

**BEFORE AN INDEPENDENT HEARINGS COMMISSIONER
AT INVERCARGILL**

COUNCIL REF: APP-20222765

UNDER THE

Resource Management Act 1991 (the Act)

IN THE MATTER OF

Applications by Pahia Dairies Limited for land use consents to use land for intensive winter grazing, to expand an existing dairy farm and to discharge contaminants to land at 171 Ruahine Road West, Orepuki, Southland

LEGAL SUBMISSIONS ON BEHALF OF NEW ZEALAND ANIMAL LAW ASSOCIATION

5 October 2022

 **KATE SHEPPARD**
— CHAMBERS —

MAY IT PLEASE THE COMMISSIONER

INTRODUCTION

1. These submissions are presented on behalf of The New Zealand Animal Law Association (NZALA).
2. NZALA is a submitter on the land use and discharge permit applications by Pahia Dairies Limited (**PDL**) to expand its existing dairy farm in Orepuki, Southland and carry out intensive winter grazing (the **Applications**).
3. NZALA is a coalition of lawyers, law students and law graduates who advocate to improve the welfare and lives of animals through the legal system in New Zealand. NZALA has over 500 members nationally.

SCOPE OF SUBMISSIONS

4. These submissions address the following topics:
 - a. Summary
 - b. Evidence to be presented on behalf of NZALA
 - c. The statutory framework
 - d. Why consent should be declined
 - e. If consent is granted, why the conditions Mr Hook proposes should be included, and
 - f. Part 2 of the RMA.

SUMMARY OF SUBMISSIONS

5. NZALA disagrees with the recommendations of the Reporting Officer in the s 42A report and submits that the Applications should be declined in their entirety as:
 - a. the likely and potential adverse effects on the welfare of the cattle herd have not been appropriately avoided, remedied or mitigated
 - b. Dr Beattie's evidence is that IWG is generally an unsustainable farming system for the Southland winter environment

- c. declining consent will best promote the sustainable management purpose of the Resource Management Act 1991 (**RMA**).

- 6. In the event the Commissioner grants consent, NZALA submits that at a minimum, the conditions set out in Mr Hook's planning evidence should be included in the consent. While these conditions will not avoid, remedy or mitigate all poor welfare outcomes, they will mitigate impacts as far as reasonably possible within the constraints of the proposal.

- 7. The conditions Mr Hook supports:
 - a. are made for a lawful RMA purpose
 - b. are within the Regional Council's powers and functions
 - c. fairly and reasonably relate to the proposal, and
 - d. are workable, reasonable and certain.

EVIDENCE TO BE PRESENTED

- 8. The following witnesses have provided evidence on behalf of NZALA:
 - a. Mr Oska Rego, a member of NZALA who explains NZALA's interest in the Applications

 - b. Dr Helen Beattie, a veterinarian and animal welfare expert who assesses the animal welfare impacts of the Applications, and

 - c. Mr James Hook, drawing from Dr Beattie's evidence, assesses the Applications in terms of the planning framework relating to animal welfare issues and proposes conditions he considers will be suitable to mitigate a range of adverse effects on cattle welfare.

STATUTORY FRAMEWORK

- 9. PDL's proposal is summarised in paragraph 2.2.1 of the s 42A report.

- 10. Expanding the existing dairy farm to incorporate Browns Block and intensively winter graze cattle on 55 hectares of crop on slopes over 10 degrees, and discharge contaminants into or onto land as part of these farming activities requires *discretionary* activity consent.

11. The activities and their effects are sufficiently interrelated that a bundled approach is appropriate. The Reporting Officer states that the overall activity status of the Applications is *discretionary*.¹
12. However, the Officer also says that the IWG aspects of the proposal require consent under Regulation 27 of the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (the **NES**) as a *restricted discretionary activity*, and the “matters of discretion do not include effects on animals or stock”.²
13. NZALA does not agree with the Officer’s interpretation of the bundling approach given the interrelated nature of the various components of the proposal. However, even if the specific matters regulated under Regulation 27 of the NES are *restricted discretionary* and the Commissioner’s consideration of effects is limited to those matters set out in that regulation, converting more than 10ha of existing farmland to dairy farmland triggers *discretionary* status under:
 - a. Regulation 19(1) of the NES, and
 - b. Rule 20(e) of the proposed Southland Water and Land plan.
14. This means that *all* effects, including actual and potential adverse effects on animal welfare, are ‘on the table’ and must be appropriately assessed and managed.
15. This point is also confirmed by the definition of “dairy farm land” in the NES which is “land that is used for grazing dairy cattle”.³ Given this broad definition of the activity in Regulation 19(1), it is appropriate for animal welfare effects that may arise from the grazing of cattle on converted land (including use of that land to provide access to shelter, lying down areas, water troughs, space and nutrition) to be considered under Regulation 19.
16. The decision-making framework that applies to the Commissioner’s assessment of the Applications is set out in Section 104 of the RMA.⁴ For completeness, the relevant matters for the Commissioner to consider, subject to Part 2 of the RMA, are:
 - a. Any actual and potential effects on the environment of allowing the activity;
 - b. 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;

¹ s 42A report, para 2.3.4.

