
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

Response from Fonterra Co-operative Group Limited in relation
to Officer provisions

Dated: 1 April 2016

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RESPONSE FROM FONTERRA CO-OPERATIVE GROUP LIMITED IN RELATION TO OFFICER PROVISIONS

INTRODUCTION

- 1 This response has been prepared by counsel for Fonterra Co-operative Group Limited (*Fonterra*) (with significant input from **Ms Justine Ashley**) following *Minute 5* of the hearing panel dated 30 March 2016.
- 2 It follows the earlier *Memorandum of counsel in relation to officer provisions* provided by Fonterra Co-operative Group Limited on 12 February 2016. At paragraphs 32-36 of that memorandum Fonterra had sought directions around ensuring it was heard at the resumed proposed Canterbury Air Regional Plan (*pCARP*) hearing. Although no directions were issued, it appears that on the basis of paragraph 3 of *Minute 11* participating submitters will (in Fonterra's view correctly) now have an opportunity to be heard.
- 3 The primary purpose of this response is therefore to provide a brief outline of the matters that have been previously raised by Fonterra in its earlier memorandum.
- 4 Within this, Fonterra proposes to also touch on a limited number of further matters and issues that have arisen following to release of the Council Officers' *Proposed Canterbury Air Regional Plan Draft Section 42A Reply Report* (the *Reply Report*) as are relevant to the above.
- 5 Fonterra's oral presentation will be provided by **Ms Ashley** (with support from **Mr Roger Cudmore**) – noting that counsel unfortunately has a significant hearing commitment that clashes with the resumed pCARP hearing. The intent of this written response is to support that oral presentation.

FONTERRA COMMENTS

- 6 Fonterra's comments are divided between:
 - 6.1 those relating principally to *Industrial and large scale discharges* (as have been directly addressed in Fonterra's previous memorandum); and
 - 6.2 a limited number of further (and generally related) matters that have arisen following the Officers' Reply Report.
- 7 **Ms Ashley** (with support from **Mr Cudmore**) is happy to expand on any matter at the hearing.

- 8 At the outset it is also noted that for ease of reference this response largely repeats the matters set out in the earlier Fonterra memorandum - with such updates as are required to identify matters that appear to be agreed (at least between Fonterra and the Officers) or where issues remain.

INDUSTRIAL AND LARGE SCALE DISCHARGES

Policy 6.19

- 9 As set out Fonterra's earlier memorandum, Fonterra supported but had no comments in respect of the Officer Recommendation on Policy 6.19.
- 10 This appears to have been carried over to the Officers reply with agreement between the Officer and most (but not all) submitters:

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.

Policy 6.20

- 11 Fonterra has commented further on the Officers' ongoing approach to ambient and cumulative air quality in paragraphs 49 to 52 below.
- 12 In respect of Policy 6.20, Fonterra sought that the policy be amended to focus on localised effects. This was on the basis 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. Fonterra was also concerned that the wording proposed by the Officer would fail to give effect to the Canterbury Regional Policy Statement (RPS), which clearly distinguishes between ambient and localised air quality effects.
- 13 On the basis of the Officers Reply Report, it appears that some rewording is proposed to the first clause (including the deletion of "is minimised" and agreement with Fonterra that this policy should relate to avoiding significant adverse effects. As such Policy 6.20 would read:

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~~ Discharges into air do not cause significant adverse cumulative and local adverse effects on air quality is minimised; and
2. Anticipated land use is not constrained beyond the property on which the discharge originates.

14 Fonterra remains concerned with this wording (despite the further explanation now provided). 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 (and vice versa). Fonterra continues to support the description and use of the terms “ambient” and “localised” air quality, as set out in the RPS.

15 There has been attempt to address the final concern raised by Fonterra (with regard to the uncertainties of “*Anticipated land use*”) through the recommended inclusion of a definition:

Anticipated land use: Means land use that is reasonably likely to occur and is provided for under district and regional plan provisions or by resource consent.

