IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2023] NZEnvC 276

IN THE MATTER	of the Resource Management Act 1991
AND	an application for a stay under s325A(7) of the Act
BETWEEN	DANONE NUTRICIA NZ LIMITED
	(ENV-2023-CHC-130)
	Applicant
AND	OTAGO REGIONAL COUNCIL
	Respondent

Court:	Environment Judge P A Steven
Hearing:	In Chambers at Christchurch
Last case event:	18 December 2023
Date of Decision:	18 December 2023
Date of Issue:	18 December 2023

DECISION OF THE ENVIRONMENT COURT ON APPLICATION TO STAY AN ABATEMENT NOTICE

A: The application for stay is granted under r 18.10 District Court Rules 2014 and ss 269, 272 and 278 of the Resource Management Act 1991 pending resolution of the appeal.

REASONS

Background

[1] This proceeding concerns an application for a stay of an abatement notice issued to Danone Nutricia NZ Limited (Danone) on 30 August 2021 by the Otago Regional Council (Regional Council). The application accompanied an appeal against the abatement notice.

[2] The appeal was filed under s325A(7) of the Act and states (relevantly):

> The part of the Abatement Notice the Appellant is appealing is the compliance date.
>
> The decision not to extend the Abatement Notice compliance date was issued on 25 October 2023 by the Respondent…

[3] The appeal followed a decision of the Regional Council on an application made under s325A(4) to change the abatement notice. Danone had sought to extend the compliance date specified in the abatement notice on the grounds that compliance by the specified date was not possible. The Regional Council's decision under s325A(5) declined the application.

[4] Although not stated in the application for the stay, it is presumed to have been made under s325(3A) of the Act as the application refers only to ss 325 and 325A(7). Nevertheless, various reasons for the stay (and the appeal) are explained in some detail in the application and in the affidavits filed in support thereof, in particular, the affidavits of Chuen Kiat Tan, Plant Director of Danone.[1]

Circumstances of the abatement notice

[5] Danone owns and operates a plant that produces infant formula products

---

[1] Dated 15 November 2023 and 12 December 2023.

(primarily) and receives milk from approximately 20 local farms. Danone holds an air discharge permit and a wastewater discharge permit (the discharge permit) for the discharge of treated industrial wastewater plant by spray irrigation onto farmland.

[6] The abatement notice was issued on the grounds that several conditions of a discharge permit were being breached, although by the time the appeal was filed Danone had achieved compliance with many of the conditions. Outstanding non-compliances relate to conditions that:

(a) limit the rate and maximum volume of discharge on daily, monthly and yearly basis; and
(b) limit the application depth of the receiving soil according to soil moisture capacity.

[7] The yearly total volume of wastewater discharged to land between 1 July 2022 and 30 June 2023 was exceeded in the consented monthly wastewater discharge volume was exceeded in 10 of the recorded months. There have been no exceedances of the maximum discharge rate or of the maximum daily discharge volume. Moreover, the discharges have occurred in circumstances where soil moisture was below field capacity and in excess of the consented maximum depth.

Regional Council's position

[8] The Regional Council opposed the stay application in its notice of opposition dated 23 November 2023, relying on *G I Finlay Trustees Ltd v Western Bay of Plenty District Council* (*Finlay Trust*). *Finlay Trust* held it could not extend the power in s325(3A) to provide for a stay application, where an appeal had been filed under s325A(7).

[9] In the event that the court disagreed, affidavits were filed in support of the stay application from Alexandra Badenhop and Mark Crawford, addressing the likely effects of a continuation of the wastewater discharge in breach of the

discharge permit conditions.

Danone's response to the Regional Council

[10] On receipt of the Regional Council's notice of opposition, Danone sought further opportunity to respond to the Regional Council's position. Directions were made by the court for a further exchange of legal submissions.

[11] Legal submissions were received by the court at which point parties were advised that the application would be dealt with on the papers.

