BEFORE THE ENVIRONMENT COURT
AT AUCKLAND

I MUA I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision No. [2023] NZEnvC 001

IN THE MATTER	of the Resource Management Act 1991 (**RMA**)
AND	of appeals pursuant to clause 14 of the First Schedule to RMA
BETWEEN	SWAP STOCKFOODS LIMITED (ENV-2019-AKL-000065) TIMBERLANDS LIMITED (ENV-2019-AKL-000073) Appellants
AND	BAY OF PLENTY REGIONAL COUNCIL Respondent
AND	TOI TE ORA PUBLIC HEALTH PORT OF TAURANGA LIMITED TE RUNANGA O NGĀI TE RANGI IWI TRUST GLENCORE AGRICULTURE (NZ) LIMITED, INTERNATIONAL NUTRITIONALS LIMITED TRADING AS AGRIFEEDS AND ADM NEW ZEALAND LIMITED TIMBERLANDS LIMITED s 274 Parties

Court:	Judge MJL Dickey Commissioner JA Hodges Commissioner AP Gysberts
Hearing:	At Tauranga, 19-22 October 2020 (**2020 hearing**) Reply submissions 18 December 2020 Reconvened by AVL at Tauranga and Auckland, 25 March 2021 (**2021 hearing**) Reconvened by AVL at Tauranga and Auckland, 2-5 May 2022 (**2022 hearing**) Closing submissions 1 July 2022
Appearances:	TS Richardson for Swap Stockfoods Limited RC Zame for Bay of Plenty Regional Council M Patterson for Toi Te Ora Public Health VJ Hamm for Port of Tauranga Limited JM Gear for Te Runanga o Ngāi Te Rangi Iwi Trust JC Brabant for Glencore Agriculture (NZ) Limited, International Nutritionals Limited trading as Agrifeeds and ADM New Zealand Limited GK Chappell for Timberlands Limited
Date of Decision:	10 January 2023
Date of Issue:	10 January 2023

INTERIM DECISION OF THE ENVIRONMENT COURT

A: We have determined that:

1 Plan Change 13 is to be amended to include the following new provisions relating to the Mount Maunganui Airshed:

Policy AQ P11	**Handling of bulk solid materials and logs as existing activities in the Mount Maunganui Airshed for an interim period**
Policy AQ P12	**Iterative management of air quality within the Mount Maunganui Airshed**

Rule AQ R22A **Handling of bulk solid materials and logs within the Mount Maunganui Airshed until [date 3 years from Environment Court decision] – Permitted**

Rule AQ R22B **Handling of bulk solid materials and handling of logs within the Mount Maunganui Airshed on expiry of Rule AQ R22A – Restricted Discretionary**

Rule AQ R22C **Notification**

2 No amendments are made to provisions applying outside the Mount Maunganui Airshed.

B: We will direct the Bay of Plenty Regional Council to prepare changes to Plan Change 13 in accordance with s 293 of the RMA to include the control of emissions of particulate matter less than 10 microns in diameter (PM_{10}) from unsealed yards to contribute to integrated management of the Mount Maunganui Airshed

C: We strongly recommend that the Regional Council:

1 Implements other non-statutory methods and undertakes a review of existing resource consents relating to the discharge of PM_{10} to air to ensure the Mount Maunganui Airshed is managed on a fully integrated basis as soon as reasonably practicable;

2 Prepares an Airshed Management Plan in consultation with Ngāi Te Rangi, Toi Te Ora, affected industries and other affected parties to ensure iterative management proceeds to ensure the objectives of Plan Change 13 are achieved as effectively and efficiently as practicable.

Contents

REASONS

Section A

Introduction

A1 Dust in the Mount Maunganui Airshed

The primary issue and relevant standards and guidelines for the protection of human health and the mauri of air

[1] This case is primarily about the management of dust in the Mount Maunganui Airshed (**MMA**) to protect human health and the mauri of air. Plan Change 13 (**PC13**) contains provisions to address the management of dust.

[2] Dust less than 10 micrometres or microns (**10 µ/m**) in diameter (**PM_{10}**) is a contaminant controlled under the Resource Management (National Environment Standards for Air Quality) Regulations 2004 (**NESAQ**). Schedule 1 of the NESAQ requires that a 24-hour average concentration of 50 $\mu g/m^3$ of PM_{10} must not be exceeded in the MMA more than once in a 12-month period (**PM_{10} Standard**). The Council must enforce the observance of the PM_{10} Standard to the extent to which its powers enable it to do so.[1]

[3] If the PM_{10} Standard is exceeded in an airshed, it will become a polluted airshed and will remain so for a period of five years after the last exceedance occurs.[2] Under Regulation 17(1) of the NESAQ (**Regulation 17**) the Council must decline applications for resource consents under specified circumstances, which the appellants and their supporting s274 parties submitted in opening as being likely to apply to some or all of their existing operations in the MMA.

[4] In addition to the requirements of the NESAQ, the Ministry for the Environment (**MfE**) Ambient Air Quality Guidelines 2002, (**Ambient Air Quality Guidelines**) provide health-based guideline values with the aim of protecting people's health and well-being. For PM_{10}, the current guideline is an annual average concentration of

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[1] RMA s44A(8).
[2] NESAQ Regulation 17(4).

20 μg/m^3. This was based on 2005 World Health Organisation (**WHO**) guidelines.

[5] In September 2021, the WHO published updated short-term and long-term global air quality guidelines for PM_{10}. It recommended that instead of one exceedance of a 24-hour PM_{10} standard of 50 μg/m^3 a year, three or four exceedances of a lower standard of 45 μg/m^3 would be permissible. It recommended that the annual average PM_{10} concentration be reduced from 20 to 15 μg/m^3.[3]

[6] The WHO recommendations are currently under review by the MfE for possible application in New Zealand. The outcome of that review is not known and cannot be predetermined by the Court. However, the recommendations indicate clearly the level of concern about the significance, in terms of protecting human health, of annual average PM_{10} concentrations. Any future requirement to comply with a lower annual ambient PM_{10} guideline would have major implications for air quality management of the MMA. While PC13 cannot predict what any future guideline value will be, as far as possible the provisions should provide flexibility to respond to changing regulations and/or guidelines without undue delay.

