
under: the Resource Management Act 1991
in the matter of: the proposed Canterbury Air Regional Plan
and: **Fonterra Co-operative Group Limited**
Submitter 63146
Further submitter C15C/102825

Memorandum of counsel in relation to Officer provisions

Dated: 12 February 2016

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MEMORANDUM OF COUNSEL IN RELATION TO OFFICER PROVISIONS

INTRODUCTION

- 1 This memorandum has been prepared by counsel for Fonterra Co-operative Group Limited (with input from the relevant Fonterra technical experts) following:
 - 1.1 the submission and further submissions prepared by Fonterra on the proposed Canterbury Air Regional Plan (*pCARP*);
 - 1.2 the evidence presented by Fonterra in support of the above submissions at the hearing on 11 November 2015;
 - 1.3 Minute 3 issued by the Panel (recording *inter alia* their concerns that the Council Officers (*Officers*) had indicated their intention to redraft Policies 6.20 and 6.21 and Rule 7.17 and 7.18 of the *pCARP* relating to industrial and large scale discharges to air, yet no alternative wording had been provided); and
 - 1.4 the reworded provisions provided by the Officers, recommending that the suite of policies managing industrial and large scale discharges into air (being Policies 6.19 to 6.24) be amended, as set out in Appendix A of the Council's Memorandum dated 18 December 2015 (noting that the Officers also recommends that Rules 7.17 and 7.18 of the *pCARP* be deleted and that Rules 7.19 to 7.27 are relied on for managing discharges from large scale solid fuel burning devices.
- 2 In accordance with the Panel's directions, Fonterra provides the following comments in relation to the amendments recommended by the Officers.
- 3 For completeness it is also noted that the matters set out in this memorandum have been prepared in consultation with representatives of Synlait Limited. It is understood that there is a high level of agreement between the two 'milk processors' as to the concerns and the relief sought.

FONTERRA COMMENTS ON OFFICER RECOMMENDATIONS

POLICY 6.19

Officer Recommendation: Policy 6.19

- 4 The Officers have proposed the following changes to Policy 6.19:

Enable discharges of contaminants into air ~~associated with~~ from large scale fuel burning devices, industrial or trade ~~activities~~ premises, 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.

Fonterra's Comments

- 5 Fonterra has no comments on the recommended amendments to Policy 6.19.

POLICY 6.20

Officer Recommendation: Policy 6.20

- 6 The Officers have proposed the following changes to Policy 6.20:

Apply the best practicable option to all large scale fuel burning devices, and industrial or trade activities premises discharging contaminants into air so that:

1. ~~degradation of ambient~~ Cumulative and local adverse effects on air quality ~~is~~ are minimised; and
2. Anticipated land use is not constrained beyond the property on which the discharge originates.

Fonterra's Comments

- 7 As outlined in the expert evidence presented by Fonterra at the hearing, it is appropriate that the pCARP recognises that while industry may impact on localised air quality, the air discharge may not necessarily impact on ambient air quality, particularly in the case of Fonterra's manufacturing sites which are located in rural areas. To this extent, it is considered that the notified pCARP fails to give effect to the Canterbury Regional Policy Statement (RPS), which clearly distinguishes between ambient and localised air quality effects.
- 8 The Officers' recommendation to substitute reference to "ambient" with "cumulative" in Policy 6.20 is therefore opposed and is otherwise considered to be unhelpful. While it is recognised that the degradation of ambient air quality can result from the cumulative impact of many discharges there will be situations where cumulative effects do not affect ambient air quality. Fonterra therefore supports the description and use of the terms "ambient" and "localised" air quality, as set out in the RPS. It is further noted that reference to minimising adverse effects in subclause (1) is unnecessary and potentially inconsistent with the best practicable option (BPO) established for each individual discharge.

- 9 Fonterra is also concerned that the addition of the second clause to Policy 6.20 confuses and alters the intent of the policy. It is a statutory requirement to consider the nature of the discharge and the sensitivity of the receiving environment in determining the BPO, which is encapsulated within the first part of Policy 6.20. The purpose of recommended subclause (2) is therefore unclear as it does not take into account matters such as land ownership, provision of written consents or sensitivity of the land beyond the property boundary containing the source of the discharge. More specifically, the meaning of "[A]nticipated" is also not clear – to the extent that it is not apparent whether the reference is to (for example) identified business growth areas identified in the RPS or whether (contrary to general RMA case law and practice) decision makers will need to consider the future environment as might be modified by activities that are yet to be applied for.
- 10 Further, it appears that subclause (2) could be construed as a means to address potential reverse sensitivity effects. These effects should be canvassed through other (more specific) policies, rather than diluting the effectiveness of the BPO policy in managing air quality overall.

