BEFORE A COMMISSIONER APPOINTED
BY THE SOUTHLAND REGIONAL COUNCIL

Under The Resource Management Act 1991 ('**The Act**')

In the matter of an application for resource consent

OPENING LEGAL SUBMISSIONS FOR RESOURCE CONSENT HEARING ON BEHALF OF PAHIA DAIRIES LIMITED

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1 These legal submissions are presented on behalf of the Applicant, Pahia Dairies Limited. A detailed summary of the application can be found in the section 42A Officers Report (**s42A Report**), and I don't intend to repeat that here.

2 Based on the application and the s42A Report, this appears to be a fairly straightforward application seeking consent for dairy expansion and winter grazing. The benefits of this proposal, including an overall reduction in nutrient loss is agreed between the s42A Report writer and Ms Mesman for the Applicant.

3 Where this application gets more complex is the introduction of animal welfare issues, as set out in the submissions and evidence presented for the only submitter, the New Zealand Animal Law Association (**NZALA**). On that basis, these submissions address the following matters:

3.1 The interaction between animal welfare and the Resource Management Act 1991 (**RMA**);

3.2 The evidence of NZALA;

3.3 The concepts of the 'existing environment' and a 'permitted baseline', and their application to this matter;

3.4 Relevant considerations under s104; and

3.5 Proposed conditions.

Interaction between animal welfare and the Resource Management Act 1991

4 It is clear from the outset that the NZALA is using this resource consent application as an opportunity to redress what it considers to be gaps in the animal welfare legislation (Animal Welfare Act 1999 (**AWA**)). Through its evidence, the NZALA is asking you to 'fix a hole' in the AWA, by either declining the application, or introducing conditions to this resource consent to be, as they say, 'preventative measures', rather than the "ambulance at the bottom of the cliff" that the AWA is seen to be. I do not intend to make any submissions to you on the adequacy, or otherwise, of the AWA. It is not relevant to your proposal. What is relevant, is for you to determine whether or not:

4.1 The matters that NZALA are asking you to consider can legally be addressed under the RMA; and

4.2 If you find they can be, whether or not it's appropriate to do so in relation to this application.

5 In your decision on the application for strike out under section 41D, you determined that Parliament would have to explicitly exclude certain categories of animals from the RMA, if that were to be the intended interpretation. With respect, I disagree. The RMA, and section 104, have been in force for over 30 years. As outlined in the legal submissions to you on the strike

out application, this issue of animal welfare is not one that has been discussed in any depth by the Courts.

6 The evidence of Dr Beattie[1] outlines the increase in cattle numbers since 1990. She also refers to the "concern" various interest groups have in relation to winter grazing[2], some of which go back as far as the mid-1960s[3]. This issue of winter grazing, and their opposition to it, particularly in Southland, is clearly not new to the NZALA.

7 Despite this, at no point has the NZALA attempted to raise issues of animal welfare as something that is legally addressed through the RMA process. You have not been referred to any appeal, successful or not, on the grounds of animal welfare from dairy farming being considered under the RMA.

8 The proposed Southland Water and Land Regional Plan was notified in 2016, and a decision made in 2018. That is a public process, with opportunity for submission. I am unaware of any submission on that Plan, or any other regional plan, where the issue of animal welfare has been considered a matter within the control of the Regional Council, and objectives, policies or rules imposed accordingly.

Animals' vs animal welfare

9 It was noted in the strike out decision that the word "animal" is referenced several times throughout the RMA.[4] We do not disagree that "animals" in its ordinary meaning, fall broadly within the ambit of the RMA however, our submissions, and that of NZALA, is regarding animal welfare concerns and not simply "animals" in its ordinary meaning.