Components of dust addressed in this decision

[7] This decision focusses on PM_{10} as the contaminant of primary concern but, to the extent relevant, it is also applicable to particulates in general. Particulates are defined in PC13 as particulate matter where the particle size is small enough to become airborne and includes total suspended particulate (**TSP**), PM_{10} and $PM_{2.5}$. Where we refer to particulates or particulate matter in this decision, it includes PM_{10} and $PM_{2.5}$.

[8] TSP is defined as particulate matter less than 100 μm in diameter.[4] $PM_{2.5}$ is particulate matter less than 2.5 μm in diameter. Importantly, particles less than 50 μm cannot be seen by the naked eye.[5] The relative size of a PM_{10} particle is shown in the following diagram.[6]

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3 Mx Wickham, supplementary evidence, 28 March 2022, at [7].
4 Dr Wilton, EIC, 25 March 2022, at [34].
5 Mx Wickham, EIC, 7 August 2020, at [15].
6 The Bay of Plenty Regional Council Mount Maunganui Dust Monitoring Report, February 2012.

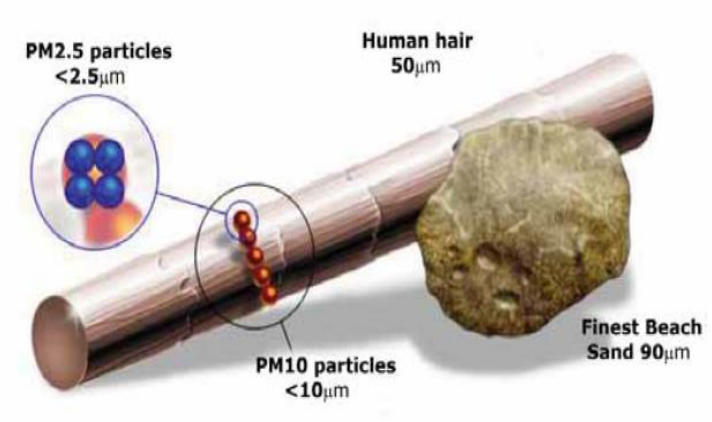

Figure 2.2 Particle size comparison

[9] The MfE "Good Practice Guide for Assessing and Managing Dust 2016 (**Good Practice Guide**) says PM_{10} can stay suspended in the atmosphere for significant periods.[7]

[10] The air quality experts agreed that:[8]

> In still air a PM_{10} particle can remain suspended for a long time (hours to days). Where there is wind, a PM_{10} particle can travel a long way (kilometres). In relation to a cloud of dust, the concentration will reduce as it moves further from the source due to inter alia meteorology. It is not possible to accurately define the concentration decline over distance from diffuse sources under all meteorological conditions.

[11] Other contaminants were not addressed to any significant extent in evidence and we have not addressed them. However, we understand that in the event that controls on other contaminants are required, they will be addressed in further Plan Change 18 (**PC18**) under consideration by the Council.[9]

The dust environment in the Mount Maunganui Airshed

[12] In 2012, following a number of dust complaints within the MMA and

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7 Ministry for the Environment 2016 *Good Practice Guide for Assessing and Managing Dust,* at Section 1.1.

8 Joint Witness Statement – Air Quality, dated 27 May 2021 (**JWSAQ#2**) in response to Question 21.

9 Memorandum of counsel on behalf of Bay of Plenty Regional Council, Timberlands Limited, Toi Te Ora Public Health and Te Runanga O Ngāi Te Rangi Iwi Trust dated 26 February 2021, (**Joint Memorandum, 26 February 2021**), Appendix 1: Strategy and Policy Committee Agenda, at section 2.3.

investigations undertaken between 2000 and 2010, the Council prepared a Dust Monitoring Report.[10] Findings included that "Overall, the levels of suspended particulate matter are quite acceptable for an urban area, although moderately higher than levels recorded in less developed parts of the region."[11] Continuous PM_{10} monitoring was undertaken at a site in Totara Street from late-2008 to mid-2009. The average PM_{10} level recorded was 15.7 μ/m^3 and there was one exceedance of the PM_{10} Standard during the period.[12]

[13] In February 2015, the Council approved the development of a Dust Reduction Operational Plan for the Port of Tauranga (**Port**) that included the preparation of a comprehensive audit of dust sources (**Port Dust Audit**). The Port Dust Audit was undertaken in October 2016.[13] Findings of the Port Dust Audit included that: [14]

(a) Activities on the Port site do not comply with the conditions of Rule 17.[15] The Regional Plan requires that any activity that does not meet the permitted activity rules (i.e. no objectionable or offensive dust) is a discretionary activity.

(b) It is recommended that the Council consider requiring the Port to apply for resource consent for discharges to air.

(c) There is a compelling argument for this resource consent to address all discharges to air.

(d) Ambient monitoring of PM_{10} would confirm whether or not ambient concentrations in and around the Port exceed the national environmental standard. However, an expert judgement based on the available evidence indicates that exceedance of the Standard is likely.

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10 The Bay of Plenty Regional Council Mount Maunganui Dust Monitoring Report, February 2012.
11 The Bay of Plenty Regional Council Mount Maunganui Dust Monitoring Report, February 2012, at page iii.
12 The Bay of Plenty Regional Council Mount Maunganui Dust Monitoring Report, February 2012, at section 5.1.5.
13 2016 Dust Audit: Port of Tauranga (**2016 Dust Audit**), dated 13 April 2017, prepared for the Council by Emission Impossible.
14 2016 Dust Audit, at sections 4 and 5.
15 Of the then operative 2003 Regional Air Plan

> This suggests that air discharges from the Port are likely to cause adverse effects on the environment, imposes monitoring obligations on the Council and may constrain granting of resource consent in the area.

