

Tabled @ Hearing 11/11/2015 Fonterra legal

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*under:* the Resource Management Act 1991 ('RMA')

*in the matter of:* the proposed Canterbury Air Regional Plan

*and:* **Fonterra Co-operative Group Limited**

*Submitter 63146*

*Further submitter C15C/102825*

## Summary of submissions on behalf of Fonterra Co-operative Group Limited

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## **SUMMARY OF SUBMISSIONS ON BEHALF OF FONTERRA CO-OPERATIVE GROUP LIMITED**

### **Introduction**

- 1 This hearing is in the process of considering submissions and further submissions in relation to the proposed Canterbury Air Regional Plan (*pCARP*).
- 2 This includes Fonterra Co-operative Group Limited (*Fonterra*- 63146 and C15C/102825). Fonterra has already called relatively extensive expert evidence (including economics, air discharge and planning) and on that basis these submissions simply provide a succinct description of some of the key issues affecting Fonterra.
- 3 Fonterra is also conscious that the Hearing Panel has already heard submissions on (in particular) the issue of reverse sensitivity<sup>1</sup> (that should perhaps be correctly referred to as the 'existing environment' issue). In the interests of an efficient hearing process these submissions simply adopt the background legal analysis of 'reverse sensitivity' (as provided by others) and focus on how Policy 6.7 (as notified) would specifically affect Fonterra's operations.
- 4 Accordingly, and in terms of a broad outline, these submissions address
  - 4.1 Fonterra's concerns with the Officer approach to this hearing, including the extent to which submitters have properly had the opportunity to consider what is actually being 'proposed';
  - 4.2 the section 32 analysis undertaken (for the purposes of ensuring Fonterra has scope on this issue);
  - 4.3 the issue of 'ambient' versus 'localised' air quality (and the appropriateness of the notified *pCARP* framework for assessing air discharge effects);
  - 4.4 the use of the ambient air quality guidelines;
  - 4.5 reverse sensitivity (most notably Policy 6.7) and how it affects Fonterra's operations; and
  - 4.6 the need for a workable rules framework for industrial and trade processes.

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<sup>1</sup> Including Carter Holt Harvey Pulp & Paper Limited and Gelita New Zealand Limited

### **Approach of the Officer Report**

5 Throughout the section 42A Officer Report and again through the *Responses to Questions of the Panel* there are numerous references to relief being suggested in circumstances where no specific wording has been proposed in response to submissions (with in some cases the Officers noting they may seek to bring further information or recommended changes during the hearing process).

6 For example:

6.1 at numerous locations in the section 42A Officer Report when discussing industrial and trade discharges, best practicable option and (in particular) Rules 7.17 and 7.18 the Officers recommend (again for example) that:<sup>2</sup>

#### ***Recommendations - Industrial and Large Scale Discharges to Air Policies***

##### ***Recommendation - Ind-Gen***

*It is recommended that:*

1. *New policies are inserted that set clear expectations around application of the best practicable option in the context of the receiving environment<sup>(272)</sup>*
2. *Rules 7.17 and 7.18 are amended to enable industry to develop in a way that is appropriate relative to the sensitivity of the receiving environment<sup>(273)</sup>*

...

##### ***Recommendation R - 6.20***

*It is recommended that:*

1. *Policy 6.20 is amended to provide clear guidance as to what is to be achieved in applying BPO in different receiving environments.<sup>(275)</sup>*

##### ***Recommendation R - 6.21***

*It is recommended that:*

1. *Policy 6.21 is amended to provide clear guidance as to what is to be achieved in applying BPO in different*

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<sup>2</sup> From page 16-18.

*receiving environments and to refer to the NESAQ as well as Ambient Air Quality Guidelines.<sup>(276)</sup>*

but in each case, no specific wording has been provided and in most cases it is not possible to ascertain from the discussion in the report as to what the wording might properly look like; and

- 6.2 at a number of places in the *Responses to Questions of the Panel* and other answers to questions, the Officers further note in response that various provisions could be updated, amended or restructured wording provided in reply.
- 7 Although Fonterra may well support the amendments being recommended it has been very difficult to prepare technical evidence and make constructive comment on amendments and wording that does not [yet] exist. Fonterra has done its best to propose its own wording on issues relevant to it but is concerned that might either 'fall by the way side' or be no longer relevant should the Officers actually articulate what is being proposed.
- 8 Fonterra of course accepts (and would encourage) the Officers to provide 'updates' on new issues and to comment on submitter-recommended relief as it arises through the hearing process – but the situation is different here (with, especially in the case of industrial, trade and large scale discharges to air a number of 'corner stone' provisions as notified being accepted as requiring deletion or amendment by the Officers but no actual replacement wording being provided prior to submitters presenting).
- 9 Given the current hearing process (including the impact of section 66 of the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010), Fonterra is concerned to ensure that it (along with all other submitters) is provided with as full opportunity as possible to comment on the provisions of the pCARP as they might be reflected in the final version.
- 10 On that basis, Fonterra respectfully asks the Hearing Panel to carefully consider potential 'natural justice' implications prior to accepting or forming what in effect will be new provisions within the pCARP framework (if they have not been properly considered by submitters).