10 In *Kaimanawa*[5], the Judge determined that the proposed activity of culling and mustering wild horses was not an activity regulated under the RMA. In reaching that conclusion, the Judge considered the purpose of section 17 against the context of the RMA as a whole and the scheme of the RMA. In doing so, the Judge made the following comments;

> "Any section in an Act should be read in the context of the Act as a whole, and the scheme of the Act. The courts have to try to make the Act work as Parliament intended, and give an interpretation which accords best with the intention and spirit of the Act. The interpretation of a section is often assisted by reading it in the context of all the sections in the same part of the Act; the theme or purpose of the part may

[1] At paragraph 30
[2] At paragraph 39.
[3] At paragraph 23.
[4] Paragraph 8.9 of the Decision of the Independent Decision Maker.
[5] *Kaimanawa Wild Horse Protection Society Inc v A-G* NZEnvC A27/97 and referred to in the strike out decision.

> often influence interpretation. The Act as a whole, the scheme of the Act, and other provisions of the Act, may make the true interpretation clear."[6]

11 When we take the sections in the RMA that references animals (listed in the strike out decision), we note that the reference to "animals" are made only in connection to the habitat the animals occupy.[7] There is no reference in the RMA to animal welfare or the protection of "animals" in its ordinary meaning. Section 331B, which refers to the "well-being of animals" was introduced into the RMA as a result of severe weather events.[8] It was noted in the Decision that if the well-being of animals were not relevant under the Act, the reference to well-being would not have been included.[9] However, section 331B must be read in the context of the purpose of the Act as a whole and the purpose of the part which the section sits. As previously submitted, the intent of provisions sections 331 – 331F, as evidenced in the Hansard reports, is to enable rural landowners and occupiers to undertake permitted activities to repair or prevent damage on their land, without the need to obtain resource consents. This is consistent with the overall scheme of the RMA, which is to regulate activities relating to the use of land, air and water, and sustainable use of resources. Therefore, when you read these sections against the context of the RMA as a whole, it becomes clear that there is no intention under the RMA to address animal welfare concerns. This is further reinforced by the fact that animal welfare is not a matter listed in sections 5, 6 or 7 of the RMA, which sets out the purpose and principles of the Act, as well as the matters of national importance and other matters which persons exercising functions and powers under the Act must have particular regard to.

12 In *Kaimanawa*, it was concluded that the activity in question was more appropriately addressed by the Wildlife Act 1953 rather than the RMA.[10] As previously submitted, there are other statutes that apply to animal welfare matters, specifically (and relevantly), the AWA. Therefore, it would be more appropriate for animal welfare issues to be addressed via the AWA, as Parliament had intended, rather than the RMA. This approach is also confirmed in *Stewart v Grey County Council*, where the Court cited the following statement from an earlier decision:

> "When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms."[11]

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[6] *Kaimanawa Wild Horse Preservation Society Inc v Attorney-General* above n5
[7] Resource Management Act 1991, ss 12, 13, 14, 70 and 107.
[8] Resource Management Act 1991, s 331B.
[9] Paragraph 8.9.7 of the Decision of the Independent Decision Maker.
[10] *Kaimanawa Wild Horse Preservation Society Inc v Attorney-General*, above n5
[11] *Stewart v Grey County Council* [1978] 2 NZLR 577.

13 Furthermore (and as submitted by NZALA), if a prosecution was to be brought which related to animal welfare, it would be related to an offence against the AWA and not the RMA.

Animal Welfare Act and Resource Management Act 1991

14 It was found in the strike out decision that the RMA and AWA can be read together. This approach is confirmed in *Stewart v Grey County Council*, whereby the Courts confirmed that where there is a potential conflict or inconsistency between two Acts, the Courts will firstly look to see if the two can be read together. If not, the specific will usually prevail over the general.[12] We note that in *Stewart v Grey County Council*, the Court was concerned with a change of land use for the purposes of mining.

