

IN THE MATTER

of the Resource Management Act
1991

AND

IN THE MATTER

of the Proposed Canterbury Air
Regional Plan

LEGAL SUBMISSIONS

ON BEHALF OF WINSTONE WALLBOARDS LIMITED

(Submitter 61392 , Further Submitter 103060)

Dated 23 November 2015

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MAY IT PLEASE THE PANEL

Introduction

- 1 Winstone Wallboards manufactures GIB® plasterboard for domestic and export markets at its' site at 215 – 219 Opawa Road, Christchurch. The site also contains the company's only South Island distribution centre. With the exception of some specialty product lines, all plasterboard for the South Island market is manufactured and distributed from this site.
- 2 The company holds an air discharge permit for its manufacturing activities (CRC921758.1, granted 2006) and a separate air discharge permit for a load shedding diesel generator (CRC093728, granted 2010). Both of those consents expire in January 2030. The nature of the air discharges from the site will be described in evidence by Mr Cooper, the company's National Manufacturing Manager.
- 3 The company's submission on the pCARP covers a range of issues. It supports a number of the provisions of the Plan as notified and seeks amendments to, or deletion of, several of the proposed objectives, policies and rules. Mr Curtis and Ms Buckingham (the expert witnesses for the company) will address you as to those amendments and deletions. I have attached, for completeness, a set of the amendments which Winstone Wallboards seeks (including to the objectives and policies as re-drafted by the Panel prior to the commencement of the hearing).
- 4 My legal submissions today focus on the issues of reverse sensitivity, offsets and the as yet undrafted rule(s) which the Council intends to replace Rule 7.18 (the prohibited activity rule¹).

Reverse sensitivity (Objective 5.9, Policies 6.7 and 6.8)

- 5 Policy 6.7 has been the subject of significant criticism from many of the submitters and their witnesses. I am not aware of any submissions in support of the policy or the Council's proposed approach to the management of reverse sensitivity effects.

¹ Rule 7.18 (as notified) makes the discharge of contaminants into air from a large scale fuel burning device or from an industrial or trade premise which will likely result in the Ambient Air Quality Guidelines being exceeded a prohibited activity.

- 6 The Winstone Wallboards factory is appropriately located in the Industrial zone. Notwithstanding that, Policy 6.7 would require the company (on an application for a new consent or variation, or on a consent review by the Regional Council) to either reduce its effects or relocate, if sensitive land uses which were significantly affected by its' discharge commenced "within the neighbourhood".
- 7 The company is therefore strongly opposed to Policy 6.7, which would apply to any activity which has a sensitive activity begin nearby. As noted by Ms Chappell in her submissions for Carter Holt Harvey², the implications of the policy have not been considered or assessed by the Council and there is in fact no evidence to support the Council's approach.
- 8 Mr Maw suggested in his opening³ that the effect of decline of an application to renew a resource consent may be that the activity relocates to a more suitable location where the effects are considered to be more appropriate in the receiving environment. You will hear from Mr Cooper that it would not be financially viable for Winstone Wallboards to relocate its manufacturing capability within Canterbury. The significant (\$100m +) investment in a Greenfield site could not be justified when compared with alternative supply options. An enforced move from the Opawa Road site would most likely mean the end of plasterboard manufacturing in the South Island.
- 9 It appears, from the Council Officer's answers to the panel's questions, that Policy 6.7 is intended to address issues which the Council has had with Gelita's gelatine factory in Woolston. Counsel for Gelita advised that those issues are due to Gelita not complying with its resource consent⁴. It is unclear whether this was appreciated by the Council officer who drafted the policy and therefore whether the Gelita "issue" is in fact an issue which needs to be addressed in the pCARP. Gelita's counsel suggests that bringing the Gelita site back into compliance with its consent will resolve the issue, to the extent that it exists.

² Legal Submissions on behalf of Carter Holt Harvey date 29 October 2015 at paragraph 5.6

³ Opening Legal Submissions for the Canterbury Regional Council at paragraph 50

⁴ Summary of Submissions on Reverse Sensitivity Issues on behalf of Gelita NZ Limited dated 30 October 2015 at paragraph 28