Relief Requested

- 11 For these reasons, and in line with evidence presented at the hearing, Fonterra seeks to amend Policy 6.20 to read as follows:

Apply the best practicable option to all large scale and industrial activities discharging contaminants into air so that localised effects on degradation of ambient air quality is minimised do not cause significant adverse effects.

- 12 The balance of the policy as set out by the Officers would be deleted.

POLICY 6.21

Officer Recommendation: Policy 6.21

- 13 The Officers have proposed the following changes to Policy 6.21:

~~Avoid the discharge of contaminants into air from any large scale burning device or industry or trade premise, where the discharge will result in the exceedance, or exacerbation of an existing exceedance, of the guideline values set out in the Ambient Air Quality Guidelines 2002 Update.~~

Applicants seeking to discharge contaminants into air from large scale fuel burning devices or from industrial or trade premises will demonstrate, to the extent they can, observance of the Resource

Management (National Environmental Standards for Air Quality) Regulations 2004 and have regard to the Ambient Air Quality Guidelines 2002 Update.

Fonterra's Comments

- 14 Notwithstanding the imprecise wording of recommended replacement Policy 6.21, Fonterra is generally comfortable with its intent, noting that compliance with the Resource Management (National Environmental Standards for Air Quality) Regulations 2004 is mandatory regardless.

POLICY 6.22

Officer Recommendation: Policy 6.22

- 15 The Officers have proposed the following changes to Policy 6.22:

~~*Within Clean Air Zones, significant increases of PM10 concentrations from discharges of contaminants are to be offset in accordance with the Resource Management (National Environmental Standards for Air Quality) Regulations 2004.*~~

Avoid significant increases in total PM10 from large scale fuel burning devices and industrial or trade premises within Clean Air Zones. The CRC will consider the following when determining significance:

- 1. The mass emission rate of PM10 from the proposed discharge relative to the total PM10 emission rate from large scale fuel burning devices and industrial or trade premises within the Clean Air Zone; and*
- 2. The degree to which the proposed discharge exacerbates cumulative effects within the Clean Air Zone; and*
- 3. The local effects of the proposed discharge, including the location of sensitive receptors; and*
- 4. The mitigation and emission control options available, including fuel choice and offsetting; and*
- 5. The duration of consent being sought and the ability for the effects of the discharge or the discharge itself to be reduced over time.*

Fonterra Comments

- 16 Fonterra maintains its position that Policy 6.22 should be deleted in its entirety. In particular, it is considered that the partial adoption of particulate emission offsetting requirements of the Resource Management (National Environmental Standards for Air Quality) Regulations 2004 and application of those requirements to the

enlarged pCARP Clean Air Zones will lead to inconsistencies with the regulations. Reference to emission offsetting should therefore be removed from the pCARP.

- 17 The implications for Fonterra are, for example, that at its Studholme site, Rule 7.14 (as notified) and Policy 6.22 (as recommended by Officers above) may require Fonterra to offset PM10 emissions within Waimate Township due to PM10 concentrations predicted to occur in the rural periphery around Waimate. This requirement would be in spite of the fact that those peripheral areas are unlikely to feature residential development (and human exposure to the predicted concentrations) over the life of the plan.

Relief Requested

- 18 Fonterra seeks that Policy 6.22 should be deleted in its entirety.

POLICY 6.22A

Officer Recommendation: Policy 6.22A

- 19 The Officer has proposed the following changes to Policy 6.22A:

When considering discharges of contaminants into air from large scale fuel burning devices or from industrial or trade premises, outside gazetted airsheds, the CRC may require the person responsible for the discharge to monitor the cumulative or local effects of the discharge.