[12] Danone had also contended that the stay could be granted under r 18.10(2) of the District Court Rules 2014 (DCRs) and ss 269, 272 and 278 of the Resource Management Act 1991, although the Regional Council contended that this would require a further application. That application was duly made by Danone on 12 December 2023.

The law

[13] Section 325A(7) states:

> Where the relevant authority, after considering an application made under subsection (4) by a person who is directly affected by an abatement notice, confirms that abatement notice or changes it in a way other than that sought by that person, that person may appeal to the Environment Court in accordance with section 325(2) against the whole or any part of the abatement notice.

[14] The issue arises as to whether there is the ability to make an application for a stay where an appeal is filed under s325A(7), because of s325(3A) which provides that:

> Any person who appeals under subsection (1) may also apply to an Environment Judge for a stay of the abatement notice pending the Environment Court's decision on the appeal.

[15] Because s325(3A) does not also refer to a person who files an appeal under s325A(7), *Finlay Trust* held that there is no ability to seek a stay of the abatement notice where an appeal is filed under s325A(7), that being a deliberate omission, a position supported by the Regional Council.

Summary of Danone's submissions

[16] Danone submits that there is discretion to grant or refuse an application for a stay under s325(3E) on the basis that this provision makes no distinction between an appeal under s325(1) and one under s325A(7). Danone argues for a contextual and purposive approach to the issue, referring to the purpose of a stay being to "preserve the appellant's position" in circumstances where the appellant would otherwise "suffer some form of prejudice even if their appeal is ultimately successful".[2]

[17] Counsel notes that the absence of any exclusive reference to appeals lodged under s325(1) in s325(3E) (which confers jurisdiction on the court to grant or refuse a stay) supports the contention that Parliament did not deliberately intend to distinguish between the two sections. Citing *Talley v Fowler*,[3] counsel submits that s325(3A) should be "read generously" to enable persons who appeal under s325A(7) to apply for a stay of an abatement notice pending a decision on the appeal.

[18] Decisions were referred to where it had been assumed that there was jurisdiction to grant a stay in this context.

[19] Counsel referred to the additional powers conferred on the Environment Court under the DCRs to grant a stay on application and submits that it would be illogical for s325(3A) to be unavailable when the same relief can be sought under

---

[2] *Barton v Chief Executive of the Department of Corrections* [2021] NZCA 328.
[3] HC Wellington, CIV-2005-485-117, 18 July 2005.

the DCRs.

[20] Responding to the relevant s325(3E) considerations, affidavit evidence was filed in support of the stay, including the evidence of Chuen Kiat Tan[4] which sets out the prejudice that would be suffered should a stay not be granted.

The cases

[21] The Council argues that Danone conflates the issue of standing with jurisdiction, noting that:

(a) standing to apply for a stay is set out in s325(3A), which exclusively refers to appeals filed under subs (1);
(b) once an application has been filed under subs(3A), the court must consider the stay application as soon as practicable;
(c) it is evident that an Environment Court judge cannot exercise their jurisdiction to grant or refuse a stay in circumstances where there is no application (or at least no valid application) before the court;
(d) there is nothing ambiguous about the manner in which subs (3D) and (3E) are drafted which would necessitate the court to "fill the gaps" or "read in" additional words as contended for by Danone.

[22] *Finlay Trust* had referred to the separate and distinct method for appealing under ss 325(1) and 325A(7) in support of the decision to decline the stay application. That distinction was recognised in *Aokautere Land Holdings Limited v Manawatu-Whanganui Regional Council* (*Aokautere*) a decision relied on in *Finlay Trust*.

[23] *Aokautere* involved an appeal under s325A(7) in circumstances where the appellant had first attempted to resolve matters with the Council to achieve cancellation of the abatement notice, through the s325A(4) procedure. The Council's decision on that application was to confirm the abatement notice. That

[4] Chuen Kiat Tan filed two affidavits, one of which was filed on a confidential basis.

decision was communicated to *Aokautere* by email.

[24] The 15 working day period for filing an appeal under s325(1) had long since passed, although the appeal under s325A(7) was filed within 15 working days of receipt of the Council's email. The appeal sought to challenge the abatement notice and, as relief, *Aokautere* sought that it be cancelled.