### **Section 32 analysis**

- 11 The first question addressed by the Council Officers in the *Responses to Questions of the Panel* was:
1. Do any of the submissions raise an objection on the basis that the Section 32 analysis is inadequate?

- 12 In response, the Officers include as "Attachment 1" to the *Responses to Questions of the Panel* a list of submitters that they identify as having raised the issue of the adequacy of the section 32 analysis undertaken. There is no mention of Fonterra in that list.
- 13 In terms of ensuring scope (especially given that the issue of section 32 is discussed in detail by **Ms Ashley**<sup>3</sup>) it is noted that the Fonterra original submission very clearly raised the issue of the adequacy of the section 32 assessment undertaken. Unfortunately it appears that the five key "General" (or 'overarching') submission points included from pages 3 to 10 of the original Fonterra submission have not been referred to by the Officer or expressly included in the summary of submissions.
- 14 For completeness it is noted that those general/overarching submission points were:
- 14.1 the structure and tone of the pCARP;
  - 14.2 the need to give effect to the Canterbury Regional Policy Statement (CRPS);
  - 14.3 the lack of recognition of significant industrial and trade premises;
  - 14.4 the [mis]use of the Ministry for the Environment's Ambient Air Quality Guidelines; and
  - 14.5 insufficient justification within the section 32 evaluation.
- 15 To varying extents the first four of those are touched on in various places in these submissions, the evidence provided by Fonterra and other original submission points. That is not the case (other than the discussion provided by **Ms Ashley**) in respect of section 32.
- 16 For ease of reference, the discussion as to the section 32 included in the original Fonterra submission is set out in full below:
- 3.28 Overall, Fonterra is concerned that there is a lack of recognition of the potential impacts that the pCARP provisions may have on Fonterra's existing (and potential future) manufacturing sites within the Section 32 evaluation. While dairy processing plants in rural areas are identified within the Section 32 report as being 'appropriate', there is a lack of justification for the 'management' that is deemed necessary outside of polluted airsheds "to ensure that new polluted airsheds are not created". It is also noted that while the Section 32 report includes numerous references to the requirement for the pCARP to give effect to the RPS,

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<sup>3</sup> At her paragraph 24 – 26.

the only apparent discussion of issues raised in the RPS is in respect to reverse sensitivity, not in terms of the distinction made between ambient and localised air quality. Furthermore, it is not considered that the pCARP provisions give effect to the RPS reverse sensitivity provisions.

*Relief Requested*

3.29 That the specific amendments itemised as Submission No's 9 & 28 within the table contained in Section 4 be accepted.

- 17 The section 32 assessment (or lack thereof) is also referred to in a number of other locations throughout the original submission in addition to the above.
- Ambient versus localised**
- 18 All five of Fonterra's manufacturing sites are located in relatively isolated rural areas featuring very low population densities and few, if any, adjacent sensitive activities.
- 19 Against that background, the CRPS makes a clear distinction between ambient (Objective 14.2.1, Policy 14.3.1) and localised air quality effects (Objective 14.2.2, Policy 14.3.3), which is not reflected within the notified pCARP. Instead, and in simple terms, the pCARP draws no distinction between the two and they are applied uniformly, regardless of effect (i.e. despite Objective 5.8 seeking to recognise "*that air quality expectations throughout the Region differ depending on location and characteristic of the receiving environment*").
- 20 It appears that Fonterra's discharge activities (which as stated have generally been deliberately located away from sensitive receptors) would be subject to a similar level of scrutiny as a discharge activity that was occurring within a gazetted urban air shed.
- 21 In response to that concern the section 42A Officer Report considers that "*there is no clear distinction as where local effects become ambient effects*" and that "*ambient air quality effects do occur outside of polluted airsheds, and cumulatively localised effects can result in an ambient air quality problem*"<sup>4</sup>.
- 22 On the basis of the technical evidence being called by Fonterra that approach to appears to be fundamentally incorrect. While Fonterra's discharges may have localised effects on air quality within their rural locality they do not have a material effect on ambient air quality within a gazetted air shed (or Clean Air Zone) or even the wider rural area.

