

**BEFORE THE HEARING COMMISSIONERS  
AT CANTERBURY**

**IN THE MATTER** of the Resource Management Act  
1991 ("**RMA or the Act**")

**AND**

**IN THE MATTER** of the Environment Canterbury  
(Temporary Commissioners and  
Improved Water Management) Act  
2010

**AND**

**IN THE MATTER** of the hearing of submissions on the  
Proposed Canterbury Air Regional Plan

---

**LEGAL SUBMISSIONS FOR HORTICULTURE NEW ZEALAND**

**23 NOVEMBER 2015**

---

---

 **ATKINS | HOLM | MAJUREY**

Helen Atkins  
PO Box 1585  
Shortland Street  
AUCKLAND 1140

---

Solicitor on the record  
**Contact solicitor**

Helen Atkins  
Helen Atkins

Helen.Atkins@ahmlaw.nz  
Helen.Atkins@ahmlaw.nz

(09) 304 0421  
(09) 304 0421

## TABLE OF CONTENTS

<b>INTRODUCTION AND OVERVIEW .....</b>	<b>1</b>
Overview of Horticulture New Zealand.....	1
Horticulture New Zealand Evidence.....	2
<b>HORTICULTURE NEW ZEALAND KEY CONCERNS AND PROPOSED AMENDMENTS.....</b>	<b>2</b>
Objectives.....	2
Non-Target Crops as Sensitive Activities.....	3
Definition of 'offensive and objectionable' .....	4
Agrichemicals and Fertilisers .....	5
<i>Training</i> .....	6
<i>Fertilisers</i> .....	8
Nuisance .....	8
Reverse Sensitivity .....	8
Outdoor Burning .....	9
Other Matters following Evidence Exchange.....	10
<b>CONCLUSION .....</b>	<b>10</b>

## **MAY IT PLEASE THE COMMISSIONERS:**

### **INTRODUCTION AND OVERVIEW**

1. The essence of Horticulture New Zealand's ("**Horticulture NZ**") submission on the proposed Canterbury Air Regional Plan ("**pCARP**") is to ensure that the provisions are workable and practical, and ensuring that best practice is used when undertaking activities which discharge to air.
2. Particularly, Horticulture NZ seeks appropriate protection for horticultural activities from air discharges, notably protection of non-target crops from spray drift.
3. Horticulture NZ also seeks the inclusion of training requirements for agrichemical application to be included in the pCARP. Horticulture NZ considers that training in agrichemical application is a crucial step in the safe use of agrichemicals and that inclusion in plans is an appropriate measure to ensure that the objectives, policies and rules in the plan are achieved.
4. Horticulture NZ's other submissions seek largely to clarify the provisions.

### **Overview of Horticulture New Zealand**

5. On behalf of its 5,454 active grower members Horticulture NZ takes a detailed involvement in resource management planning processes as part of its National Environmental Policies. Horticulture NZ works to raise growers' awareness of the RMA to ensure effective grower involvement under the Act, whether in the planning process or through resource consent applications. The principles that Horticulture NZ considers in assessing the implementation of the RMA include:
  - (a) The effects based purpose of the RMA;
  - (b) Non-regulatory methods should be employed by councils;
  - (c) Regulation should impact fairly on the whole community, make sense in practice, and be developed in full consultation with those affected by it;
  - (d) Early consultation of land users in plan preparation; and
  - (e) Ensuring that RMA plans work in the growers interests both in an environmental and sustainable economic production sense.

## Horticulture New Zealand Evidence

6. Horticulture NZ has produced evidence from the following two witnesses:
  - (a) **Lynette Wharfe** – planning consultant, The Agribusiness Group, has produced primary and rebuttal evidence in respect of Horticulture NZ's submissions.
  - (b) **Matthew Dolan** – Business Manager, Horticulture NZ with responsibility for the GROWSAFE portfolio, sets out the requirements and features of the GROWSAFE agrichemical application accreditation.