[25] The Council opposed *Aokautere's* application and contended that in reality, the appeal was against the abatement notice which was filed out of time. Moreover, the right of appeal under s325A(7) did not allow a challenge to the abatement notice. The court did not accept either contention.

[26] Notably, *Aokautere* observed that the express language of s325A(7) provides that an appeal may lie "against the whole or any part of the abatement notice"; it is not against the Council's decision on the application to cancel or change the abatement notice and nor is it limited to grounds relating to that application or resulting decision.

[27] Accordingly, in substantive terms, the s325A(7) appeal rights are as fulsome as those conferred on an appellant under s325(1).

Interface issues

[28] There are clearly interface issues between these two provisions which have been discussed in earlier Environment Court decisions. As to the timeframe for filing an appeal, *Aokautere* heard (and implicitly accepted) submissions that s325A affords an opportunity of dialogue with the Council prior to embarking on litigation and that the appeal right under s325A(7) is rendered effectively redundant if the 15 working day period in s325(2) is applied with reference to the date of service of the abatement notice.

[29] *Aokautere* records that there may be a unintended "statutory mischief" in the interface with the ordinary appeal provision (s325(1), the answer to which lies

in the context of s325A(4)-(7)), namely that the right of appeal arises only after an appellant has first made an application to change or cancel an abatement notice and that application has been determined by the local authority which issued the abatement notice.

[30] *Aokautere* held that such appeals must be filed within 15 working days of the issuing authority decision on the application for change or cancellation as with any other RMA appeal right.[5] The court acknowledged that this interpretation could result in several appeals arising out of several attempts to change or cancel an abatement notice, although that was observed to be a potential consequence (possibly unintended by Parliament) that arises out of a plain reading of the section.

[31] However, *Aokautere* did not have to consider the additional question of whether a stay could be sought to the abatement notice.

[32] Danone referred to other decisions of the Environment Court where issues with the interface between these two sections has been noted. The timing issue was also discussed in the context of the s325A(7) appeal right in *Wilson v Canterbury Regional Council* (*Wilson*).[6] *Wilson* held that such appeal is to be made to the Environment Court in accordance with s325(2) of the Act, pursuant to which the appeal is to be filed within 15 working days of service of the abatement notice on the appellant.

[33] *Wilson* had made an application to extend the date of compliance with the abatement notice (under s325A(4)) and the Council had issued a decision on that application. The application had been made soon after the abatement notice was served which meant that the appeal was filed only 11 working days after the specified time frame in s325(2) (from the date of service of the abatement notice). No issue was taken with the late filing by the Regional Council.

---

[5] At [21].
[6] [2019] NZEnvC 72 at [7].

[34] The court considered that a strict application of the timeframe specified in s325(2) in the context of a s325A(7) appeal would be unreasonable and unfair to the appellant noting that "…a small technical amendment to section 325 (or section 325A) might be desirable to deal with the issue".[7]

Discussion

[35] It is apparent that there are issues with the interface between the two appeal provisions; it cannot be said that the time for filing an appeal against a decision made under s325A(5) is clear, precise and ambiguous.

[36] *Aokautere* and *Wilson* recognised the need for a generous reading of this provision (essentially a "filling the gaps" approach) to give effect to the requirement that an appeal under s325A(7) is to be in accordance with the s325(2) notice requirements.

[37] Nor is it manifest that Parliament deliberately excluded the power of a s325A(7) appellant to seek a stay of the abatement notice. Indeed, in *Wilson* the court proceeded to grant a stay under s325(3D) (that had been opposed by the Regional Council on merit grounds) as though the procedure was available in that s325A(7) appeal context.

[38] Accordingly, in light of *Finlay Trust* and the submissions from Danone, I have given careful consideration to the legislative history of the interface between each of these provisions.

