

BEFORE INDEPENDENT COMMISSIONERS

UNDER the Resource Management Act
1991

IN THE MATTER of Public Hearings on the
Proposed Canterbury Air
Regional Plan

**OPENING LEGAL SUBMISSIONS OF COUNSEL FOR
THE CANTERBURY REGIONAL COUNCIL**

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MAY IT PLEASE THE PANEL

Introduction

1. These legal submissions provide a brief description of the background to the proposed Canterbury Air Regional Plan ("pCARP"). They also address matters in relation to the statutory framework that are particularly relevant to the pCARP, together with some of the key issues that are addressed by the pCARP.

Background to pCARP

2. Canterbury has had an Air Plan since 2002, through Chapter 3 of the Canterbury Natural Resources Regional Plan ("NRRP"), which became operative in October 2009.
3. A review of Chapter 3 of the NRRP was initiated as it became clear that the Resource Management (National Environmental Standards for Air Quality) Regulations 2004 ("NESAQ") would not be met under the existing planning framework. Growth in rural Canterbury and the rebuild and recovery following the Canterbury earthquake sequence needed to be addressed. The development of the Canterbury Land and Water Regional Plan also provided an opportunity to simplify the Air Plan and to improve consistency across regional plans in Canterbury.
4. Through the review of the Air Plan, it became clear that NESAQ compliance is important but this needs to be achieved in a way that enables people to provide for their health and safety as well as their social, cultural and economic wellbeing. It also became clear that, not only is it important to achieve NESAQ compliance inside of polluted airsheds, but there is also a need to ensure air quality outside of polluted airsheds is managed so that additional polluted airsheds are not created. It was recognised that all dischargers, both domestic and industrial, have a role to play in the reduction of emissions
5. The outcomes sought from the review of the Air Plan were:
 - (a) Community led solutions to enable health and well-being by providing clean healthy air;

- (b) Improve air quality within polluted airsheds to achieve compliance with the NESAQ health based targets;
 - (c) Create an enabling framework to encourage new technology, innovation and best practice;
 - (d) Provide for economic growth in rural and urban areas; and
 - (e) Simplify and stream-line provisions.
6. The review has been undertaken over a period of two years and the pCARP has been developed as part of a wider strategy for managing air quality. The strategy also includes developing local solutions for polluted airsheds, working with partner organisations, reducing wood burner emissions through encouraging better burning techniques, and working with industry on their development of ultra-low emission wood burners. The pCARP is intended to support this non-regulatory clean air work programme by providing the regulatory tools where necessary to manage air quality issues.

Summary of legal framework

7. The Council has prepared the pCARP in accordance with its functions under the RMA, which among other things, enable the Council to prepare a regional plan for the whole or part of its region for the control of discharges of contaminants into air for the purpose of giving effect to the RMA in Canterbury.¹ The pCARP has also been prepared in accordance with the Council's obligations under section 32 of the Act. Any changes made to the pCARP will require a further assessment pursuant to section 32AA of the RMA.
8. The higher order statutory framework for the management of air quality in Canterbury comprises the RMA, the NESAQ, relevant national policy statements² and the Canterbury Regional Policy

¹ Resource Management Act 1991, sections 30(1)(f) and 65(3).

² National Policy Statement for Renewable Electricity Generation 2011 and National Policy Statement for Electricity Transmission 2011.

Statement. This is set out in the section 42A report.³ However, we address those matters of particular relevance to air quality management below.

Presumption in the RMA regarding air quality management

9. Section 15(1) of the RMA states that no person may discharge any contaminant from any industrial or trade premises into air, unless that discharge is expressly allowed by a national environmental standard or other regulations, a rule in a regional plan (as well as in a proposed regional plan), or by a resource consent. In other words, discharges to air from industrial or trade premises are not permitted unless they are specifically authorised.
10. The reverse presumption applies for discharges from any other place or source, such as domestic sources. Those discharges are permitted, provided they do not contravene a standard or a rule.⁴
11. This presumption in the Act is important as it means that the pCARP has to have both rules that limit discharges to air from non industrial and trade activities and rules to allow discharges from industrial and trade activities where it is appropriate.

National Environmental Standard for Air Quality

12. Achievement of the NESAQ standards has been a key driver for the promulgation of the pCARP.
13. Sections 44A(7) and 44A(8) of the RMA require local authorities to observe national environmental standards and to enforce them to the extent to which their powers enable them to do so. A rule in the pCARP cannot be more lenient than the NESAQ.⁵ That is, rules in the

³ Section 42A Report, p 3-2 – 3-24.

⁴ Resource Management Act 1991, sections 15(2) and (2A).

