, as the NZALA submission does not raise any valid issues under the Act.

4 NZALA Memorandum in response to strike out

- 4.1 On 9 June 2023 NZALA lodged a Memorandum of Counsel in response to the Applicants strike out application, submitting:
 - 4.1.1 The threshold for striking out has not been met – NZALA submission raises a reasonable and relevant case and does not amount to an abuse of process;
 - 4.1.2 The ability to strike out under s41D must only be used sparingly, given the significant implications on public participation¹¹.
- 4.2 NZALA notes the power to strike out:
 - 4.2.1 is discretionary, contrasted with other powers in relation to application and hearings;¹²
 - 4.2.2 should only be used when a claim is beyond repair and so unobtainable that it could not possibly succeed;¹³ and
 - 4.2.3 can be in whole or part (noting the Applicant hasn't considered whether it may be more appropriate to strike out part of the submissions only).
- 4.3 NZALA notes a significant lack of case law regarding section 41D, and that the wording mirrors aspects of a similar power for Environment Court Judges under s279(4), and considers case law under this section can provide useful guidance¹⁴.
- 4.4 NZALA note the Act encourages public participation and people should not be deprived of "their day in court"¹⁵. This application was publicly notified, enabling the highest level of public participation¹⁶.

¹¹ NZALA Memorandum of Counsel in response to Strike Out Application 9 June 2023, paragraphs 39 and 40

¹² NZALA Memorandum of Counsel in response to Strike Out Application 9 June 2023, paragraph 4

¹³ Citing *Coldway Installation Ltd v North Shore CC* W118/96

¹⁴ NZALA Memorandum of Counsel in response to Strike Out Application 9 June 2023, paragraph 7

¹⁵ NZALA Memorandum of Counsel in response to Strike Out Application 9 June 2023, paragraphs 10 and 11

¹⁶ NZALA Memorandum of Counsel in response to Strike Out Application 9 June 2023, paragraph 15

- 4.5 The submitter also highlighted that when a submission is struck out under s41D, although there is a right of objection under s357, there is no right of appeal to the Environment Court.

Reasonable or relevant case

- 4.6 NZALA asserts its submission does not raise only animal welfare issues – it is also concerned with:
- 4.6.1 Whether the application, the consent (if granted) and any conditions comply with relevant legislation and regulations, including the NES Freshwater and the Animal Welfare Act and associated regulations;
 - 4.6.2 Effects of the consent application on animal welfare; and
 - 4.6.3 Whether the consent application provides for sufficient management of the effects of IWG, including the ability to manage the effects of pugging¹⁷.
- 4.7 NZALA also notes it is common for consent conditions to include a condition ensuring compliance with all applicable legislation and regulations¹⁸.
- 4.8 There is no need for an authority to agree with the merits of the case or whether they are strong or not, especially if novel arguments are raised¹⁹.

Animal welfare considerations

- 4.9 The definition of “environment” and “effect” are broadly constructed, as is the purpose of sustainable management, which can include animals. A lack of direct legislative reference to animal welfare does not automatically exclude its consideration,²⁰ although effects on “animals” are specifically mentioned as something an assessment of environment effects must address²¹.
- 4.10 Although there is scarce case law considering impacts on animal welfare in consenting decisions, the issue has been considered in passing²² and imposed as part of conditions of consent²³.
- 4.11 NZALA considers the Applicant’s strike out notice relies heavily on references to internal local authority and Ministry legal advice and statements made in correspondence from the Minister for the Environment in the Mackenzie example and

¹⁷ NZALA Memorandum of Counsel in response to Strike Out Application 9 June 2023, paragraph 19

¹⁸ NZALA Memorandum of Counsel in response to Strike Out Application 9 June 2023, paragraph 20

¹⁹ NZALA Memorandum of Counsel in response to Strike Out Application 9 June 2023, paragraph 21

²⁰ NZALA Memorandum of Counsel in response to Strike Out Application 9 June 2023, paragraph 22, citing *Backcountry Helicopters Ltd v Minister of Conservation*[2013] NZHC 982 where the Court found animal welfare concerns were not irrelevant or improper, even though not mentioned in either the Wild Animal Control Act 1977 or the Conservation Act 1987 (the relevant statutes)

²¹ Schedule 4 Clause 7 of the Act

²² FN 11: *Stark v Waikato District Council* [2014] NZEnvC 150 (NB this should be [2014] NZEnvC 49), paragraph 8

²³ FN 12: *Gray Cuisine Limited v South Waikato District Council* [2011] NZEnvC 121

submits Ministry guidance or statements regarding interpreting legislation do not have authoritative weight in decision-making²⁴.