² s 42A report, para 3.3.2.3.

³ Regulation 3, NES.

⁴ See s 42A report, para 3.1.1.

- c. Any relevant provisions of relevant statutory planning documents, and
 - d. Any other matter the consent authority considers relevant and reasonably necessary to determine the application.
17. As the Applicant is also seeking a discharge permit, the consent authority must also have regard to the matters in s 105.
18. A consent authority may grant or refuse discretionary activity consent applications (s 104B, RMA). If granted, conditions can be imposed under s 108.

Effects on the environment

19. The Commissioner's decision must assess adverse effects "on the environment" that will be impacted by the Applications (s 104, RMA).
20. The Council Officer's view is that animal welfare concerns are more appropriately regulated by other legislation such as the Animal Welfare Act 1999 (**AWA**).⁵
21. In my submission, this is incorrect because:
- a. The definition of "Environment"⁶ includes:
 - i. "ecosystems and their constituent parts", and
 - ii. "all natural and physical resources"
 - b. Plants and animals are constituent parts of ecosystems.⁷ An assessment of environmental effects must assess effects on ecosystems, including plants and animals and any physical disturbance of habitats in the vicinity⁸.
 - c. "Natural and physical resources" includes "land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures"⁹

⁵ s 42A report, para 3.3.2.3.

⁶ s 2, RMA.

⁷ Re Auckland Council [2011] NZEnvC 129 at [32].

⁸ Schedule 4, clause 7(1)(c), RMA.

⁹ s 2, RMA.

- d. Sustainable management applies to animals due to the broad definition of “natural and physical resources”¹⁰
- e. “Effect” is defined broadly and includes potential, temporary, cumulative and indirect effects,¹¹ as well as additive effects that create “synergetic impacts” on the environment¹²
- f. Numerous sections of the RMA refer to ‘animals’¹³
- g. The Environment Court has found that effects on animals are covered by the RMA where those adverse effects arise from land use activities¹⁴
- h. Animal welfare effects and concerns are a relevant matter for assessment under s 104, RMA¹⁵
- i. Conditions of consent that provide for animal welfare requirements and standards have been accepted and confirmed by the Environment Court¹⁶
- j. Section 17 of the RMA places a duty on people carrying out activities to avoid, remedy, or mitigate any adverse effect on the environment arising from those activities and whether or not they are carried out in accordance with a rule in a plan, a resource consent, or have existing use rights.
- k. An amendment to the RMA in 2023 specifically allows farmers to undertake remedial measures to prevent serious detriment to the “health or well-being of animals”¹⁷ as a result of severe weather events suggesting that animal welfare considerations are within the scope of the RMA

¹⁰ See *Kaimanawa Wild Horse Preservation Society Inc v Attorney-General* [1997] NZRMA 356 in which Judge Sheppard stated that “‘sustainable management’ is capable of applying to wild horses as a result of the broad definition of ‘natural and physical resources.’”

¹¹ s 3, RMA.

¹² *Kuku Mara Partnership v Marlborough DC* (2005) 11 ELRNZ 466 (EC) where the Court stated: “if an existing activity has adverse effects, and a proposed activity also has an adverse effect even if only minor, which would add to the existing effects, then the definition requires a consideration of both. It would be an exception to the permitted baseline concept, but only to the extent that one could have regard to existing adverse effects when, and only when, taken together with the new effect, they produce a synergetic impact on the environment.”

¹³ ss 12, 13, 14, 70, 107 and 331B; sch 4, cl 7 and sch 10, cl 2.

¹⁴ *Kaimanawa Wild Horse Preservation Society Inc v Attorney-General*; see also *Stark v Waikato District Council* [2014] NZEnvC 19 (EC).

¹⁵ [2014] NZEnvC 19 (EC).

¹⁶ *Gray Cuisine Limited v South Waikato District Council* [2011] NZEnvC 121.

¹⁷ Section 331B, RMA was included by the Severe Weather Emergency Legislation Act 2023. All severe-weather related provisions included by the emergency legislation repeal in April 2024.

- l. The AWA does not overlap with the RMA. The former and its specific Codes and Regulations are reactive and focus on the actions of owners and people in charge of animals; whereas the RMA provides for proactive management of land use activities (and air and water) so as to avoid, remedy or mitigate adverse effects on the environment (including animals) prior to those adverse effects occurring
- m. Dr Beattie’s evidence is that the AWA and its secondary legislation does not work to appropriately mitigate animal welfare impacts on cattle through IWG practices, and a draft code for Dairy Cattle¹⁸ does not have regulatory impact, and
- n. It is common practice for plan rules and consent conditions to require compliance with industry codes of practice¹⁹ and also compliance with applicable legislation and regulations.