- 10 As noted in the legal submissions for several of the other submitters, the Council's approach is not supported by the case law on reverse sensitivity. Past reported cases typically involve situations where an applicant seeks resource consent or a plan change to enable development which may be incompatible with existing (already authorised) activities. It is settled law that reverse sensitivity is itself an adverse effect in terms of s3 of the RMA⁵. That has a significant consequence. If reverse sensitivity is an adverse effect, then there is a duty (on an applicant for resource consent or a plan change proponent) to avoid, remedy or mitigate that effect so as to achieve the Act's purpose of sustainable management⁶. Reverse sensitivity effects need to be addressed by an applicant at that stage, rather than that duty being shifted onto the existing activity later down the track.
- 11 I note that the Council's proposed approach is also inconsistent with Policy 14.3.5 of the CRPS which makes it clear that **existing** air discharging activities where reverse sensitivity is an issue are to adopt the BPO, and that **new** air discharging activities are required to locate away from sensitive land uses and receiving environments.
- 12 In my submission, the effects of a discharging activity on any nearby sensitive activities can be adequately considered and addressed by Policies 6.5, 6.6 and 6.10. Objective 5.9 and Policy 6.7 should therefore be deleted. Policy 6.8 (which refers to longer consent duration being available for activities that "locate appropriately") should (if it is retained) be amended so that it applies to both existing and new activities. There is no evidential basis for doing otherwise.

Rule 7.14 and Off-setting

- 13 Rule 7.14 seeks to implement Regulation 17 of the NES AQ⁷. Mr Maw confirmed in his opening legal submissions for the Council that achievement of the NES AQ standards has been a key driver for promulgation of the pCARP⁸.

⁵ *Winstone Aggregates & Auckland Regional Council v Papakura District Council* (A49/02) at [12]

⁶ *Winstone Aggregates v Matamata-Piako District Council* (2004) 11 ELRNZ 48

⁷ Resource Management (National Environmental Standards for Air Quality) Regulations 2004

⁸ Opening Legal Submissions for the Canterbury Regional Council at paragraph 12

- 14 Rule 7.14, as notified, required that 100% of the discharge of PM₁₀ from a large scale burning device be off-set where concentrations of PM₁₀ beyond the boundary of origin will likely equal or exceed 2.5µg/m³.
- 15 Winstone Wallboards sought the addition of a note to the rule to make it clear that in the case of existing activities renewing their consents, the rule only applied if the proposed discharge would increase off-site levels of PM₁₀ by 2.5µg/m³ or more above the previously consented level.
- 16 The relevant part of Regulation 17 provides:

17 *Certain applications must be declined unless other PM₁₀ discharges reduced*

- (1) *A consent authority must decline an application for a resource consent (the proposed consent) to discharge PM₁₀ if the discharge to be expressly allowed by the consent would be likely, at any time, to **increase** the concentration of PM₁₀ (calculated as a 24-hour mean under Schedule 1) by more than 2.5 micrograms per cubic metre in any part of a polluted airshed other than the site on which the consent would be exercised.*
- (2) *However, subclause (1) does not apply if—*
- (a) *the proposed consent is for the same activity on the same site as another resource consent (the existing consent) held by the applicant when the application was made; and*
- (b) *the amount and rate of PM₁₀ discharge to be expressly allowed by the proposed consent are the same as or less than under the existing consent; and*
- (c) *discharges would occur under the proposed consent only when discharges no longer occur under the existing consent.*

- 17 In the Section 42A report, the officers recommend that Rule 7.14 be deleted and replaced. The new Rule 7.14 now refers to existing offsite concentrations of PM₁₀ being **increased** by more than 2.5µg/m³, which makes the rule more similar to Regulation 17. However as the panel have noted, it is also still not clear whether the requirement in Rule 7.14 that "100% of the discharge will be off-set" applies to the **incremental change** in the discharge which results in the trigger limit being exceeded, or **all** of the emissions from the site.

- 18 The new rule also does not contain the Regulation 17(2) exemption for existing activities renewing their consents, as sought in Winstone Wallboard's submission.
- 19 The 2011 Users' Guide to the revised National Environmental Standards for Air Quality makes it clear that Regulation 17 is only intended to apply to the incremental change in the discharge when an application is made for a consent renewal. The Users' Guide states (in relation to the policy intention of Regulation 17):

*The '2.5 µg/m³' relates to the offsite effects of the activity's discharge. For applications to increase or change conditions for existing discharges, the 2.5 micrograms threshold is intended to refer to **any additional effect of the increased or modified discharges**. Where a new consent is sought to increase or modify a consented discharge, the policy intent is that **only any additional discharge requires offsetting** (ie, emissions **additional to those already authorised by a resource consent**), and **not** the whole discharge. This is because the existing consented discharge forms part of the background PM₁₀ concentration for an airshed⁹.*

- 20 The Guide also provides¹⁰:

*For existing discharges where a new consent is sought, the policy intent is slightly different. This is because, as stated above, the intent is not that existing emitters are penalised by the Regulations. Existing discharges are already part of the existing environment and will not bring about further reductions in air quality as a result of being granted without an offset. This means that in cases of existing discharges, the 2.5 micrograms threshold is intended to refer to **any additional effect of increased or different discharges**. In other words, where a new consent is sought (or the applicant applies to change the conditions of their consent), the policy intent is that **only any additional discharge is offset** (ie, emissions additional to those already authorised by a resource consent), and **not** the whole discharge.*

