

**IN THE MATTER**

of an application for resource  
consent by Pahia Dairies  
Limited to Environment  
Southland APP-20222765

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**DECISION OF COMMISSIONER**

**Jayne Macdonald**

**Dated this 21<sup>st</sup> day of November 2023**

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## Introduction

[1] I have been appointed by Southland Regional Council (“the Council”) as an independent Hearings Commissioner to hear and determine an application by Pahia Dairies Limited (“applicant”) for the following consents:

- Land Use Consent to use land for farming – being in the form of dairy farm expansion;
- Land Use Consent for intensive winter grazing (“IWG”);
- Discharge Permit to discharge contaminants to land associated with the use of land for the dairy farm expansion and IWG.

[2] The applicant seeks consent to expand its dairy farm to incorporate a 100 hectare block, known as “Browns Block” into the dairy platform. It is proposed to rotate winter grazing around the entire farm to a maximum area of 55 hectares of crop, with approximately 350 hectares available for rotation. Some slopes will be over 10 degrees.

[3] The applicant’s property is located at 171 Ruahine Road West, Pahia.

[4] The application was publicly notified on 23 February 2023. One submission from New Zealand Animal Law Association (“NZALA”) was lodged, seeking that the application be declined. An application to strike out that submission by the applicant was unsuccessful<sup>1</sup>.

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<sup>1</sup> That application was the subject of a decision issued on 10 July 2023.

[5] I heard the application in Invercargill on 5 October 2023 and adjourned the hearing to allow the applicant to file its submissions in reply, which were filed on 13 October 2023. Thereafter, by memorandum dated 19 October 2023, NZALA sought leave to file brief submissions on the issue of the permitted baseline. I granted leave and invited the applicant and the Council to reply to those submissions by 27 October 2023. I received further submissions/comments from both<sup>2</sup>. I closed the hearing on 31 October 2023.

[6] I have granted consent to the application and impose those conditions set out in the suite of consents appended to this decision.

[7] The full text of my decision and the reasons for it are set out hereunder from paragraph [49].

### **Pre-hearing**

[8] There was a pre-hearing meeting attended by representatives of the Council and the applicant. NZALA did not attend the meeting. The outcome of the meeting<sup>3</sup> was that there were no points of disagreement between the Council and the applicant. Both agreed that the draft consent conditions prepared and circulated by the Council were appropriate and consent should be granted.

### **NZALA's submission**

[9] NZALA's submission opposes the grant of consent to all three applications sought. In a nutshell, its submission is to the effect that as animals are included in the definition of environment under the Resource Management Act ("RMA"), the consent authority must

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<sup>2</sup> Ms Bragg, consents manager, provided the response on behalf of the Council due to Ms McRae's unavailability

<sup>3</sup> Summarised in the s42A report

consider the potential adverse effects of IWG on cattle, including their welfare. If consent was to be granted, NZALA sought the imposition of a range of conditions addressed to providing for the welfare of cattle.

[10] As I discuss below, NZALA's evidence was focused to the IWG component of the applications. It did not present evidence to suggest that the extension of the dairy platform per se to include Browns Block would result in adverse effects on cattle and their welfare.

[11] As noted above, the applicant applied to strike out NZALA's submission. Its grounds for that application were that that the submission raised animal welfare issues which are outside of the scope of the RMA.

[12] The commissioner in declining to strike out NZALA's submission found that while finely balanced, where a land use consent is required, it may be relevant to consider animal welfare (depending on the type of land use consent), and impose conditions to avoid, remedy or mitigate adverse effects of land use activities on animals. She also found that the NZALA submission was broad in its scope to include effects of IWG on water quality.

[13] The relevance of animal welfare effects were explored in some detail in the legal submissions for both the applicant and NZALA in the hearing before me. I address those submissions further below, but at this point record that I agree with the findings made in the strike out decision, that effects on animal welfare may be a relevant consideration under the RMA, but that is very much dependent on a consideration of the activity for which consent is sought and the receiving environment.

[14] I also record here that there was no disagreement between the parties as to the importance of animal welfare concerns. The evidence for the applicant, which is discussed further below was that it wanted to “do right” by its animals.

### **The Hearing and Appearances**

#### **Applicant**

[15] The Applicant was represented by Ms **Jamie Robinson**, solicitor, who presented legal submissions. The applicant called the following witnesses who gave evidence in support of the application:

- (a) Mr **Simon Anderson**, a Shareholder and Director of the applicant, and farm manager at the property;
- (b) Ms **Georgette Wouda**, a registered veterinarian and clinical head of the team of mixed and large animal vets at Vet South, based in Winton;
- (c) Ms **Nicole Mesman** a Farm Environmental Advisor at Lumen Environmental.

#### **NZALA**

[16] NZALA was represented by Ms Dhilum Nightingale, Barrister, who presented legal submissions. NZALA called the following witnesses who gave evidence in support of its submission:

- (a) Mr **Oska Rego** a member of NZALA;
- (b) Dr **Helen Beattie** a registered veterinarian;
- (c) Mr **James Hook** , a resource management planner

## Council Staff

[17] The following Council staff were present:

- (a) Ms Jade McRae – Senior Consents Officer and author of the s42A report;
- (b) Ms Catherine Ongko – Panel Assistant

## Summary of Evidence Heard

### The Applicant

[18] **Mr Anderson** explained the applicant's farming operations. He specifically addressed matters relating to severe weather and how that is managed in relation to the movement of stock, the on farm history of fodder beet usage and animal health practices.

