

In the matter of the Resource Management Act 1991

And

In the matter of the Proposed Canterbury Air Regional Plan
(Policies 6.19 to 6.24 and Rules 7.17 and 7.18)

**LEGAL SUBMISSIONS ON RE-DRAFTED PROVISIONS ON
BEHALF OF SYNLAIT MILK LIMITED**

12 February 2016

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INTRODUCTION

- 1 Synlait Milk Limited (“Synlait”) is a submitter who filed submissions directed to policies 6.20 & 6.21 and rules 7.18 & 7.19.
- 2 In accordance with Minute 3, these submissions are in response to the re-drafted provisions set out in the Memorandum of Counsel for the Canterbury Regional Council dated 18 December 2015.

RULES 7.17 AND 7.18

- 3 Synlait supports the deletion of Rules 7.17 and 7.18, with Rules 7.19 to 7.27 being relied on for managing discharges from large scale solid fuel burning devices. This approach is consistent with the evidence presented on behalf of Synlait.¹

POLICIES

Policy 6.19

- 4 Synlait agrees that the amendments proposed are an improvement to this policy.

Policy 6.20

- 5 This policy requires the application of the best practicable option to all large scale fuel burning devices and industrial and trade premises discharging contaminants to air. However the policy then goes on to state that this is so that cumulative and local adverse effects are minimised and anticipated land use is not constrained beyond the property. This is potentially contradictory as the best practicable option is what it is and whether this will achieve clauses 1 and 2 depends on the circumstances of each case. The requirement should simply be to achieve best practicable option and for that to be assessed on its merits.
- 6 In relation to clause 2, this in practice introduces the concept of reverse sensitivity which is inappropriate in this policy which addresses the best practicable option. The policy as worded is too uncertain and is unreasonable. The meaning of “anticipated land use” is open to interpretation. For example it is unclear:

¹ See for example evidence of Prue Harwood paragraphs 30 and 44 – 45; and evidence of Tim Ensor paragraph 24.

- 6.1 whether this is intended to relate to land use which is permitted, or whether this could extend to land use which is, for example, a discretionary activity. If this were intended to capture controlled or discretionary activities this would be contrary to case law which has stated that the effects of consents that might be granted in the future should not be part of the consideration of the likely future state of the environment.²
- 6.2 whether anticipated land use could be considered to be constrained if this affects only a fraction of the property, but the overall property use is not constrained i.e. there is plenty of room to locate a house for example outside the sphere of the discharge.
- 6.3 how this could affect existing discharges at the time of renewal if anticipated land uses on neighbouring properties change over time, for example as a result of a change in zoning.
- 6.4 how this would be applied where the Dairy Processing Management Area under the Selwyn District Plan is wider than Synlait's existing site and extends over neighbouring land.
- 6.5 how this would be applied in circumstances where there is an agreement to discharge over neighbouring land (for example Synlait has an agreement to discharge over neighbouring land owned by Purata Farming Limited), or where written approval has been obtained from a neighbouring landowner.
- 7 As set out above, the consequence of the unclear drafting of the policy is to introduce the concept of reverse sensitivity into a policy which is aimed at promoting the best practicable option.
- 8 The issue of reverse sensitivity was addressed in the legal submissions on behalf of Synlait dated 11 November 2015. As set out in those submissions, case law seeks to protect existing dischargers (which may be causing an adverse impact to nearby land) from the effects of new sensitive activities in

² *Queenstown Lakes DC v Hawthorn Estate Ltd* (2006) 12 ELRNZ 299, [2006] NZRMA 424.

their vicinity. It is not appropriate for an existing activity to fully internalise effects in all situations and this depends on the circumstances of each case.³

- 9 This Policy therefore sets the benchmark unreasonably high in including a blanket requirement that anticipated land use should not to be constrained beyond the boundary (particularly given the potential for anticipated land use to be interpreted very broadly).
- 10 This also goes beyond the requirements of the Regional Policy Statement which, in relation to existing activities that require discharge consent, requires the adoption of the best practicable option to prevent or minimise any actual or likely adverse effect on the environment (Policy 14.3.5).
- 11 For the reasons set out above it is considered that paragraphs 1 and 2 to this policy are inappropriate; add very little to the policy framework; reduce the effectiveness of the policy; and should be deleted. The requirement to adopt the best practicable option already takes into consideration both the nature of the discharge and the sensitivity of the receiving environment to adverse effects. Addressing effects on sensitive activities will also be required as a result of other policies in the plan (for example policies 6.5 and 6.6).
- 12 Synlait maintains that Policies 6.20 and 6.21 as set out in the attachment to the legal submissions presented by Synlait at the hearing are appropriate (also **attached** to these submissions for ease of reference). These provisions have the advantage of not only requiring the adoption of best practicable option but also draw attention to the fact that localised effects (whether they be from one or more industries) are going to be the effects that are likely to be of most concern outside of clean air zones and that inside clean air zones cumulative effects are the primary concern.⁴

Policy 6.21

- 13 This Policy requires an applicant to demonstrate observance with the Resource Management (National Environmental Standards for Air Quality) Regulations 2004 (“the NES”). This therefore does not add anything to what is already a legal requirement. The policy is vague and does not provide any guidance.