Legislative history

[39] From its enactment, until 16 December 1997, s325(3) provided that an appeal against an abatement notice operated as a stay.[8] From 17 December 1997,

---

[7] At [7].
[8] RMA, s 325(3) (between 1 October 1991 and 16 December 1997).

s 325(3) was amended; an appeal no longer operated as a stay, unless in certain defined circumstances and (relevantly) an Environment Judge granted a stay under s325(3D).[9] In all other circumstances, an application could be made for a stay where a s325(1) appeal was filed, although that right was contained in newly inserted s325(3A).

[40] Section 325A was added in 1993 (by s 148 RMAA 1993, from 7 July 1993). This provision enabled the relevant authority to cancel the abatement notice where it was no longer required by giving notice to the person subject to that abatement notice. On the Bill's introduction, there was no equivalent to s 325A(7) (the appeal right).[10] The explanatory note to the first version of the Bill says:[11]

> *Clause 134* inserts a new *section 325A* into the principal Act. The new section sets out a procedure for the cancellation of abatement notices.

[41] That is the whole explanation for the section. Had that been the extent of the power afforded by s325A, there would be little need to seek a stay of the abatement notice on an appeal against the decision to cancel. However, the explanatory note overlooks that s325A(4) enabled a person "who is directly affected by an abatement notice" to apply to the relevant authority to change or cancel an abatement notice.

[42] The Regional Council's ability to cancel (at its initiative) was provided for under new s325A(2). However an application (to change or cancel the abatement notice) under s325A(4) could be made by the person who is the subject of the abatement notice in addition to a person who is directly affected by it.

[43] Section 325A(5) addresses the relevant authority's decision-making requirements on an application under s325A(4) to cancel or change an abatement notice. It was not until the Committee of the Whole House stage of the Bill's

---

[9] RMA, s 325(3) (from 17 December 1997).
[10] Resource Management Amendment Bill 1992 (212-1), cl 134.
[11] Resource Management Amendment Bill 1992 (212-1), at xxii.

progression,[12] that 325A(7) was inserted.[13] That affords a right of appeal against a decision under s325A(4) "in accordance with s325(2) against the whole or any part of the abatement notice…".

[44] However, from its introduction in 1993, s325A(7) ended with the words "…but nothing in section 325(3) shall apply in relation to a notice of appeal lodged under section 325(2) (as applied by this subsection)".[14]

[45] Until 17 December 1997 a notice of an appeal under s325(1) had acted as a stay of the abatement notice by s325(3). However, s325(3) did not apply where an appeal was filed under s325A(7). The practical effect of s325A(7) was therefore unaffected by the 1997 amendment; amended s325(3) set out the limited circumstances for when a stay could be made under that subs, although that continued to not apply where an appeal was filed under s325A(7).

[46] However, the power to seek a stay in all circumstances was other than those specified in s325(3) had been provided for in newly inserted stay provisions in s325(3A). This provision was *not* caught by the exclusionary wording of s325A(7). Despite that, the wording of s325(3A) was such (and remains so) that it can only be invoked where an appeal was lodged under s325(1).

[47] Although an appeal under s325A(7) must be filed in accordance with s325(2), the appeal right derives from s325A(7) and not s325(1).

What was the effect of the 2005 amendment to s 325A(7)?

[48] This 2005 amendment removed the phrase "but nothing in section 325(3) shall apply in relation to a notice of appeal lodged under section 325(2) (as applied by this subsection)". This amendment could merely have been a "tidy-up"; that

---

[12] On 30 June 1993.
[13] (30 June 1993) 536 NZPD.
[14] RMA, s 325A(7) (between 7 July 1993 and 9 August 2005).

is, the legislators saw no further need for this exclusionary provision; this was because s325(3) no longer said that an appeal automatically resulted in a stay of abatement notice. There is no discussion of this 2005 amendment in Hansard. The introduction version of the Bill has an explanatory note which states:[15]

> *Clause 84* amends section 325A of the principal Act, which provides for the cancellation of abatement notices. The amendment clarifies that an appeal against a decision to confirm or cancel an abatement notice does not operate as a stay of the notice.