[14] Following receipt of the Port Dust Audit, and in accordance with Regulation 15 of the NESAQ, the Council installed an MMA-wide monitoring network between August and December 2018. The results confirmed that exceedances of the PM_{10} Standard were occurring, with three exceedances recorded at Whareroa Marae in late 2018 and two at De Havilland Way by 1 February 2019.[16] There were 20 exceedances of the PM_{10} Standard in the first full year of monitoring.[17]

[15] On 28 November 2019, the MMA was gazetted as a polluted airshed by the Minister for the Environment.[18]

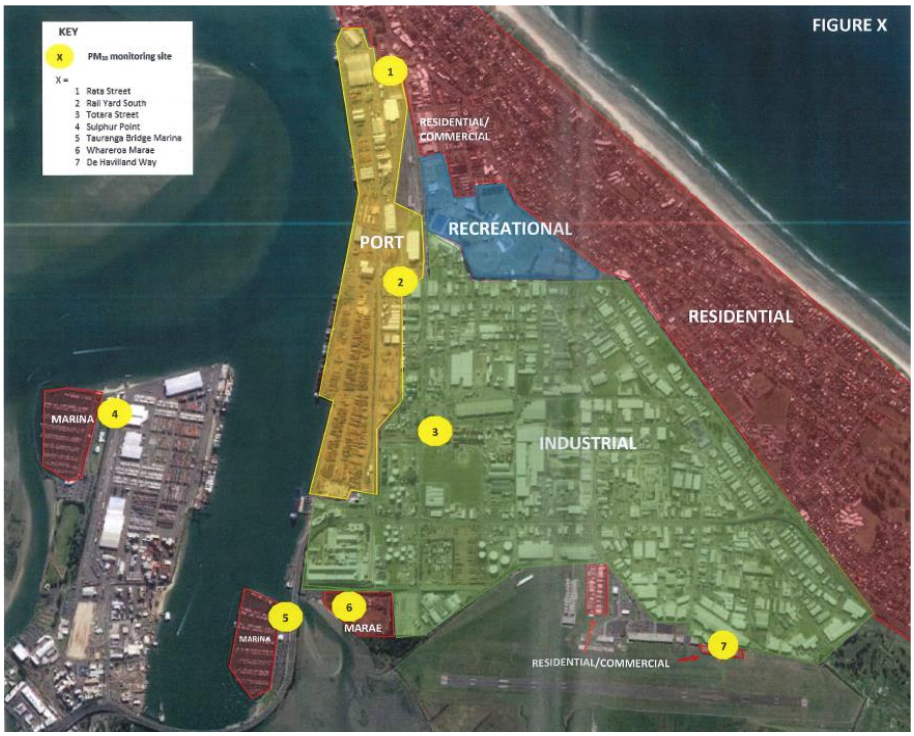
A2 The Mount Maunganui Airshed

General overview

[16] The boundaries of the MMA are shown in the figure below.[19]

[16] Bay of Plenty Regional Council Air Quality Data Update 2020, publication 2020/03, at Table 4.
[17] Dr Wilton, EIC, 25 March 2022, at Appendix B, Table B1.
[18] Ms Parcell, EIC, 7 August 2020, at [80].
[19] Bay of Plenty Regional Council web site: boprc.govt.nz/environment/air/airshed

[17] The following map of the MMA is reproduced from Figure X in the Statement of Agreed Facts. It shows the locations of PM_{10} monitoring sites as yellow circles numbered 1 to 7 with 1 being Rata Street, 2 Rail Yard South, 3 Totara Street, 4 Sulphur Point, 5 Tauranga Bridge Marina, 6 Whareroa Marae and 7 De Havilland Way. For clarity, the residential and recreational areas shown on Figure X are not within the MMA but need to be considered in terms of potential adverse effects if elevated particulate and PM_{10} concentrations occur within the MMA.



[18] The area within the MMA includes the Port, which is New Zealand's largest by volume. It is identified as nationally significant infrastructure in the Bay of Plenty Regional Policy Statement (**RPS**), which provides for ports in Policy CE 14B. We have considered this Policy, which is to "Recognise the national and regional significance of the Port of Tauranga and the need for it to be located within the coastal environment". The explanation to the policy is that it gives effect to Policy 9 of the New Zealand Coastal Policy Statement 2010, which is to "Recognise that a sustainable national transport system requires an efficient national network of safe ports."

[19] Ms KE Parcell, a planning expert and Team Leader Kaiwhakatinana at the Council stated:[20]

> Land to the east of the Port is a mix of heavy industrial, light industrial, and commercial activities. Other activities associated with these land uses are rail and heavy vehicle movements. The airport is located on the southern edge of the area next to the harbour.
>
> Also included in the area is the Tauranga Harbour Marina, residents at De Havilland Way and the Whareroa Marae.

Locations of PM_{10} emitting activities within the MMA

[20] The locations of industrial activities discharging PM_{10} within the MMA are shown on the following figure.[21]

[21] Other than PM_{10} emissions from stockfood related bulk solid materials (**BSM**) handling activities and log handling activities, we received limited evidence on other forms of BSM or industrial air emissions generally within the MMA. We were advised that 28 air discharge consents were issued within the MMA, based on information

[20] Ms Parcell EIC, 7 August 2020, at [72] and [73].
[21] Mr McKenzie, EIC, 4 September 2020, at [72].

