

IN THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

**of the Proposed Canterbury Regional
Air Plan**

**LEGAL SUBMISSIONS ON BEHALF OF
CARTER HARVEY PULP & PAPER LIMITED**

29 OCTOBER 2015

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1. INTRODUCTION

1.1 Carter Holt Harvey Pulp & Paper Limited ("CHH") appears in support of its submissions on the Proposed Canterbury Air Regional Plan ("pCARP").

1.2 CHH made a number of submissions (submission points 2363/2351, 2356, 2359, 2360, 2362, 2371, 2368, 2372 and 2373) seeking to amend the introduction, objective, policies and rules sections of the pCARP that deal with;

- (a) Objectives and policies to recognise and provide for industry.
- (b) Best Practicable Option ("BPO") Provisions.
- (c) Provisions relating to reverse sensitivity.
- (d) Ambient Air Quality Guidelines ("AAQG").

1.3 Those submissions cover a range of issues that are addressed in the evidence of Mr Richard Matthews. Rather than address the specific amendments sought, which are outlined by Mr Matthews, these submissions will focus on its primary concerns with the plan which are:

- (a) The reliance on the AAQG as the basis for rules where those impose greater restrictions on activities than is provided for in the National Environmental Standard for Air Quality ("NESAQ");
- (b) Reverse sensitivity; and
- (c) BPO.

2. EVIDENCE

2.1 CHH calls two witnesses:

- (a) Mr John Reid, (Engineering Manager for CHH) who outlines the company's assets in the region and the need for the pCARP to recognise and provide for existing industry,

particularly in terms of the impact of regulation on on-going decisions for continuing investment;

- (b) Mr Richard Matthews (Planning) (Director of Mitchell Partnerships) who addresses CHH's submissions and the planning rationale for the amendments sought. With reference to proposed rules 7.17 and 7.18, Mr Matthews has provided a primary statement and subsequent rebuttal outlining two possible approaches to these rules. The first approach distinguishes between new discharges to air and the renewal of existing consents where there is a likely exceedance of the NESAQ. The second approach outlined in Mr Matthews' rebuttal reflects on the points and amendments proposed by other witnesses. In light of the amended policy framework he concurs that the preferred approach is that the rules 7.17 and 7.18 be deleted in their entirety.¹ He also addresses a number of consequential amendments.

- 2.2 Attached as an appendix to these submissions is an outline of the amendments CHH seeks. This document incorporates Mr Matthew's primary and rebuttal evidence and is based on the redrafting of the objectives and policies as proposed by the Panel.

3. INTRODUCTION

- 3.1 The background to CHH's Australasian operations and its Hornby plant are outlined in its two statements of evidence. In summary, the plant is located in the Business 5 (General Industrial) zone under the Christchurch City Plan, and within the Clean Air Zone and Christchurch Airshed. It has operated for nearly 60 years from the same location and has, over that period seen significant change in its surrounding environs. More recently, CHH has invested more than \$7M in the plant² which currently employs over 130 permanent staff.³

¹ It is noted that if rules 7.17 and 7.18 are deleted, the default activity status for large scale fuel burning devices is discretionary. This is not a situation where there is a lack of fall back consent status to require observance of the policies. (see *Paokahu Trust v Gisborne District Council* W078/05)

² EIC Reid para 5.3

³ EIC Reid para 3.5

The plant produces steam by means of a coal fired and an oil fired boiler.⁴

- 3.2 CHH's motivation in submitting on the pCARP is to ensure that existing industry is appropriately recognised and provided for. It seeks changes to a number of key objectives, policies and rules to achieve this. In particular it is concerned that the policies and objectives flow through to rules which as notified would potentially prevent any renewal of its operations owing to the prohibited activity status applied to large scale fuel burning devices inside a clean air zone (Rule 7.18).