[19] His evidence explained that while the property comprises a total of 511 hectares a significant portion is fenced and planted in shrub and trees, with 350 hectares used as the dairy platform. He noted the applicant holds a consent to milk up to 1,000 cows.<sup>4</sup> That number is not sought to be increased as part of this application.

[20] Mr Anderson explained that if consent is granted to this application, winter grazing can be spread across a larger area, which will result in less feed having to be purchased, and nutrient loss improvements. From a practical perspective it allows the applicant to spread wintering over better and more suitable soils.

[21] Mr Anderson addressed NZALA's concerns with respect to "dry lying" explaining that changes have be made to how crop are sown to minimise pugging.<sup>5</sup> In particularly wet weather when pugging

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<sup>4</sup> AUTH-02222602

<sup>5</sup> At paragraph [13], a technique known as strip tiling, which has been implemented for the past 4 years

becomes more likely, stock are moved off winter feed and transferred to a paddock of baleage or grass where ground is harder.<sup>6</sup>

[22] Mr Anderson explained that in the absence of a wintering barn, dry ground cannot be assured in the event of rain. Rather, if conditions are particularly wet, straw is laid to provide lying space, with the straw being laid in areas of higher ground so animals are kept out of any water that settles on the ground, with fresh straw provided when needed.<sup>7</sup> With an average weekly rainfall of 25mls a week, Mr Anderson explained the applicant is used to wet weather and farm practices are adapted accordingly.<sup>8</sup>

[23] Fodder beet has been used as winter feed on the property for the last 10 years. It was Mr Anderson's evidence that no animal health issue have arisen as a result and the applicant works with a nutritionist to ensure animals are getting the required levels of minerals, which are supported by blood testing.<sup>9</sup>

[24] Finally, Mr Anderson addressed issues raised by NZALA regarding lame cattle, foot infections and wintering as to the causation. Mr Anderson's evidence was that the NZALA's concerns are not borne out by his experience of winter grazing cattle.

[25] **Ms Wouda's** veterinary practice assists the applicant with its animal health needs which she said are of a routine nature including pregnancy testing, blood tests and the like.<sup>10</sup> Her evidence addressed effects on food type, display of normal patterns of behaviour and injury or disease from winter grazing.

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<sup>6</sup> At paragraph [15]

<sup>7</sup> At paragraph [16]

<sup>8</sup> At paragraph [17]

<sup>9</sup> At paragraphs [22] - [24]

<sup>10</sup> At paragraph [5]

- [26] Ms Wouda acknowledged fodder beet can be a higher risk feed if not managed correctly. She opined that the key issue is an overall approach to wintering management of dry cows and mitigation of risk by adopting good feed transition practices, rather than concentrating on a single feed source.<sup>11</sup>
- [27] Ms Wouda addressed the concerns raised by NZALA with fodder beet as a food source. Her evidence supported that of Mr Anderson with respect to satisfactory mineral levels as a result of supplement use,<sup>12</sup> and opined that NZALA has overstated the occurrence of spontaneous humeral fractures. She observed that the paper referenced in the NZALA submission does not make reference fodder beet as a cause, and that the concerns raised in the paper would apply to any diet requiring mineral supplementation.<sup>13</sup>
- [28] Ms Wouda agrees a lay down area for cows is important for cow welfare. She agrees with Mr Anderson that in extreme wet weather one cannot expect lying surfaces to be dry and this then brings into play weather event management plans,<sup>14</sup> which are an important component of winter grazing.
- [29] Addressing lameness, Ms Wouda opined that in her experience lameness is more likely experienced as a result of prolonged time on concrete, or long walks on ill maintained tracks, rather than standing in wet conditions for prolonged periods. She identified farm management practices, including those used by the applicant,<sup>15</sup> that can assist with good hoof health and kill bacteria that can cause lameness.

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<sup>11</sup> At paragraph [9]

<sup>12</sup> At paragraph [10.1]

<sup>13</sup> At paragraph [10.2]

<sup>14</sup> Referred to as "Winter Grazing Plan" by Dairy NZ

<sup>15</sup> For example use of zinc or copper sulphate mats



- [30] Her evidence also addressed steps taken by the applicant to manage mastitis risk.
- [31] **Ms Mesman** provided an overview of the application. She is largely in agreement with the section 42A report. She discussed some of the consent conditions with reference to nutrient losses and improvement to soil health, and concerns raised by NZALA regarding pugging and animal welfare.
- [32] Ms Mesman confirmed the proposed consent conditions are endorsed by the applicant, including the suggested paddocks to be included in the IWG exclusion map, and the requirement for a riparian management plan.

#### **NZALA**

- [33] **Mr Rego** is a lawyer and a member of NZALA. He has a personal interest in animal welfare. His evidence traversed the background to NZALA and its interest in IWG. Mr Rego explained that NZALA's primary position is that IWG practices should not be granted consent at all, and particularly in Southland, where the winter climate does not allow cattle to exhibit their natural behaviours, but if consent is to be granted, NZALA supports the inclusion of land use conditions which are addressed to avoiding or mitigating animal welfare issues.<sup>16</sup>
- [34] **Dr Beattie** has extensive experience in matters related to animal welfare and IWG. Her evidence provided a broad overview of IWG and the various animal welfare issues that have been identified with it as a type of farming practice.