- 4.12 Section 331B of the Act was incorporated in 2023 by the Severe Weather Emergency Legislation Act 2023 and expressly allows for consideration of the well-being of animals. Although relevant provisions will be automatically repealed in April 2024, this indicates animal welfare considerations are not outside the ambit of the Act.
- 4.13 The application requires consent as a discretionary activity under the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (**NESFW**) including provisions relating to IWG. The IWG provisions were introduced to address, among other factors, negative effects on “animal welfare” and the environment and these are relevant concerns that may be raised by a submitter²⁵.

Abuse of process

- 4.14 NZALA submits an abuse of process involves using the Court for an ulterior purpose e.g. a purpose not within the scope of such process²⁶, and a high threshold has to be met.
- 4.15 In response to the Applicant asserting allowing the NZALA submission would put the Applicant to unnecessary expense, the costs of responding to NZALA points and any such hearing (regardless of the number of submitters) is not an abuse of process, but a consequence of the process set out under the Act²⁷.

5 Applicant response

- 5.1 On 22 June 2023, the Applicant lodged submissions in response to the NZALA Memorandum.
- 5.2 The Applicant agrees there is very little relevant case law for strike out applications and considers s279(4) can provide useful guidance, noting there are an additional two grounds in s41D.
- 5.3 In response to the assertion by NZALA that strike out powers should be used sparingly, the Applicant noted where one of the grounds is made out in s41D, such as in this case, there is no discretion – the submission must be struck out²⁸.

²⁴ FN 13: Citing *Opoutere Ratepayers and Residents Association v Waikato Regional Council* [2015] NZEnvC 105 at [97] and *Gray v Dunedin City Council* [2023] NZEnvC 45 at [205]

²⁵ NZALA Memorandum of Counsel in response to Strike Out Application 9 June 2023, paragraph 30

²⁶ FN 16: Citing *Fletcher Challenge Energy Power Generation Ltd v Waikato RC* EnvC A109/98

²⁷ NZALA Memorandum of Counsel in response to Strike Out Application 9 June 2023, paragraphs 35 and 37

²⁸ Relying on *Federated Farmer v Wellington Regional Council* {1999} EnvC C192/99 at [17]

- 5.4 The Applicant reiterates animal welfare concerns are not an issue within scope of the Act. Scope is a relevant matter to consider for strike out under s279(4) and to grant relief sought that is not within scope would be an abuse of process.²⁹
- 5.5 The Applicant notes any consideration of animal welfare made by the Environment Court are in passing and there is no case where the Environment Court has considered animal welfare in conjunction with the Act's core purpose of promoting sustainable management.
- 5.6 The only case where conditions were recorded regarding animal welfare³⁰ simply reinforced existing statutory requirements of the AWA and no other matters of animal welfare were addressed by the Court.
- 5.7 It is not unreasonable to turn to secondary commentary where there otherwise would be none. The case cited by NZALA was one where reliance on secondary sources was dismissed because there was clear authority provided for in the NZCPS and the Act³¹.
- 5.8 The Provisions of s331-331F (inserted by way of the Sever Weather Emergency Legislation Act 2023) are time limited and will be automatically repealed in 2024. The inclusion of animal welfare in these provisions is not to expressly allow consideration of the wellbeing of animals, but to allow farmers to more effectively and efficiently manage their property, which includes livestock and animals. Its relevance is negligible.