WHY CONSENT SHOULD BE DECLINED

- 22. Dr Beattie’s evidence describes the poor animal welfare outcomes associated with IWG including lack of shelter or lack of access to shelter (through the use of back fencing), health impacts for cattle from the crop diet, psychological impacts of high stocking rates and how poor environmental outcomes (i.e pugging) fail to support cows’ inelastic behavioral need to lie contentedly. Farm conversions to dairy farm systems, and intensification of farming practices push the environment beyond its limits, and to an extent that significantly compromises cattle welfare. It is for this reason that Dr Beattie does not generally support IWG in Southland.²⁰
- 23. NZALA has not filed any expert evidence regarding water quality or soil health effects but does query whether the Officer’s report gives due consideration to *ki uta ki tai*, integrated management (Policy 3 and clause 3.5 of the National Policy Statement on Freshwater Management 2020 (NPS-FM)). PDL has stated that discharges will predominantly occur along the coastal margin, the subsurface drains at Pahia present a potential source of contamination, particularly of microbes to the groundwater, and groundwater is expected to flow to the coast rather than to surface water.²¹

¹⁸ Draft Code of Welfare: Dairy Cattle, available at <https://www.mpi.govt.nz/dmsdocument/50998-NAWAC-proposed-Code-of-Welfare-for-Dairy-Cattle-draft-for-consultation>

¹⁹ For example, proposed rule 14D 2.1 in the Decisions version of the Hutt City Council District Plan Change 56 says Permitted Activity: “The retail sale of petrol (up to a storage of 100,000 litres in underground tanks) and diesel (up to 50,000 litres in underground storage tanks), provided that it can be demonstrated that the *Code of Practice for “Design, Installation and Operation of Underground Petroleum Systems”*, published by the Department of Labour, OSH, is adhered to”: <https://www.huttcity.govt.nz/council/district-plan/district-plan-changes/completed-district-plan-changes/implementing-government-requirements-for-housing-intensification>

²⁰ Statement of Evidence of Dr Beattie, paras 12 and 20.

²¹ Application, section 2.9.

24. In my submission, further information on effects on the receiving environment (being effects which are relevant under the NPS-FM) is required to understand whether the proposal gives effect to Te Mana o te Wai. Freshwater Farm Plans are now a regulatory requirement for the Aparima catchment²² and although a Farm Environment Plan has been provided with the Application, I submit that impacts on the coastal environment particularly given the close location of the site to the coast, have not been adequately considered. Dr Beattie discuss the impacts of sediment run-off on sentient animals in marine ecological systems.²³
25. Under s 104(6) RMA a consent authority has jurisdiction to decline an application for resource consent on the basis that it has inadequate information to determine it.²⁴ This subsection imposes an evidential burden on an applicant to supply adequate information to satisfy a consent authority that the effects of a proposed activity will be appropriate, in light of the relevant statutory framework.
26. Even if consent is not declined on the basis of impacts on the coastal receiving environment, given the sensitive nature of the coastal environment, s 108 allows consent authorities to impose conditions that require the best practicable option to prevent or minimise adverse environmental effects having regard to the sensitivity of the receiving environment.

APPROPRIATE CONDITIONS OF CONSENT

27. If consent is granted, the evidence of Dr Beattie and Mr Hook is that consent conditions should be included to provide for acceptable animal welfare outcomes. The conditions Dr Beattie supports go further than those Mr Hook proposes for the simple reason that Mr Hook supports those conditions that he considers are valid under the RMA, whereas Dr Beattie supports additional measures to meet a broader range of the cattle's physical, health and behavioural needs.
28. Section 10 of the AWA states that:

The owner of an animal, and every person in charge of an animal, must ensure that the physical, health, and behavioural needs of the animal are met in a manner that is in accordance with both—

- (a) good practice; and
- (b) scientific knowledge.

²² <https://www.es.govt.nz/environment/land-and-soil/land-management/freshwater-farm-plans>

²³ Statement of Evidence of Dr Beattie, paras 62-63.

²⁴ *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52 (HC) [at 100 – 102].

