

In the matter of the Resource Management Act 1991

And

In the matter of the Proposed Canterbury Air Regional Plan

**LEGAL SUBMISSIONS ON REPLY REPORT ON BEHALF OF
SYNLAIT MILK LIMITED**

1 April 2016

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INTRODUCTION

- 1 Synlait Milk Limited (“Synlait”) is a submitter who filed submissions directed to policies 6.20 to 6.22B and rules 7.17 and 7.18 as permitted by Minute 3.
- 2 In accordance with Minute 5, these submissions are in response to the s 42A Reply Report (insofar as it relates to those particular provisions).
- 3 Synlait appreciates the opportunity to be able to address these issues.

Policy 6.20

- 4 This Policy as recommended in the Reply Report states:

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

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

- 5 In the legal submissions of Synlait dated 12 February we raised a concern in relation to the fact that, having stated the best practicable option must be achieved, the policy then goes on to state that this is so the matters in 1 and 2 are achieved. This is potentially contradictory as the best practicable option is what it is and whether this will achieve clause 1 and 2 depends on the circumstances of each case. The requirement should be to achieve the best practicable option and for that to be assessed on its merits. This issue has not been addressed in the Reply Report and this concern still stands.

- 6 The Reply Report refers to the amendments sought by Synlait whereby Policy 6.20 would only apply outside a clean air zone and to localised air quality effects, and states:

Application of the policy within Clean Air Zones is appropriate, particularly with regard to the management of cumulative adverse effects. Localised effects are also of particular concern within Clean Air Zones where people already experience increased levels of PM.

- 7 However Synlait’s relief with respect to this Policy needs to be considered in conjunction with the relief with respect to Policy 6.21. Synlait suggested that Policy 6.20 apply outside Clean Air Zones, and Policy 6.21 inside Clean Air Zones. In Synlait’s submissions dated 11 November 2015, we explained the reasons why it is helpful to draw attention to the fact that localised effects 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.

It is important to recognise however that cumulative effects are not forgotten outside of clean air zones (refer policies 6.1, 6.2 etc) and localised effects are not forgotten within (refer policies 6.1, 6.6 etc.).

8 Below we have also set out comments that are specific to clauses 1 and 2 of this Policy.

Clause 1

9 The proposed policy introduces the word “significant” but does not define what this means or how it will be determined, which is different to proposed Policy 6.22. As the policy is written at present the policy could result in an impediment to industries such as Synlait.

10 In the evidence of Prue Harwood¹ the example was used of the very localised high modelling results that were predicted to occur just inside Synlait’s boundary. Had this been predicted to occur just beyond the boundary and, if for example, Environment Canterbury decided to interpret “significant” as any predicted exceedances of the AAQG (without taking into account the probability that anyone would be exposed) Environment Canterbury may consider this to be contrary to the policy. This could result in an impediment to industries such as Synlait.

11 If an explanation was included in the policy, as in Policy 6.22, which spelt out how significance was to be determined, this would assist, however the factors would not necessarily be the same as those listed in policy 6.22. Within Clean Air Zones policies 6.20 and 6.22 both apply and both policies refer to “significant” so there would be a temptation to apply the methods for determining significance in the same way unless it was clearly stated in each policy what the factors for consideration should be.

Clause 2

12 The legal submissions by Synlait dated 12 February also raised concerns in relation to clause 2. The reasons why the phrase “anticipated land use” is unclear and open to interpretation were set out.

13 The Reply Report attempts to address this by proposing the following 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 consents.

14 This definition does not however alleviate the concerns of Synlait.

¹ Paragraphs 36 – 37.

15 Firstly the definition does not capture what we understand to be the intention of the Council Officers.

16 The explanation in the Reply Report to this policy states:

The term anticipated refers to activities that would reasonably take place on the **land because they are permitted to take place** within the zone or resource consent **has been granted** for them to occur. (emphasis added).

17 There are two key differences between the definition proposed and this explanation:

17.1 This explanation suggests that anticipated land use should include only activities that are permitted activities under the plan. In comparison, the definition refers to activities “provided for” under the plan. The meaning of “provided for” is uncertain and could be interpreted as extending beyond permitted activities. If the plan makes provision for an activity to be a controlled or discretionary activity is that activity provided for? This is the type of debate that would inevitably arise. If the definition did capture such 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 state of the environment.²

17.2 Secondly, the explanation refers to resource consents that have been granted. In comparison the definition refers to development provided for by resource consents. It is unclear whether this extends the definition to resource consents that have not yet been granted (in circumstances where the plan sets up a framework for resource consent to be obtained). Again, this would be inconsistent with the case law referred to in the previous paragraph.