6 Stark case – further NZALA and Applicant response

- 6.1 On 28 June I advised the parties I had ascertained one of the case references from the NZALA legal submissions was in error (footnote 11 had the wrong citation *Stark v Waikato District Council* [2014] NZEnvC 150, should have been [2014]NZEnvC 19).). When I found the correct case, I realised it is relevant regarding animal welfare concerns and thought it important this be pointed out to the parties and they be offered an opportunity to respond.
- 6.2 The Applicant referred to this issue being considered in relation to several applications to ECan for intensive indoor dairy farming in the Mackenzie Basin. When I followed the link in the Applicant's reply to submissions (footnote 1), it only led to a Ministerial Briefing Note. I asked for a copy of the ECan legal opinion.

NZALA response

- 6.3 NZALA responded on Friday 30 June. NZALA noted the *Stark* case related to consent for the relocation, construction and operation of a Gun Club. The Starks, adjoining property owners, appealed.

²⁹ Citing *Elwell-Sutton v West Coast Regional Council* [2013] NZEnvC 58 at [15]

³⁰ *Gray Cuisine v South Waikato District Council* [2011] NZEnvC 49

³¹ Applicant submissions in response 22 June 2023 paragraph 12

- 6.4 The Court observed that although permitted noise standards did not apply to issues raised by the Starks (effects of noise on farm animals) “That of course is not to say that the possible effects of noise on animal welfare is not relevant as a factual issue under s104”.
- 6.5 The Court then went on to record the animal welfare concerns of the Starks at paragraph [13] noting in particular the concerns that the noise from the Club, particularly gunfire, will disturb and be harmful to the wellbeing of their stock, including by unsettling ewes and does following birth resulting in failure to bond, poor development and death.
- 6.6 Both the Appellant and the Applicant engaged animal behaviour specialists to support their views. The Appellant’s were concerned about; inter alia, disturbance of lambing ewes. The assessment of the effects on animal behaviour and welfare are summarised by the Court at paragraphs [24] - [35].
- 6.7 The Court found that the potential adverse effects of gunshot noise over the lambing period was credible and turned to mitigation opportunities. The Court reviewed the proposed conditions and made a number of comments, including comments to ensure that the animal welfare concerns raised by the Starks were addressed. The Court considered that the granting of consent with the conditions proposed (subject only to the amendments suggested) was appropriate.
- 6.8 NZALA submit that *Stark* is clear authority that animal welfare effects and concerns are a relevant matter for assessment under the RMA. The merits or strength of a submission is not relevant for the assessment of a strike out application under section 41D. This assessment is for the consent authority in considering the application and any matters raised in submissions³².

Applicant response

- 7 The Applicant considers three key issues arise out of the *Stark* case:
- 7.1 The applicability of animal welfare to a resource management application was not explicitly considered by the Court. There was no discussion of the Animal Welfare Act 1999, and how the AWA and the RMA co-exist. This does not conclude decisively either way whether the issue of animal welfare is legitimately within the ambit of RMA ‘effects’.
- 7.2 The effects considered were ones arising on **another parties animals**, rather than animals of the applicant. This is a situation where the effects of an activity (noise) on a neighbours ability to use its land (for productive farming) was the issue, rather than one of animal welfare explicitly.

³² NZALA Memorandum of Counsel 30 June 2023

7.3 The *Stark* application was for a land use activity, where the effects of that land use (noise, from a shooting range) were at issue. The PDL application is for a land use activity authorising discharges to land associated with farming. The issues raised in the NZALA submission do **not** relate to the discharge to land, which is the activity to be consented. The application does not amend the total number of animals authorised to be farmed by PDL, it only extends the area in which those animals can be farmed and winter grazed. The NZALA submission does not relate to the effects of the activity, in the way the *Stark* effects related to the application and effects at issue.