## HORTICULTURE NEW ZEALAND KEY CONCERNS AND PROPOSED AMENDMENTS

7. In this section I outline:
  - (a) The key concerns that Horticulture NZ has with the pCARP; and
  - (b) The general thrust of the amendments Horticulture NZ proposes to deal with those concerns.
8. Further details of Horticulture NZ's position on the issues and the amendments are set out in the primary and rebuttal evidence of Ms Wharfe. In particular, Ms Wharfe has set out a table of Horticulture NZ's submissions and how they have been dealt with by the s42A Report.<sup>1</sup> Where submissions have been accepted by the officer, the amendments are supported. The below matters are the outstanding concerns.

### Objectives

9. Horticulture NZ sought that discharges to air are managed in accordance with the existing amenity values of the relevant environment, however the s42A Report rejects this submission as it would be overly onerous to describe each constantly changing environment in the area.<sup>2</sup> Ms Wharfe proposes text for Objective 5.4 which addresses both changes:<sup>3</sup>

Discharges to air are managed in accordance with the existing amenity values of the receiving environments in which they are located.

10. In regards to Objective 5.8 Horticulture NZ considers it more appropriate to manage air quality in light of different receiving

<sup>1</sup> EIC of Lynette Wharfe for Horticulture NZ, at Appendix 1.

<sup>2</sup> S42A Report at Recommendation R-5.4.

<sup>3</sup> EIC Lynette Wharfe for Horticulture NZ at paragraphs [6.1] to [6.8].

environments, rather than merely recognise the difference as recommended.<sup>4</sup> Ms Wharfe proposes a middle ground:<sup>5</sup>

Manage air quality to reflect the different receiving environments across the region, taking into account the location and characteristics of the background receiving environment, including the underlying use patterns or zoning.

### **Non-Target Crops as Sensitive Activities**

11. Horticulture NZ considers that including 'non-target crops' in the definition of 'sensitive activities' is appropriate, particularly in the context of agrichemical spray drift and fertiliser use.
12. The intention of Horticulture NZ's submission on this point was to protect crops beyond the boundary of the property on which discharge occurs from being damaged by an air discharge. This can be caused by dust, agrichemical or fertiliser drift, or ash.<sup>6</sup> For example if excessive ash lands on fruit just prior to harvest, which can cause significant damage and loss of value of the fruit.<sup>7</sup> Fertiliser drift landing on organically grown crops can affect the organic registration of the grower.
13. There is some concern that 'non-target crops' is not a clear category, and that such an inclusion would cause unnecessary over-regulation.<sup>8</sup>
14. Ms Wharfe considers that there could be a solution which addresses all concerns,<sup>9</sup> such as that proposed by Mr Le Marquand,<sup>10</sup> but does not agree with not including non-target crops at all, as suggested by Canterbury Aggregates and PIANZ/EFPNZ.
15. Ms Wharfe further notes that odour will not affect crops, and as such the provision should not affect the poultry industry.<sup>11</sup>
16. The Section 42A Report includes recommendations to address this issue, including a new sentence in the introduction of Section 1 under the heading 'Outdoor burning and rural discharges of

<sup>4</sup> S42A Report, at Recommendation R-5.8.

<sup>5</sup> EIC Lynette Wharfe for Horticulture NZ at paragraphs [6.9] to [6.16].

<sup>6</sup> Rebuttal Evidence of Lynette Wharfe for Horticulture NZ, at paragraph [44].

<sup>7</sup> An example of this features in the procedural decision *Hinton v Otago Regional Council*

<sup>8</sup> Rebuttal Evidence of Kevin Bligh for Canterbury Aggregates, and Emma-Jayne Hayward for Poultry Industry Association NZ and Egg Producers Federation NZ.

<sup>9</sup> Rebuttal Evidence of Lynette Wharfe for Horticulture NZ, at paragraph [45].

<sup>10</sup> EIC David Le Marquand for the Oil Companies, at paragraph [5.11].

