

BEFORE THE INDEPENDENT COMMISSIONERS

UNDER the Resource Management Act
1991

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

**MEMORANDUM OF COUNSEL FOR THE
CANTERBURY REGIONAL COUNCIL**

22 November 2015

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MAY IT PLEASE THE PANEL

Introduction

- 1 This Memorandum of Counsel is provided in response to questions from the Hearing Panel in relation to Regulation 17 of the Resource Management (National Environmental Standards for Air Quality) Regulations 2004 ("NESAQ").
- 2 During the Council's opening presentation on 27 October 2015, the Council provided a response to a question of the Hearing Panel in relation to the requested explanatory note requested by Winstone Wallboards on Policy 7.14 and whether the requested explanatory note is consistent with the Council's interpretation of the offsetting requirements of the NESAQ.¹
- 3 The Panel has asked the Council to provide further submissions on the Council's interpretation of the offsetting requirements in Regulation 17. In particular in relation to existing activities, where an applicant proposes to increase the amount or rate of PM₁₀ to be discharged, whether the applicant must offset all of the discharge of PM₁₀ or only the additional portion.

Offsetting requirements in Regulation 17 of NESAQ

- 4 Regulation 17 of the NESAQ is set out in full in **Attachment 1** to this Memorandum.
- 5 Regulation 17 requires offsetting in circumstances where 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
- 6 A specific exemption is provided for in Regulation 17(2) where the proposed consent is for the same activity on the same site and the

¹ Responses to Questions of the Panel, 27 October 2015, p 6..

amount and rate of PM₁₀ to be discharged is the same as or less than that authorised by an existing resource consent, and the discharge would only occur under the proposed consent when discharges no longer occur under the existing consent. Therefore the offsetting requirements only apply to applications for new or increased discharges of PM₁₀ where they trigger the threshold in sub-clause (1).

- 7 In relation to new discharge activities, the position is clear that where the proposed discharge is likely to increase the concentration of PM₁₀ 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, an applicant is required to offset all of the PM₁₀ discharged in each relevant airshed.
- 8 The position is less clear in a situation where an existing consent is held and an application is made to renew the consent, or change the conditions of the existing consent, that would increase the amount or rate of PM₁₀ discharged, and whether the entire PM₁₀ discharge that is authorised by the consent must be offset, or only the additional portion to be discharged over and above what is already consented.
- 9 Sub-clause (3) of Regulation 17 provides that sub-clause (1) does not apply if –
- (a) *the consent authority is satisfied that the applicant can reduce the PM₁₀ discharged from another source or sources into each polluted airshed to which sub-clause (1) applies by the same or a greater amount than the amount likely to be discharged into the relevant airshed by the discharge to be expressly allowed by the proposed consent; and*
 - (b) *the consent authority, if it intends to grant the proposed consent, includes conditions in the consent that require the reduction or reductions to take effect within 12 months after the consent is granted and to then be effective for the remaining duration of the consent. [our emphasis]*
- 10 Sub-clause (1) applies to discharges that would likely, at any time, to increase the concentration of PM₁₀ 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.

- 11 It is submitted that when read together with the exemption for existing discharges in sub-clause (2), the requirement to offset must only relate to the additional discharge over and above what is authorised by an existing resource consent, not to the entire amount to be discharged. The reference to 'increase the concentration of PM₁₀' in sub-clause (1) recognises the existing environment in relation to concentration of PM₁₀ and it is only those discharges that increase the concentration of PM₁₀ by more than 2.5 micrograms per cubic metre that are captured by Regulation 17(1). If an existing discharger is seeking to increase the amount of PM₁₀ discharged, it must follow that the amount authorised under the applicant's existing consent has already been taken into account as part of the existing environment for the purposes of sub-clause (1) and it is only the additional portion being sought that must be off-set.
- 12 This interpretation is supported by the MfE 2011 Users' Guide to the revised National Environmental Standards for Air Quality: Updated 2014 which states:²

How to calculate whether the discharge could cause a concentration exceeding 2.5 microgram threshold is discussed later. However, it is important to note the qualifying term used in the Regulations that is that the discharge must be "likely, at any time" to bring about an increase of PM10 concentrations to this degree or more. This means that new emissions that breach this threshold – which add 2.5 micrograms PM10 or more to the background PM10 concentrations – are intended to be offset as a whole.