4. USE OF AIR QUALITY GUIDELINES

- 4.1 CHH's concern with the pCARP provisions is that they create a framework that is unjustifiably more restrictive than the NESAQ. That occurs as a result of the AAQG which:
- (a) include different (additional and therefore more stringent) averaging periods for the various pollutants
 - (b) do not allow for permissible exceedances in a 12 month period;
 - (c) include other guideline values for other potentially harmful contaminants;⁵ and
 - (d) apply outside of airsheds.
- 4.2 Both the RMA⁶ and the NESAQ⁷ allow such an approach to be taken in regional plans with the proviso that that can only occur where the Council is able to demonstrate that the approach is "justified" *in addition* to the normal "most appropriate" test in section 32 being met. In particular section 32(4) provides that if a proposal will impose a greater prohibition or restriction than a national environmental standard:

4 EIC Reid para 3.4
5 S42A report page 13-7
6 S48B
7 Regulation 28

...the evaluation report must examine whether the prohibition or restriction is **justified in the circumstances of each region or district** in which the prohibition or restriction would have effect. (emphasis added)

- 4.3 The section 32 Report has not undertaken such an evaluation.

Section 32(4) - justified

- 4.4 The term "justified" is not defined in the RMA, nor have I been able to find any relevant case law discussing the definition. However, when read in the wider context of section 32, it appears that a deliberate distinction has been made between section 32(4) and other parts of section 32. That is, section 32(4) is the only part of section 32 that uses language like "justified" and is the only part with a deliberate focus on the circumstances of a region.

- 4.5 The Shorter Oxford English Dictionary provides the following definition:

Justified

Just, right, righteous; warranted; having good cause or reason, correct; supported by evidence; (in printing etc.) that has been justified.

- 4.6 The term "justified" in the context of section 32(4) imposes a positive obligation, requiring proof by way of clear evidence that a greater prohibition or restriction is warranted in response to a specific problem or issue.

Section 32(4) - in the circumstances of each region or district

- 4.7 The fact that the prohibition or restriction must be justified *in the circumstances of each region or district in which the prohibition or restriction would have effect* is important.
- 4.8 This requires justification specific to the particular region or district, rather than a more general justification. For example, a significant health issue established by evidence, which is also shown to be unique to a region, might justify stricter controls, whereas more general reasons (such as wishing to adopt a precautionary approach) may not. This is reinforced by the underlying purpose of national

environmental standards. As the Ministry for the Environment identifies:⁸

NESs protect people and the environment and secure a consistent approach and decision-making process throughout the whole country. They create a level playing field.

Evidentiary justification

- 4.9 The Council's section 32 Report fails to identify any regional justification for reliance on the AAQG as the basis for a rule. In fact, the Council's evidence is that of the five contaminants (PM₁₀, SO₂, NO₂, CO and O₃) identified in the NESAQ, only PM₁₀ still regularly exceeds the standard.⁹ The "Air Quality Status Report Christchurch Airshed" also:
- (a) estimates that industrial and commercial sources are responsible for about 22% of known daily PM₁₀ emissions, while home heating (59%) and motor vehicles (19%) are responsible for the remaining 78% of emissions;
 - (b) establishes that total industrial PM₁₀ emissions have reduced by about 18% in the period from 2009 to 2014.¹⁰; and
 - (c) suggests that the contaminant of particular importance in Christchurch is PM₁₀.
- 4.10 In contrast to industrial emissions, discharges from mobile sources are a permitted activity. Discharges from mobile sources have been recognised as an issue that needs to be dealt with at a national level.
- 4.11 The factual context suggests that the status quo is working and therefore there is no issue or problem associated with the relevant contaminants in the Canterbury region that could justify the imposition of controls on industry that are stricter than the NESAQ.

⁸ <http://www.mfe.govt.nz/rma/rma-legislative-tools/national-environmental-standards>

⁹ Environment Canterbury Investigations and Monitoring Group "Air quality status report Christchurch Airshed" Technical Report No. R14/116, December 2014.

¹⁰ EIC Matthews paras 5.3 – 5.5

Appropriateness of use of the AAQG

- 4.12 The AAQG also make it clear that they were not designed to be used to assess the environmental and health impacts of individual discharges to air as required by the RMA, or a regional or district plan, although they are often used as part of the assessment process:

...the ambient guideline values are not designed to be used to assess the environmental and health impacts of individual discharges to air as required by the RMA, or a regional or district plan...