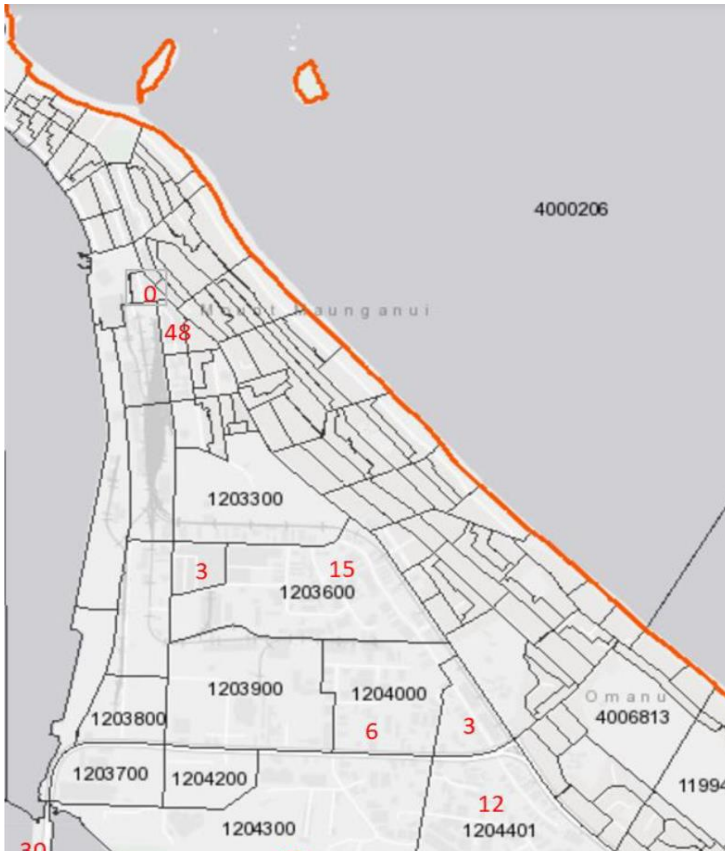
provided by the Council.[22]

[22] We were also advised that many industries operate under permitted activity Rule 17 of the 2003 Regional Air Plan.

Residential activities within the MMA

[23] There are residences at Whareroa Marae and De Haviland Way just inside the MMA boundary. Tauranga Bridge Marina is also located just inside the boundary but we received no evidence about people living there.

[24] No planning expert identified a residential property within the area shown as "industrial" on the above Figure X. However, Dr Wilton produced the following plan for use at the second air quality expert conference, which identified dwelling numbers in mesh blocks in the MMA based on 2018 census data.



[22] Mr Whyte, EIC, 21 August 2020, at [40].

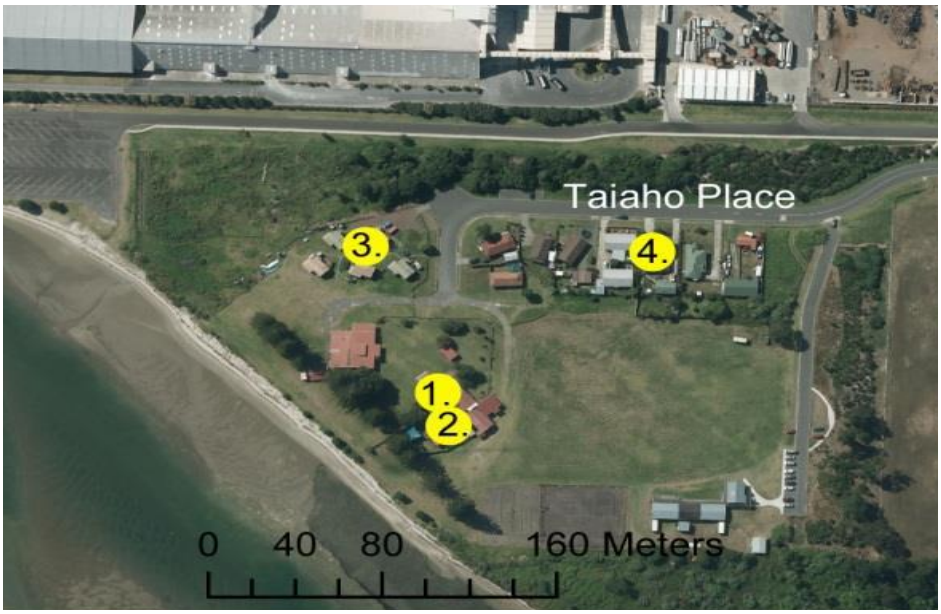
[25] The plan appears to show there were 159 occupied dwellings within the MMA at the time of the census, in the general locations shown.[23] However, while the 48 dwellings at the northern end are in relatively close proximity to the Rata Street monitoring site, they are located outside the MMA boundary. The dwellings at the southern end of the area include those at Whareroa Marae. The plan was not tested in evidence, and it was not made clear to us if or why almost 30 dwellings would be located in an area zoned industrial. We consider this is an important matter the Council should investigate further as it has potentially significant consequences for future air quality management of the MMA.

Whareroa Marae

[26] Whareroa Marae and its community was established by Taiaho Hori Ngatai in 1867. His descendants have maintained residence at the Marae ever since. The local marae community has a standing population of approximately 90 people, with 80% either under 10 years old or over sixty years of age. Te Kohanga Reo o Whareroa is located near the Marae and has a roll of 20 and a staff of five. Te Runanga o Ngāi Te Rangi iwi offices are located on the Marae land and there are an estimated 20 to 30 personnel in the offices daily. Overall, the community has a population of 140 to 150 people.[24]

[27] The Marae is located in the south of the MMA, with industrial premises immediately adjacent to the north and east. The following plan shows its location in relation to the industrial area to the north, a distance of perhaps 30 metres boundary to boundary. Reference 1 is the location of the Council's air quality monitoring site, 2 is the kohanga reo, 3 is papakainga housing and 4 is residential housing.[25]

[23] Reproduced from JWSAQ#2, at Attachment 2.
[24] Mr Ngatuere, EIC, 7 August 2020, at [9] to [14].
[25] Ms Parcell, EIC, 7 August 2020, Attachment A, Original s 32 Report, Figure 7.20.