- 21 Thus, contrary to Ms Jenkins' response to Question 5, Regulation 17 is not intended to require 100% of the discharge to be off-set where an existing discharge is increased. In relation to Question 6, the

⁹ 2011 Users' Guide to the revised National Environmental Standards for Air Quality 2011: Updated 2014 at p73

¹⁰ 2011 Users' Guide to the revised National Environmental Standards for Air Quality 2011: Updated 2014 at p74

effect of the amendment sought by Winstone Wallboards to Rule 7.14 is, in my submission, entirely consistent with Regulation 17.

- 22 As Mr Curtis notes in his evidence¹¹, there is an issue as to whether Rule 7.14 is even necessary given that the NES applies in any event, irrespective of whether its requirements are included in the Plan rules.
- 23 I also note that Rule 7.14 is not a stand-alone rule. It applies in addition to other rules (such as Rule 7.27, the catch all discretionary activity rule for discharges from any large scale burning device). The Panel may decide (if there is scope) to remove Rule 7.14 and instead include a policy which refers to the requirements of Regulation 17. That policy would then flag to Plan users the requirements of the NES, and would ensure that the NES requirements are expressly considered if an application is made for a discretionary activity under Rule 7.27.
- 24 If Rule 7.14 is to be retained, it is accepted that a rule in the pCARP can be stricter than the NESAQ¹² but this needs to be supported by evidence. The Section 42A report suggests that only the space heating rules were intended to be stricter than the NESAQ¹³, and neither the section 32 report nor the section 42A report contain any evidence that the industrial PM₁₀ rules should be stricter than the NESAQ.

Rule 7.18 and Prohibited Activity Status

- 25 You will hear from Ms Buckingham that Rule 7.18 as notified could prevent existing industrial activities from obtaining renewals of their existing air discharge permits.
- 26 Council, in its s42A report, accepted (at least in part) the concerns expressed about Rule 7.18 and was to prepare a "new rule or rules that enable application of BPO as appropriate". However no such rules have yet been made available and Ms Jenkins advised the panel at the start of the hearing that she wished to reserve her position in relation to such a rule or rules until after she has heard the evidence.

¹¹ Evidence of Andrew Curtis at paragraph 5.1

¹² NESAQ Regulation 28

¹³ Section 42A report page 3-11

However the expert evidence was lodged by 18 September 2015, with (very limited) rebuttal evidence lodged by 9 October 2015.

- 27 Winstone Wallboards requests that its expert witnesses have the opportunity to file supplementary evidence if the new rule(s) (and any other proposed new or significantly amended provisions, such as the amendments to Policy 6.21) will not be tabled until the Council's closing.

Conclusion

- 28 The Council has stated that the pCARP is not intended to halt growth until room is made for industry to develop, but rather is intended to take a long term view and provide for growth (particularly through offsets and innovation) while emission reduction continues.
- 29 Council has accepted¹⁴ that some improvements to the pCARP are required to ensure that this occurs. However as you will hear from the witnesses for Winstone Wallboards (and from my review of the evidence, every other expert witness for the submitters), the amendments proposed by the Council in the s42A report do not go far enough. The amendments sought by Winstone Wallboards, and supported by Mr Curtis and Ms Buckingham, strike the appropriate balance between economic growth and protection of the environment, and better achieve the purpose of the Act.

DATED this 23rd day of November 2015



Monique Thomas

Counsel for Winstone Wallboards Limited

¹⁴ Section 42A report at p3-27

Objectives

Either **delete** Objective 5.9 or **amend** as follows:

- 5.9 *Ensure that new discharging and sensitive activities are spatially located so that ~~appropriate air quality outcomes are achieved both now and into the future~~ significant adverse effects are avoided.*

Policies

Central Policies Applying to All Activities

Amend Policies 6.2 and 6.3 as follows:

- 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~~ the values set out in the NES, and the values set out in the AAQC 2002 Update (where those contaminants are not covered by the NESAQ.*
- 6.3 *Improve air quality where concentrations of contaminants exceed 100% of guideline values set out in the Ambient Air Quality Guidelines 2002 Update the standards in the NES, and the values set out in the AAQC 2002 Update (where those contaminants are not covered by the NESAQ.*

Either **delete** Policy 6.4 or **amend** as follows:

- 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.~~*

Delete Policy 6.7:

- ~~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.*~~

Amend Policy 6.8 as follows:

- 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.~~*

Amend Policy 6.19 as follows:

6.19 *Enable discharges of contaminants to 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~~ underlying zoning and while ensuring that activities on air quality are minimised.*

6.21 *[To be re-drafted as per 13-8 of the s42A report. Winstone Wallboard's submission sought that reference in this policy to the 2002 AAQG be deleted and replaced with reference to the NESAQ or that the AAQG only be referred to for any values not addressed in the NESAQ].]*

Rules

The section 42A report proposes that Rule 7.14 as notified be deleted and replaced with a new rule. Further **amendments** to that new rule are sought as follows:

7.14 *Any discharge of PM₁₀ into air that would be likely, at any time, to increase the ambient concentration) of PM₁₀ (calculated as a 24-hour mean) by more than 2.5µg/m³ in any part of a polluted airshed other than the site on which the discharge occurs, is a restricted discretionary activity provided the following condition is met:*

1. *~~100%~~ The portion of the discharge which results in the exceedance will be off-set within the polluted airshed in accordance with Regulation 17 of the Resource Management (National Environmental Standards for Air Quality) Regulations 2004.*

The exercise of discretion is restricted to the following matters:

1. *The proposal to off-set 100% of the emissions within the polluted airshed to ensure that there is no net increase of PM10 emissions; and*
2. *The matters set out in rule 7.2.*

Note: this rule does not apply to an application for replacement of an existing consent unless the offsite amount of PM₁₀ discharge arising from the replacement consent application exceeds the amount of the

discharge of PM₁₀ authorised by the existing consent by more than 2.5µg/m³.

The section 42A report recommends that Rule 7.19 be retained as notified. The following amendments are sought, in accordance with the WWB submission:

7.19 The discharge of contaminants into air from the combustion of liquefied petroleum gas or compressed natural gas in any large scale external combustion device with a net energy output of less than or equal to 5MW is a permitted activity provided the following conditions are met:

- 1. The discharge is directed vertically into air and is not impeded by any obstruction above the emission stack which decreases the vertical efflux velocity below that which would occur in the absence of such obstruction; and*
- 2. Except for a period not exceeding two minutes in each hour of operation, the opacity of the discharge is not darker than Ringelmann Shade No. 1, as described in Schedule 5; and*
- ~~3. There are no buildings higher than five metres above natural ground level within a 25m radius of the emission stack, unless the building, land or other structure is on a different property to the stack and was not established or anticipated at the time the stack was established; and~~*
- 4. The fuel burning equipment is maintained in accordance with the manufacturer's specifications at least once every year by a person competent in the maintenance of that equipment and a copy of each maintenance report is held for three years and made available to the CRC on request; and*
- 5. The following emission stack height must be met for the device net energy output specified below:*

| Net energy output (kilowatts) | Emission stack height |
|--------------------------------------|---|
| 41-500 | 1m above any building, land or structure within 15m of the emission stack |
| 501-5000 | 7m above natural ground level and 3m above any building, land or structure within 35m of the emission stack |

A new rule 7.19A is sought as follows:

7.19A The discharge of contaminants to air from the combustion of liquefied petroleum gas or compressed natural gas in any large scale combustion device with a net energy output of less than or equal to 5MW that does not comply with one or more of conditions 1-5 in Rule 7.19 is a restricted discretionary activity.

The exercise of discretion is restricted to the purpose of the condition(s) that is not complied with, and the BPO for the discharge.

The section 42A report recommends that Rule 7.24 be retained as notified. The following amendments to the rule are sought:

7.24 The discharge of contaminants into air, for the purpose of emergency electricity generation, maintenance and peak electricity network load management, from the combustion of diesel, petrol, liquefied petroleum gas or compressed natural gas in any stationary large scale internal combustion device with a net energy output capacity up to and including 300kW is a permitted activity provided the following conditions are met:

...

4. The sulphur content of the fuel diesel burnt does not exceed 0.001% by weight, and the sulphur content of the petrol burnt does not exceed ~~0.001%~~ 0.005% by weight; and

...

The section 42A report recommends that Rule 7.25 be retained as notified. The following amendments to the rule are sought, in accordance with the WWB submission:

7.25 The discharge of contaminants into air, for the purpose of emergency electricity generation, maintenance and peak electricity network load management, from the combustion of diesel, petrol, liquefied petroleum gas or compressed natural gas in any stationary large scale internal combustion device with a net energy output of:

1. 301kW to 1MW within a Clean Air Zone; or

2. 301kW to 2MW outside a Clean Air Zone

is a controlled activity provided the following conditions are met:

...

3. *The sulphur content of the ~~fuel~~ diesel burnt does not exceed 0.001% by weight, and the sulphur content of the petrol burnt does not exceed 0.005% by weight; and*

...