Fonterra Comments

- 20 It appears that this policy is out of scope given that no submissions sought the inclusion of this or a similar policy.
- 21 Leaving scope to one side, the purpose of recommended Policy 6.22A is also unclear, given that currently, even in the absence of any specific policy direction, appropriate monitoring conditions are already regularly, imposed on air discharge consents under section 108 of the RMA.
- 22 Although it is acknowledged that the policy refers to “may require”, Fonterra is concerned that formalising the approach as set out (especially in the context of cumulative effects):
- 22.1 moves the focus away from the effects of the individual application under consideration to the more general need for any wider need for cumulative effects monitoring. Normally only those making a material or significant contribution to cumulative effects would be required to do such monitoring. It is considered inappropriate to require a discharger to

monitor cumulative effects regardless of the scale of their own individual effect(s); and

22.2 is otherwise inappropriate in that it should properly be the consent authority that undertakes wider cumulative or ambient air quality monitoring.

23 Fonterra is therefore concerned that the policy appears to be supporting consent conditions and monitoring requirements that are not reasonable (in light of the effects of the relevant individual application) and therefore do not meet the general tests for the inclusion of consent conditions set out under the 'Newbury principles'.¹

24 It is further questioned why the policy only relates to areas outside gazetted airsheds as there are likely to be instances where monitoring inside gazetted airsheds is also appropriate. Reference to gazetted airsheds instead of Clean Air Zones is also confusing and inconsistent with other policies relating to 'Industrial and Large Scale Discharges to Air'.

Relief Requested

25 Fonterra seeks that the policy is deleted.

POLICY 6.22B

Officer Recommendation: Policy 6.22B

26 The Officers have proposed the following changes to Policy 6.22B:

When considering the discharge of contaminants into air from large scale fuel burning devices or from industrial or trade premises, the CRC will consider the combined effect of all discharges of contaminants into air associated with the activity.

Fonterra Comments

27 While Fonterra agrees that it is appropriate to assess the combined effect of all consented discharges from the same activity, it is again questioned why this matter is the subject of a specific policy when cumulative effects on both localised and ambient air quality will be

¹ *Newbury DC v Secretary of State for the Environment: Newbury DC v International Synthetic Rubber Co Ltd.* In simple terms the principles provide that a condition will generally only be regarded as valid if it is:

- (a) For a [resource management] purpose, not an ulterior one;
- (b) Fairly and reasonably relate to the development authorised by the consent to which it is attached; and
- (c) Not be so unreasonable that a reasonably planning authority, duly appreciating its statutory duties, could not have approved it.

encapsulated by an assessment of effects in relation to an individual application.

- 28 Fonterra is not strongly opposed to the policy but questions whether it is properly necessary in light of the requirements relating to the assessment of resource consent applications under the RMA that are already in place. It is also considered that the text "consented" should be inserted into the policy to ensure that permitted discharges are excluded from the assessment.

Relief Requested

- 29 Fonterra seeks the following changes to Policy 6.22B (further change in grey highlight):

When considering the discharge of contaminants into air from large scale fuel burning devices or from industrial or trade premises, the CRC will consider the combined effect of all consented discharges of contaminants into air associated with the activity.

RULES 7.17 AND 7.18

Officer Recommendation: Delete Rules 7.17 and 7.18

- 30 The Officers have proposed deleting Rules 7.1 and 7.18 in their entirety.

Fonterra Comments

- 31 Fonterra supports the deletion of Rules 7.17 and 7.18 as the application of the Ministry for the Environment Ambient Air Quality Guidelines 2002 within these rules is inconsistent with the intention of these guidelines, and is therefore inappropriate.

FURTHER DIRECTIONS SOUGHT

- 32 On the basis that the hearing will reconvene, Fonterra wishes to be heard in support of these comments.

- 33 To this extent it is noted that Minute 3 simply refers to a "reply hearing" and it is unclear on what the Panel's expectations are with regard to the extent to which:

33.1 submitters will have the opportunity to talk to their written replies (including whether the Panel will be assisted by technical experts attending);

33.2 the Officers will respond (and/or provide yet a further version of provisions) following the above; and

- 33.3 whether replies may also address other matters that arose through the hearing process (noting that in the case of Fonterra these appear to be relatively limited).
- 34 Fonterra therefore seeks directions (or correctly, clarifications) as to the Panel's expectations on attendance and presentation(s).
- 35 In the case of Fonterra it seeks to have legal counsel and Ms Justine Ashley (planner called by Fonterra) present a brief summary of the response to the Officer comments (as provided in writing) and to answer any questions that the Panel may have in respect of the provisions and amendments sought.
- 36 Fonterra's other technical experts are (at least at this stage) available and willing to attend should it assist the Panel.

Dated: 12 February 2015



Ben Williams
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