⁵ Resource Management Act 1991, section 43B(3).

pCARP cannot permit or authorise an activity that the NESAQ prohibits or restricts.⁶ However, a rule in the pCARP (or resource consent) can be more stringent than the NESAQ.⁷ A rule is more stringent than a standard if it prohibits or restricts an activity that the standard permits or authorises.⁸

14. The NESAQ regulations were first introduced in 2004. They have been amended in December 2004, July 2005 and November 2008, largely for technical reasons. In 2009, the regulations relating to PM₁₀ were reviewed to address concerns about the perceived stringency of the ambient standard, the lack of equity for industrial air pollution sources, and the difficulty in achieving the original target timeline of 2013. In response, the standards were revised and the amended regulations came into force on 1 June 2011.⁹
15. The NESAQ regulations are designed to protect public health and the environment by setting concentration limits for clear air, regulating or prohibiting certain activities that pollute the air and imposing air quality monitoring and reporting requirements on regional councils.
16. With regards to PM₁₀, the regulations:
 - (a) Require councils to monitor if it is likely that the ambient PM₁₀ standard will be breached in an airshed.¹⁰
 - (b) Require councils to give public notice if the ambient PM₁₀ standard is breached in an airshed.¹¹

⁶ Resource Management Act 1991, section 43B(4).

⁷ Resource Management Act 1991, section 43B(1).

⁸ Resource Management Act 1991, section 43B(2).

⁹ <http://www.mfe.govt.nz/air/national-environmental-standards-air-quality/about-nes>; 2011 Users' Guide to the revised National Environmental Standards for Air Quality: Updated 2014 at p2 – 3.

¹⁰ NESAQ, Regulation 15.

¹¹ NESAQ, Regulation 16.

- (c) Allow councils to apply for an exceedance to be deemed due to exceptional circumstances and therefore not count towards the number of permissible exceedances.¹²
 - (d) Allow councils to have split targets for the number of permissible exceedances in an airshed based on meaningful date and average exceedances.¹³
 - (e) Require councils to decline resource consent applications for certain PM₁₀ discharges in polluted airsheds unless the discharges are offset.¹⁴
 - (f) Require councils to prohibit discharges from wood burners installed on certain properties unless the wood burner meets a particular design standard and meets a particular thermal efficiency standard.¹⁵
 - (g) Require councils to prohibit discharges from certain domestic solid-fuel burning open fires 12 months after an airshed standard is breached.¹⁶
 - (h) Allow councils to have a more stringent rule, resource consent or bylaw than the Regulations.¹⁷
17. The NESAQ sets a concentration limit for PM₁₀ of 50 micrograms/m³ average in any 24 hour period, and targets for this to be exceeded include no more than 3 times per year by 2016 and no more than once a year by 2020.
18. Whilst achievement of the NESAQ standards in relation to polluted airsheds is not a stated objective of the pCARP, a key purpose of the

¹² NESAQ, Regulation 16A.

¹³ NESAQ, Regulations 16B – 16D.

¹⁴ NESAQ, Regulation 17.

¹⁵ NESAQ, Regulation 22 – 24.

¹⁶ NESAQ, Regulation 24A.

¹⁷ NESAQ, Regulation 28.

pCARP is to set a policy framework to comply with the NESAQ standard for PM₁₀ in the eight airsheds identified that exceed the standard regularly.

Key issues addressed by pCARP

19. The pCARP is separated into the following issue groups:
 - (a) Outdoor burning;
 - (b) Industrial, trade and large scale discharges to air;
 - (c) Rural discharges to air; and
 - (d) Space heating.
20. However, all of these issues are interconnected in promoting the sustainable management of air quality. In this context, we address below some of the key issues that have been addressed in the pCARP.

Polluted airsheds

21. There are eight airsheds in Canterbury that are identified as polluted as they exceed the NESAQ standards for ambient concentrations of PM₁₀ regularly.
22. In all airsheds, there is a need to reduce emissions from all sources. The pCARP focuses on reducing emissions from industrial and domestic sources as this is the area in which the pCARP can have the greatest effect.
23. During the development of the pCARP it was evident that the target dates for achieving compliance with the NESAQ were going to be difficult to meet, and would come at significant cost to the community. In order to mitigate that cost, the pCARP provides for improvements in both domestic and industrial sectors to be made over time. The pCARP also provides for short term gains which can be made to minimise emissions from existing sources with less financial impact. This includes requiring domestic wood burner users to manage their smoke emissions, including a limitation on the amount of time wood

burners are able to discharge visible smoke (the “no visible smoke rule”). Together with strong education, assistance and social marketing programmes, it is anticipated that this approach will provide the best chance of achieving NESAQ standards in polluted airsheds, while continuing to promote the sustainable management of natural and physical resources.