De Havilland Way

[28] Residential properties at De Havilland Way are located within the same cadastral site boundary as a number of BSM storage and handling facilities located at 101 Aerodrome Road. A plan of the general site locality is included below, reproduced from a report commissioned by Toi Te Ora relating to health effects.[26] While Swap Stockfoods Limited (**Swap**) is shown as operating at the site, that is no longer the case.[27]

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[26] Mx Wickham EIC, 7 August 2020, Attachment B: prepared for Toi Te Ora by Emission Impossible *Dust Investigation at 101 Aerodrome Road, Mt Maunganui* (10 May 2018), at Figure 3.

[27] Opening submissions by Swap Stockfoods Limited, undated, at [3].

A3 Proposed Plan Change 13

Background to plan development

[29] Proposed Plan Change 13 (**PC 13**) will form a chapter in the Regional Natural Resources Plan, replacing an earlier air quality chapter, which became operative in 2003. The Draft Plan Change was publicly released on 26 April 2016 to obtain feedback from those affected and the wider community.[28] PC13 was notified on 28 February 2018.

[30] We were advised that, at the time PC 13 was being developed the Mount Maunganui area began to emerge as a significant air quality issue. The Port Dust Audit did not identify any single source as the cause of the dust issue, instead it listed a number of sources that contributed to the dust in the area: BSM, log handling, open spaces and vehicles and cargo handling equipment. Palm kernel and other grains at and around the Port was identified as one of two issues that had emerged in recent years, the other relating to odour, which is not addressed in PC13.

[28] Ms Parcell EIC, 7 August 2020, Appendix 1 at section 4.3.2.

[31] Council staff responded to more than 50 complaints regarding the handling of BSM at De Havilland Way and compliance staff were working with shipping operators and stevedores to improve handling of palm kernel at the Port. Despite that, complaints continued.[29]

[32] Under the heading "Risk of acting or not acting", the s 32 Report for PC13 said: "There is sufficient evidence to establish that there is an air quality issue in this area, and that a response is required. However, there is not enough evidence to support the introduction of strict rules for the Mount Maunganui area."[30]

[33] Over the life of the 2003 Plan a number of issues arose in relation to dischargers relying on permitted activity Rule 17. Ms Parcell stated:[31]

> … the general nature of the conditions in Rule 17 made it difficult to establish with certainty that a resource consent was required. In the case of cumulative effects, it proved very difficult for the Regional Council to demonstrate an adverse effect where a number of sites were contributing to an issue.

[34] A replacement permitted activity rule in the notified version of PC13, Rule AQ R1, required that an activity on industrial and trade premises (**ITP**) that was not identified as permitted, controlled, or restricted discretionary by another rule in PC13 automatically defaulted to a discretionary activity under Rule AQ R2. Following submissions, Ms Parcell agreed with the submitters in the s 42A report that "… the exclusion of all ITPs from the permitted activity rule was, on reflection, too broad and would inadvertently capture *de minimus* activities."[32] She "… recommended to the Hearing Committee a new rule AQ R22 where the discharge from ITPs discharging particulates, odorous compounds and hazardous air pollutants were discretionary activities."[33]

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[29] Ms Parcell, EIC, 7 August 2020, at [36] to [45].
[30] Ms Parcell, EIC, 7 August 2020, Attachment A: Original Section 32 Report, at 7.9.5.
[31] Ms Parcell, EIC, 7 August 2020, at [48].
[32] Ms Parcell, EIC, 7 August 2020, at [60].
[33] Ms Parcell, EIC, 7 August 2020, at [60].

Changes made by the Council Hearing Committee

[35] Submitters speaking to the Hearing Committee were concerned that Rule AQ R22 as recommended in the s 42A report was also too stringent, and upon reflection Ms Parcell agreed. The Committee deleted the proposed wording of Rule AQ R22.

[36] After hearing several submissions regarding the adverse effects of the BSM handling facility at Aerodrome Road, which is more generally referred to as De Havilland Way, the Hearing Committee decided that facilities of this type, including BSM handling at the Port, have the potential to generate significant dust emissions and should be subject to resource consent. It included a new Rule AQ R22, Handling of BSM, as a discretionary activity.[34] As it was included as a regional rule, it was to apply to all BSM handled within the Bay of Plenty region. We define and discuss BSM in detail later in this decision.

[37] The report and recommendations of the Council Hearing Committee was published in February 2019. It had been finalised and all appeals were lodged well before the MMA was gazetted as a polluted airshed on 28 November 2019.

Current status of PC13

[38] PC13 is now operative except in relation to the matters covered by the appeals.

A4 The appeals

Swap Stockfoods Limited

[39] Swap appealed against the inclusion of replacement discretionary activity Rule AQ R22. Swap sought to include a permitted activity rule covering the discharge of particulate matter in the handling of BSM.

[40] The following parties joined the appeal as s274 parties:

(a) ADM New Zealand Ltd (**ADM**), International Nutritionals Limited trading as Agrifeeds (**Agrifeeds**) and Glencore Agriculture (NZ)

[34] Ms Parcell, EIC, 7 August 2020, at [62].

Limited (subsequently renamed as **VAA**) [35], all in support;

(b) Port of Tauranga Limited (**PoTL**), neither in support nor opposition but wishing to monitor the relief sought; and

(c) Toi Te Ora on behalf of the Bay of Plenty and Lakes District Health Boards and Ngāi te Rangi, both in opposition.

[41] Swap's closing submissions sought a pathway whereby existing BSM handling and storage businesses can be afforded the opportunity to continue their operations through the Port and the Mount Maunganui industrial area, while accepting regulation which is both transparent and unambiguous.