7.4 The ECan opinion was not available but a letter from the Chief Executive to the then Minister for the Environment included aspects of that advice, as follows:

“...the effects which are relevant and which need to be assessed the context of all applications relate to the effects of the activity for which consent is sought. In the case of effluent discharge permits, that is the effects (in the main) of the discharge of effluent to land and associated earthworks (in riverbeds). There, the advice we have received is that the effect of factory dairy farming on the welfare of the dairy cattle is not an “effect” of the activity when the subject application is for a discharge permit and further, issues in terms of animal welfare are more appropriately addressed via the Animal Welfare Act 1999...

there is a stronger argument to suggest that a detrimental effect on New Zealand’s image abroad could fall within the scope of the definition of “effect” under the RMA. Nevertheless, my advice is that any such effect would again, be associated with a land use activity rather than any discharge and earthworks (in riverbeds permits which have to be processed by a Regional council. In other words, it is unlikely that any Regional council as a consent authority can place significant weight on this issue.

8 Law – strike out

8.1 Section 41D (Striking out submissions) of the Resource Management Act provides

- (1) An authority conducting a hearing on a matter described in section 39(1) may direct that a submission or part of a submission be struck out if the authority is satisfied that at least 1 of the following applies to the submission or the part:
 - (a) it is frivolous or vexatious:
 - (b) it discloses no reasonable or relevant case:
 - (c) it would be an abuse of the hearing process to allow the submission or the part to be taken further:
 - (d) it is supported only by evidence that, though purporting to be independent expert evidence, has been prepared by a person who is not independent or who does not have sufficient specialised knowledge or skill to give expert evidence on the matter:
 - (e) it contains offensive language.
- (2) An authority—
 - (a) may make a direction under this section before, at, or after the hearing; and
 - (b) must record its reasons for any direction made.
- (3) A person whose submission is struck out, in whole or in part, has a right of objection under section 357.

8.2 As both parties acknowledged, there is very little if any case law on s41D and I agree it is useful to look to s279(4) (Powers of Environment Court Judge Sitting Alone) of the Act for guidance, which provides:

An Environment Judge sitting alone may, at any stage of the proceedings and on such terms as the Judge thinks fit, order that the whole or any part of that person's case be struck out if the Judge considers -

- (a) that it is frivolous or vexatious; or
- (b) that it discloses no reasonable or relevant case in respect of the proceedings; or
- (c) that it would otherwise be an abuse of the process of the Environment Court to allow the case to be taken further.

8.3 Both parties have set out helpful cases.

8.4 I agree with the Applicant that scope is a relevant matter when considering whether to strike out under s279(4) and it could, in certain circumstances, be an abuse of process.³³

8.5 I also agree with NZALA that the equivalent power under s279(4)(c) requires a high threshold to be met and is no more than a "statutory recognition of the Court's wider jurisdiction to prevent its own procedures from being misused to achieve a result which would be manifestly unfair or which otherwise would bring the administration of justice into disrepute".³⁴

8.6 I also agree with the NZALA that the "cost of responding to "points in the NZALA submission does not meet the threshold required to be an abuse of process and in fact is a consequence of the process encapsulated in the Act³⁵.

8.7 To ascertain whether the NZALA submission is in scope it is necessary to look at the purpose and provisions of the Act.

Purpose and provisions of Act

8.8 The purpose of the Act is to promote the sustainable management of natural and physical resources. Sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while -

- (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

³³ Applicant Submissions in response dated 22 June 2023, paragraph 8

³⁴ Applicant Submissions in response dated 9 June 2023, paragraph 33

³⁵ Applicant Submissions in response dated 9 June 2023, paragraphs 35 and 37

- (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
- (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

8.8.1 “Environment” includes all natural and physical resources, s2. “Natural and physical resources” includes animals (s2), which can include cattle.

References to “animal”

8.9 The Applicant submits that animal welfare is not a matter listed in sections 5,6 or 7 of the Act, which sets out the purpose and principles as well as matters of national importance However, I note the word “animal” is used numerous times in the Act:

8.9.1 “Use” is defined (a) in sections 9, 10, 10A, 10B, 81(2), 176(1)(b)(i), and 193(a), means—

- (iii) damage, destroy, or disturb the habitats of plants or **animals** in, on, or under land:

8.9.2 Section 12 No person may, in the coastal marine area,—...

- (c) destroy, damage, or disturb any foreshore or seabed (other than for the purpose of lawfully harvesting any plant or animal) in a manner that has or is likely to have an adverse effect on plants or **animals** or their habitat

8.9.3 Section 13 No person may do an activity described in subsection (2A) in a manner that contravenes a national environmental standard or a regional rule unless the activity—

- (a) is expressly allowed by a resource consent; or
- (b) is an activity allowed by section 20A.