29. Section 4 defines physical, health, and behavioural needs, in relation to an animal, as including:
- (a) proper and sufficient food:
 - (ab) proper and sufficient water
 - (b) adequate shelter:
 - (c) opportunity to display normal patterns of behaviour:
 - (d) physical handling in a manner which minimises the likelihood of unreasonable or unnecessary pain or distress:
 - (e) protection from, and rapid diagnosis of, any significant injury or disease,—
being a need which, in each case, is appropriate to the species, environment, and circumstances of the animal.
30. It is an offence to fail to comply with section 10.²⁵ The AWA provides for codes of welfare which can include minimum standards on animal care as well as best practice recommendations.²⁶
31. The current Code of Welfare for Dairy Cattle does not address IWG specifically. While it incorporates some of the lying needs of cattle in minimum standard number 6 and recommended best practice, but as Dr Beattie explains, the Code is not delivering on appropriate welfare outcomes for cattle.²⁷
32. Issues relating to poor compliance and enforcement of the Code and AWA are well-documented²⁸ and raised as a significant concern by the Winter Grazing Taskforce.²⁹ The Taskforce report states that there are no enforceable regulations that directly address access to water, shelter and requirements for lying, depth of mud, and proper nutrition when winter grazing.³⁰
33. Because the Code does not provide for specific IWG practices, has not kept up with industry practice or developing sector guidelines and is not meeting welfare needs, the Taskforce recommended more proactive management to ensure positive welfare outcomes including:³¹
- a. provision for animals to lie comfortably (on a soft, dry substate) for as long as they want to
 - b. ability to readily move animals to shelter/dry land in adverse weather
 - c. continuous, convenient access to fresh, clean water

²⁵ Section 12, AWA.

²⁶ Section 68, AWA.

²⁷ Statement of Evidence of Dr Beattie, para 77.

²⁸ Statement of Evidence of Oska Rego, para 20.

²⁹ Winter Grazing Taskforce Final Report & Recommendations, page 5, available at: <https://www.mpi.govt.nz/dmsdocument/38210/direct>.

³⁰ Statement of Evidence of Oska Rego, para 17.

³¹ Winter Grazing Taskforce Final Report & Recommendations, page 7, available at: <https://www.mpi.govt.nz/dmsdocument/38210/direct>.

- d. access to an adequately balanced diet.
34. No regulatory tools have been developed in response to the Taskforce’s recommendations although these have been recommended by the National Animal Welfare Advisory Committee.³²

The s 42A report and PDL’s evidence

35. The Council Officer’s position on the issue of animal welfare is not clear. In paragraph 3.3.3.1 of the s 42A report, the Officer says that “A consent condition relating to pugging of soil and the Animal Welfare Act addresses the concerns raised in the submission”. However, no such condition relating to the Animal Welfare Act is included in the Officer’s recommended condition set and neither the application or the s 42A report propose how the management of cattle will meet the Code of Welfare for Dairy Cattle or subsequent updates.
36. The actual position of PDL, NZALA and the Council Officer does not seem too far apart.
37. Mr Anderson and Dr Wouda agree that:
- a. animal welfare is important³³
 - b. IWG presents potential risks to cattle health and wellbeing³⁴
 - c. cattle need proper and sufficient food and water³⁵
 - d. fodderbeet presents higher and some unknown risks³⁶
 - e. cattle need suitable lying surfaces³⁷ and this is impacted by pugging³⁸ which is more likely in particularly wet weather³⁹
 - f. cattle need adequate shelter⁴⁰
 - g. positive welfare outcomes rely on the good management of cattle.⁴¹
38. It is perhaps on this basis that Ms Mesman says:
- a. “the proposed consent conditions ... include a requirement to take all practicable steps to avoid pugging”⁴²

³² Statement of Evidence of Dr Beattie, para 51.

³³ Statement of Evidence of Mr Anderson, para 28.

³⁴ Statement of Evidence of Dr Wouda, paras 9 and 18.

³⁵ Statement of Evidence of Dr Wouda, para 9.

³⁶ Statement of Evidence of Dr Wouda, para 9.

³⁷ Statement of Evidence of Dr Wouda, para 13.

³⁸ Statement of Evidence of Mr Anderson, para 13.

³⁹ Statement of Evidence of Mr Anderson, para 15.

⁴⁰ Statement of Evidence of Mr Anderson, para 15.

⁴¹ Statement of Evidence of Dr Wouda, para 18.

⁴² Statement of Evidence of Ms Mesman, para 15.4.