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<sup>16</sup> At paragraph [25]

- [35] She expressed the general view that IWG practices are not compatible in Southland's geophysical attributes and winter climate, but readily accepted she did not have the expertise to comment on whether the application appropriately manages water quality effects from IWG activities. In answer to my questions, she acknowledged she had not undertaken a site visit and would need to undertake two or three detailed site investigations to be able to comment specifically on the effects of IWG undertaken on the applicant's property.
- [36] Dr Beattie did not accept animal welfare concerns would be addressed by the proposed conditions regarding pugging, nor deference to the Animal Welfare Act 1999 ("AWA"). Her reason was that the AWA is reactive, whereas a resource consenting process with proactive land management secured by consent conditions is more appropriate.
- [37] From Dr Beattie's written evidence, and the questions I put to her at the hearing, I understood she had reached the position where she did not oppose a grant of consent provided Mr Hook's conditions are included.
- [38] **Mr Hook's** evidence provided a planning assessment of the proposal on behalf of NZALA. In his expert opinion, in order for consent to be granted, I need to be satisfied that the farming methodology, including specific measures to support the welfare of dairy cows (including conditions of consent) are suitable to avoid, remedy or mitigate adverse effects on the environment – including the welfare of animals that occupy the applicants property.<sup>17</sup>

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<sup>17</sup> At paragraph [13]

- [39] Mr Hook acknowledged that the application demonstrated that detailed consideration has been given to the adoption of farm management practices to minimise nutrient and sediment runoff associated with dairy farming operations, along with measures to protect soils and maintain water quality.<sup>18</sup> What Mr Hook takes issue with is the lack of assessment in the application and s42A report of the effects of the use of land for IWG on stock welfare.<sup>19</sup>
- [40] His evidence described potential adverse effects associated with IWG per se. He accepted Ms McRae’s assessment of actual and potential effects of the proposal on water quality, and that the applicant’s winter grazing programme and plans incorporate reasonable practical steps intended to avoid soil damage and other environmental effects arising from pugging of soils.<sup>20</sup>
- [41] Mr Hook records that the area of disagreement between himself and Ms McRae is the relevance of animal welfare under the RMA.<sup>21</sup> He gives the opinion that effects on animal welfare are relevant considerations under s104(1)(a) of the RMA, noting among other things, references to “animals” in various provisions of the RMA, and the definitions of environment, natural and physical resources and effect.<sup>22</sup> Mr Hook confirmed his agreement that a consent expiry date of 31 December 2030 is appropriate.
- [42] Mr Hook’s evidence did not include any assessment of the permitted baseline with respect to either the National Environmental Standards for Fresh Water Regulations 2020 (“NES-FW”) or the proposed Southland Water and Land Plan (“SWLP”).

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<sup>18</sup> At paragraph [25]

<sup>19</sup> At paragraph [26]

<sup>20</sup> At paragraph [38]

<sup>21</sup> Also noting at paragraph [50], that this issue is not addressed in Ms Mesman’s evidence

<sup>22</sup> At paragraph [39] and [40]

[43] Mr Hook tabled a set of revised conditions during the presentation of his evidence which had been amended during the course of the hearing. For completeness, the latest iteration of these conditions is attached as Annexure A.

### **Staff Review**

[44] Ms McRae provided an overview of the permitted baseline with respect to IWG on the landholding. Her advice was that the permitted baseline includes 52ha of IWG on slopes under 10 degrees. She clarified that Browns Block is permitted to graze dairy support cattle, and it is the milking of cows on Browns Block that is an unlawful activity.<sup>23</sup>

[45] She helpfully explained the Council's approach with respect to Regulation 24 of the NES-FW and reliance on the OverseerFM model, as well as consideration of targeted mitigations undertaken post 2 September 2020. Specific examples of those mitigations on Browns Block include riparian planting to reduce the chance of overland flow of contaminants to surface waterways.

[46] Ms McRae explained that her s42A report while discussing a pugging condition, had omitted to include the same in the land use conditions. She advised that this condition should be included under the mitigation measures section of the consent, and should read:

*The consent holder shall take all reasonably practicable steps to avoid pugging of soils as a result of the intensive winter grazing activity.*

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<sup>23</sup> Here I note the definitions of 'dairy farm land', 'dairy cattle', dairy support cattle' and 'dairy support land' in the NES-FW with respect to the status of activities on the applicant's land.

- [47] She responded to an issue raised in the evidence of Dr Beattie and in Ms Nightingale's legal submissions<sup>24</sup> as to the adequacy of the assessment of integrated management and potential effects of discharge via subsurface drains to groundwater, that is then expected to flow to the coast. She advised that based on the physiographic zones for the property the main contaminant pathway is overland flow,<sup>25</sup> and that she was satisfied that the mitigation measures to be implemented by the applicant sufficiently avoid, remedy or mitigate effects on water quality, and the coast.
- [48] She advised that her recommendation that consent be granted remained unchanged as the proposal is consistent with policy, and the mitigations proffered by the applicant will avoid, remedy and mitigate potential adverse effects.

### **Decision**

- [49] Pursuant to Section 34A and Section 104B of the RMA I grant consent to the application for **land use consent** to use land for farming in the form of dairy farm expansion incorporating the 100 ha Browns Block, to use 55 ha of the landholding for intensive winter grazing on slopes in excess of 10 degrees and a **discharge permit** to discharge contaminants to land associated with the use of land for the dairy farm expansion and intensive winter grazing.