[49] However, the automatic stay provision had not applied since 17 December 1997. Moreover, the explanatory note suggests that s325A was introduced to enable cancellation by the issuing council where an abatement notice was no longer required although s325A had always enabled a person directly affected by an abatement notice to make an application to change or cancel the abatement notice.

[50] An appeal right to a decision on that application was available to an application made under s325A(4), but not to a s325A(2) decision to cancel. Accordingly, s325A was wider in scope than is suggested in that explanation.

My consideration

[51] There are clear differences in breadth of two appeal provisions, other than as to the timing of an appeal (relative to the time of service of the abatement notice). Differences extend to the range of persons who may initiate the appeal procedure.[16] The right of appeal under s325A(7) is available to a wider class of persons than under s325(1), due to the reference to persons "directly affected by" an abatement notice. This right is not limited to the person/s who are the subject of the abatement notice.

[52] It is not possible to glean what the legislators understood about the

---

[15] Resource Management and Electricity Legislation Amendment Bill 2004 (237-1), at 10.
[16] Described in submissions of the respondent dated 6 December 2023.

availability of the stay procedure under s325(3A) when the amendment was made in 2005; that is whether s325(3A) was also available to an appellant who had filed an appeal under s325A(7).

[53] However, I am reluctant to find that Parliament deliberately excluded the right to seek a stay when an appeal is filed against a decision refusing to change an abatement notice under s325A(7). My consideration of the history of these provisions suggests that this exclusion is an oversight.

[54] I have not seen anything to support the position that Parliament has clearly turned its mind to the question of whether an application for a stay should be available where an appeal is filed against a decision to decline a change to an abatement notice following an application under s325A(4).

[55] There may not always be grounds to seek a stay of an abatement notice (for instance) if the appeal is against the cancellation of an abatement notice by a "person directly affected by [it]"[17]. However, the circumstances of this case bring into focus the purpose of a stay, being "to ensure that appeal rights are practically effective."[18]

[56] As in *Aokautere*, Danone utilised the s325A(4) procedure in an attempt to resolve the disputed aspect of the abatement notice directly with the Council in preference to exercising an appeal right under s325(1). The availability of this informal remedy is analogous to exercising a right of objection under s357 before appealing under s120. Having made this election, Danone is prejudiced if it is not able to seek a stay of the abatement notice. It should be stated that I am unaware of the facts of the *Finlay Trust* decision.

[57] However, rather than "filling the gaps" and giving the section a generous reading, I am willing to consider the alternative application made under r 18.10(2).

---

[17] Following a decision on an s325A(4) application by the person subject to the abatement notice.
[18] *Barton v Chief Executive of the Department of Corrections* [2021] NZCA 328.

On the facts of this case, I do not consider this to be a way of avoiding a deliberate decision on the part of Parliament to exclude the right to seek a stay in this context. I have come to the view that Parliament may not have recognised the full breadth of s325A as discussed earlier in this decision. In other words, it is not clear to me that Parliament had turned its mind to the need to provide for the right to seek a stay by a person in the position of Danone.

Relevant legal considerations – s325(3D)

[58] Despite receiving the application under the DCRs it is appropriate to consider the provisions of s325(3D):

> Before granting a stay, an Environment Judge must consider –
> (a) what the likely effect of granting a stay would be on the environment; and
> (b) whether it is unreasonable for the person to comply with the abatement notice pending the decision on the appeal; and
> (c) whether to hear –
> (i) the applicant:
> (ii) the relevant authority whose abatement notice is appealed against; and
> (d) such other matters as the Judge thinks fit.

Likely effect of granting a stay

For Danone

[59] Danone filed an affidavit of Judith van Dijk, an Environmental Consultant and Soil Specialist, who addressed the potential for adverse effects resulting from a continuation of the discharge of treated industrial wastewater in excess of the limits contained in the consent conditions.

[60] Ms van Dijk explains that since May 2021, the applicant has used precision irrigation software to ensure that irrigation only occurs when the soil is below field capacity which minimises the risks of nutrient losses, while also noting that the applicant is not in breach of any of the nutrient application limits.