- b. “a winter grazing plan [is] being prepared for each paddock along with wet weather management strategies”⁴³, and
 - c. PDL has “agreed to mitigation measures which they see as practical and can implement on farm ...”.⁴⁴
39. I note that the consent conditions proposed in the s 42A report do not include a specific requirement to take all practicable steps to avoid pugging, but the Farm Environment Management Plan (**FEMP**) prepared by Lumen and attached to the Application, lists various “good management practices” to “maintain or improve the physical and biological condition of soils in order to minimise the movement of sediment, phosphorus and other contaminants to waterways”.⁴⁵ These practices include the use of strip tilling, back fencing, crop paddocks planted in pasture as soon as practicable, fencing to keep animals out of critical source areas and portable troughs used when practicable.⁴⁶
40. Therefore, although it seems there is *general consensus* between PDL, the Council officer and NZALA on the nature and type of farm practices that are needed to mitigate poor animal welfare outcomes (or at least mitigate environmental effects which may in turn have corresponding positive welfare outcomes), PDL and NZALA disagree on:
- a. how these matters are best provided for
 - b. when they need to be provided, and
 - c. whether voluntary compliance is sufficient, or consent conditions are required.
41. With respect, the measures in the FEMP are not presented as a cohesive, consistent, transparent and clear package of measures and this could lead to implementation issues and a fragmented understanding of best practice requirements. This is reinforced by a lack of clear direction in the s 42A report. The Council Officer states that effects on farmed animals and animal welfare concerns are better managed outside the RMA,⁴⁷ but then states that a condition relating to the Animal Welfare Act addresses NZALA’s submission⁴⁸ (although no such condition seems to be included in the recommended conditions).
42. Dr Wouda’s evidence is that the animal welfare concerns raised by NZALA can be addressed by:
- a. “following best practice winter management principles”⁴⁹

⁴³ Statement of Evidence of Ms Mesman, para 27.

⁴⁴ Statement of Evidence of Ms Mesman, para 38.

⁴⁵ Soil Structural Management, Farm Environment Management Plan, Lumen, pages 120-122 of AEE

⁴⁶ Soil Structural Management, Farm Environment Management Plan, Lumen, pages 120-122 of AEE.

⁴⁷ Section 42A Report, paragraph 3.3.2.3.

⁴⁸ Section 42A Report, paragraph 3.3.3.1.

⁴⁹ Statement of Evidence of Dr Wouda, para 11.

- b. “putting extreme weather event management plans (referred to as a “Winter grazing plan” by Dairy NZ in place”⁵⁰
 - c. mitigating “risks of injury and disease” through “good management”⁵¹
 - d. managing “risk of mastitis” by “herd testing three times a year and utilising the data to work through a dry cow strategy plan with the farm’s key vet”⁵², and identifying cows which require antibiotic treatment and internal teat sealant⁵³
 - e. ‘correctly managing’ the use of fodder beet which can be a “higher risk feed”⁵⁴ including through supplements like dicalcium phosphate and trace element supplementation⁵⁵
 - f. using “good feed transition practices (as outlined in the factsheet on transitioning in winter by Dairy NZ”⁵⁶
 - g. using crop transition practices⁵⁷
 - h. proactive engagement with animal health professionals.⁵⁸
43. Mr Anderson’s evidence also is that positive animal welfare concerns can be provided for, and risks adequately mitigated, through voluntary measures such as:
- a. ensuring areas are available that are “as dry as possible for lying”⁵⁹ by:
 - i. strip tilling⁶⁰
 - ii. moving stock off winter feed in wet weather and putting them:
 - (a) in paddocks of baleage
 - (b) on grass with harder ground⁶¹ and/or
 - (c) “up on dry ground” which is “free draining” and with “harder soil” and within two days at most” when there is heavy rain.⁶²
 - ii. providing lying space by laying straw:

⁵⁰ Statement of Evidence of Dr Wouda, para 13.

⁵¹ Statement of Evidence of Dr Wouda, para 15.

⁵² Statement of Evidence of Dr Wouda, para 17.

⁵³ Statement of Evidence of Dr Wouda, para 17.

⁵⁴ Statement of Evidence of Dr Wouda, para 9.

⁵⁵ Statement of Evidence of Dr Wouda, para 10.1

⁵⁶ Statement of Evidence of Dr Wouda, para 9.

⁵⁷ Statement of Evidence of Dr Wouda, para 17.

⁵⁸ Statement of Evidence of Dr Wouda, para 18.

⁵⁹ Statement of Evidence of Mr Anderson, para 17.

⁶⁰ Statement of Evidence of Mr Anderson, para 13.

⁶¹ Statement of Evidence of Mr Anderson, para 15.

⁶² Statement of Evidence of Mr Anderson, paras 16 and 17.

- (a) when needed and “usually every couple of days”⁶³, and
 - (b) as required in:
 - 1. either the crop paddock⁶⁴
 - 2. a grass or baleage paddock if conditions are particularly wet⁶⁵, and/or
 - 3. areas of higher ground to ensure animals are kept out of water that settles on the ground and in areas they would usually pace⁶⁶
 - b. using the Dairy NZ feed checker to ensure feed is well balanced and working with a professional nutritionist to ensure an appropriate blend of minerals and feed is offered⁶⁷
 - c. taking blood tests every year (usually two, one in spring and one in autumn) to check levels are healthy, and tweak the feed and mineral regime if not⁶⁸
 - d. feeding minerals into water troughs and feeding cows a mineral mix during milking⁶⁹
 - e. minimising the distances the cows walk to the shed, including by varying milking times, to reduce lameness in the herd,⁷⁰ and
 - f. using a crop transitioning system to allow the cows more time back on pasture prior to calving.⁷¹
44. Dr Beattie’s evidence discusses some of the inadequacies of the voluntary measures proposed by PDL including how some measures which are intended to reduce pugging (eg back-fencing) are not acceptable from an animal welfare perspective.⁷²

Why voluntary self-regulation is inadequate

45. Dr Beattie’s evidence based on her 25 years’ experience as a veterinarian, animal welfare inspector and member of the Taskforce on IWG, is that voluntary, self-regulated compliance with codes, good management practices and industry guidelines as discussed in PDL’s evidence statements, do not provide for appropriate animal welfare

⁶³ Statement of Evidence of Mr Anderson, para 16.