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<sup>4</sup> Section 42A report, pages 5-4 & 5-5

- 23 To address the concern, Fonterra is seeking a new objective (Objective 5.10) - along with a number of other amendments - that make a clear distinction between managing localised air quality effects and any potential impact on the wider ambient environment.
- 24 As notified, the approach in the pCARP could mean that appropriately located air discharge activities are either prevented or have under take assessments relevant to a gazetted air shed (or Clean Air Zone) that are wholly disproportionate to the level of real-life effect(s).

#### **Use of the Ambient Air Quality Guidelines**

- 25 The 2002 Ambient Air Quality Guidelines (AAQG) published by the Ministry for the Environment at least in part formed the basis of the more recent National Environmental Standards for Air Quality (NESAQ) were based.
- 26 At a general level Fonterra supports reference to the AAQG as a means of wider air shed management but is concerned about their use in the notified version of the pCARP as an individual discharge 'trigger' and assessment methodology.
- 27 In particular, Policy 6.21 and Rule 7.18 seek to avoid/prohibit (respectively) industrial and large scale combustion discharges to air that will likely result in exceedances of the AAQG (in circumstances where the nature of the wording proposed is such that an inability to avoid is likely to lead to the decline of consent).
- 28 This appears to be directly contrary to the express wording of the AAQG that state, for example:<sup>5</sup>

As was stated in the 1994 Guidelines, 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. Individual discharges include point, area or line sources from activities such as industries, roads and sewage-treatment plants.

...

...it is useful to briefly look at how the ambient guideline values should **not** be used to assess individual discharges, and to highlight key issues that must be taken into account in assessing the environmental impacts of individual discharges through the resource consent and plan processes.

[Emphasis added]

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<sup>5</sup> Ministry for the Environment, Air Quality Guidelines (2002), section 3.7, page 40.

- 29 Examples given as to how the guidelines should not be applied include not taking into account the sensitivity of the receiving environment or considering background concentrations and potential cumulative effects; and that the AAQG should only be used as part of a full assessment of environmental effects.<sup>6</sup>
- 30 In addition to Policy 6.21 and Rule 7.18, Fonterra is concerned that the requirement in Policy 6.2 (which requires effects on air quality are minimised where ambient air quality monitoring data is between 66% and 100% of AAQG levels) might effectively become a 'pass/fail' criteria for the assessment of individual resource consents. That is also clearly not an appropriate use of the AAQG.
- 31 On that basis Fonterra is further concerned to ensure Policies 6.2 and 6.3 should refer only to measured ambient air quality monitoring data (and not individual discharges).

#### **Reverse sensitivity**

- 32 As noted in paragraph 3, these submissions do not repeat what has been said by others in relation to 'what is reverse sensitivity' and its potential application to the pCARP.
- 33 In simple terms, Fonterra does however wish to emphasise that:
- 33.1 reverse sensitivity is an effect that is typically considered in the context of either an application for resource consent or enabling land use zoning (the latter typically at a District Council level) which might mean that more people are exposed the effects of pre-existing activities;
- 33.2 it appears that Policy 6.7 is intended to address "*legacy effects*"<sup>7</sup> – the example cited by implication being the Gelita situation. In that context it is submitted that the issue not really one of reverse sensitivity *per se* (as the effects are occurring already) – but rather a need to ensure that the first in time activity (e.g. Gelita) has full regard to the latter in time activity (e.g. the Tannery and other residential-type development) as part of 'the environment' when it comes to renew or review its resource consent(s);
- 33.3 if the above is accepted then in Fonterra's submission the issue is one properly of the appropriateness of any effects and weight for the decision maker (in particular, how much weight should be given to the effects on a person who 'came to the nuisance').

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<sup>6</sup> At page 41.