15 The statutes which the Court considered was the Mining Act 1978, the specific legislation regulating mining, and the Town and Country Planning Act 1953, the general legislation applying to all land. It was clear in this case that there was some overlap and inconsistency between the two statutes as both Acts regulated land use activities and there were specific provisions in the Mining Act 1978 that required the consent of the local authority in certain circumstances. Ultimately, the Court determined that the specific provisions of the Mining Act 1978 prevailed over the Town and Country Planning Act 1953, as it otherwise would have been inconsistent with the overall scheme of the Mining Act 1978 to allow local authorities to implement controls which it did not have the authority to do under the specific legislation.[13]

16 We submit that there is no conflict between the AWA and the RMA as the two Acts regulate separate activities and therefore, it is not appropriate to read the two statutes together. The AWA governs and regulates owners in charge of animals, which naturally encompasses animal welfare matters. The RMA regulates activities relating to land, air and water in a way that promotes sustainable management of the environment, which broadly speaking includes animals, in its ordinary meaning only. As submitted above, animal welfare concerns are not a valid consideration under the RMA and so does not overlap with the AWA.

17 The Applicant's key submission remains that animal welfare concerns are not a relevant matter under the RMA.

Evidence of the NZALA

18 Dr Beattie confirms in her evidence that she has read, and complies with, the expert code of conduct. Her expertise is listed as a registered veterinarian, with specific expertise in the discipline of animal welfare. However, her evidence addresses a broad range of issues, many of which are well outside the scope of a veterinarian or animal welfare issues. They also appear to go beyond the scope of the original NZALA submission. Her summary statement[14]

[12] *Stewart v Grey County Council*, above n 11.
[13] *Stewart v Grey County Council*, above n 11.
[14] Dr Beattie paragraph 12

and much of her initial evidence[15] address environmental matters relating to soil, runoff and nutrient management which are outside her stated expertise area.

19 The photographs provided are somewhat misleading, in that many of them apply to different wintering systems than proposed by PDL (grass and baleage for example). None of them relate to the Application property.

20 Dr Beattie also has a clearly stated opposition to winter grazing generally, and particularly in Southland[16]. This position drives her evidence, and the conclusions she reaches.

21 In my submission, her evidence is advocacy dressed up as expert evidence. Her conclusions go well beyond providing you with her expert opinion on animal welfare matters, and instead address suggested changes to the farming practices of Mr Anderson[17].

22 As you will be aware, you have a broad discretion, conferred on you by s276 of the RMA, to "receive anything in evidence that it considers appropriate to receive" and "call before it a person to give evidence who, in its opinion, will assist it to make a decision". The Court in *Upper Clutha Environmental Society Inc v Queenstown Lakes District Council*[18] addressed the weight that can go to expert evidence, and I submit that decision provides useful guidance for you to consider when determining the weight to be given to Dr Beattie's evidence.

23 Judge Hassen considered the Evidence Act 2006, and in particular the definition of an "expert" and "expert evidence". There is no doubt that much of Dr Beattie's evidence falls within this definition. However, the Judge in *Upper Clutha* found "where an expert offers opinions on matters going beyond that specialist knowledge or skill, those opinions do not meet the Acts definition of 'expert evidence'".

24 The Judge went on to discuss the weight to be given to expert evidence, and said "advocacy by an expert can be a matter of degree such that it impacts upon the weight ascribed to their opinions (rather than necessarily rendering their opinion inadmissible)"[19]. Comments further on are also relevant, where the Judge identified issues of unreliability can arise when an expert "strays" into offering opinions the expert is not qualified to offer. He stated "It can also be unfair for substantial unqualified opinion to be offered under colour of expertise. It can potentially give a party undue influence. That is particularly a risk where the opinion is in the nature of advocacy for a particular party's interests over another's."

25 It is my submission that much of Dr Beattie's evidence is in the nature of an advocacy statement, rather than impartial expert evidence. In that light, and with the guidance offered

[15] See for example paragraph 25 – 28, 35 and 36
[16] See for example paragraph 12.
[17] From paragraph 91 onwards.
[18] [2019] NZEnvC 46
[19] *Upper Clutha* at [25]

by the *Upper Clutha* decision, I submit you need to be cautious when determining the weight to be given to Dr Beattie's evidence.

Evidence of Oska Rego

26 Mr Rego refers to two Council level decisions which he suggests include conditions targeted at animal welfare management. As you will be aware, these are not binding on your decision making, but could be useful if they were relating to similar matters.