Reducing home heating emissions

24. The pCARP response to reducing home heating emissions relies mostly on technology upgrades within polluted airsheds. This will reasonably occur over a longer timeframe to provide time for people to have a reasonable economic use from existing appliances and ensure time to plan for a replacement.
25. The 15 year phase out period begins from the date of plan notification, and is implemented as each appliance reaches 15 years from installation. Appliances that are 11 years or older now will need to be retired by 2019. From 2019, appliances will be retired as they turn 15 years old. People will have a minimum of 4 years to replace an older style or low emitting wood burner and a maximum of 15 years if the wood burner is installed prior to 2019. To enable the longer timeframe for technology upgrade while still improving health outcomes, the use of some technology, such as open fires, will be phased out more rapidly.
26. The rules in the pCARP requiring better operation of the current wood burner stock, together with the non-regulatory work programme, will minimise emissions in the short term.
27. A key component of the strategy for reducing home heating emissions is the introduction of ultra-low emission wood burners (ULEBs).¹⁸ The pCARP sets an emission and efficiency standard for these burners

¹⁸ ULEBs are defined in the pCARP as appliances that achieve an emission and efficiency standard that is lower than an older style or low emitting enclosed burner, when tested to simulated real life conditions.

and enables their use in polluted airsheds in place of older and higher emitting appliances. The availability of ULEBs is critical to allowing wood to be used as a home heating fuel in the future, while continuing to achieve improvements in air quality and observing the requirements of the NESAQ. To date, three ULEBs have been authorised and are available for purchase.

Reducing emissions from industrial sources

28. Emissions from industrial sources must also be reduced, particularly to ensure capacity for future growth in this sector. The pCARP is intended to drive on-going improvement in industry practice and upgrade in plant and equipment to reduce emissions. It is not the intention of the pCARP to halt growth until the room is made for industry to develop, but rather to take a long term view and provide for growth (particularly through the application of offsets and promotion of innovation) while emission reduction continues. It is accepted that this intention has not been fully realised through the pCARP and improvements to the pCARP are required. This has been addressed further in the written response provided to the questions from the Panel.

Discharges outside of polluted airsheds

29. There are some areas outside of polluted airsheds where air quality is degraded. While not necessarily exceeding NESAQ or ambient air quality guidelines, these areas may become “polluted” in the future if the cumulative effects of land use intensification across all sectors are not managed appropriately.
30. The pCARP responds to this by providing guidance to ensure that new polluted airsheds are not created, but at the same time ensure development can occur where effects are managed. The provisions of the pCARP require the best practicable option to be applied to all discharging activities. For large scale and industrial activities, this is determined on a case by case basis in the context of the receiving environment and applied through consent processes. For home heating, this is determined through rules specifying technology and

operation standards. For outdoor burning in rural areas, this is determined by rules and resource consents specifying practice standards and conditions. For outdoor burning in urban areas, best practicable option is determined through rules generally prohibiting outdoor burning for waste management purposes and allowing outdoor burning for cooking and cultural reasons.

31. It is also recognised, that despite the application of the best practicable option, there may be instances where the objectives of the plan will not be achieved. Therefore it is important for the plan to provide a policy framework that allows decision makers on resource consent applications to require appropriate levels of mitigation, or to be able to decline consents where necessary.

Ambient versus localised air quality effects

32. Some submitters seek changes to the pCARP to distinguish between localised and ambient air quality effects.
33. The NRRP and Canterbury Regional Policy Statement ("CRPS") distinguish between local and ambient air quality. The pCARP seeks to manage all air quality as "ambient air quality" inside and outside of polluted airsheds. The NRRP used the term "ambient" synonymously with "the airshed cumulatively" whereas the pCARP uses the term to refer to "outdoor air quality". While the NRRP recognised that industrial emissions have a cumulative impact on the airshed, the policies and rules focused on the "localised effects" and as a result, the cumulative effects on, for example, airshed compliance with objectives, was not always considered appropriately at the resource consent application stage.
34. Rather than determine the types of activities that can have either an effect at a local or ambient level, the pCARP recognises that all activities could potentially have a local and/or ambient effect, and it is the scale of the activity and the level of effect that requires assessment.
35. The pCARP is designed to manage both cumulative effects and individual effects of contaminant sources. There is an overarching strategy to reduce PM₁₀ discharges within polluted airsheds, namely

through the upgrade of home heating technology and a drive to best practice for industry. Outside of polluted airsheds, the cumulative impacts of growing home heating and industrial discharges are managed through the application of minimum standards for home heating and case by case assessment of best practicable options for industry.

36. The pCARP approach recognises that while localised effects are necessarily managed, cumulative effects must also be considered if air quality is to provide for health and wellbeing.
37. This can be done with a single set of policies and rules rather than a set of provisions for “cumulative effects” and a separate set of provisions for “localised effects”. Maintaining a single policy stream ensures cumulative effects can be given appropriate consideration so that the plan can be effective in managing cumulative effects both inside and outside of polluted airsheds.
38. The CRPS does seek management of localised and maintenance and/or improvement of ambient air quality effects. However, it does not require that these effects be addressed separately through the Regional Plan.