<sup>7</sup> As referred to by the Officer in the presentation of the *Responses to Questions of the Panel*



- 34 The directive for 'relocation' in Policy 6.7 (if effects cannot be reduced [to acceptable levels] – whatever they might be) appears contrary to general approach of wider RMA framework (which is generally intended to provide as much certainty as possible to the 'first in time' activity).
- 35 In addition, the wording of the policy is such that it is not limited to "legacy effects". This is of particular concern to Fonterra – the most obvious scenario being subsequent development alongside a milk processing plant. Even very modest activity around the boundary of a Fonterra site (e.g. construction of a rural cottage in accordance with permitted activity rules) could, on the wording of Policy 6.7, have very fundamental implications for Fonterra (in circumstances where the 'cottage owner' clearly came to the nuisance).
- 36 Overall, Fonterra simply submits that the CRPS already provides a clear framework for addressing 'reverse sensitivity effects' and this has not been reflected within the pCARP. Although Policies 6.6, 6.7, 6.8 and 6.19 appear to recognise that reverse sensitivity effects can arise as a result of incompatible land use patterns, the provisions fail to protect the existing activity discharging to air (as sought by Policy 14.3.5 of the RPS):

**Policy 14.3.5 – Relationship between discharges to air and sensitive land-uses**

In relation to the proximity of discharges to air and sensitive land-uses:

- (1) To avoid encroachment of new development on existing activities discharging to air where the new development is sensitive to those discharges, unless any reverse sensitivity effects of the new development can be avoided or mitigated.
  - (2) Existing activities that require resource consents to discharge contaminants into air, particularly where reverse sensitivity is an issue, are to adopt the best practicable option to prevent or minimise any actual or likely adverse effect on the environment.
  - (3) New activities which require resource consents to discharge contaminants into air are to locate away from sensitive land uses and receiving environments unless adverse effects of the discharge can be avoided or mitigated.
- 37 In addition, even within the immediate context of the pCARP, Policies 6.6, 6.8 and 6.19 appear to conflict in part with the approach taken by Policy 6.7 (noting however that Policy 6.8 also sets a potentially unachievable expectation that is linked to consent duration rather than environmental effects).

38 Fonterra accordingly seeks a number of amendments that will bring the pCARP in line with the CRPS.

39 In practical terms it also needs to be emphasised that a consent holder of a discharge to air permit typically has little control over the activities that locate beyond its property boundary. In such circumstances it is further submitted that core reverse sensitivity matters are ultimately and more appropriately dealt with through district plan provisions as directed by the CRPS.

**The approach to industrial and trade discharges generally**

40 On the basis of the evidence of **Mr Keir** and **Mr Copeland**, milk processing is clearly a significant part of the Canterbury and wider New Zealand economy.

41 However, with specific reference to Rules 7.14 to 7.18 Fonterra is especially concerned to ensure the pCARP continues to enable the discharges that are required as a part of its milk processing operations.

42 In particular, the potential for the expansion of an existing, or establishment of a new greenfield, manufacturing site which cannot avoid *some effects* beyond its boundary (even though located outside any Clean Air Zone) to potentially be a prohibited activity status (under Rule 7.18) is entirely inconsistent with the need of the Region to enable milk processing.

43 In terms of the wider rules framework, the implications of a prohibited activity (or even a non-complying) status have not been sufficiently justified within the Section 32 evaluation – but would have the likely effect of fettering aspects of industrial development throughout Canterbury.

**Conclusion**

44 The pCARP will need to “*give effect*” to the CRPS (which includes Chapter 14 – Air Quality).<sup>8</sup>

45 Against the above requirement it is respectfully submitted that there are significant shortcomings in the notified version (both in terms of the extent to which it gives effect to the CRPS and the extent to which it provides a workable air discharge regime for those undertaking and affected by air discharge activities in the Canterbury Region).

46 In the particular case of Fonterra, while dairy processing plants in rural areas are identified within the section 32 report as being ‘appropriate’, there is also a lack of justification for costs arising

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<sup>8</sup> RMA, s67(3)(c).

from the management that is 'deemed' (albeit it is submitted incorrectly) necessary outside of polluted airsheds, particularly where there is nil or only a negligible impact on ambient air quality.

- 47 In addition, the approach as to matters such as air shed management and reverse sensitivity appears to depart (in some cases by a long way) from recognised *and required* approaches under the AAQG, the NESAQ, the case law around *inter alia* reverse sensitivity and ultimately Part II of the RMA.

**Evidence being called**

- 48 Fonterra is calling evidence from:

48.1 **Mr Tim Keir** (Fonterra);

48.2 **Mr Mike Copeland** (economic expert);

48.3 **Mr Roger Cudmore** (air quality expert);

48.4 **Mr Richard Chilton** (air quality expert);

48.5 **Mr Jason Pene** (air quality expert); and

48.6 **Ms Justine Ashley** (planning).

- 49 It is noted that the evidence of **Mr Cudmore** is being called jointly with Ravensdown Fertiliser Co-operative Group Limited. For clarification it is noted that the two entities have (but for the evidence of **Mr Cudmore**) prepared separate submissions and presentations in respect of this hearing.

Dated: 11 November 2015

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Group Limited