³ *Winstone Aggregates Limited v Papakura District Council* (Environment Court, Auckland, A049/02, 26 February 2002).

⁴ See Legal Submissions of Synlait, paragraphs 57 – 62.

- 14 It is considered that Policies 6.20 and 6.21 as proposed by Synlait are more helpful in providing guidance to applicants and the consent authority.

Policy 6.22

- 15 It is considered that there are a number of problems with this Policy including the following:
- 15.1 Synlait is opposed to the term “significant”, which is open to interpretation. The original version of the NES used the term “significant” but this was later deleted and replaced with numerical values which provided much greater clarity.
 - 15.2 Both clauses 1 and 2 are essentially requiring consideration of cumulative effects in two different ways. However, the consideration of the scale of mass emission rates from a discharge compared to the total mass emission rate of a contaminant into an airshed does not equate to the consideration of the relative effect of a discharge on an airshed. Many other factors including meteorology, terrain and discharge characteristics (such as height and velocity of the, discharge)) need to be taken into consideration in order to determine the effect of a discharge on an airshed.
 - 15.3 The focus of clause 4 is too narrow in referring to fuel choice and offsetting. The emission control options available already form part of a consideration of the best practicable option which is dealt with in other policies.
 - 15.4 Offsetting under the NES applies within gazetted airsheds that are classified as “polluted” under regulation 17. This policy applies offsetting over the Clean Air Zones. The boundaries of the Clean Air Zones under the Plan are bigger than the gazetted airsheds and therefore the plan broadens the offsetting requirements beyond that envisaged by the NES resulting in inconsistencies. This is an example of the confusion that may be caused by the airshed boundaries being different to the Clean Air Zone boundaries.
 - 15.5 The policy is confusing in referring to significant effects and then going on to refer to mitigation.

- 16 It is considered that this policy cannot be properly rectified by amendments. Synlait seeks that this be deleted and replaced with the policies proposed by Synlait.

Policy 6.22A

- 17 This policy states that the Canterbury Regional Council may require the person responsible for the discharge to monitor the cumulative or local effects of the discharge.
- 18 There are potential scope issues associated with this policy as we are not aware of any submissions which sought a requirement for such monitoring.
- 19 Although Synlait has no issue with monitoring local effects, it is unreasonable and impractical to require a consent holder to monitor cumulative effects on the behalf of Environment Canterbury.
- 20 As stated in the summary of evidence of Prue Harwood dated 11 November 2015, in rural areas there is very limited air quality data and gathering such information would be very expensive and time consuming.
- 21 Monitoring of cumulative effects is properly the role of Environment Canterbury. The policy however gives the Council an unqualified discretion to require a consent holder to undertake monitoring without regard to whether it is within an area where monitoring would be justified or practical, and whether the consent holder is making a significant contribution to cumulative effects.
- 22 Further, the reference to gazetted airsheds within this policy is inconsistent with other policies which refer to Clean Air Zones.

Policy 6.22B

- 23 This policy is consistent with standard practice and therefore there is little need for such as policy.
- 24 If this policy is retained then this should be amended to refer to considering the “combined effect of all consented discharges” so as to make it clear that this does not override the usual principles relating to the application of the permitted baseline.

CONCLUSION

- 25 Synlait supports the deletion of rules 7.17 and 7.18 as recommended by the Council officers. However it is considered that the amended policies provide little guidance and have the potential to cause confusion.
- 26 Synlait maintains that the policies put forward by Synlait are appropriate.
- 27 Synlait also suggested a number of other amendments to the objectives and central policies (see attached). These objectives and policies are not dealt with in the memorandum on behalf of Canterbury Regional Council and are therefore not addressed above. For the avoidance of doubt, Synlait confirms that it continues to seek that these amendments be adopted.

Dated 12 February 2016

Ewan Chapman/Shoshona Galbreath
Solicitors for Synlait Milk Limited, Submitter

ANNEXURE A TO EVIDENCE OF TIMOTHY ENSOR

Definitions of ambient and localised air quality

Objective 5.8

Ensure that discharging activities are located appropriately given that air quality expectations throughout the Region differ depending on the location and characteristics of the receiving environment, including the land use patterns and zoning.

Comment [DC1]: Synlait agrees with the evidence of the other witnesses that it would be useful for these terms to be defined.

Objective 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.

Objective 5.X

Existing discharging activities contribute to achieving appropriate air quality outcomes.

Policy 6.2

Manage ~~Minimise~~ adverse effects on ambient air quality within the airshed 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 values.~~

Policy 6.3

Improve ambient air quality where ambient concentrations of contaminants within a clean air zone exceed 100% of guideline values set out in the Ambient Air Quality Guidelines 2002 Update.

Comment [DC2]: To avoid any confusion caused by references to a “clean air zone” and “the airshed” within the same policy, we have deleted the reference to “within the airshed” (which was originally proposed by Synlait), and have amended the policy to refer to “improving ambient air quality.”

Policy 6.5

Manage offensive and objectionable effects from discharges into air identified because of their frequency, intensity, duration, offensiveness and location.