We recognise, however, that in the absence of alternative guidance the guideline values will be used in such assessments and have, at times, been applied inappropriately. National advice on how they should and should not be applied to individual discharges is therefore needed to improve the quality and consistency of assessments.¹¹

- 4.13 The Panel is due to hear from a number of experts as part of these proceedings and no expert supports the inclusion of the AAQG as the basis for any rule. It is Mr Matthew's opinion:

"...that it is entirely inappropriate for the guidelines to be used to define the activity status for consent applications, particularly with respect to non-complying and prohibited activity status where the RMA tests themselves set very high thresholds as to whether a consent application can even be made or considered."¹²

- 4.14 It is submitted that in the absence of any evidence that the AAQG are "justified", there is no basis for the pCARP to include standards that are higher than national standards.

5. REVERSE SENSITIVITY

- 5.1 Many of the statements of evidence from submitters, including Mr Matthews, are of the view that the pCARP and s42A report contain misguided references to the concept of reverse sensitivity. Specifically the Council's policies seek to manage legacy issues by reducing the effects of existing discharges or by relocating the industry, in a manner that is inappropriate and inconsistent with the law.

¹¹ Ambient Air Quality Guidelines, Section 3.7
¹² EIC Matthews para 7.13

- 5.2 Reverse sensitivity is a concept that has evolved through case law. The approach taken to reverse sensitivity and the obligations of a territorial authority are summarised in Nolan:¹³

The Environment Court has long recognised the importance of establishing rules that control the location of sensitive activities where they may cause reverse sensitivity effects. The Environment Court has accepted that it is not enough for people to be made aware of a potential nuisance before they make the decision to purchase any particular parcel of land – a territorial authority has a duty to ensure that reverse sensitivity effects are avoided, remedied, or mitigated. While existing physical resources should be protected against reverse sensitivity effects, those existing activities must, where reasonably practicable, internalise their effects. The concept of “reasonable internalisation” is part of the requirement under the Resource Management Act 1991 to “avoid, remedy or mitigate” adverse effects; it is not a separate duty. However, a balance needs to be struck. It is not a case of “internalise at all costs”. The Court will assess what equates to reasonable internalisation and also have regard to the local, regional, or national significance of the resource...

One approach is to provide buffer zones around existing activities within which sensitive uses should not be allowed to locate, or only to locate these in circumstances where the potential for reverse sensitive effects is minimised. For example, many district plans in New Zealand have provisions restricting the location of residential and other noise-sensitive activities within the vicinity of airports, and where such uses are allowed they are subject to acoustic insulation requirements. A similar approach to the use of buffer zones was illustrated by the recent case of *Golden Bay Cement Ltd v Whangarei District Council* in which the underlying zoning of a property located near a quarry was changed so as to discourage intensive residential activity and thereby minimising the chance of reverse sensitivity effects occurring.

- 5.3 The above quote refers to the territorial authority’s duty and as an example notes one approach to managing that duty as being the use of buffer zones around airports. Clearly there are other mechanisms for managing reverse sensitivity effects including appropriate zoning around industrial activities (such as the location of light industry around heavy industry zones) and a general limitation on the types of sensitive activities that may locate in surrounding zones (for example restricting child care centres in a light industrial zone). However, in all of these examples, reverse sensitivity is a future effect that is avoided or mitigated prior to its existence. These are also effects managed through district plan mechanisms.