16 Fonterra acknowledges that this is a step in the right direction – but even within the definition the meaning of “*provided for*” is not necessarily clear – for example, greenfields areas identified in the RPS or District Plan will still typically require resource consent (so are arguably ‘not provided for’?). Further concerns arise in respect of the reference to “*reasonably likely*” – this appears to impose a further subjective discretion or ‘real world’ gloss that in practice we expect would be difficult apply (with potential arguments around whether identified activities or development may or may not occur despite being identified in the planning framework).

17 Fonterra therefore prefers its earlier sought relief, namely that Policy 6.20 be amended to read:

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.

18 The balance of the policy as set out by the Officers should be deleted.

Policy 6.21

19 The Officers similarly have not recommended any further changes to Policy 6.21. The policy would read:

~~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.

- 20 Fonterra remains of the view that wording is imprecise and it serves no real function – but it 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

- 21 Fonterra sought that Policy 6.22 be deleted – the primary issue raised by Fonterra being a concern around the partial adoption of particulate emission offsetting requirements of the Resource Management (National Environmental Standards for Air Quality) Regulations 2004. In particular, Fonterra is concerned that the application of those requirements is to the enlarged 'Clean Air Zones'.
- 22 The Officers' Reply Report appears to largely ignore the concerns raised by Fonterra with regard to 'elevating' the NES regime from smaller gazetted air sheds to apply to a large area. The Officers instead consider (at para 66) that "Some submitters have incorrectly interpreted the Policy as relating specifically to the application of Regulation 17 of the NESAQ, which prevents consents being granted unless emissions are offset.". With respect, for Fonterra the key issue was not offsetting *per se*, it was foreshadowing the requirement to offset in circumstances where there were effects to a Clean Air Zone only – i.e. where the actual gazetted air shed did not exceed the NES' limit.
- 23 The Officers have not recommended any further changes to Policy 6.22 such that it would read:

~~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.

- 24 Fonterra maintains its position that Policy 6.22 should be deleted in its entirety. The policy largely repeats matters that would be done as a matter of routine as part of an application under Schedule 4 of the Act (except in the case of offsetting which it applies incorrectly to 'Clean Air Sheds'). To this extent, even if the policy were corrected to apply to gazetted air sheds (only) it adds nothing to what would be done anyway.
- 25 The Officers' reasoning is also ultimately flawed – as they advise (at para 68):
- 68 The Policy is vital to ensuring CRC can properly exercise its duty to enforce observance of the NESAQ...
- 26 Again, it is Fonterra's view that they are not properly applying the NESAQ as the proposed wording is incorrectly structured around Clean Air Zones and not gazetted air sheds. The concern set out in the balance of page 5-10, para 68 (in short that the Council needs a tool to decline resource consents where there are significant effects on Clean Air Zones) is therefore similarly misplaced. And in respect of the further concerns raised with regard to the need for a 'tool', it is simply noted that Policy 6.20 already provides a clear 'tool' available to decline a resource consent should it be considered inappropriate.
- 27 If, contrary to Fonterra's earlier submission, the policy is retained it needs to be limited to gazetted air sheds. In such a case paragraph

2 of the policy should also be amended to focus on ambient air quality and not cumulative effects (as set out elsewhere there are issues with relying on cumulative effects - i.e. not all cumulative effects will impact on ambient air quality and vice versa)).

Policy 6.22A

- 28 The Officers have similarly recommended no further changes Policy 6.22A which would mean it would read:

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.

- 29 In its earlier submission, Fonterra noted that the policy is out of scope given that no submissions sought the inclusion of this or a similar policy. The Officers have not commented on that concern.

- 30 More generally Fonterra was concerned that:

30.1 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; and

30.2 that formalising the above (even in circumstances where the policy refers to "may require") would move the focus away from the effects of the individual application under consideration to the more general need for any cumulative effects monitoring.