[42] The core concern of the s274 parties in support of the Swap appeal was that because of the wording of Regulation 17, it may not be possible to obtain resource consents for BSM activities within the MMA and their import activities through the Port would be forced to cease. The parties sought that "A way through must be found" to prevent that situation arising.[36] In closing submissions, VAA confirmed their need for a lawful opportunity to continue their operations and maintained that the most appropriate and "less restrictive" method is the inclusion of a permitted activity rule.[37]

[43] The s274 parties opposing the Swap appeal sought the following outcomes:

Toi Te Ora: That discharges of particulate matter from bulk handling of solids should be robustly regulated and monitored to protect public health.[38]

Ngāi te Rangi: That their " … future is one where our people can simply live as Maori on their turangawaewae, breathe fresh clean air and not have to worry about getting sick or leaving our tamariki with a legacy of ill health, poor living conditions and zero

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[35] By memorandum of counsel dated 30 May 2021, the Court was advised that Glencore Agriculture (NZ) Limited had changed its name to Viterra New Zealand Limited (**VAA**).
[36] Legal submissions of Glencore, Agrifeeds and ADM, 21 October 2020, at [11] and [13].
[37] Legal submissions of Glencore, Agrifeeds and ADM, 21 October 2020, at [26] and [27].
[38] Dr Miller, EIC, 7 August 2022, at [49].

incentive to come home."[39]

Timberlands Limited

[44] Timberlands Limited (**Timberlands**) appealed against the replacement Rule AQ R22 and the new definition of "Bulk Solid Material", seeking that both be deleted. Alternatively, it sought that Rule AQ R22 be amended to exclude BSM handling unless there is any discharge to air that is "Noxious, dangerous, offensive or objectionable beyond the boundary of the subject property", or that the definition be amended to specifically exclude logs.

[45] The following parties joined the appeal as s274 parties:

(a) PoTL, neither in support nor opposition but wishing to monitor the relief sought; and

(b) Swap, stating an interest in replacement Rule AQ R22 and the link with BSM, and supporting the proposal to delete the Rule.

[46] The Timberlands appeal is the subject of a consent memorandum to the Court and draft consent order dated 18 December 2019. The consent memorandum was signed on behalf of all parties to the appeal and the agreement reached was (tracking in underline and ~~strikethrough~~):[40]

> Amend the definition of 'Bulk Solid Material' in Plan Change 13 (Air Quality) to the Bay of Plenty Natural Resources Plan (Plan Change 13) as follows:
>
> **Bulk solid material** means ~~means~~ materials consisting of, or including, fragments that could be discharged as dust or **particulates**. These materials include but are not limited to: gravel, quarried rock, **fertiliser**, coal, cement, flour, rock aggregate, grains, compost, palm kernel extract, tapioca, and woodchip (but do not include logs).

[47] Mr Richardson advised that Swap does not engage over the need or otherwise for a change to the definition of "bulk solid material". He then referred us to the following reservation included in paragraph 18 of the joint memorandum of counsel:[41]

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[39] Ms Bennett, EIC, 14 August 2020, at [110].
[40] Consent Memorandum, dated 18 December 2019, at [16(a)].
[41] Consent Memorandum, dated 18 December 2019, at [18].

> … the order to lie in Court pending the resolution of the remaining appeals by Balance and Swap which relate to the associated Rule AQ R22.

[48] Timberlands had accepted that its operations within the MMA required resource consent as a discretionary activity and, along with two other companies, applied for the necessary consents. It is concerned to ensure that outside of the MMA, its activities are assessed based on effects on the environment and not on a threshold based on volumes of materials as set out in proposed Rule AQ R22.

[49] In its reply submissions, the Council stated that in relation to the definition of 'bulk solid material' the Regional Council and Timberlands continue to seek that, for clarification purposes, logs be explicitly excluded from that definition.

A5 Outcomes of mediation

[50] As a result of mediation, the parties agreed to change the activity status of Rule AQ R22 relating to BSM handling to restricted discretionary and a proposed rule was agreed by all parties except Swap.

A6 The gazetting of the Mount Maunganui Airshed as a polluted airshed

[51] On 28 November 2019, approximately seven months after the appeals were lodged, the MMA was gazetted as a polluted airshed. While the likelihood of this occurring had been foreshadowed in the Port Dust Audit at the time PC13 was being developed, PC13 included no provisions specific to the management of the MMA as a polluted airshed. Similarly, it did not include any means of addressing possible constraints to granting resource consents arising from Regulation 17.

[52] Ms Zame for the Council submitted in opening that as the MMA is a 'polluted airshed', Regulation 17 of the NES-AQ may provide an additional consenting 'hurdle' for applicants, if a resource consent is required for their activities.[42]

[53] Other legal counsel submitted that because the MMA is now gazetted as a polluted airshed in accordance with the NESAQ, Regulation 17 is likely to prevent

[42] Opening submissions by Bay of Plenty Regional Council, 19 October 2020, at [10(h)].

consents being granted for existing PM_{10} emitting activities operating as permitted activities. This would include the majority if not all BSM and log handling activities within the MMA.

[54] Counsel for the appellants and supporting s274 Parties submitted that:

> [Swap]
>
> [28] …The change in status of the airshed… puts at risk the on-going importation of products through the Port of Tauranga. In particular it threatens the significant stock food supply line for farming communities serviced through the Port. It also threatens to make redundant or seriously curtail the use of established infrastructure which services the bulk product industries, with obvious detrimental impact on the economic wellbeing of the enterprises and those that rely on them for jobs and commercial activity.[43]
>
> [Timberlands]
>
> [7] … Not being able to continue to operate at the Port is a scenario that would be untenable with significant social and economic consequences.[44]
>
> [VAA]
>
> [11] … it may be impracticable to consent bulk handling activities with (*sic*) the Mount Maunganui Airshed, their import activity through the PoT would be forced to cease. Such an outcome would be catastrophic. For VAA and their employees. For stevedores and trucking firms. For farmers and their livestock. Arguably for PoT. Extraordinarily, the s32 analysis undertaken by the Respondent does not address this potential outcome.[45]

[55] Mr Brabant laid down the challenge that "A way through must be found".[46]

A7 Council response

[56] Prior to the 2020 hearing, Council staff had identified the need for further provisions in the Regional Air Plan to address the newly confirmed status of the MMA as a polluted airshed and had advised the Council's Strategy and Policy Committee accordingly. In response, the Committee provided guidance to staff on a preferred approach for a future plan change primarily intended to manage the effects of PM_{10} within the Airshed. The Court was not made aware of this until we received a