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. (16. Note, however, that under section 88 of the RMA applications for

² MfE 2011 Users' Guide to the revised National Environmental Standards for Air Quality: Updated 2014 at 74.

resource consent are treated as 'new' consent applications – regardless of whether the activity is proposed as new or existing.) This means that in the case 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 application applies to change the conditions of their consent), the policy intent is that only an additional discharge is offset (ie, emissions additional to those already authorised by a resource consent), and not the whole discharge.

- 13 The guidance material also states in relation to the phrase "...increase the concentration of PM₁₀...by more than 2.5 micrograms per cubic metre..." in sub-clause (1) that:

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 airshed.

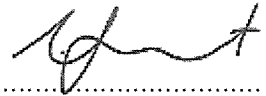
Policy 6.22 and Rule 7.14 of the pCARP

- 14 Policy 6.22 and Rule 7.14 have been included in the pCARP in order to provide a rules framework under which the Council may enforce the observance of Regulation 17 of the NESAQ.
- 15 The Council did not intend for these provision to be more stringent than the requirements of Regulation 17 in the NESAQ.
- 16 On reflection, the Council considers that amendments are required to Rule 7.14 as recommended in the section 42A report, in order to realise this intention. In particular, amendments are required to recognise the exemption provided in Regulation 17(2) for existing activities and ensure that applications to renew existing resource consents where the amount of PM₁₀ to be discharged is the same as or less than what is authorised

under the existing consent, are not captured by the offsetting requirements of Rule 7.14.

- 17 Further, amendments are required to Rule 7.14 to make it clear that for existing activities, where an application is sought to increase the amount of PM₁₀ to be discharged and that increase is likely to increase the concentration of PM₁₀ by more than 2.5 micrograms per cubic metre, that it is only the increase or the additional portion of the discharge over and above what has already been consented, that is required to be offset, not 100% of the discharge.
- 18 Recommended amendments to Rule 7.14 will be provided by as part of the Council's reply, or prior to this if requested by the Panel.

Dated this 22nd day of November 2015



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P A C Maw / M A Mehlhopt
Counsel for Canterbury Regional Council

ATTACHMENT 1

Resource consents for discharges of PM₁₀

- 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.
- (3) Subclause (1) also does not apply if—
- (a) the consent authority is satisfied that the applicant can reduce the PM₁₀ discharged from another source or sources into each polluted airshed to which subclause (1) applies by the same or a greater amount than the amount likely to be discharged into the relevant airshed by the discharge to be expressly allowed by the proposed consent; and
 - (b) the consent authority, if it intends to grant the proposed consent, includes conditions in the consent that require the reduction or reductions to take effect within 12 months after the consent is granted and to then be effective for the remaining duration of the consent.
- (4) For the purposes of this regulation,—
- (a) an airshed becomes a polluted airshed on and from 1 September 2012 or any later day if, for the immediately prior 5-year period,—

- (i) the airshed has meaningful PM₁₀ data for at least a 12-month period; and
 - (ii) the airshed's average exceedances of PM₁₀ (as calculated under regulation 16D) was more than 1 per year; and
 - (b) an airshed stops being a polluted airshed on and from any day if the PM₁₀ standard was not breached in the airshed in the immediately prior 5-year period.
- (5) If an airshed is established by notice in the *Gazette*, the data (if any) that best applies to the new airshed from the 1 or more airsheds from which the new airshed derived must be treated as if it were the new airshed's data to determine, under subclause (4),—
- (a) whether the new airshed immediately becomes a polluted airshed; or
 - (b) whether the new airshed later becomes or stops being a polluted airshed.
- (6) To avoid doubt,—
- (a) a polluted airshed to which subclause (1) applies may or may not be an airshed in the region of the consent authority considering an application; and
 - (b) if an airshed stops being a polluted airshed under subclause (4)(b), it may later become a polluted airshed again under subclause (4)(a).

Example

An airshed's average exceedances of PM₁₀ per year is 1.2 for the 5-year period from 1 September 2007 to 31 August 2012. The airshed therefore becomes a polluted airshed on 1 September 2012.

15 March 2020 is the first day after the end of a 5-year period in which the PM₁₀ standard was not breached in the airshed. The airshed therefore stops being a polluted airshed on 15 March 2020.

Regulation 17: substituted, on 1 June 2011, by regulation 10 of the Resource Management (National Environmental Standards for Air Quality) Amendment Regulations 2011 (SR 2011/103).