- 31 Fonterra remains of the view that it is inappropriate to require a discharger to monitor cumulative effects regardless of the scale of their own individual effect(s). To this end the Officers appears to be simply relying on the words "may require" – there is however no guidance in the policy as to how that discretion might be applied.

- 32 Fonterra considers that the better approach is to delete the policy and rely on the ordinary *Newbury* principles around the imposition of consent conditions.

- 33 For completeness it is also noted that reference to gazetted airsheds (even if a step in the right direction) instead of Clean Air Zones is also confusing and inconsistent with other policies relating to 'Industrial and Large Scale Discharges to Air'.

Policy 6.22B

- 34 The Officers have accepted Fonterra's sought amendment to Policy 6.22B. With the change, Policy 6.22B would read:

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.

- 35 Fonterra actually opposed the policy (but not strongly) on the basis that it questioned 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 not concerned with the retention of the now amended policy.
- 36 The inclusion of the word "consented" means that permitted discharges which properly form part of the permitted baseline do not need to form part of the assessment.

Rules 7.17 and 7.18

- 37 It appears the Officers continue to support the deletion of Rules 7.17 and 7.18 in their entirety. This is supported by Fonterra – noting that 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.
- 38 The Officers now propose the deletion of Rule 7.16 as well. Fonterra understands that this would mean that its activities would typically fall to the 'catch-all' discretionary Rule 7.59. Although a specific discretionary rule for Industrial, trade and large scale discharge activities might have been easier to read within the same part of the plan, defaulting instead to the catch-all discretionary rule is not opposed (provided the understanding set out is correct).

OTHER COMMENTS

- 39 In addition to the specific comments stated above, Fonterra respectfully seeks to make the following comments on three other issues that appear to arise through the Reply Report. All three are relevant to points already made above.
- 40 The first of these is the issue of 'ambient versus localised air quality' where it was noted that this would be further discussed in this response. The second is application of the ambient air quality guidelines (which is relevant to the deletion of Rules 7.17 and 7.18). The third is the issue of reverse sensitivity (which is relevant to Policy 6.20).

Ambient versus localised air quality

- 41 Consistent with the discussion earlier in this response, there appears to be a remaining issue with the use of 'localised' versus 'ambient' versus 'cumulative' air quality effects.
- 42 The Officers appear to be supportive of the inclusion of a definition of "Ambient Air" as per the Ambient Air Quality Guidelines. They also appear to have changed their position (in part) with regard to the use of both localised and ambient effects in response to submitter concerns – but they go on to consider that "cumulative" effects is the more appropriate label rather than "ambient".
- 43 As the Officers Reply Report advises:
- 36 Having considered this matter further, I have changed my recommendations to include policies for large scale and industrial discharges that discuss both localised and cumulative effects and recognise the difference between them. On the basis of the evidence received, particularly that of Ms. Justine Ashley on behalf of Fonterra, I consider that acknowledging localised and cumulative effects within the policies will ensure that both types of effects will be considered and managed and the objectives will more likely be achieved. I recommend that the definition of "ambient air" as defined in the Ambient Air Quality Guidelines is adopted into the pCARP as a new definition, in order to make clear what is meant by the term in the Air Plan. I do not recommend the use of the term "ambient effects" within the policies though because it tends to be interpreted as referring to a number of matters (including air quality in the worst part of the airshed, airshed wide effects or region wide effects), or used at cross-purposes (i.e. to refer to cumulative effects rather than outdoor air quality). "Cumulative" effects better describes the effects we are seeking to manage and is less ambiguous than "ambient effects".
- 37 The recommended approach, of distinguishing between local and cumulative effects, provides certainty and clarity. The recommended changes, result in a more efficient and effective framework that will better achieve the Plan Objectives.
- 44 Accordingly (and despite accepting the inclusion of a definition of ambient air quality effects), the approach of the officer is to favour the label "cumulative" over "ambient".
- 45 Fonterra does not consider the Officers' concerns are correct. With a definition of "Ambient Air" ("*Means the air outside buildings and structures. This does not include indoor air, air in the workplace, or contaminated air discharged from a source*") it is clear what it means. It is also consistent with the RPS (and the Ambient Air Quality Guidelines) and will ensure that it ambient effects are

properly considered in respect of all relevant applications (bearing in mind that any planning assessment will also need to consider the higher order or separate documents).