18 These issues can be illustrated using the Synlait site as an example. Synlait’s site has been identified as a Dairy Processing Management Area (DPMA). The Selwyn District Plan sets out a rule framework to enable dairy processing on the site. Surrounding the DPMA, and extending over neighbouring land, is a noise control boundary. Any dwellings that are proposed within the noise control boundary need to meet certain standards to achieve noise insulation (rule 3.13.1.6). Any dwellings that do not comply with those requirements are a restricted discretionary activity.

19 Synlait wish to ensure that Policy 6.20 is not interpreted in a way that means dwellings within the noise control boundary with no noise insulation are an anticipated land use because the

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

plan sets up a framework to apply for resource consents. Such an interpretation would run completely contrary to the fundamental purpose of establishing a DPMA at the site.

20 However, even if the definition were improved to better reflect its intention, Synlait maintains that this clause is inappropriate, including for the reasons set out at paragraphs 7 – 9 of Synlait’s submissions dated 12 February.

21 Policy 6.19 already includes a consideration of compatibility with surrounding land use patterns so Policy 6.20 does not need to make any further reference to land use.

Relief Sought

22 Synlait seeks that Policy 6.20 as proposed in the Reply Report be deleted. It is maintained 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.

Policy 6.21

23 As set out in Synlait’s submissions dated 12 February it is considered this policy is vague and does not add anything to what is already a legal requirement.

24 However Synlait has no objection to the inclusion of such a policy.

Policy 6.22

25 A key concern with this policy is that it applies to the Clean Air Zones (rather than gazetted airsheds) and Environment Canterbury is proposing to increase the size of the zones considerably and beyond the boundary of the gazetted airshed. There are large areas of rural land within the extended CAZ in which an industry would be unlikely to have any major effect on achievement of the NES within the gazetted airshed or ambient air quality within the CAZ. The policy as written would have the potential to restrict the establishment of any new industry within the CAZ and will increase the scrutiny placed on any resource consent application within the CAZ

26 The Reply Report discusses the use of “avoid”. Synlait consider however that a reference to “avoid, remedy or mitigate” would be more appropriate.

27 The method for determining significance is very subjective and there is no knowing what weight will be put on each of the individual considerations and if this would be applied consistently. For instance an emission may have a large PM₁₀ emission but it may have very little localised or cumulative effect on the airshed if it is located close the coast and the

discharges will be blown out to sea. Rarity of the event is not considered a factor. It is uncertain whether or not Environment Canterbury would determine this to be 'significant'. The policy may encourage industries to increase their discharges in small increments.

Relief Sought

28 Synlait seeks that this policy be deleted for the reasons set out above, and the reasons set out in Synlait's submissions dated 12 February.

Policy 6.22A

29 This Policy relates to the ability of the Council to require a discharger to monitor the cumulative or local effects of a discharge. Synlait maintains that this is unreasonable and impractical for the reasons set out in Synlait's submissions dated 12 February. Although the Reply Report makes the point that this policy is not definitive and simply indicates the CRC may use this option, this gives the Council an unqualified discretion to require monitoring. If any such policy were to remain, the policy should make it clear that this is only an option that should be considered if:

29.1 Monitoring would be practical (i.e. there must be sufficient data available as to existing air quality which is not the case in many rural areas); and

29.2 The consent holder is making a significant contribution to cumulative effects.

30 The Reply Report justifies the policy by saying the option to require monitoring is there anyway because of section 108(4) RMA. Although that section allows conditions to be imposed to require monitoring, this is not an unqualified discretion. This is subject to requirements set out in case law as to what is a valid condition – including that the condition must be reasonable and practical and must fairly and reasonably relate to the development authorised by the consent.³

31 Further the fact that there is an ability to impose monitoring under section 108 means that it is not necessary for this also to be included in the Air Plan. As the policy does not specify the situations where monitoring will be considered, the policy does not add anything and only creates uncertainty.

Relief Sought

32 Synlait seeks that this Policy be deleted.

³ *Newbury DC v Secretary of State for the Environment* [1981] AC 578, [1980] 1 All ER 731.

Policy 6.22B

33 Synlait supports the amendment to this policy accepted in the Reply Report so that it refers to all consented discharges.

CONCLUSION

34 Synlait maintains that the policies put forward by Synlait at the hearing are appropriate. These policies are attached for ease of reference.

35 Synlait also suggested a number of other amendments to the objectives and central policies (see attached) which have not been adopted in the Reply Report, in many instances without any explanation. For the avoidance of doubt, Synlait confirms that it continues to seek that these amendments be adopted.

Dated 1 April 2016



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