<sup>11</sup> Rebuttal Evidence of Lynette Wharfe for Horticulture NZ, at paragraph [41].

contaminants<sup>12</sup>, and accepts the change to the definition<sup>13</sup> as sought Horticulture NZ's submission.<sup>14</sup>

17. It is noted that non-target crops already feature as matters of discretion in the pCARP in Rule 7.72(5), and adverse effects on vegetation and/or fauna beyond the boundary of the target site is considered by Rules 7.72(3), 7.74(4).
18. On further reflection, Horticulture NZ proposes two alternatives to address the concerns raised by PIANZ and Canterbury Aggregates as follows:
  - (a) Non-target crops are not defined as 'sensitive activities' but are referred to directly in the agrichemicals and fertilisers (Rule 7.72), ash and dust rules. This may also require a definition of 'non-target crops' as those crops which are sensitive to ash, dust, and agrichemical or fertiliser drift; or
  - (b) The definition of 'sensitive activities' includes 'Any non-target crop that will actually or potentially be adversely effected by a discharge of ash, dust, agrichemical drift and fertiliser drift...'.
19. Horticulture NZ sought changes to Policy 6.26, Rule 7.3 (to provide for exceptions to the non-complying rule),<sup>15</sup> and the deletion of permitted activities in Schedule 2.<sup>16</sup>

#### **Definition of 'offensive and objectionable'**

20. Horticulture NZ sought a definition of 'offensive and objectionable' as being effects which 'cause significant discomfort':<sup>17</sup>

Offensive and objectionable effects are effects that cause significant discomfort and need to be assessed in the context of the discharge, in particular the nature, frequency, duration, intensity and location of the discharge to determine the extent to which it may be considered offensive or objectionable. Offensive and objectionable effects will be assessed as set out in Schedule 2.

<sup>12</sup> S42A Report, Recommendation R-Section 1-5, page 5-4: "Agrichemical sprays and powders can have adverse effects on people and non-targets plants and animals if not managed appropriately."

<sup>13</sup> S42A Report, at 'Sensitive Activity' page 6-16.

<sup>14</sup> S42A Report, page 6-6: "Horticulture New Zealand seeks an addition to the definition to include non-target plants/crops which may be damaged by a discharge to air. It is appropriate that sensitive crops are protected from being adversely affected by discharges to air, but it is important that it is done in a way that is appropriate to ensure undue requirements are not imposed where there is no likely effect."

<sup>15</sup> EIC Lynette Wharfe for Horticulture NZ, at paragraphs [8.1] to [8.6].

<sup>16</sup> EIC Lynette Wharfe for Horticulture NZ, at paragraphs [8.7] to [8.15].

<sup>17</sup> EIC Lynette Wharfe for Horticulture NZ, at paragraph 5.25.

21. Ms Wharfe supports the inclusion of this definition,<sup>18</sup> but it has not been accepted by the officers, and is opposed by Ms Hayward for PIANZ.<sup>19</sup>
22. 'Offensive and objectionable' is an objective standard but one nonetheless based on the particular context,<sup>20</sup> to be determined by the enforcement authority, or the Courts.<sup>21</sup> In determining whether to impose an enforcement order, the Court has imported a two step process – firstly, whether the subject matter may be offensive or objectionable, and secondly, if so, whether this is to the extent that it is likely to have an adverse effect on the environment.<sup>22</sup>
23. The question for the Panel is whether 'offensive and objectionable' would be clarified by definition as a discharge which 'causes significant adverse effects'.
24. It is Horticulture NZ's submission that the definition clarifies the purpose of the offensive and objectionable term, namely to identify and avoid those effects which are likely to lead to enforcement action under the RMA.<sup>23</sup>
25. It is noted that 'noxious or dangerous effect' is defined in the Plan as "means an effect that is materially harmful to people or the environment".

### **Agrichemicals and Fertilisers**

26. Horticulture NZ is particularly interested in the policies and rules relating to agrichemical use and fertiliser use as growers are both users and potentially affected parties of these substances.
27. Horticulture NZ's views on the key planning issues in this respect are as follows:<sup>24</sup>
  - (a) That the pCARP implements Policy 14.3.4 of the CRPS, which seeks:

*To avoid adverse effects of agrichemical sprays drifting beyond property boundaries or onto non-targeted properties and to avoid the contamination of water.*

<sup>18</sup> EIC Lynette Wharfe for Horticulture NZ, at paragraphs 5.22-5.29.

<sup>19</sup> Rebuttal Evidence Emma-Jayne Hayward for PIANZ and EFPNZ, at paragraphs 2.1-2.3.