¹³

Nolan, Environmental and Resource Management Law, 4th ed, page 689

- 5.4 The evidence of Mr Matthew's sets out the relevant provisions of the Regional Policy Statement and the inaccurate translation of these provisions in the section 32 report which follow through into the pCARP and section 42A report.
- 5.5 The key issue is that Policy 6.7 purports to transfer an obligation for legacy situations to the discharger. The justification for the approach is an incorrect application of the law. Mr Matthews' expert view is that the appropriate way of addressing the effects of a discharge is through implementation of the NESAQ, the BPO provisions in the pCARP (as proposed) and resource consent application processes.¹⁴ It should be recalled that discharges to air associated with a renewal consent will be required to consider the existing environment.¹⁵
- 5.6 It is submitted that there is also an absence of analysis of the costs to industry and to the Canterbury economy associated with the Policy 6.7 approach. As outlined by Mr Reid, such policies only serve to create investment uncertainty, and a cost for the **regional economy**, as "picking up an entire heavy industrial plant and shifting it somewhere else is hardly ever viable".¹⁶ These factors are directly relevant to the Panel's consideration of the most appropriate provisions for Canterbury. That is reinforced by the reference in section 30(1) to the regional council's "functions for the purpose of giving effect to this Act **in its region**", and by the reference to "communities" in section 5 of the RMA. The Panel's questions for Council Officers have also correctly identified that the policy is inappropriate on the basis that the Council may refuse consent, but cannot compel relocation of an industry.
- 5.7 On the other hand, the Section 42A report proposes an amendment to the introductory text to recognise that:

Where discharging activities are provided for, they must be protected from reverse sensitivity effects through provisions in district plans that ensure the avoidance of encroachment of sensitive activities into these areas.¹⁷

¹⁴ EIC Matthews para 6.13

¹⁵ *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA)

¹⁶ EIC Reid para 5.6

¹⁷ Section 42A Report, Recommendation R-Section 1-10

5.8 This amendment is supported as it is consistent with the case law. It is not considered appropriate for the pCARP to take legacy issues any further.

6. USE OF BPO

6.1 The s42A Report has recommended a number of amendments to some of the more problematic provisions of the pCARP as identified by submitters. These include policies 6.10, 6.21 and Rules 7.17 and 7.18 which are of direct interest to CHH. The recommendations refer to the redrafting of these provisions to require the application of BPO. Unfortunately, without the substance of the proposed redrafted provisions submitters are unable to provide the Panel with specific comment. To assist in this regard Mr Matthews has suggested specific wording for new BPO policies.

6.2 The concept of "best practicable option" to prevent or minimise adverse effects appears in a number of parts of the RMA and is defined in section 2.¹⁸ As set out in its submissions and the evidence of Mr Matthews, in general terms CHH supports the concept of BPO. Its reservations are associated with its use in a rule on the basis that what is 'practicable' inherently requires an assessment of a range of technical, practical and financial factors.¹⁹ Mr Matthew's conclusions are that rather than defining activity status, BPO would be most appropriately used as part of the assessment criteria used in assessing applications for resource consent.²⁰ Depending on the drafting, to include the BPO as part of a rule could be open to subjective interpretation and result in a lack of clarity as to activity status. For industrial, trade and large scale discharges to air, it is submitted that the preferred approach is to rely on the catch-all discretionary activity classification (per Rule 7.27).

¹⁸ *Best practicable option, in relation to a discharge of a contaminant or an emission of noise, means the best method for preventing or minimising the adverse effects on the environment having regard, among other things, to—*

- (a) *The nature of the discharge or emission and the sensitivity of the receiving environment to adverse effects; and*
- (b) *The financial implications, and the effects on the environment, of that option when compared with other options; and*
- (c) *The current state of technical knowledge and the likelihood that the option can be successfully applied.*

¹⁹ EIC Matthews para 5.6

²⁰ EIC Matthews para 5.17

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Appendix 1 to CHH legal submissions

The changes below show the redrafted changes provided by the Panel together with amendments outlined in the statement of primary evidence and rebuttal of Mr Richard Matthews.

5. Objectives

- 5.1 Maintain air quality where it provides for people's health and wellbeing.
- 5.2 Improve air quality where it is degraded so that over time it does provide for people's health and wellbeing.
- 5.3 Manage air quality to ensure that its mauri / life supporting capacity is maintained for future generations.
- 5.4 Manage discharges to air in accordance with the amenity values of the particular receiving environment.
- 5.5 Manage discharges to air to recognise, and provide for, the relationship of Ngai Tahu with their culture and traditions.
- 5.6 Provide for developments and innovation in technology which have the potential to improve air quality.
- 5.7 Enable discharges to air as required to ensure that nationally and regionally significant infrastructure is enabled and resilient and positively contributes to economic, cultural and social wellbeing through its efficient and effective operation, ongoing maintenance, repair, development and upgrading.
- 5.8 Ensure that discharging activities are located appropriately given that air quality expectations throughout the Region differ depending on the location and characteristics of the receiving environment, including the land use patterns and zoning.
- 5.9 Ensure that discharging and sensitive activities are spatially located so that appropriate air quality outcomes are achieved both now and into the future.
- 5.10 Recognise and provide for the investment and contribution to economic and social wellbeing of existing industrial, service and rural productive activities that discharge to air.