[61] Ms van Dijk explains that the wastewater activity has caused a cation imbalance in the soil, although she deposes that there is no immediate risk to the environment from these imbalances. She further notes that the effects of irrigation to this imbalance were apparent before non-compliance and no increased effects have been recorded since non-compliance.

[62] In her opinion, ongoing non-compliant discharge is not expected to cause any additional adverse effects compared to a compliant discharge. She deposes that with the correct course of action, the cation imbalance can be remediated after the irrigation has ceased.

For the Regional Council

[63] Alexandra Badenhop addresses the potential environmental effects of allowing a continuation of the discharge in breach of the conditions. Ms Badenhop comments on the reduction of nutrient concentrations in the wastewater discharge since 2021, noting that this has reduced the loading of nutrients that can leach to the groundwater as a result of the wastewater discharge.

[64] Due to poor groundwater conceptualisation in terms of groundwater flow directions, Ms Badenhop states that it is difficult to confirm the impacts of the discharge of groundwater. However, groundwater quality data referred to in her affidavit indicates to her that the groundwater quality has been impacted by the very high wastewater nitrogen contract concentrations in the past.

[65] Mr Crawford addresses the effect upon the soil environment referring to patterns in nutrient levels from soils tests since July 2012. However, Mr Crawford was not able to conclude with any certainty whether higher soil nutrient levels (for some nutrients) would lead to higher levels in the groundwater. However, he considered that the risks for the environmental impacts are higher with higher P availability. In part this is due to higher Na levels and high fertility levels as well as higher N levels leading to increased risk of nutrient loss to waterways from overland flow and groundwater.

[66] Mr Crawford notes that excess nutrients from discharges above the consented annual volume have led to higher soil nutrient levels within the discharge area, with a likely increased risk to the environment. If discharges continue in excess of the consented volumes, the increased levels of Na and pH within the soil will continue.

Danone's response

[67] Ms van Dijk assessed the effects of exceeding the irrigation volumes. She notes that the daily discharge limit has not been exceeded in the last three completed reporting years, although exceedances have occurred with the monthly and annual limits. However, the additional effects to the environment (beyond those that would occur if all conditions are complied with) are considered to be minimal as most of the wastewater has been evenly spread over the dryer months and the growing seasons.

[68] As to the application depths in relation to soil moisture, Ms van Dijk considers that the consented daily irrigation depths are conservative from a soil perspective, and referred to the Soil Mapping Report from Babbage Consultants Ltd 2023 obtained by the appellant. The soils are capable of receiving irrigation depths of 15.0 mm (instead of the consented 6.9 mm) with minimal increased risk to the environment as long as the field capacity does not get exceeded.

[69] The effects of breaching conditions pertaining to field capacity of the soil were also considered. The witness considers that exceeding the limits for when soil as above field capacity has a higher potential impact on the environment and if additional wastewater needs to be disposed of, it is better done when the soil is below field capacity.

[70] Ms van Dijk notes that there had been occasions where conditions as to the return periods for when soil is above soil capacity had been exceeded in the past, although the use of precision irrigation software has caused the number of exceedances to drop significantly and in the last reporting year any added effects

to the environment are considered to be negligible.

[71] In reply, Ms van Dijk maintained her opinion that it is unlikely that the continued irrigation for the next six months would result in significant increases in concentrations of nutrients and groundwater, noting that at the end of the six-month period the plan is to move irrigation elsewhere.

[72] Ms van Dijk considered that the risks to the environment are likely to be minimal provided that the discharge does not continue into the winter months. Many of the risks addressed in the Regional Council's evidence would occur mostly in the winter periods. In her professional opinion, as long as irrigation occurs below field capacity, the direct losses to groundwater would be minimal as a result.

[73] As to soil health, the main issue is cation imbalance resulting from increase pH, although for the next six-month period, being the dryer months and part of the growing season the effects of wastewater irrigation to the soil test values, soil health and the environment, both within the limits and with the added effects of irrigation over those limits are expected to be minimal. Changes to calcium and sodium were also considered as a result of the wastewater irrigation, with higher K and for lower Mg being attributable to fertiliser (NPK) application.