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<sup>24</sup> At paragraph [23]

<sup>25</sup> The oxidizing zone makes up 4% of the property, where the main risk is contaminant movement to groundwater.

## Reasons for Decision

### Status of the Activity

[50] It was Ms McRae's evidence that for the purposes of "bundling", all consent applications have been considered as discretionary activities.<sup>26</sup> I consider this to be the correct approach in the circumstances.<sup>27</sup>

### The Existing Environment

[51] The description of the existing environment is set out from paragraph [3.2.1] of Ms McRae's report, and I do not repeat that here. It is not contentious.

[52] Discharge permit AUTH-20222602 for the discharge of dairy shed effluent from 1,000 cows expires on 31 May 2032. The consents sought by this application were to line up with this expiry date. As discussed below, they cannot be granted beyond 31 December 2030.

[53] I agree with the submissions of Ms Robinson, that relevant to my consideration of the application to expand the dairy platform to include Browns Block is the discharge permit referred to above, which is part of the existing environment. Consent is sought to increase the size of the milking platform. Cow numbers are not being increased and to that end cattle numbers will be the same, regardless of whether the land area of the farm is increased.

### Relevance of animal welfare effects

[54] A key issue for consideration in this application is to what extent if any, I can consider the actual and potential effects of the activity of **intensive winter grazing** on cattle and their welfare.

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<sup>26</sup> McRae, Paragraph [2.3.4]

<sup>27</sup> See *Darby v Queenstown Lakes District Council and the Youth Hostel Association of New Zealand C69/2007* at [33]

- [55] Ms Robinson refers to the legal submissions made on this issue as part of the strike out application. She also sought to distinguish between effects on animals, in the ordinary meaning of the word, and animal welfare, stating that the applicant's key submission is that animal welfare is not a relevant matter for consideration under the RMA.
- [56] Ms Nightingale for NZALA likewise canvassed the legal submissions made in defence of the strike out application. NZALA submit that effects of IWG on animal welfare are a valid consideration under the RMA.
- [57] As above, I agree with the decision on the strike out application that the effects of an activity on animal welfare may be a relevant consideration under the RMA.<sup>28</sup>
- [58] Counsel for both parties referred to the *Kaimanawa*<sup>29</sup> decision in support of their respective positions. In her reply submissions, Ms Robinson noted her agreement with the NZALA submissions that the general proposition in *Kaimanawa* seems to indicate that animals can come under the broad definition of environment.
- [59] In *Kaimanawa*, the Court held that the culling and mustering of horses would not of itself be a making use of land. In the application before me, cattle involved in the activity is a making use of land.

***The activity – Intensive Winter Grazing and the receiving environment***

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<sup>28</sup> See also *Stark v Waikato District Council* [2014] NZEnvC 19

<sup>29</sup> *The Kaimanawa Wild Horse Preservation Society Incorporated v Her Majesty's Attorney-General* A27/97

- [60] IWG is defined in the NES-FW as the grazing of livestock on an annual forage crop at any time in the period that begins on 1 May and ends with the close of 30 September of the same year (my emphasis).<sup>30</sup>
- [61] In *Kaimanawa*, the Court found that the proposed culling, mustering and sale of some of the wild horses was an activity within the ordinary meaning of the word. It then went on to find that a duty to avoid adverse effects on the environment arising from that activity would give effect to the purpose of the Act.
- [62] The Court having found however that the duty under s17 did not apply, did not go on to examine what the adverse effects of the culling and mustering of horses would be, nor what constituted the environment that would be affected by the activity of culling the horses.
- [63] Section 104(1)(a) requires me to consider the actual and potential effects of allowing the activity on the environment. Inherent in that consideration is that the environment I am to consider is the receiving environment.
- [64] As above, the activity in this case involves animals (cattle) grazing the land. Cattle are a fundamental component *of the activity*, and themselves a cause of adverse effects on the receiving environment. If I were to follow the logic of the NZALA's submissions on the matter, I would need to consider the adverse effects of the activity on itself. There would be no distinction between the activity on the one hand and the receiving environment on the other. This distinction between the activity (and its components) and the receiving environment appears to have been overlooked in the submissions of

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<sup>30</sup> The SWLP has a very similar definition being "Grazing of stock between May and September (inclusive) on forage crops (including brassica, beet and root vegetable crops), excluding pasture and cereal crops."



NZALA. As a consequence, I do not consider that cattle are part of the receiving environment or that I am obliged to consider effects of IWG on them or their welfare.

[65] This does not mean that effects of land use activities on animal welfare are not a relevant consideration. For example, in *Stark*, noise effects generated as a result of the relocation of a gun club on the receiving environment (which included stock on a neighbouring property) were a relevant consideration under s104(1)(a) of the RMA.

[66] In *Kaimanawa*, the Court refers to the whole thrust of the RMA being the **regulation and control of the use of land, sea and air**. What the RMA does not do is regulate and control is the use of animals themselves. In essence however, this is what NZALA is asking the consent authority to do – to regulate and control the use of cattle per se in this type of farming system. In my assessment, it is the actual and potential effects of IWG (including the effects caused by cattle) on the receiving environment that can be regulated and controlled under the RMA rather than control over the animals themselves as a part and parcel of the activity for which consent is being sought.