PM₁₀ versus PM_{2.5}

39. A number of submitters seek that the pCARP focus on the reduction of PM_{2.5}, rather than a reduction of PM₁₀. The World Health Organisation recommends a limit of 25 micrograms of PM_{2.5} per cubic metre averaged over a 24 hour period. The NESAQ require that PM₁₀ concentrations meet set targets. However, they do not set standards for PM_{2.5}. It is noted that PM_{2.5} is a component of PM₁₀. Therefore, in focusing on significant combustion sources of PM₁₀, it is likely that PM_{2.5} will also be reduced over time. This is further addressed in the Council’s written response to the Panel’s questions.

Offensive and objectionable effects

40. Dust, odour and smoke can create a significant nuisance and cause effects that are offensive and objectionable. Establishing if an effect is

offensive and objectionable requires an assessment of the overall effect of the frequency, intensity, duration, offensiveness and location of the effect (the FIDOL factors).

41. The pCARP seeks to avoid these offensive and objectionable effects by providing a mechanism by which consideration of the FIDOL factors can be undertaken in accordance with Schedule 2 prior to the activity beginning.¹⁹ This is provided for through Rule 7.3 which applies to all activities.
42. The pCARP also contains rules in relation to specific activities where certain management practices are required, including dust, odour and smoke management plans to be prepared in accordance with Schedule 2 of the pCARP.
43. For example, in Christchurch dust from construction and development or unconsolidated surfaces is a particular problem, and will continue to be as the rebuild continues. The pCARP requires a dust management plan to be prepared in accordance with Schedule 2.
44. As the dairy industry develops and the pressure to manage nitrogen discharges increases, barn and feedlot farming systems with longer term storage of effluent, are becoming more common in Canterbury. While odours are anticipated in the rural environment, these systems can discharge significant odour. Therefore rules requiring set backs and odour management are proposed in the pCARP in order to manage this issue.²⁰

Reverse sensitivity

45. In relation to reverse sensitivity, some submitters seek amendments to the pCARP so that provisions only relate to new activities, not existing.
46. The concept of reverse sensitivity is used to refer to the effects of sensitive activities on other legitimate activities in their vicinity,

¹⁹ pCARP, Rule 7.3.

²⁰ pCARP, Rules 7.60 to 7.74.

particularly if it becomes necessary to restrain those other activities in order to accommodate the sensitive activity.²¹

47. Reverse sensitivity effects occur when sensitive activities move into an area where existing activities can cause adverse effects to the sensitive activity. When reverse sensitivity occurs with discharging activities, the effects of these discharging activities can become offensive and objectionable in the new receiving environment, even if the effects were minor when the activity established.
48. The CRPS has strong directive policy, primarily to be implemented through district plan provisions, seeking the avoidance of reverse sensitivity effects.²² The CRPS anticipates that future incidents of reverse sensitivity will not occur. However, there are legacy issues where reverse sensitivity issues have occurred and as a result some discharging activities are located in areas where they are no longer appropriate.
49. It is recognised that the Regional Council does not have the ability to control land for the purpose of managing reverse sensitivity effects. This function falls to territorial authorities under section 31 of the RMA. The CRPS recognises this and seeks that district plans include provisions to ensure discharging activities are appropriately located and are protected from adverse effects of encroachment by sensitive land uses.
50. The pCARP has been developed to focus on the part of the issue that it can influence, that being the discharge of contaminants into air. The pCARP includes policy²³ to address existing situations where sensitive activities have been allowed to encroach on discharging activities and as a result, objectives seeking air quality that provides for health and wellbeing are not achieved. This approach is intended to give decision makers on consent applications a tool to decline a resource consent

²¹ *Auckland Regional Council v Auckland City Council* (1997) 3 ELRNZ 54.

²² CRPS, Policy 14.3.5.

²³ pCARP, Policy 6.7.

application for an existing activity, if it is appropriate to do so. The effect of the decline of an application to renew a resource consent, may be that the activity relocates to a more suitable location where its effects are considered more appropriate in the receiving environment.

Conclusion

51. The pCARP is a key part of the Council's wider strategy to manage air quality in Canterbury. It seeks to support the Council's non-regulatory clean air work programme with regulation that seeks to strike a balance between maintaining Canterbury's good air quality and improving air quality where it is degraded in order to meet the NESAQ, whilst ensuring that growth in the rural and industrial sector continues and people can continue to use wood as a source of domestic heating, through the development and use of better technology and operation practices.

Dated this 27th day of October 2015



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