[74] She states that ideally in the future the cation imbalance will be restored to closer to the optimum in the future. Her evidence contains measures that could mitigate this and other cation imbalances although being recommended future measures, these would be best considered at a hearing of Danone's appeal and not in this context.

Is compliance unreasonable?

[75] Danone had made five successful prior requests for an extension of the time to achieve compliance, although the latest application was declined by the council. The compliance date is 30 September 2023.

[76] However, Danone has undertaken significant works to try and achieve compliance, although it has not been possible to achieve compliance with the discharge volume and soil moisture capacity/application depth conditions. Steps are being taken to secure a new discharge site and a new resource consent for discharge of an increased volume of effluent on to that site.

[77] Danone has been unsuccessful in its negotiations with the owner of the current discharge site to increase the consented discharge area which would resolve outstanding non-compliances with its discharge permit.

[78] Since the abatement notice was first served on Danone, meetings have taken place with the Regional Council on a monthly basis and compliance progress has been reported to the Council on a regular basis. That had previously resulted in successful requests for a series of extensions to the deadline by which compliance with all conditions is to be achieved, that is, until the latest application.

[79] Danone had submitted an application for a new wastewater discharge permit to allow for an increase in the volume of the discharge was lodged with the Regional Council in January 2021, although Danone is yet to secure a larger land area for irrigation which has meant that the application for the new discharge permit has had to remain on hold.

[80] Danone anticipates that eventually all discharge operations will be transferred to a new consented site. The current application will be replaced when a new site is secured for the increased volume of discharge.

[81] I am also told that advances have been made in securing an alternative site for the discharge of effluent. Moreover, as a result of pre-application discussions with Regional Council officers, the (updated) anticipated timeframe for resource consent approval could result in a decision by the end of March 2024. However, the applicant acknowledges that delays to this timeframe hinge on potential requirements written approval approvals and requests for additional information.

Danone's options

[82] Lowering production is not considered to be an effective solution. I am told that the volume of effluent being discharged is not related to the level of production at the plants. Rather, it is associated with water used in the automated cleaning system for plant. Since the discharge consent was originally granted in 2011, stricter guidelines for hygiene protocols are in place to prevent contamination and ensure the production of safe and high-quality dairy products.

[83] Even if the plant were to receive less milk and lower production, this would not lead to a reduction in volume of the discharge and arguably may result in the need to clean the equipment more thereby generating more waste. The relationship is driven by the fact that silos, pipes, plate heat exchangers can be emptied and refilled multiple times without cleaning as long as the plant is running continuously. However, if the plant is run at a lower capacity, the empty and fill rhythm would be broken, therefore driving the need to clean once empty. Cleaning would occur on a more frequent basis.

My decision

[84] Having read the confidential and open affidavits of Chuen Kiat Tan, I am satisfied that there are a number of alternative feasible options available to Danone to achieve immediate compliance with all conditions. I am also satisfied that the applicant is using best endeavours to secure a replacement discharge permit for discharge of an increased volume of effluent which would need to be applied to a larger area of land.

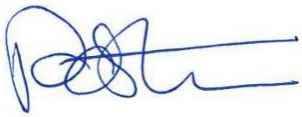
[85] I have considered the likely effect on the environment resulting from the grant of the stay. I accept the evidence of Ms van Dijk that:

(a) it is unlikely the continued irrigation will result in significant increases in concentrations of nutrients and groundwater; there is no record of sludge having been applied in areas that also receive wastewater

irrigation as contended by the Regional Council;

(b) there is no conclusive evidence that the non-compliances pose an increased risk in comparison to irrigating in accordance with the consent conditions; and phosphorus levels from wastewater are not causing issues in the nitrogen application through wastewater and need negligible on the farm operation scale.

[86] On the basis of that evidence, (together with the legal submissions filed for Danone) I consider that the stay is able to be granted under r 18.10 DCR pending resolution of the appeal. Accordingly, that is my decision.



P A Steven
Environment Judge