[67] Again, this can be distinguished from *Stark*<sup>31</sup> where the activity in that case was the relocation and construction of a gun club. The effects of the activity to be managed were noise from the gun club. Animals located on Mr and Mrs Starks neighbouring property were part of the receiving environment, and the Court accepted that animal welfare effects were a relevant matter for assessment.

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<sup>31</sup> *Stark v Waikato District Council* [2014] NZEnvC 19

[68] Finally on this matter, Ms Nightingale referred to the decision in *Gray Cuisine Limited v South Waikato District Council*<sup>32</sup> as authority for conditions of consent that provide for animal welfare requirements and standards. *Gray Cuisine* involved an application for land use consent to establish and operate a dog boarding kennel, and greyhound breeding training facility. The Court in its interim decision noted that the most significant effects related to noise that might be generated by the greyhound operation.

[69] Condition 15 of the consent conditions required any transportation trailer used for overnight kennelling of returning dogs to have noise attenuation characteristics no worse than in the kennel buildings themselves, and to “meet all applicable animal welfare requirements.” I note however that the interim and final decisions contain no discussion of animal welfare effects or concerns. In addition the conditions include an advice note stating that “nothing in this consent shall limit or constrain the Council’s rights and responsibilities under the Dog Control Act 1996, the Animal Welfare Act 1999, the Dog Control Bylaws and related legislation.” The advice note is consistent with my interpretation that controls and regulations on animals themselves are not a matter for the RMA.

### **The permitted baseline**

[70] In the event that I am wrong in the decision I have come to above, I go on to consider the application on the basis that effects of IWG on cattle and their welfare can be a relevant consideration.

[71] Of relevance to this part of the decision is a consideration of the permitted baseline and the extent to which that is to inform my assessment.

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<sup>32</sup> [2011] NZEnvC 121

[72] Section 104(2) of the Act provides that:

*When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.*

[73] Pursuant to Policy 39 of the SWLP, all effects related to the use of land for a farming activity on water quality are to be considered, irrespective of whether the plan permits an activity with the effect.

[74] Notwithstanding Policy 39, no party has suggested to me that the permitted baseline cannot be applied to an analysis of effects of IWG on cattle. Ms Bragg for the Council in her reply submissions comments that Policy 39 does not prevent the application of the permitted baseline when considering other effects, and while it may seem unusual that the permitted baseline cannot be taken into account for one effect, but can be considered for another, that approach does not conflict with s104(2). I agree.

[75] Ms McRae provided a comprehensive overview of the permitted baseline when providing her review comments. The matter was also addressed in Ms Robinson's closing submissions. The permitted baseline with respect to the IWG component of the application involves a consideration of both the SWLP and the NES-FW.

[76] As above, I granted leave for Ms Nightingale to address me further on the application of the permitted baseline. In her supplementary submissions, Ms Nightingale took issue with the analysis of both Ms McRae, and Ms Robinson in her closing submissions. She said both had failed to consider the rules of the SWLP, noting that a rule in a

regional plan can be more restrictive than a rule in the NES-FW, which she said was the case here.<sup>33</sup>

[77] She submitted that the use of land for a farming activity is permitted under Rule 20 of the SWLP in very limited circumstances, for example if the landholding is less than 20 hectares in area or the dairy platform has a maximum of 20 cows. She submitted that the permitted baseline assessment must be undertaken with reference to Rule 20, which is more restrictive than the NPS-FW.

[78] In reply, Ms Robinson made the following points:

- (a) Intensive winter grazing on the existing milking platform is a permitted activity as the farm held, in 2016, a resource consent authorising the milking of 1000 cows on the milking platform.<sup>34</sup>
- (b) NZALA confuses the two consent requirements – for expansion on the one hand and IWG on the other.
- (c) The one landholding (existing platform and Browns Block combined) has a permitted baseline for IWG of 52 ha under the NES-FW<sup>35</sup>.
- (d) IWG on Browns Block during the reference period occurred over an area of 30ha. It was not the IWG that was unlawful,

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<sup>33</sup> At paragraph 5.

<sup>34</sup> She submitted that NZALA's submissions appear to overlook Rule 20(a)(ii)(2), which in respect of the existing dairy platform provides for 'farming activities including a dairy platform' (with more than 20 cows) subject to the same holding of a dairy effluent discharge permit from a date of 3 June 2016 that specifies a maximum number of cows. Likewise, I observe that farming on Browns Block for use as dairy support/winter grazing could qualify as a permitted farming activity pursuant to Rule 20(a)(iv), and in respect of which IWG could be undertaken as a permitted activity. Ms McRae confirmed that Browns block could operate independently as a dairy support block as a permitted activity.

<sup>35</sup> I do not agree with Ms Robinsons submission at paragraph 5 of her further submissions that under the NES-FW, IWG on the *existing platform* could occur over 52ha, as the land comprising the existing platform has only ever been grazed to a maximum capacity of 34 ha (see regulation 29(3)(b)). As I observe below, over the landholding (existing platform and Brown's Block), IWG can occur over 52 ha (being 10% of the landholding) as a permitted activity.

but rather the expansion of the dairy platform onto the Browns Block land after the date specified in Rule 20(ii)(6).<sup>36</sup>

[79] For the Council, Ms Bragg confirmed the Council stood by the analysis of the permitted baseline provided by Ms McRae and agreed with the submission of Ms Robinson at [78](d) above.