- 46 From a practical perspective, Fonterra is concerned that with the use of 'cumulative' there will be circumstances where there are both:
- 46.1 no cumulative effects but there may still be effects on ambient air quality (consider an isolated dairy factory discharge in a rural zone); and
- 46.2 no ambient air quality effects but there may still be effects on cumulative air quality (consider the above, but with another discharge nearby – the total of which is still well within Ambient Air Quality Guideline levels).
- 47 A full cumulative effects assessment (which seems to be implicit within a number of the policies) will also not be required in every instance – there will be situations where it will be readily accepted that the 'incremental effect' on ambient air quality (especially outside of airsheds) is entirely satisfactory and appropriate.
- 48 As final matter (and referring to the principles that apply to statutory interpretation and the interpretation of regulatory instruments), the use of two different phrases or definitions in the same instrument (here "cumulative" and "ambient") would suggest they have a different meaning. That is not the case with, on the Officer's approach, one (it appears) being both a partial subset and a partial synonym for the other. Fonterra simply submits that the pCARP is not assisted by the inclusion of further terms that are inconsistent with both the RPS and guideline framework (such that 'ambient' should be used instead).

Ambient Air Quality Guidelines

- 49 As set out elsewhere, Fonterra supports, in principle, the deletion of Rules 7.17 and 7.18 and changes to Policies 6.2, 6.3 and 6.21 to apply the Ambient Air Quality Guidelines more appropriately.
- 50 The changes proposed by the Officers (relying on Fonterra's submission) to Policy 6.2 and 6.3 are set out below:
- 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 values where people or the environment could actually or potentially be adversely affected.

6.3 Where concentrations of contaminants exceed 100% of guideline values set out in the Ambient Air Quality Guidelines 2002 Update, action is taken to improve air quality or ensure people or the environment are not adversely affected by the exceedance.

- 51 Under the RMA the “*environment*” already includes people and communities so it appears unnecessary to provide for “*people*” separately.
- 52 In addition the use of the phrase “*could actually or potentially*” is uncertain and could be interpreted fairly loosely (meaning that the actual intent of the policies may become lost). Fonterra considers the wording proposed by it (at the original hearing) to be more appropriate.

Approach to reverse sensitivity

- 53 The Officers appear to maintain the view that pCARP does give effect to policy 14.3.5 of the RPS (see page 5-2, para 16). The Officers have however gone on to recommend some changes to Policy 6.7:

Where, as a result of authorised land use change, land use activities within the neighbourhood of a discharge into air are significantly adversely affected by that discharge, the effects of the discharging activity must be reduced, within a reasonable time frame, so they are appropriate within the existing receiving environment, or consent may be reviewed and / or declined. ~~it is anticipated that within a defined time frame the activity giving rise to the discharge will reduce effects or relocate.~~

- 54 To this end the Officers appear to have accepted that the Council does not have the jurisdiction to require an activity to relocate and has attempted to amend the policy accordingly (see page 5-3, para 19). Fonterra is however concerned that the revised wording conflicts with the now revised Policy 6.20 (which requires industrial discharges to apply best practical options to avoid significant cumulative (or ambient) and local effects on air quality, thereby invoking an assessment of the sensitivity of the receiving environment).
- 55 In such a context, Policy 6.7 would potentially be used as an overarching ‘threat’ that consent will be declined if effects are not reduced. Fonterra considers that would not be appropriate and on the basis that a sufficient policy direction is already provided by Policy 6.20 (and elsewhere), Policy 6.7 should be deleted.

Dated: 1 April 2016



Ben Williams
Counsel for Fonterra Co-operative
Group Limited

To be presented by Ms Justine
Ashley (with support from Mr
Cudmore).