⁶⁴ Statement of Evidence of Mr Anderson, para 16.

⁶⁵ Statement of Evidence of Mr Anderson, para 16.

⁶⁶ Statement of Evidence of Mr Anderson, para 16.

⁶⁷ Statement of Evidence of Mr Anderson, para 23.

⁶⁸ Statement of Evidence of Mr Anderson, para 23.

⁶⁹ Statement of Evidence of Mr Anderson, para 24.

⁷⁰ Statement of Evidence of Mr Anderson, para 25.

⁷¹ Statement of Evidence of Mr Anderson, para 27.

⁷² Statement of Evidence of Dr Beattie, from para 71; and paras 106 – 107 re back fencing.

outcomes. Managing animal health issues once they have arisen is not the same thing as acknowledging animal sentience, and ensuring quality of life and cows' welfare needs are met. Health is only one of the Five Domains that contribute to an animal's overall welfare.⁷³

46. Mr Rego refers to research documenting deficiencies with welfare codes including lack of enforcement, reliance on industry self-regulation and under-resourcing of welfare inspectors.⁷⁴ Mr Rego also cites the findings of the Winter Grazing Taskforce that enforcement activity is hindered by a lack of clear, enforceable rules and there are currently no regulations that address the welfare impacts of IWG.⁷⁵
47. Dr Beattie, Mr Rego and Mr Hook discuss in their evidence statements the need for, and merits of, proactive land use management and planning to elevate current welfare management practices from being self-regulated guidance to transparent, clear and enforceable conditions that can help to ensure more acceptable animal welfare outcomes, which in turn are also likely to have positive environmental and reputational effects.

The conditions in Mr Hook's planning evidence

48. In my submission, based on Dr Beattie's evidence, if the Commissioner approves the Applications, the consent conditions in Mr Hook's evidence should be applied as a minimum in order to avoid, remedy or mitigate adverse effects on animal welfare. Compliance with the conditions Mr Hook supports will ensure:
 - a. suitable lying surfaces for the cattle that enable 10-12 hours of contented lying per day on an area of approximately 8-10m² per cow
 - b. the cattle have ready access to water
 - c. a balanced diet
 - d. access to adequate shelter, and
 - e. access to a suitable place to calve.
49. These conditions are appropriate because they are *vires*, workable, they are consistent with industry best practice, are within the Regional Council's powers, mitigate adverse effects and are sufficiently certain.

⁷³ Statement of Evidence of Dr Beattie, para 41, citing Mellor & Reid (1994); The Five Domains are nutrition, environment, health, behavioural interactions, and mental state, all of which contribute to the animal's overall welfare.

⁷⁴ Statement of Evidence of Mr Rego, para 20.

⁷⁵ Statement of Evidence of Mr Rego, para 17.

Vires

50. Case-law provides that to be lawful, a condition must be:⁷⁶
- a. for a resource management purpose, not an ulterior one
 - b. fairly and reasonably relate to the proposal authorised by the consent
 - c. not be so unreasonable that no consent authority could have approved it.
51. A condition is for an RMA purpose if it is necessary for the sustainable management of natural and physical resources.
52. For the reasons set out above, conditions of consent providing for positive animal welfare outcomes are relevant resource management considerations within the scope of the RMA.⁷⁷ The point is captured succinctly by the Environment Court in *Kaimanawa Wild Horse Preservation Society Inc v Attorney-General* in this way:⁷⁸

The extended meaning given to the term “natural and physical resources” includes all forms of animals, whether native to New Zealand or introduced. Plainly that covers the wild horses. The meaning given by section 5(2) to the term “sustainable management” refers to managing the protection of natural and physical resources. That is capable of applying to the protection of the wild horses. The extended meaning given to the term “environment” includes natural and physical resources.

53. The jurisdiction to impose conditions on the granting of a resource consent springs from s 108, RMA.⁷⁹

54. Section 108(1), RMA states that:

except as expressly provided in this section and subject to any regulations, a resource consent may be granted on any condition that the consent authority considers appropriate, including any condition of a kind referred to in subsection (2).