[80] I set out below my understanding of the relevant components of the permitted baseline with respect to the NES-FW and SWLP, and having considered the submissions on the matter from all parties.

#### **NES-FW**

- (a) The relevant regulations in the NES-FW refer to ‘land on a farm’. Farm is defined as a landholding, which in turn means “one or more parcels of land (whether or not contiguous) that are managed as a single operation”.
- (b) Browns Block was previously managed as a separate operation. The proposal for which consent is sought is to include Browns Block within the main dairy platform, with the result that the existing dairy platform and Browns Block are to be treated as a single landholding, or the “farm” for the purposes of the NES-FW.<sup>37</sup>
- (c) The NES-FW identifies certain permitted activities, one of which is IWG,<sup>38</sup> provided a number of conditions are met, including, that during the *reference period* land on the farm must have been used for IWG, and at all times the area of the farm that is used for IWG must be no greater than the maximum area of the farm that was used for IWG in the reference period (notwithstanding

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<sup>36</sup> Rule 20(ii)(6) requires that the land area of the dairy platform is no greater than it was at 3 June 2016.

<sup>37</sup> Likewise under the SWLP.

<sup>38</sup> Regulations 26 and 29

that this area may be less than the maximum 50ha or 10% permitted in Regulation 26(4)(a)).<sup>39</sup>

- (d) The **reference period** is that period that started on 1 July 2014 and ended with the close of 30 June 2019. During this reference period, Browns Block lawfully winter grazed 30 hectares of dairy support cattle. The dairy platform lawfully winter grazed 34 hectares. While this provides a total 64 hectares, the permitted activity conditions in the NES-FW allow a maximum of either 50 hectares or 10% of *the landholding*, whichever is the greater. On this basis, as a permitted activity under the NES-FW, 52 hectares of winter grazing can occur *across the landholding* on slopes less than 10 degrees.
- (e) The evidence of Mr Anderson for the applicant was that over the landholding, compliance with a 10 degree slope factor can be met over a 52 hectare area.
- (f) Under the NES-FW, the permitted baseline for IWG on the landholding is 52ha on land with a slope factor not exceeding 10 degrees.

### **SWLP**

- (g) Rule 20 of the SLWP addresses farming. The use of land for a farming activity is *prima facie* a permitted activity, subject to compliance with certain conditions, dependent on the type of farming activity being undertaken or the size of the landholding.
- (h) Farming on a landholding less than 20 ha is a permitted activity without more, as is a farming activity including a dairy platform with a maximum of 20 cows<sup>40</sup>. If the platform has more than 20 cows, there are additional conditions to comply with.
- (i) A farming activity that includes intensive winter grazing is a permitted activity subject to compliance with conditions,

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<sup>39</sup> See Regulation 29(4)

<sup>40</sup> I note the definition of dairy platform is the area of a landholding where dairy cows being milked on a daily basis are kept *during the milking season*.

including that from 1 May 2019, the grazing does not occur on more than 15% of the area of the landholding, or 50 hectares, whichever is the **greater area**<sup>41</sup>.

- (j) There is what appears to be a default permitted activity “catch-all” for all *other* farming activities provided that from 1 May 2020 a farm management plan is prepared and implemented.<sup>42</sup>
- (k) Under the relevant SWLP rule<sup>43</sup> the permitted baseline for IWG over the landholding is 64 hectares.<sup>44</sup>

[81] The NES-FW is the more stringent rule<sup>45</sup> and therefore, the permitted baseline to be applied is that of 52 ha with a slope requirement of less than 10 degrees.

[82] Finally, Ms Nightingale submitted that it was artificial to separate the two parcels of land for the purpose of calculating the area of IWG on each property during the reference period, and then to combine the totals and mount the argument that when considered as one landholding, it is only the effects over and above those permitted on individual parcels that needs to be considered.<sup>46</sup>

[83] In response, Ms Robinson submitted that this was not what had occurred at all, and the reference to 30 ha and 34 ha respectively was to illustrate what could occur as permitted IWG if the properties were ever operated independently of each other in the future. She

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<sup>41</sup> The Environment Court in its fifth interim decision on the SWLP ([2022] NZEnvC 265), split rule 20 into 3 parts (20, 20A and 20B) in an effort to simplify the rule. The decisions version of Rule 20 had a requirement that the size of the landholding that could be grazed was 15% or 100 hectares, whichever was the *lesser*. The fifth interim decision records at paragraph [169] that the rule is to be amended so that the area trigger is **50ha or 15% of the landholding, whichever is greater**. The Environment Court’s ninth interim decision issued on 19 September 2023 ([2023] NZEnvC 204) directed that the Council amend the SWLP as set out in Annexures 1 and 2 to the decision, which includes inter alia the amended rule 20, 20A and 20B.

<sup>42</sup> Rule 20(a)(iv).

<sup>43</sup> 20(a)(iii) of the decisions version and Rule 20A Environment Court decision.

<sup>44</sup> 30 ha Browns Block and 34 ha existing dairy platform.

<sup>45</sup> See Regulation 6 NSE-FW and s43B RMA

<sup>46</sup> Supplementary submissions at paragraph 7.

submitted that the permitted baseline to be applied is 52 ha over the landholding, which can meet the conditions in the NES-FW. This is of course a lesser area than has historically occurred over the two properties.