27 I have reviewed the decision of the Taranaki Regional Council[20]. At no point in that decision does the Panel consider animal welfare concerns. The conditions referred to by Mr Rego are not supported in the decision discussion as being for animal welfare purposes. They are not inserted by the Panel as a result of submissions, and acceptance by the Panel of animal welfare being a relevant RMA consideration. Although ammonia and humidity levels were said to be monitored to "maintain bird health and safe working conditions inside the shed", the discussion by the Panel in relation to these matters was in the context of an air discharge (with increased ammonia resulting in increased odour issues).

28 I have also reviewed the consent conditions and recommendation report for the Otago Regional Council decision[21]. Again, at no point is animal welfare or health considered in the recommendation report. No guidance is given on the applicability of animal welfare to the resource consent process. I note that all of the consent conditions can be directly linked to environmental concerns, such as pugging, sediment run-off risk and nutrient loss. I consider it would be incorrect to take the view that these conditions were imposed for animal welfare purposes, rather than environmental reasons associated with soil and water health.

The existing environment and the permitted baseline

29 Section 104(1)(a) of the RMA requires consent authorities, when determining resource consent applications to have regard to any actual and potential effects of the environment of allowing the activity.[22] It is well established in case law that the term "environment" in section 104(1)(a) includes the environment as it may be modified by permitted activities (the 'existing environment') and the implementation of resource consents which have been granted and which are likely to be implemented (receiving/future environment).[23]

30 In this instance, the Applicant has an existing dairy effluent consent (AUTH-20222602) for one thousand cows, which expires 31 May 2032. Any actual or potential effects of the

[20] Mr Rego at paragraph 28.
[21] Mr Rego at paragraph 30, for ease of reference those documents can be accessed at the following links:
Consent RM23.321.01 Online.pdf (orc.govt.nz)
Recommending Report RM23.321.01 Online.pdf (orc.govt.nz)
[22] Resource Management Act 1991, s 104(1)(a).
[23] *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] CA/45/05 at 84.

Applicant's proposed activity, therefore, must be assessed against the environment comprising of the existing consent. The resource consent application in question seeks to increase the land area of the Applicant's milking platform (as well as authorising winter grazing, which I come to under the 'permitted baseline' below). The application does not seek to increase stock numbers. Therefore, the number of cattle on the farm will be the same regardless of whether the land area of the farm is increased. I note that the decision in *Port Gore Marine Farms v Marlborough District Council*[24] established that an activity authorised by resource consent cannot be considered part of the existing environment beyond the expiry date of that consent. For completeness, I note that the consents as sought and per the proposed consent conditions do not extend beyond the expiry date of the effluent consent.

31 Section 104(1)(2) of the RMA allows consent authorities to disregard any adverse effect of the activity on the environment if it is permitted by national environmental standard or if permitted by a rule in a plan.[25] This discretionary authority is also known as the 'permitted baseline.'

32 Under rule 26(4) of the Resource Management (National Environment Standards for Freshwater) Regulations 2020 (**NES-F**), intensive winter grazing is a permitted activity provided the requirements of the rule are met.[26] The Applicant has a permitted baseline of 64 hectares of crop (as outlined in the s42A Report, with 34 hectares on the dairy platform, and 30 hectares on Browns Block). Consent is sought as the two properties are proposed to operate as one, which introduces an upper limit of 50 hectares as a permitted activity, and some areas that the Applicant wishes to use for winter grazing has a slope of more than ten degrees. Should the Applicant choose to, there is 50 hectares of flat land on which winter grazing could be planted, and so that remains a valid permitted baseline. For environmental reasons, land with greater slope (but more appropriate soils) are sought for some areas of IWG.

33 With that background, it is submitted it is entirely appropriate for you to consider the permitted baseline when making your decision. This would mean you disregard any of the adverse effects of intensive winter grazing as permitted by the NES-F – i.e. up to 50 hectares, and all area of the farm with slopes less than 10 degrees. It is only the adverse effects (if any) emanating from the increase of up to five hectares of land area and the additional increase in slope that should be considered.