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[43] Opening submissions of Swap Stockfoods Limited, undated, at [28].
[44] Addendum to legal submissions by Timberlands, 20 October 2020, at [7].
[45] Legal submissions of VAA, 21 October 2020, at [11].
[46] Legal submissions of VAA, 21 October 2020, at [13].

memorandum of counsel dated 26 February 2021, some four months after the 2020 hearing finished.[47]

[57] The Court was advised that staff had recommended a further plan change was required "… to better manage all significant sources of particulate matter and odour within the Mount Maunganui Airshed."[48] It was intended:

(a) "As PC13 had only recently become operative, any new plan change provisions will be developed independently of those already included in PC13, …"[49]

(b) to "Build on the existing policies of PC13 to be strengthened and more specific to particulates and odour within Mount Maunganui."[50]

(c) to include a "Specific Mount Maunganui Airshed policy - airshed as a control mechanism, prioritise development of air quality management plans where necessary to prevent further degradation of airshed."[51]

(d) to include a policy relating to "Cumulative effects - To assist with reviewing resource consents in a set time frame, activities that require resource consent and contribute to the cumulative discharge of PM_{10} within the Airshed shall be required to be reviewed within a set timeframe."[52]

[58] We understood that it was anticipated that rules would be drafted to address particulate matter from log handling within the MMA, a subject of appeal under PC13, and the discharge of contaminants to air from general fugitive (diffuse) discharges and dust sources beyond the boundary of the property. It was difficult to understand how log handling and emissions from the large exposed areas used for log handling and storage at the Port could be excluded from consideration in PC13 and why they would then be reconsidered in PC18.

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[47] Joint Memorandum, 26 February 2021, at [17].
[48] Joint Memorandum, 26 February 2021, attachment 1, at section 2.1.
[49] Joint Memorandum, 26 February 2021, attachment 1 at section 2.1.
[50] Joint Memorandum, 26 February 2021, attachment 1 at section 2.3.
[51] Joint Memorandum, 26 February 2021, attachment 1 at section 2.3.
[52] Joint Memorandum, 26 February 2021, attachment 1 at section 2.3.

A8 Current legal status of existing BSM and log handling activities operating in the Mount Maunganui Airshed

[59] The Port and most other PM_{10} emitting activities operate under permitted activity Rule 17 of the 2003 Regional Air Plan. This provided, among other requirements, that:

> Rule 17 Permitted Activity – General Activities
>
> All other discharges of contaminants into air which are not subject to an express rule in this regional air plan shall be a permitted activity subject to compliance with the following conditions. If the conditions cannot be complied with the activity shall be a discretionary activity.
>
> …
>
> (b) The discharge must not result in objectionable or offensive odour or particulates beyond the boundary of the subject property or into water;
>
> …

[60] As noted above, the Council had identified a number of issues in relation to dischargers relying on permitted activity Rule 17 of the Plan and had found it difficult to determine if resource consents were required.

[61] The Port Dust Audit stated that at the time of the audit, activities on the Port site did not comply with the conditions of Rule 17 and recommended that the Council considered requiring PoTL to apply for an air discharge consent. This advice was not disputed by any party, but did not form part of the evidence.

[62] Other evidence was presented that activities at De Havilland Way were causing adverse health effects of significant concern to nearby residents and to Toi Te Ora. It is unlikely that this could have been considered lawful with or without a resource consent.

[63] It is unclear from the evidence whether other PM_{10} emitting activities in the MMA outside the Port complied with Rule 17. The Council submitted that "… it is not clear whether all existing operators could demonstrate compliance with (previous Rule 17) …"[53]

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[53] Closing submissions of Bay of Plenty Regional Council, 18 December 2020, at [77].

[64] This leaves uncertainty as to whether existing activities emitting PM_{10} in the MMA were being lawfully undertaken without a resource consent.

A9 Effects of PM_{10} on human health and the mauri of air

[65] The sustainable management purpose of the Resource Management Act 1991 (**RMA**) includes enabling people and communities to provide for their social, economic, and cultural well-being and for their health and safety. Objective AQ O1 of PC13 is "Protection of the mauri of air and human health from adverse effects of anthropogenic contaminant discharges to air."

[66] As recorded in section A1, PM_{10} is invisible to the human eye and can travel long distances, possibly up to kilometres. It is a contaminant for which there is no safe threshold for the protection of human health.[54] This combination of factors presents serious challenges in terms of effectively managing the effects of PM_{10} emissions on human health.

[67] Dr JM Miller, who is the Medical Officer of Health and also holds the position of Manager for Health Protection based within Toi Te Ora Public Health, became aware of a case of ill-health related to exposure to dust at De Havilland Way in January 2018. He contacted the Council and was made aware of the history of dust complaints at the site. To ascertain the facts, with the support of the Ministry of Health, he commissioned Emission Impossible to undertake an investigation.[55]

[68] The resulting report[56] found that:

> [38] … a dust nuisance had clearly existed in the area, dust which is a risk to health was reaching properties on De Havilland Way and these dust emissions were having adverse health effects on workers and residents. The report found the ill health and symptoms experienced were consistent with dust exposure that is likely to have been from nearby handling of large scale bulk solid materials.
>
> [39] The air is harming the physical, mental and social wellbeing of this community. The effects experienced range from nuisance effects of dust

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54 Dr Miller, EIC, 7 August 2020, at [25].
55 Dr Miller, EIC, 7 August 2020, at [37].
56 Mx Wickham, EIC, 7 August 2020, Attachment B: Dust Investigation: 101 Aerodrome Road, Mt Maunganui, Emission Impossible, 10 May 2018.

> affecting quality of life to health effects that range from respiratory effects (coughing, shortness of breath, sore throat, asthma) to allergic effects itchy eyes, sneezing, irritated sinus, hay fever and allergic bronchitis.