[84] I agree with Ms Robinson's submissions on this point, and add that I can find nothing in the relevant rules that would support the position advanced by Ms Nightingale.

**Should I exercise my discretion and consider the permitted baseline?**

[85] No party suggested that it was inappropriate that I apply the permitted baseline to my consideration of the effects of the IWG activity on cattle and their welfare. In so doing, I agree with Ms Robinson that the matter to be assessed is the difference in effects on animal welfare from the permitted 52 ha, to the 55 ha (a difference of 3ha) in respect of which consent is sought.

[86] My assessment of the effects of IWG on cattle and their welfare applying the permitted baseline is discussed further below.

**Assessment of Effects on the Environment – s104(1)(a)**

[87] The s42A report contains a comprehensive assessment of the following effects:

**(a) Water Quality – on land use of the expanded dairy platform.**

Ms McRae notes nutrient budgets have been peer reviewed and no issues of concern have been identified. The loss of P and N via overland flow and artificial drainage is identified as of higher concern than leaching of N to groundwater with Good Management Practices ("GMP") and mitigation



measures formulated accordingly.<sup>47</sup> The s42A report identifies 4 crucial mitigation measures which are accepted as appropriate by the applicant.<sup>48</sup> N losses are expected to decrease by -7.6%, and P losses by -19.2%. Decreasing the winter crop area by 14% across the entire landholding, to a total of 55 hectares, is a key factor offered by the applicant to mitigate N and P losses. Of microbe and sediment loss, the assessment is that these are also likely to reduce in line with P losses.

**(b) Soil Health and Regulation 26A of the NES-FW – pugging.**

This regulation requires taking of all reasonably practicable steps to minimise adverse effects on freshwater of any pugging. The applicant identifies 8 of 17 paddocks on Browns Block to be excluded from winter grazing, together with intensive winter grazing management measures which include a winter grazing plan prepared for each paddock and wet weather management strategies.

**(c) Animal Welfare**

Ms McRae considers stock and animal welfare concerns are more specifically covered by other legislation, for example the AWA, and it will be a matter for the commissioner to determine the weight to give to the NZALA submission. As above, I have determined that the effects of IWG on animal welfare are to be assessed against a permitted baseline of 52 ha. This leaves a balance of 3ha for my consideration.

NZALA did not address me on this matter. As above, it took issue with the manner in which the baseline was determined.

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<sup>47</sup> Either already happening or to be undertaken on-farm

<sup>48</sup> Including the implementation of a winter grazing exclusion map and extensive riparian planting

Ms Robinson submitted that the level of adverse effect arising from a 3ha difference is negligible over the total 55ha sought. I agree. I also agree with her submission that the positive effects of the application are significant, in that the proposal reduces nitrogen load, phosphorus loss, and results in significant planting alongside waterbodies, and retires paddocks identified as less suitable for intensive winter grazing.

### **Conclusion on effects**

[88] Ms McRae finds that effects of the proposal will be sufficiently avoided, remedied or mitigated and recommends consent be granting subject to the conditions appended to her report.<sup>49</sup>

[89] For the reasons set out at paragraph [3.3.3] of the s42A report, a condition requiring groundwater quality monitoring is not necessary. No other party took issue with this recommendation. I agree an advice note as to twice yearly compliance visits is appropriate. The applicant did not object to an advice note to this effect.

### **Regional Planning Framework**

[90] Resource consents are required under the NES-FW and the SWLP. Table 2 from Ms McRae's s42A report sets out succinctly the consents required.

[91] The relevant provisions of the regional plan documents are identified and discussed from Part 3.4 of Ms McRae's report. I need not repeat them here and no party took issue with her analysis. She concludes

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<sup>49</sup> Noting as above, she had omitted a condition as to pugging in error.

that the application is consistent with both the operative Regional Water Plan 2010 and the SWLP.

[92] At Part 3.5, Ms McRae discusses the relevant provisions of the Southland Regional Policy Statement 2017. Again, these are not repeated here. She concludes that the activity is consistent with these policies. Again, no party took issue with her analysis.

[93] At 3.6, Ms McRae discusses the National Policy Statement for Freshwater Management 2020 (NPS-FM). Ms McRae notes the NPS-FM postdates all relevant regional plans and the policy statement, and as a later in time piece of national direction, carries considerable weight. Except as to policy 3 (integrated management which is discussed above<sup>50</sup>), the provisions cited and her analysis of them was not challenged by any party.

[94] The NES-FW are discussed in Part 3.8. She notes the NES-FW came into effect at the same time as the NPS-FM. Her report addresses the consent requirements specified in Regulations 18, 19, 24, 26 and 27. She notes the consent required pursuant to Regulation 27 is a restricted discretionary activity.

[95] Finally Ms McRae considers the Iwi Management Plan for Murihiku under s104(1)(c). Again, no party took issue with the policies referred to pursuant to this plan or her analysis of them.

[96] Finally at part 3.10 she considers the discharge of greenhouse gases, noting the repeal of s104E of the RMA. She observes that the applicant's greenhouse gases are predicted to decrease when the current farm system is compared to the proposed dairy farm system as modelled in OverseerFM.

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<sup>50</sup> At paragraph [47]

**Section 105 & 107 – matters relevant to discharge permits**

[97] Section 105 comes into play as the discharge contravenes s15 RMA. Section 105 requires inter alia a consideration of possible alternative methods of discharge, including discharge into any other receiving environment.