[24] [2012] NZEnvC 72
[25] Resource Management Act 1991, s 104(2)..
[26] Resource Management (National Environmental Standards for Freshwater) Regulations 2020, rule 26(4).

34 The existing environment and permitted baseline provide critical context, which I consider is missing from the evidence of Mr Hook for the NZALA. Those two matters together mean that the environment to which you should consider this application must contemplate:

34.1 1000 cows authorised to be milked on the property; and

34.2 50 hectares of winter grazing as a permitted activity.

35 If this consent were not granted, the activity can continue in a fairly similar manner. 1000 cows will be milked (solely off the existing dairy platform), and 64 hectares of winter grazing can continue (some of this on Browns Block), on soils less suited to winter grazing. The application has been made to allow for better environmental management. That must be a relevant factor in your decision making.

Relevant considerations under section 104

Part 2

36 Mr Hook[27] directs you to refer back to section 5 (and so Part 2) of the Act, as he considers there is an "absence of national policy statement, environmental standards or plans directly relating to animal welfare".

37 You will be aware of the line of cases derived from the Supreme Court decision in *King Salmon*[28], and the later Court of Appeal case of *Davidson*[29] applying those principles to resource consent applications (rather than plan changes).

38 In summary, those lines of case law have established that specific reference back to Part 2, and the application of a "broad overall judgment" that had previously been the manner in which the Courts approached a resource consent application, was not appropriate **unless** the relevant planning documents under which a plan change or resource consent was sought was "illegal, uncertain or incomplete".

39 Based on that guidance from the higher courts, I submit you would have to find that there is an aspect of the relevant planning documents that are "illegal, uncertain or incomplete" in order to be able to refer back to Part 2, and the broader statutory purpose of the RMA which Mr Hook is directing you to do.

40 In my submission, there is no issue here which would direct you to refer to Part 2. The proposed Southland Water and Land Plan (**pSLWP**) is new, and there is no reason on its face which would suggest that it has not given effect to the relevant higher order documents, and particularly Part 2 of the RMA. The winter grazing consent is sought under the NES-F, which was introduced as part of the Essential Freshwater package which also introduced the NPS-FW 2020. Both the pSLWP

[27] At paragraph 54
[28] *Environmental Defence Society Inc v New Zealand King Salmon Company Limited* [2014] NZSC 38
[29] *R J Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81 at [262] as corrected by Erratum [2016] NZEnvC 148; confirmed on appeal: [2017] NZHC 52.

and the NES-F are recent documents, established following the *King Salmon* decisions. The NZALA has provided no grounds to indicate why it considers animal welfare should have been assessed by these documents.

41 I consider the fact that these documents are entirely silent on animal welfare should give you guidance as to the relevance of that issue under the RMA. There was opportunity through the pSLWP for submitters to identify animal welfare as a matter to be included within the planning documents. This would have allowed a much more comprehensive assessment of the relevance of these issues under the RMA, but they did not occur. Similarly, Dr Beattie refers specially to the Freshwater regulations developed in 2020[30]. She says the notified draft initially included "fairly comprehensive regulation of IWG due to the major environmental impacts of IWG", but says the final version was "significantly weakened" and "failed to provide meaningful protection for animals during winter grazing". In my submission, this was on purpose, in recognition of the fact that the RMA is **not** the legislation that addresses animal welfare issues. Even the notified draft referred to only included controls that relate to freshwater management, not environmental welfare concerns.

Draft Code of Welfare for Cattle

42 The National Animal Welfare Advisory Committee (NAWAC) has recently undertaken a review of the Code of Welfare of Cattle (Code), and the NZALA seems to be asking you to give weight to this document[31]. We submit that it is not appropriate to place weight on the draft Code, which can be subject to change following the consultation process. Therefore, it is unlikely and unreasonable for draft codes to be a valid consideration under section 104(1) of the RMA.