<sup>20</sup> *Watercare Services Limited v Minhinnick* [1997] 1 NZLR 294 (CA) at page 304, followed in *Save Our St Heliers v Ancona Properties Ltd* [2011] NZEnvC 19 at paragraph [13].

<sup>21</sup> Sections 17(3)(a), 314(1)(a)(ii), 322(1)(a)(ii), RMA.

<sup>22</sup> *Save Our St Heliers v Ancona Properties Ltd* [2011] NZEnvC 19 at paragraph [48],

<sup>23</sup> Sections 17(3)(a), 314(1)(a)(ii), 322(1)(a)(ii), RMA.

<sup>24</sup> EIC Lynette Wharfe for Horticulture NZ, at paragraph [11.6].

Horticulture NZ seeks amendments to Policy 6.25 and Rule 7.72 to implement the 'avoid' directive, over and above the 'minimise' currently proposed, and Policy 6.26 narrowed to discharges of smoke, dust or odour which are subject to the Schedule 2 offensive and objectionable test.<sup>25</sup>

- (b) That the pCARP's management of agrichemicals and fertilisers not cross into issues regarding their discharge into or onto water or land, which is the distinct focus of the LWRP.<sup>26</sup>
- (c) That fertilisers and agrichemicals should be split out into separate rules with clear and specific conditions related to the effects of the substances.<sup>27</sup>
- (d) That best management practice (not appropriate management practice) is enabled, through achieving a list of attributes.<sup>28</sup>
- (e) That the provisions for managing air quality outcomes for agrichemical use require:<sup>29</sup>
  - i. Compliance with specific sections of NZS8409:2004 Management of Agrichemicals.
  - ii. The substance approved under HSNO.
  - iii. That no adverse effects occur from off target spray drift.
  - iv. Preparation of a spray plan.
  - v. That appropriate training be undertaken.
  - vi. That notification be required in specific situations.

### **Training**

28. Horticulture NZ has sought that training requirements be specified in the pCARP. Horticulture NZ agrees that HSNO provisions and regulation should not be duplicated in the pCARP. Horticulture NZ's submission does not seek to duplicate HSNO, as Approved Handler is a limited HSNO tool but GROWSAFE is a specific and tailored accreditation system for

<sup>25</sup> EIC Lynette Wharfe at paragraphs [11.7] to [11.21].

<sup>26</sup> EIC Lynette Wharfe for Horticulture NZ, at paragraphs [11.22] to [11.23].

<sup>27</sup> EIC Lynette Wharfe for Horticulture NZ, at paragraphs [11.24] to [11.31].

<sup>28</sup> These attributes are set out in EIC Lynette Wharfe for Horticulture NZ at paragraph [11.36].

<sup>29</sup> EIC Lynette Wharfe for Horticulture NZ at paragraphs [11.38] to [11.81].



use in an RMA context. Horticulture NZ considers that reference to specific and tailored training requirements is useful for plan users.

29. The s42A report authors consider that the HSNO should direct training, rather than the pCARP:

"The qualifications of the contractors applying agrichemicals and fertilisers are not directly relevant to discharges into air. Rather it is the actions of those operators that is the relevant matter. Rule 7.72 requires that application is in accordance with HSNO regulations and New Zealand Standards. This is considered sufficient to ensure that CRC is able to exercise its functions under section 30 of the RMA, with regard to the management of discharges of contaminants into air."

30. It is Horticulture NZ's submission that training is essential to ensure that users are aware of best practice. Accreditation for aerial operations also ensures that best practice is used at all times.
31. As set out in the evidence of Mr Dolan, GROWSAFE training covers the knowledge and practices required for safe, responsible and effective use of agrichemicals, based on NZS8409:2004.<sup>30</sup> Horticulture NZ is a strong supporter and promoter of GROWSAFE as it results in best practice agrichemical management for the benefit of both people and communities, and the environment.<sup>31</sup> A clear statement about which agrichemical training programme is accepted by the Council as proof that HSNO requirements are met is needed to address the confusion which exists among agrichemical users about which scheme is appropriate, and to encourage participation in that scheme.<sup>32</sup>
32. Ms Wharfe supports the inclusion as training is a key component in ensuring that the risk of affecting non-target locations is met.<sup>33</sup> Both in rules and in Policy 6.25 (Sub 4.4.1).
33. Meridian Energy sought changes to ensure that weed spraying activities are provided for in the plan.<sup>34</sup> Ms Wharfe considers that the changes sought would not enable best practice application, and that the changes sought by Horticulture NZ are likely to address Meridian's concerns.<sup>35</sup>

<sup>30</sup> EIC Matthew Dolan for Horticulture NZ, at paragraph [3.5].