~~Policy 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.~~

Policy 6.8

Without limiting the ability of the consent authority to consider other relevant matters,
Consider longer consent durations to durations to provide ongoing operational certainty where activities that discharge into air locate appropriately to avoid the potential for reverse sensitivity effects.

Policy 6.10

Minimise cumulative effects by requiring application of the best practicable option to minimise discharges into air.

Policy 6.11

Recognise the contribution of nationally and regionally significant infrastructure and primary sector manufacturing to people's social and economic wellbeing and facilitate its ongoing operation and development.

Policy 6.11A

Locational constraints of discharging activities, including heavy industry and infrastructure, are recognised so that operational discharges into air are enabled where the best practicable option is applied.

Comment [DC3]: This Policy was proposed in the section 42A report and is supported by Synlait.

Policy 6.12

Recognise that the management of discharges into air is likely to improve during the life of resource consents and incorporate such improvements in new and replacement consents where this is consistent with the best practicable option.

Policy 6.19

Enable discharges of contaminants into 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 and while ensuring that adverse effects on air quality are minimised.

Policy 6.20

Outside a clean air zone Apply the best practicable option to all large scale and industrial activities discharging contaminants to air so that the degradation of ambient-localised air quality is minimised.

Policy 6.21

~~Avoid~~ Within a clean air zone apply the best practicable option to avoid, remedy or mitigate the cumulative effects from 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 at sensitive receptors or exceedance of the National Environmental Standards for Air Quality.

Policy 6.26

Ensure that the discharge of contaminants into air associated with rural activities do not cause offensive or objectionable effects beyond the boundary of the property ~~of origin the discharge occurs on.~~

Rule 7.3

The discharge of odour, dust or smoke into air that is offensive or objectionable beyond the boundary of the property of ~~origin the discharge occurs on~~ when assessed in accordance with Schedule 2 is a non-complying activity.

~~Rules 7.17~~

~~The discharge of contaminants into air from a large scale solid fuel burning device or from an industrial or trade premise established prior to 28 February 2015, outside a Clean Air Zone, that will likely result in guideline values, set out in the Ambient Air Quality Guidelines 2002 Update, being exceeded is a non-complying activity.~~

~~Rule 7.18~~

~~The discharge of contaminants into air from a large scale fuel burning device or from an industrial or trade premise established either: inside a Clean Air Zone; or outside a Clean Air Zone after 28 February 2015, that will likely result in guideline values, set out in the Ambient Air Quality Guidelines 2002 Update, being exceeded is a prohibited activity.~~

Rule 7.27

Any discharge of contaminants into air from any large scale fuel burning device that does not comply with the appropriate permitted activity rule and conditions, and is not prohibited, and is not otherwise provided for by rules 7.3, 7.4 or rules 7.19-7.26 is a discretionary activity.

Rule 7.28

The discharge of odour, beyond the boundary of the property ~~of origin the discharge occurs on~~, from an industrial or trade premise is a restricted discretionary activity, except where otherwise permitted or prohibited by rules 7.29 to 7.59 below.

The exercise of discretion is restricted to the following matters:

1. The contents of the odour management plan to be implemented; and
2. The frequency of the discharge; and
3. The intensity of the discharge; and
4. The duration of the discharge; and
5. The offensiveness of the discharge; and

6. The location of the discharge; and

7. The matters set out in Rule 7.2.

Rule 7.29

Except where otherwise permitted or prohibited by rules 7.30 to 7.59 below, the discharge of dust, beyond the boundary of the property ~~of origin~~ the discharge occurs on, including from unsealed or unconsolidated surfaces, from an industrial or trade premise, including a construction, subdivision or development property is a restricted discretionary activity.

The exercise of discretion is restricted to the following matters:

1. The contents of the dust management plan to be implemented; and

2. The frequency of the discharge; and

3. The intensity of the discharge; and

4. The duration of the discharge; and

5. The offensiveness of the discharge; and

6. The location of the of the discharge; and

7. The matters set out in Rule 7.2.

Rule 7.68

The discharge of contaminants into air from the collection, storage, treatment and application of liquid and slurry animal effluent or solid animal effluent onto production land, is a permitted activity provided the following conditions are met:

1. The discharge does not cause a noxious or dangerous effect; and

2. An odour management plan prepared in accordance with Schedule 2 is held by the persons responsible for the discharge, and where a Farm Environment Plan is required pursuant to Rule 5.45 of the Land and Water Regional Plan, the odour management plan will be a component of that Plan; and

3. The odour management plan is supplied to the CRC on request; and

~~4. The pH range of the liquid or slurry effluent is between pH6.5 and pH8; and~~

~~5. Dissolved oxygen is present in liquid or slurry effluent at concentrations greater than 1ppm; and~~

~~6. The persons responsible for the effluent application will keep a record for 3 months, to be provided to the CRC on request, of the effluent discharged including the following information:~~

~~(a) the type of effluent applied to land; and~~

- ~~(b) the estimated daily quantity of effluent applied to land in cubic metres; and~~
- ~~(c) the location of the effluent application; and~~
- ~~(d) the wind direction at the time of application.~~