[98] Ms McRae observes that the nature of the discharge in this case is an *incidental* discharge from cows resulting from the conversion of land to dairy farm and the use of land for winter grazing. I agree with Ms McRae's conclusion that imposing any requirement to consider alternatives would be a nonsense.

[99] I agree with Ms McRae, that the requirements of s107 are not an impediment to the grant of consent

**Part 2 RMA**

[100] My consideration of the application is subject to Part 2 of the Act. The section 42A report contains a fulsome discussion of the relevant Part 2 matters. I agree with the conclusion reached and am satisfied that the proposal will give effect to and achieve the purpose and principles of the RMA.

**Decision**

[101] I record that I have been greatly assisted by Ms McRae's thorough and concise s42A report. In summary I find as follows:

- the applications are consistent with the objectives and policies of the NPS-FW, Regional Policy Statement, operative Southland Water Plan and SWLP and the Iwi Management Plan;

- the actual or potential effects on the environment of the proposed activity will be avoided, remedied or mitigated to an acceptable degree by the imposition of and compliance with, the suite of conditions proposed;
- the proposed dairy farm expansion satisfies the 'containment threshold' tests set out in the NES-FW.

### **Consent Conditions**

#### **Term of consent**

[102] The applicant had requested a consent term of nine years to coincide with the term of its discharge permit. Ms McRae sets out matters from Policy 40 of the SWLP relevant to the determination of the term, and observes that the term initially sought by the applicant is contrary to the provisions of the NES-FW which stipulates that the term for any discretionary activity must expire before 1 January 2031.

[103] NZALA did not ultimately take issue with the term sought, and I am therefore satisfied that it is appropriate to grant consent for a term expiring on 31 December 2030.

Dated this 21<sup>st</sup> day of November 2023



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Jayne Macdonald

**Independent Hearing Commissioner**

**ANNEXURE A – MR HOOK’S CONDITIONS**

### Intensive Winter Grazing – Animal Welfare

X. The use of forage crops for intensive winter grazing of dairy cattle shall at all times comply with the current Code of Welfare: Dairy Cattle published by the Ministry for Primary Industries and shall, as a minimum, be managed to ensure that the following performance standards are met:

- i. access to a balanced feed regime sufficient to meet the nutritional requirements of dairy cows *including the provision of supplementary feed (including silage, baleage or hay) in portable feeders in the area being grazed;*
- ii. readily accessible fresh water supply (replenished frequently and so to meet cows' immediate needs) including the provision of *transportable water trough(s) in or near the areas being grazed;*
- iii. mineral supplementation to ensure all animals receive nutrients to meet the Dairy NZ reference minerals requirements for dairy cows;
- iv. access to a clean, soft, dry lying space equivalent to a minimum of 8-10 m<sup>2</sup> per cow each day e.g. ensure break area is sufficient, and/or by not back fencing in dry conditions; spreading straw to achieve a dry surface, or using a standoff grass paddock in wet conditions;  
N.B. only *back fence cattle at all times to prevent the stock re-entering previously grazed areas* in wet conditions unless that would prevent the cattle obtaining shelter in adverse weather conditions;
- v. access to effective shelter in adverse weather conditions e.g. a shelter belt or shelter structure; and
- vi. relocation to pasture paddocks no less than 14 days prior to their calving date to ensure they do not calve on a crop paddock.

#### Advice Notes:

1. "Dry conditions" means soil conditions that achieves:
  - a) a gumboot score of 1, under the Dairy NZ "gumboot scoring method for wintering paddocks" i.e. a gumboot leaves a clear footprint with a visible tread pattern and does not fill up with water a gumboot score; or
  - b) a gumboot score of 2 for a period of less than 48hrs (with dry weather forecast).
2. "Wet conditions" means soil conditions that achieve a gumboot score of 2 for (with continued wet weather forecast) or 3 where surface water pooling is visible.  
[https://www.dairynz.co.nz/media/5795909/gumboot\\_score\\_method\\_chart\\_sept2022\\_update\\_v2.pdf](https://www.dairynz.co.nz/media/5795909/gumboot_score_method_chart_sept2022_update_v2.pdf)
3. "Adverse weather conditions" means weather (including any one or more of precipitation rainfall, sleet, snow, hail, or cold conditions) in excess of the seasonal average for the location and time of year, including or any period over which MetService has issued a Severe Weather Warning.
4. In the event there is an inconsistency between the current Code of Welfare: Dairy Cattle, and any applicable regulations under the Animal Welfare Act 1999 and this condition, the Consent Holder shall adhere to that regulatory standard or performance standard which specifies the higher standard of animal welfare.

### **Annual Winter Grazing Plans**

Y. Prior to any winter grazing activity commencing annually:

- a) The Consent Holder shall prepare and submit by 31 March a winter grazing plan for each paddock within that years' winter grazing rotation for certification.
- b) The winter grazing plans shall be prepared in accordance with the most recent version of the "Your Winter Grazing Plan" template published by Dairy NZ.
- c) The winter grazing plans shall include specific details on execution of the paddock plan that address the requirements of condition 6 (relating to buffers and mob size) and X (relating to animal welfare) to the satisfaction of the Council.

#### **Advice Note:**

1. The certified intensive winter grazing plans shall be included within the annual update to the FEMP required by 31 May each year under Condition 31.