(emphasis added)

55. Section 108(2)(c) states that a resource consent may include any one or more of the following conditions:

a condition requiring that services or works, including (but without limitation) the protection, planting, or replanting of any tree or other vegetation or the protection, restoration, or enhancement of any natural or physical resource, be provided

⁷⁶ *Newbury DC v Secretary of State for the Environment* [1981] AC 578, approved in *Estate Homes Ltd v Waitakere CC* [2007] 2 NZLR 149 (SC).

⁷⁷ Paragraph 20 of these legal submissions.

⁷⁸ 1997] NZRMA 356.

⁷⁹ *Carter Holt Harvey Ltd v Te Runanga O Tuwharetoa Ki Kawerau* [2003] 2 NZLR 349 at [36] (HC).

(emphasis added)

56. Section 108(2)(c) therefore expressly contemplates protection and enhancement of any natural or physical resource. Providing for lying down areas, water, shelter and suitable places for calving, are all for welfare purposes, or in other words, the protection of the cattle. The conditions Mr Hook supports therefore all fall, without difficulty, inside the ambit of s 108(2)(c) and no issues of scope or jurisdiction arise.

Fairly and reasonably relate to the proposal

57. The conditions Mr Hook supports fairly and reasonably relate to the Applications and adverse effects arising from them and are within the Council's statutory powers under ss 104, 108 and s 30, RMA. It is sufficient that the conditions are related to the proposal; they do not have to be required for the purpose of the proposal.⁸⁰
58. They are "logically connected"⁸¹ to the Applications and are not imposed to manage any "external or ulterior concerns".⁸² This is because the conditions require land use matters or specific things to be carried out on the subject site, including on the land that PDL is seeking to convert to dairy farmland for the intensive winter grazing of dairy cattle.⁸³
59. The conditions Mr Hook supports will have the co-benefits of maintaining and enhancing the quality of water in water bodies and coastal water given the correlation between pugging (caused by cows trampling on forage crops creating slurry), reduction of soil surface infiltration and pore volumes, and increases in overland flow and loss of nutrients, sediment and pathogens into surface and groundwater.⁸⁴ As stated in a sentencing decision by the District Court, "the risks associated with intensive winter grazing of dairy cows are well known and include the pugging and compacting of soil, together with the concentration of effluent on the soil surface. Rainfall and overland flow may transport sediment and effluent to surface water bodies and artificial watercourses."⁸⁵
60. There are no issues with a consent authority imposing a condition (e.g. requiring cattle have continued access to fresh water and clean, soft, dry lying space) on a continuing

⁸⁰ Skyline Enterprises Ltd v Queenstown Lakes District Council [2017] NZEnvC 124 (EC).

⁸¹ *Morgan v Whangarei DC* [2008] NZRMA 115 (HC) at [25].

⁸² *Waitakere City Council v Estate Homes Limited* [2007] 2 NZLR 149 [at 66].

⁸³ This can be distinguished from the situation in *Kaimanawa Wild Horse Preservation Society Inc v Attorney-General* where the purpose of the proposed culling and mustering of the horses which was to avoid or mitigate adverse effects on flora and other features of land, was found by the Environment Court to not in itself be "making use of land".

⁸⁴ Statement of Evidence of Dr Beattie, paras 35-36.

⁸⁵ *Canterbury Regional Council v Delos Dairies Ltd* [2020] NZDC 20201 at [23].

basis.⁸⁶

61. PDL is seeking to use land in a way that, according to NZALA, creates adverse effects. There is clear jurisdiction to require the land to be managed in a way that mitigates *all* consequent effects. In other words, imposing consent conditions under the RMA that control land use activities to manage adverse effects on water and cumulative, concurrent and additive effects on animal welfare is appropriate and within the scheme of the RMA given the “whole thrust of the regime is the regulation and control of the use of land, sea and air.”⁸⁷
62. In *Kaimanawa Wild Horse Preservation Society Inc v Attorney-General* [1997] NZRMA 356, the Environment Court stated that the culling and mustering of wild horses was not ancillary to a use of land (in terms of s 9, RMA), or part of a bundle of activities that make up a use of land, “in the way that management of farm animals might be.” Although *dicta*, the comment is specifically relevant to the present circumstances and supports NZALA’s position as to the *vires* of land use consent conditions that have the co-purposes of mitigating effects on water quality and improving welfare outcomes.
63. Similarly in *Stark v Waikato District Council*⁸⁸ the Environment Court accepted that gunshot noise from a gun club would disturb and be harmful to the wellbeing of neighbouring ewes, particularly over the lambing period, and imposed conditions such as an increased bund/fence height to minimise noise effects, including on the ewes.