(2A) The activities are -

- (d) to damage, destroy, disturb, or remove the habitats of **animals** in, on, or under the bed of a lake or river.

8.9.4 Sections 70 and 107 are for rules about discharges -

- (f) the rendering of fresh water unsuitable for consumption by farm **animals**:

RMA Severe weather provisions

8.9.5 Section 331B Provides an owner or occupier of rural land may take emergency preventive or remedial measures

(1) Subsection (2) applies if,-

- (a) because of or in connection with the impacts of a severe weather event, a sudden event or an adverse effect on the environment has caused, is causing, or is likely to cause loss of life or injury to humans, loss of life or serious detriment to the health or well-being of **animals**, or serious damage to land or property

8.9.6 The Applicant submits that s331B (and related provisions) were introduced solely in response to severe weather events and the intent is to enable landowners to undertake permitted activities to repair or prevent damage on their land without the need to obtain consent. The inclusion of animal welfare is only to allow farmers to more effectively and efficiently manage their property and livestock.

8.9.7 I do not agree with the above argument – whether provisions are permanent or introduced for a short term, they still need to be consistent with the Act’s purpose. “Wellbeing of animals” was specifically included in these provisions. Farmers can undertake remedial measures to prevent serious detriment to the health or well-being of animals. If the well-being of animals weren’t relevant under the Act, the reference to wellbeing would not have been included.

AEE

8.9.8 Information required as part of an application must include any effect on ecosystems, including effects on plants or **animals** and any physical disturbance of habitats in the vicinity, Clause 7 of Schedule 4.

“Effects”

8.10 Section 104(1)(a) requires a consent authority to have regard to any actual and potential effects on the environment of allowing the activity.

8.11 “Effect” is broadly defined in section 3 to include any positive or adverse effect; any temporary or permanent effect; any past, present, or future effect; any cumulative effect which arises over time or in combination with other effect, regardless of the scale, intensity, duration, or frequency of the effect, and also includes any potential effect of high probability; and any potential effect of low probability which has a high potential impact.

8.12 The definition of “effect” is very broad. It is relevant to consider not only direct effects of activities, but indirect or consequential effects for which no consent might be needed.

8.13 In *Aquamarine Limited v Southland Regional Council*³⁶ the Court considered whether the activities of passage of water tankers and discharge of ballast water (for which consent was not being sought) were relevant issues. The Court agreed with analogy that it is commonplace to consider associated potential (permitted) traffic effects on the surrounding area from a land use consent for development.

“Relevance is not dependent upon the need or otherwise for resource consents or whether such effects can be the subject of controls. Nor is it dependent on whether a common law rite of passage is being exercised. Rather it is dependent upon giving a sufficiently wide interpretation to s104 (1)(a) of the Act to ensure that in achieving its purpose, all reasonably foreseeable effects...can be considered by the consent

³⁶ (1996) 2 ELRNZ 361 at page 3

authority...to exclude such effects on the grounds that a resource consent is not required or that they cannot be controlled by conditions, could lead to the granting of resource consent that, because of those effects, may not achieve the purpose of the Act.”

- 8.14 Here, an example of a consequential effect of the land use and allowing cattle to graze on pugged soil might be injury and/or disease in the cattle as a result (which would need to be proved by evidence from NZALA). Conditions could be imposed regulating the land use to avoid, remedy or mitigate this effect.