<sup>31</sup> EIC Matthew Dolan for Horticulture NZ, at paragraph [4.1].

<sup>32</sup> EIC Matthew Dolan for Horticulture NZ, at paragraph [4.2].

<sup>33</sup> EIC Lynette Wharfe for Horticulture NZ, at paragraphs [11.56] to [11.66].

<sup>34</sup> EIC Jane Whyte for Meridian Energy Ltd at paragraph [38].

<sup>35</sup> Rebuttal Evidence of Lynette Wharfe for Horticulture NZ, at paragraphs [53] to [55].

### **Fertilisers**

34. The conditions in Rule 7.72 are inappropriate for fertiliser use. Currently, by only allowing the application of fertilisers approved under HSNO, this provision is more stringent than the HSNO regime which does not necessarily apply to all fertilisers.
35. Ms Wharfe suggests identifying the relevant portions of the Horticulture Code of Practice for Nutrient Management to be included in a fertiliser rule, which could also address training requirements.<sup>36</sup>

### **Nuisance**

36. Horticulture NZ seeks that the term nuisance is deleted from the pCARP altogether.<sup>37</sup>
37. Horticulture NZ is concerned about the appropriateness of the use of the Health Act 1956 definition of 'nuisance' being used in an RMA context.

### **Reverse Sensitivity**

38. Horticulture NZ considers it appropriate to include a definition of 'reverse sensitivity', and Ms Wharfe proposes the following:<sup>38</sup>

Reverse sensitivity occurs when occupants of a new development (for example, a lifestyle block) complain about the effects of an existing, lawfully established activity (for example, noise or smell from industry or farming) which can have the effect of imposing economic burdens, operational limitations or other constraints on the existing activity thereby reducing its viability.

39. Following the s42A report<sup>39</sup> and evidence exchange, it is clear that there is a difference of opinion on the scope of reverse sensitivity and a definition would resolve this confusion. Ms Wharfe continues to consider her definition to be appropriate.<sup>40</sup>
40. In addition:
  - (a) Horticulture NZ seeks the deletion of Policy 6.7 as it does not only address legacy issues, but could be interpreted as looking forward.<sup>41</sup>

<sup>36</sup> EIC Lynette Wharfe for Horticulture NZ at paragraphs [11.73] to [11.78].

<sup>37</sup> Rebuttal Evidence of Lynette Wharfe for Horticulture NZ, at paragraphs [5.18] to [5.21].

<sup>38</sup> EIC Lynette Wharfe for Horticulture NZ, at paragraph [5.36].

<sup>39</sup> S42A Report, at Section 6.9.

<sup>40</sup> Rebuttal Evidence of Lynette Wharfe for Horticulture NZ, at paragraphs [32] to [37].

<sup>41</sup> EIC Lynette Wharfe for Horticulture NZ, at paragraphs [7.11] to [7.17].

- (b) Horticulture NZ seeks that Policy 6.8 also provides certainty to permitted activities, not merely consented activities.<sup>42</sup>