6. Policies

Central Policies Applying to All Activities

- 6.1 Ensure that discharges of contaminants into air, either individually or in combination with other discharges, do not cause:
 - a Adverse effects on human health and wellbeing; or
 - b Significantly diminished visibility; or
 - c Significant soiling or corrosion of structures or property; or
 - d Adverse effects on the mauri/life supporting capacity of ecosystems, plants or animals.

- 6.2 Minimise adverse effects on air quality where concentrations of contaminants are between 66% and 100% of the guideline values set out in the Ambient Air Quality Guidelines 2002 Update, so that concentrations do not exceed 100% of those guideline values.
- 6.3 Improve air quality where concentrations of contaminants exceed 100% of guideline values set out in the Ambient Air Quality Guidelines 2002 Update.
- 6.4 Reduce overall concentrations of PM_{2.5} in clean air zones so that by 2030 PM_{2.5} concentrations do not exceed 25µg/m³ (24 hour average), while providing for industrial growth.
- 6.5 Manage offensive and objectionable effects from discharges into air identified because of their frequency, intensity, duration, offensiveness and location.
- 6.6 Ensure that discharges of contaminants into air, and the effects of those discharges, occur in appropriate locations, taking into account the distribution of land use as provided for by the relevant district plan.
- ~~6.7 Where authorised land use change results in land use activities which are significantly affected by discharges to air from an existing activity, the existing activity may be required to reduce effects or relocate within a defined time frame.~~
- 6.8 Consider longer consent durations to provide ongoing operational certainty where activities that discharge into air locate appropriately to avoid the potential for reverse sensitivity effects.
- 6.9 Recognise the value of air quality as a taonga to Tangata Whenua and work with Ngai Tahu to manage adverse effects of discharges into air on wahi tapu, wahi taonga, and sites of significance to Ngai Tahu.
- 6.10 Minimise cumulative effects by requiring application of the best practicable option to minimise discharges into air. All activities that discharge into air apply, at least, the best practicable option so that cumulative effects are minimised.
- 6.11 Recognise the contribution of nationally and regionally significant infrastructure to the regional and national economy and facilitate its ongoing operation and development.
- 6.11A Locational constraints of discharging activities, including heavy industry and infrastructure, are recognised so that operational discharges into air are enabled where the best practicable option is applied.
- 6.12 Recognise that the management of discharges into air is likely to improve during the life of resource consents and incorporate such improvements in new and replacement consents.
- 6.13 Provide for discharges of contaminants into air necessary to protect production species and other biodiversity from biosecurity risks.
- ~~6.14 Adopt a precautionary approach when assessing the effects of discharges where the effects are not predictable because of uncertainty or absence of information.~~

BPO1 Minimise the effects of air discharges by:

- a) Using best practicable option emissions control at the source of the discharge;

b) Adopting a precautionary approach to new discharges to air where there is uncertainty and a risk of serious effects or irreversible harm to the environment from those discharges; and

c) Avoiding discharges to air that will cause significant adverse effects.

BPO2 Require individual sources of any discharge to air to demonstrate where relevant to the discharge type and reasonably practicable:

a) Fuels used are appropriate for use in the Christchurch Air Shed or Clean Air Zones;

b) Energy is efficiently used;

c) Best practicable option is used;

d) Fugitive emissions are appropriately managed;

e) Risk and adverse effects on people, property and the environment from hazardous air pollutants are avoided; and

f) The amenity provisions of any zone where the discharge is having an effect are met.