Workable

64. The conditions proposed are reasonable and workable and only require PDL to take the minimum measures required to mitigate the welfare effects caused by IWG and the conversion of land to dairy farmland.⁸⁹ They are matters that they broadly accept they should implement, and are largely already implementing or planning to implement⁹⁰, as part of “good management practices”. There are mutual positive benefits in applying these conditions. The FEMP recognises the environmental benefits of reducing pugging, and as Mr Anderson says in his evidence statement, there is an economic benefit to PDL in having their animals “in excellent health and condition”.⁹¹
65. The conditions are necessary for the reasons set out in Dr Beattie’s evidence, and they do not duplicate requirements in the AWA or associated regulations. There is a

⁸⁶ *Morgan v Whangarei DC* [2008] NZRMA 113 (HC).

⁸⁷ *Falkner v Gisborne District Council* [1995] 3 NZLR 622 (HC) per Barker J.

⁸⁸ [2014] NZEnvC 19.

⁸⁹ In *Sampson v Waikato RC* EnvC A 178/02, the Environment Court held [at 84] that to impose a condition, requiring an applicant to take measures beyond what is required to mitigate effects caused by an activity, would be unreasonable.

⁹⁰ See paragraphs 33 -34 above of these legal submissions.

⁹¹ Statement of Evidence of Mr Anderson, para 28.

correlation between them, but this is not inappropriate.

66. An analogy is the requirement for a consent to be exercised in accordance with the New Zealand Electrical Code of Practice for Electrical Safe Distances (NZECP34:2001) even though compliance is mandatory under the Electricity Act 1992;⁹² and a requirement for a consent holder to comply with Civil Aviation Authority requirements. With respect to the latter, in confirming the validity of a consent condition relating to restrictions on residential over-flight, the Environment Court stated:⁹³

we ... accept that it is possible for the Council to impose conditions that mirror requirements of other authorities, provided they do not seem to take on jurisdiction the Council does not have, or of course, derogate from the requirements of the Civil Aviation Authority ...

It would be unwise for the Council to be suggesting that it could have different provisions to those imposed by the [Civil Aviation] Authority. On the other hand, we accept that the citizens of Westland and the Council itself are entitled to be satisfied that the operation is being conducted in accordance with the Civil Aviation Authority's requirements. The consent not only reflects that concern, but confirms to members of the public reading the consent, that that requirement is imposed.

Certain

67. Lastly, in my submission, the conditions Mr Hook supports are sufficiently certain. PDL cannot properly or reasonably argue that it could not know what is expected of it from the conditions. PDL's experts acknowledge in their evidence both the importance of animal welfare, the benefits of meeting animal welfare needs and the extent to which their current farming practices provide for these needs.
68. There is already significant alignment other than on the issue of whether welfare needs can be provided for through voluntary compliance with good management practices (which seems to be PDL's position), or whether consent conditions are justified and appropriate to ensure positive welfare outcomes (NZALA's position).

PART 2, RMA

69. I support Mr Hook's s 104 evaluation in his evidence statement.⁹⁴ As there are no relevant national policy statements, standards or planning provisions directly relating to animal welfare from IWG activities, it is "appropriate and necessary to refer to Part 2."⁹⁵ Doing so adds the critical considerations of sustaining the life-supporting capacity of ecosystems and the sustainable management of natural and physical resources into the s 104 assessment of effects, as well as the "ethic of stewardship" (s 7(aa)). In a recent

⁹² See for instance the consent order confirmed by the Environment Court in *Airbnb Australia Pty Ltd v Queenstown Lakes District Council* [2023] NZEnvC 11.

⁹³ *McBride v Westland District Council* EnvC C97/05 at [17] and [19].

⁹⁴ Paragraphs 53 – 60.

⁹⁵ *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 at [75].

case (although not related to animal welfare), the Environment Court noted the importance of recognising and encouraging sound primary production practices in accordance with “an ethic of stewardship”.⁹⁶

70. The ethic of stewardship is central to these Applications. PDL’s evidence statements demonstrate a strong commitment to both the management of environmental effects and positive animal welfare outcomes. As stated by the Taskforce on Intensive Winter Grazing:⁹⁷

...achieving good welfare is intertwined with environmental considerations. Simply, good animal welfare and good environmental outcomes require good planning and must be considered together...This would allow farmers to make effective and cohesive change to their systems that best balances all needs...

A farm system that does not provide for animal welfare is not sustainable, regardless of the environmental footprint.

71. The burden is on the PDL to satisfy the consent authority that the s 5 sustainable management purpose of the RMA will be met by granting rather than refusing consent.⁹⁸ In my submission, it can only discharge this burden if the consent conditions proposed by Mr Hook are, as a minimum, included in the consent.



D Nightingale
Counsel for NZALA

⁹⁶ *Re Ngāti Tama Ki Te Waipounamu Trust* [2023] NZEnvC 157 at [60].

⁹⁷ Winter Grazing Taskforce Close out Report, pages 5 – 8,
<https://www.mpi.govt.nz/dmsdocument/50959/direc>

⁹⁸ *Baker Boys Ltd v Christchurch CC* [1998] NZRMA 433 (EnvC).