### Outdoor Burning

41. The main point of contention in the provisions is the nature of and extent of the controls that are necessary to manage the effects from outdoor burning. The Council is relying on Schedule 3 and smoke management plans as a key tool in managing the effects of smoke. Horticulture NZ supports the approach taken to managing the effects of outdoor burning in Schedule 3.<sup>43</sup>
42. Ms Wharfe sets out the changes which Horticulture NZ seeks in relation to outdoor burning, which are summarised as follows:
- (a) Amend Policy 6.15 to clearly enable best practice as well as Schedule 3, and not read as a rule;<sup>44</sup>
  - (b) Amend Rule 7.5 to discretionary activity status, as prohibited activity status is inappropriate for a 'catch-all' rule;<sup>45</sup>
  - (c) Support the recommended changes to Rule 7.7;<sup>46</sup>
  - (d) Amend Rule 7.8 to clarify that the concern is the burning of standing crop residue, not any crop residue;<sup>47</sup>
  - (e) Amend Rule 7.10 to delete reference to 'offensive and objectionable' which is too uncertain for a permitted activity standard, and replace 'in any direction' with 'upwind'.<sup>48</sup>
43. In regards to the definition of 'crop residue', the s42A Report author was concerned that officers would have to assess whether the crop residue was to be disposed of by burning.<sup>49</sup> Ms Wharfe notes that there may be crop residue which may not be standing or may be to be disposed of by other means.<sup>50</sup> She has suggested in response a definition as follows:

---

<sup>42</sup> EIC Lynette Wharfe for Horticulture NZ, at paragraphs [7.18] to [7.21].

<sup>43</sup> EIC Lynette Wharfe for Horticulture NZ, at paragraph [9.6].

<sup>44</sup> EIC Lynette Wharfe for Horticulture NZ, at paragraphs [9.8] to [9.11].

<sup>45</sup> EIC Lynette Wharfe for Horticulture NZ, at paragraphs [9.12] to [9.20].

<sup>46</sup> EIC Lynette Wharfe for Horticulture NZ, at paragraphs [9.21] to [9.24].

<sup>47</sup> EIC Lynette Wharfe for Horticulture NZ, at paragraphs [9.25] to [9.32].

<sup>48</sup> EIC Lynette Wharfe for Horticulture NZ, at paragraphs [9.38] to [9.46].

Rebuttal Evidence of Lynette Wharfe for Horticulture NZ, at paragraphs [52].

<sup>49</sup> S42A Report, at page 6-2.

<sup>50</sup> Rebuttal Evidence of Lynette Wharfe for Horticulture NZ, at paragraphs [5.13] to [5.17].

Standing crop residue: Means the standing organic matter left behind after a cultivated crop is harvested that is to be disposed of by burning.

44. Ms Wharfe also supports the evidence of Mr Pyke that stubble burning may be managed by Farm Environmental Plans.<sup>51</sup>

#### **Other Matters following Evidence Exchange**

45. Horticulture NZ supports a new objective which provides for recognition and provision for existing industrial, service and rural productive activities that discharge to air.<sup>52</sup>
46. Horticulture NZ submits that it is inappropriate to use the MfE Ambient Air Quality Guidelines 2002, as set out by a number of submitters and witnesses.<sup>53</sup>
47. Horticulture NZ supports the changes sought to the definitions of localised and ambient air quality, as set out in the evidence of Mr Cudmore for Fonterra and Ravensdown, and Ms Ashley for Fonterra.<sup>54</sup>
48. In the absence of any new Rules 7.17 and 7.18 being proposed by Council, Horticulture NZ supports Rule 7.17 and 7.18 as sought in the evidence of Mr Hansen for Ravensdown. Mr Hansen's approach would enable large scale industrial and trade activities to seek resource consents relative to the sensitivity of the receiving environment, which would include where resource consent for burners in greenhouses is required in rural areas.<sup>55</sup>

#### **CONCLUSION**

49. In conclusion, the key for Horticulture New Zealand is to ensure that the pCARP manages the adverse effects of air discharges while enabling horticultural activities to continue to operate.

**DATE: 23 November 2015**



**H A Atkins**

Counsel for Horticulture New Zealand

<sup>51</sup> Rebuttal Evidence of Lynette Wharfe for Horticulture NZ, at paragraphs [47] to [49].

<sup>52</sup> Rebuttal Evidence of Lynette Wharfe for Horticulture NZ, at paragraphs [10] to [11].

<sup>53</sup> Rebuttal Evidence of Lynette Wharfe for Horticulture NZ, at paragraphs [12] to [17].

<sup>54</sup> Rebuttal Evidence of Lynette Wharfe for Horticulture NZ, at paragraphs [18] to [25].

<sup>55</sup> Rebuttal Evidence of Lynette Wharfe for Horticulture NZ, at paragraphs [26] to [31].