Case Law

- 8.15 In the *Stark* case, there was no argument from either party that it was not relevant to consider the adverse effects (noise) on animals, in this case both sheep and gun dogs. The appeal was declined but I note the Court was satisfied there were conditions put in place that would avoid, remedy or mitigate the adverse noise effects on the welfare of the animals, so there was no need to grant the appeal.
- 8.16 I note the Applicant’s comments that the *Stark* case involved a land use affecting the welfare of a **neighbour’s** animals. That is a different case than the present, where it is the Applicant’s animals and the AWA is directly relevant. I surmise that is why the AWA was not specifically mentioned in that case (as the obligation is on owners and people in charge of animals).
- 8.17 The *Kaimanawa*³⁷ horse case involved a party seeking a declaration the s17 duty had been breached in relation to the culling and mustering of wild horses. The Judge concluded the Act is broad enough to include adverse effects on animals, but he could not make a declaration there was a duty under s17 in this case, as it was not a use of land controlled by section 9. There was no consideration of the AWA in that case.
- 8.18 In this, unlike the *Kaimanawa* case, there is a use of land, which requires a consent.
- 8.19 I also note the *Gray Cuisine* case where a condition was imposed relating to animal welfare. Although it may have been a standard condition (as asserted by the Applicant), any condition imposed must still be for a resource management purpose³⁸.

³⁷ *Kaimanawa Wild Horse Protection Society Inc v A-G* NZEnvC A27/97

³⁸ Often cited as the *Newbury test* - the benchmark for vires of conditions. It provides a condition must: (i) be for a resource management purpose, not for an ulterior one; (ii) Fairly and reasonably relate to the development authorised by the consent to which the condition is attached; and (iii) Not be so unreasonable that a reasonable planning authority, duly appreciating its statutory duties, could not have approved it. *Newbury DC v Secretary of State for the Environment*, *Newbury DC v International Synthetic Rubber Co Ltd* [1981] AC 578; [1980] 1 All ER 731 (HL).

9 ECan opinion - effects

- 9.1 The letter I was provided that referred to the ECan legal opinion has very little context or detail, which made it difficult to understand the conclusion - that the effect of factory dairy farming on the welfare of the dairy cattle is not an “effect” of the activity when the subject application is for a discharge permit and further, issues in terms of animal welfare are more appropriately addressed via the AWA.
- 9.2 I agree with the ECan opinion to the extent that **if** it were relevant to consider adverse effects of an activity on animals, it would be the effects of the land use rather than any discharge permits.
- 9.3 I disagree about limiting effects in the way ECan appears to have done. The definition of effect is broad, and includes consequential effects, as set out above.

10 Animal Welfare Act and Code of Welfare for Dairy Cattle

- 10.1 Where there is a potential conflict or inconsistency between two Acts, firstly Courts will look to see if the two can be read together. If not, the specific will usually prevail over the general, *Stewart v Grey County Council*³⁹.
- 10.2 The purpose of the relevant part of the AWA is to ensure that owners and people in charge of animals attend properly to the welfare of those animals, section 9. Section 9 also requires:
- 10.2.1 Owners and people in charge of animals to take all reasonable steps to ensure the physical, health and behavioural need of the animals are met in accordance with good practise and scientific knowledge; and
- 10.2.2 owners of ill or injured animals and people in charge of them, to ensure the animals receive treatment that alleviates any unreasonable or unnecessary pain or distress from which the animals are suffering, s9(2)(a)&(b).
- 10.3 The Act provides for Codes of Welfare (Part 5). The Codes can relate to one or more of the following:
- 10.3.1 a species of animal:
- 10.3.2 animals used for purposes specified in the code:
- 10.3.3 animal establishments of a kind specified in the code:
- 10.3.4 types of entertainment specified in the code (being types of entertainment in which animals are used):
- 10.3.5 the transport of animals:
- 10.3.6 the procedures and equipment used in the management, care, or killing of animals or in the carrying out of surgical procedures on animals, s69.