Proposed conditions

43 Ms Mesman in her evidence[32] outlines the additional comments that the Applicant made to the proposed conditions prepared by Council. On that basis, the Applicant supports the conditions attached to the s42A report. My additional comments relate only to the proposed conditions suggested by the NZALA, taken from the evidence of Mr Hook[33] , and the discussion in the evidence of Mr Rego relating to conditions imposed in other resource consents.

44 The Court of Appeal[34] held that the test established in the English *Newbury* decision should be applied in relation to the provisions of the RMA. That sets out that a consent condition is valid if:

44.1 The condition must be for a resource management purpose, not for an ulterior one.

44.2 The condition must fairly and reasonably relate to the development authorised by the consent to which the condition is attached.

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[30] Dr Beattie at paragraph 52
[31] Dr Beattie at paragraph 77.1, Mr Hook at paragraph 30
[32] At paragraph 35 and 36
[33] From paragraph 61
[34] See *Housing NZ Ltd v Waitakere City Council* [2001] NZRMA 202

44.3 The condition must not be so unreasonable that no reasonable planning authority duly appreciating its statutory duties could have approved it.

45 As submitted above, the NZALA submission is seeking controls through the RMA as it considers the specific animal welfare legislation falls short. This is an ulterior purpose, that sits outside a resource management purpose.

46 These submissions outline the permitted baseline, and existing environment. The difference between what is sought under consent, and what can occur as of right (or as already consented) is negligible. It would not be fair or reasonable to impose additional conditions on an this application that extend beyond the conditions that apply to permitted winter grazing.

47 If you are convinced that animal welfare is a valid resource management consideration, and that consent conditions are required on that basis to support the grant of consent, I make the following comments on Mr Hook's suggested Condition X and Condition Y:

48 Condition X (iv) as proposed includes conditions that go beyond the current Code of Welfare (**CoW**). The CoW sets out that under "usual conditions" cattle should be able to lie and rest on a dry, clean and soft surface. The Applicant has no issue with this, that is its standard practice. However, it is inappropriate to require compliance with "usual conditions" all the time. Consideration needs to be given to situations where "soft, clean and dry" isn't possible, and this should not mean instant non-compliance with consent conditions. I suggest that wording reflects that in adverse weather conditions, all reasonable measures will be taken to ensure than cattle have access to an area which encourages the ability to lay down. In addition, this condition requires rewording to require "at a minimum, $8m^2$", rather than "8 – $10m^2$" which is unclear.

49 Advice note 1 defining "dry conditions" should also capture the "Gumboot Score" of 2 with weather clearing, as the table provided by Mr Hook identifies this means there is no water pooling, and cows may lie down.

50 Advice note 3 is unclear. Firstly, precipitation/rainfall is not "adverse weather conditions" in and of itself. Particularly heavy rainfall (for example, a rainfall warning) may meet that definition. The proposed wording around temperature provides no certainty to a consent holder or compliance officer as to how adverse conditions are to be assessed. To say that any temperature below the average is "adverse" is not appropriate, by that logic, weather conditions could be adverse around 50% of the time. This condition would be improved if a particular low temperature was forecast to occur for longer than a stated period of time. Ms Wouda in her evidence has addressed her understanding of "harsh" conditions, and how that aligns with the Southland conditions.

51 Advice note 4 is not appropriate. The conditions of resource consent must prevail in case of uncertainty, for the purposes of compliance under the RMA. It is inappropriate to have the 'goalposts shift' if a new code of conduct is introduced. The Applicant will be required to comply with that code of conduct regardless, however a resource consent cannot have its conditions

changed without due process (i.e. through an application under s127 RMA). This must be deleted.

52 Condition Y as proposed would be lawful if animal welfare is considered ‘within the scope’ of this application.

53 Mr Hook also refers to an inconsistency between the application (seeking a maximum mob size of 120 cows) and the proposed consent conditions (suggesting 250). The Applicant confirms it has no intention to IWG mobs larger than 120 cows, and suggests that the condition be amended to reflect that.

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