Industrial and large scale discharges to air

6.19 Enable discharges of contaminants into air associated with large scale fuel burning devices, industrial and trade activities and nationally and regionally significant infrastructure, in locations where the discharge is compatible with the surrounding land use pattern and while ensuring that adverse effects on air quality are minimised.

~~6.20 [Note: To be re-drafted as per 13-8 of the S42A report] [see new BPO policies above]~~

~~6.21 [Note: To be re-drafted as per 13-8 of the S42A report] [see new BPO policies above]~~

6.22 Enable the discharge of PM₁₀ in Clean Air Zones where an offset is to be realised in accordance with the Resource Management (National Environmental Standards for Air Quality) Regulations 2004.

7. Rules

Either **delete** or amend Rule 7.17 as follows:

7.17 The discharge of contaminants into air from a large scale solid fuel burning device or from an industrial or trade premise established after 28 February 2015 that will likely (based on air dispersion modelling) result in the National Environmental Standard for Air Quality standards being exceeded is a non-complying activity.

Either **delete** or amend Rule 7.18 as follows:

- 7.18 Unless provided for under Rules 7.19 to 7.26 or Rules 7.28 to 7.58, the discharge of contaminants into air from a large scale fuel burning device or from an industrial or trade premise that was established prior to 28 February 2015 or will likely not (based on air dispersion modelling) result in the National Environmental Standard for Air Quality standards being exceeded is a discretionary activity.
- 7.27 Any discharge of contaminants into air from any large scale fuel burning device that does not comply with the appropriate permitted activity rule and conditions, and is not prohibited, and is not otherwise provided for by rules 7.3, 7.4, 7.17, 7.18 or rules 7.19 – 7.26 is a discretionary activity.
- 7.59 Any discharge of contaminants into air from an industrial or trade premise or process that does not comply with the appropriate permitted activity rule and conditions, and is not prohibited, and is not otherwise provided for by rules 7.3, 7.4, 7.17, 7.18, 7.19 – 7.26 or 7.28 – 7.58 is a discretionary activity.

Proposed best practicable option assessment criteria:

The degree to which the activity affects the ability to meet the National Environmental Standard for Air Quality standards.

Whether the amount of separation between the activity discharging to air and existing activities sensitive to air discharges is appropriate to mitigate adverse effects on the environment, health and amenity.

The value of the existing investment and its contribution to economic and social wellbeing.

The extent to which the activity is consistent with and appropriate to the purpose of the underlying zoning of the subject site.

The degree to which conditions of consent can avoid, remedy or mitigate adverse effects.

The degree to best practicable options for the control of air discharge emissions can or will be implemented.

The extent to which amenity provisions of any zone where the discharge is likely to have an effect are met.

Whether the assessment methods, including monitoring and modelling are appropriate to the scale of the discharge and any potential adverse effects.

Whether discharges to air are reduced where practicable, through:

a) Use of fuels appropriate for the Christchurch Air Shed or Clean Air Zones;

b) Efficient use of energy;

c) Implementation of best practicable option;

d) Appropriate management of fugitive emissions; and

e) Avoidance of risk and adverse effects on people, property and the environment from hazardous air pollutants.

Schedule 1 - Information to be provided with applications for resource consent

Add as Item 11:

11. The assessment of compliance with the National Environmental Standard for Air Quality standards and air dispersion modelling referred to in Rules 7.17 and 7.18 should be undertaken in accordance with the Good Practice Guide for Assessing Discharges to Air from Industry, Ministry for the Environment, June 2008 and the Good Practice Guide for Atmospheric Dispersion Modelling, Ministry for the Environment, June 2004, or any subsequent updates to those guides.

Schedule 1 – List of information requirements

Add as Item 8:

8. The assessment of compliance with the National Environmental Standard for Air Quality standards and air dispersion modelling referred to in Rules 7.17 and 7.18 should be undertaken in accordance with the Good Practice Guide for Assessing Discharges to Air from Industry, Ministry for the Environment, June 2008 and the Good Practice Guide for Atmospheric Dispersion Modelling, Ministry for the Environment, June 2004, or any subsequent updates to those guides.