³⁹ *Stewart v Grey County Council* [1978] NZLR 577

- 10.4 Given the above, the Codes are limited in their ambit.
- 10.5 There is a Code for Dairy Cattle (2019). It is comprehensive and includes guidance for the animal's physical environment. I note it does not explicitly include impact such as pugging.
- 10.6 The focus of the AWA (and Codes) is on owners and people in charge of animals. It is more specific than the RMA, which has as its purpose sustainable management, and is focussed on the use of land air and water and the adverse effects of activities on the environment, including animals (and cattle). Although there may be some overlap, the RMA is broader and more proactive – it attempts to avoid, remedy and mitigate adverse effects of activities on the environment (including animals) prior to them occurring (the fence at the top of the cliff), by requiring resource consents in certain situations and providing for the imposition of relevant conditions to regulate activities.
- 10.7 The AWA is more specific and reactive – standards are only enforced when people breach them, ss10-12. Even then, the language of the AWA is such that only very clear cases would be prosecuted (the ambulance at the bottom of the cliff).
- 10.8 The two statutes can be read together. Where land use consent is required (that is discretionary or non-complying), it may be relevant to consider animal welfare (it would depend on the type of land use consent), and if so, conditions may be imposed to avoid remedy or mitigate adverse effects of land use activities on animals. It is not possible for this to be done under the AWA, so there is no overlap in this respect.
- 10.9 By way of example of such overlaps in other situations, the provisions of the Civil Aviation Act 1990 did not prevent the (then) Tribunal from investigating matters of air safety generally (normally the province of the CAA) and assessing public safety risks (a consequential effect on the environment) of an air accident⁴⁰.
- 10.10 Another safety case involved Maritime Rules and the Court held the question of safety could not be delegated by a decision maker under the RMA to a decision made under the Maritime rules⁴¹ (both considering safety concerns).

11 CONCLUSION

- 11.1 I agree with the Applicant that there is no case law specifically considering the issue of whether animal welfare is a relevant consideration on an application for a land use consent where the adverse effects are on the applicant's animals, rather than e.g. a neighbours (the *Stark* case).
- 11.2 I also agree with NZALA that while the term "animal welfare" is not specifically captured in the Act, a lack of direct legislative reference does not automatically exclude its

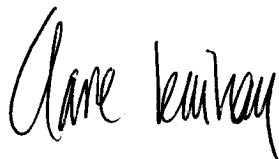
⁴⁰ *Glentanner Park (Mt Cook) Ltd v Mackenzie DC* W050/94 (PT) and *Director of Civil Aviation v Planning Tribunal* [1997] 3 NZLR 335; [1997] NZRMA 513 (HC)

⁴¹ *Southern Alps Air Ltd v Queenstown Lakes DC* [2007] NZRMA 119 (EnvC)

consideration in the course of decision-making.⁴² “Animals” are part of the natural and physical resources covered by the Act. The Act also mentions “animals” numerous times, and specifically requires applicants to provide information about any adverse effects of activities on animals. A recent amendment to the RMA now specifically includes wellbeing of animals.

- 11.3 Given all the references to “animals” in the Act and the broad definition of natural and physical resources and effects, if certain categories of animals are to be excluded from the Act, or certain types of effects on certain animals are to be excluded, Parliament would need to make that explicit. There are no such exclusions in the Act relating to animal welfare considerations, and no limits on either the sorts of animals that might be considered (when associated with a land use activity), or the types of effects that might be considered.
- 11.4 It is relevant the activities in this case are bundled as discretionary. If they were restricted discretionary, it would be highly unlikely animal welfare would be a listed matter of discretion, so would not be relevant to consider. The Applicant submits its application is for a land use activity authorising discharges to land associated with farming (so a discharge consent in disguise). I think this is too narrow – the application specifically triggers three land use consents (distinct from the discharge consents), so this brings land use into play (I have not dealt with whether consequential effects of discharges may also be relevant, given my conclusion that it is relevant to consider of effects of land use activities on the Applicant’s animals).
- 11.5 For the above reasons, I do not consider the high threshold for striking out a submission has been met for either ground advance by the Applicant. It is finely balanced, but I conclude that it **is** relevant to consider any consequential effects of the land use activity on the Applicant’s animals (which **could** include animal welfare). Even if I am wrong to conclude it is relevant to consider this, I think the NZALA submission is broad enough in scope to include e.g. effects of intensive winter grazing including pugging, which also affects water quality, and therefore it is within scope.

Dated at Invercargill this 10th day of July 2023.



Clare Lenihan
INDEPENDENT DECISION MAKER

⁴² NZALA Memorandum of Counsel 9 June 2023, paragraph 22 and FN 9