[69] Based on an updated report, Dr Miller stated that:[57]

> [42] There is clearly an increased burden to health from people dying prematurely, being admitted to hospital with a cardiovascular or respiratory condition, and not able to participate in society because of ill health in this community.
>
> [43] The report shows there are 2.2 more deaths and about 2500 restricted activity days per year in Mount Maunganui community from the increased annual particulate matter pollution levels.
>
> [45] Based on this information and my own investigations and observations, my opinion is that air quality is not being managed for the protection of human health and the current Regional Air Plan has failed to protect human health.

[70] Mr RR Tuanau, Pou Herenga at Te Rūnanga o Ngāi Te Rangi Iwi Trust, explained the importance of mauri to the tāngata whenua of Whareroa Marae, noting that the protection of the mauri of air and human health from adverse effects of anthropogenic contaminant discharges to air is set out as the first objective of PC13. He stated:[58]

> In terms of mauri, for me, the tangata whenua and their well being is the greatest indicator of mauri. From what I can see, and what I hear from the tangata whenua at Whareroa, the mauri of Whareroa is at a low level.

[71] Mr JH Ngatuere, who manages environmental issues at Whareroa Marae, described the adverse health effects on residents at Whareroa Marae as including asthma, bronchitis, respiratory issues, constant phlegm, headache and migraines, nausea, sore eyes, nose, and throat and premature deaths. He said that:

> Living in a community that is subjected to PM_{10} and seeing/experiencing the real harm to human health and quality of life; I am of the firm belief that Plan Change 13 (PC13) is too weak and does not go far enough to keep Whareroa — my children and kaumatua safe.

[72] The Council accepted that:[59] "The health effects of air pollution and particulate matter are well established and are not in dispute."

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[57] Dr Miller, EIC, 7 August 2020, at [42], [43] and [45].
[58] Mr Tuanau, EIC, 14 August 2020, at [29].
[59] Opening submissions of the Bay of Plenty Regional Council, 19 October 2020, at [8].

A10 PM_{10} emitting activities that can and cannot be managed under the Resource Management Act 1991

[73] The evidence-in-chief was silent on the extent to which PM_{10} emissions generated in the MMA can be controlled under the RMA. This is an important consideration in terms of the requirements of s 44A(8) of the RMA that the Council must enforce the observance of the NESAQ to the extent to which its powers enable it to do so. All PM_{10} emissions, whether under the control of the Council or not, contribute to exceedances of the PM_{10} Standard and to exceedances of annual average air PM_{10} concentrations, which requires an understanding of what can and cannot be controlled under a regional plan.

[74] Emissions that cannot be controlled under PC13 include those from roads, rail, shipping and natural sources.[60] The air quality experts subsequently agreed at expert conferencing that these sources contribute an estimated 35% of all PM_{10} emissions in the MMA.[61]

A11 Policy and planning considerations

[75] One of the functions of the Council[62] is the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region. This is reflected in Objective 11 of the RPS: "An integrated approach to resource management issues is adopted by resource users and decision makers", and related Policy IR 3B.

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[60] The Council submitted that shipping emissions and transport (vehicle) emissions are controlled under other regimes than the RMA, which are set out in a memorandum dated 28 May 2021. There was a general consensus among counsel that emissions from roads, rail, shipping and natural sources cannot be controlled under the RMA. Several counsel confirmed that discharges from ship exhausts are controlled under the Resource Management (Marine Pollution) Regulations 1998. Motor vehicle exhaust emissions are regulated under the Vehicle Exhaust Emissions Rule, promulgated pursuant to s 155 of the Land Transport Act 1998. Under s 52 of the Railways Act 2005, the Director-General of Land Transport has the power to make "rules concerning rail vehicles". In his submissions dated 28 May 2021, Mr Richardson stated he is not aware of any rules made under the Railways Act to regulate locomotive emissions.

[61] JWSAQ#2 in response to Question 26.

[62] RMA s30(1)(a)

[76] The Decisions Version of PC13 does not give effect to this objective or policy. It included no MMA-specific policies to guide consent processing officers, applicants for resource consents or affected parties on how the airshed was to be managed to comply with the PM_{10} Standard.

[77] We had concerns from the outset as to the extent to which PC13 gives effect to other relevant RPS objectives and policies. Ms Bennett was forthright in stating her frustration and disappointment at the way the RPS is being applied in relation to matters of concern to Ngāi Te Rangi, including:[63]

> [21] In my time working for Ngāi Te Rangi there has not been one consent application that we have not had to fight for our right to be heard. … Many get past us without our knowing.
>
> [22] The most recent example would be an application to establish a bulk handling & storage facility across the road from the Ngāi Te Rangi headquarters at Whareroa.
>
> [25] It is disappointing that the mana of the RPS is not being upheld. By this I mean, if the job of the RPS includes interpreting the requirements of Part 2 in relation to our local regional setting, but decisions are not being made within the policy provision 'boundaries', this is setting up the RPS to fail as it will not accomplish its own objectives.
>
> [28] … The applicants … were not interested in engaging with us. … This makes a mockery of the RPS and planning framework more generally.

[78] This is directly relevant to the extent to which Objective 13 of the RPS is given effect to: "Kaitiakitanga is recognised and the principles of the Treaty of Waitangi (Te Tiriti o Waitangi) are systematically taken into account in the practice of resource management."

[79] While advised through much of the hearing that the policies of PC13 were beyond appeal, our concerns remained.

[80] We were concerned about the impacts of a further plan change to backfill gaps in PC13 and the potential for inconsistencies in the way discharges to air would be managed under two different plan changes.

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[63] Ms Bennett, EIC, 14 August 2022.

A12 Airshed management

[81] The Council's evidence at the 2020 hearing provided no information on how the Council intended to manage air quality in the MMA. It became clear that the Council did not have a strategy for addressing the many management issues involved, either individually or collectively, although it was intending to provide guidance notes in the future. We were not told what these were intended to cover.

[82] We were told that there was a draft airshed action plan for the MMA, development of which had been commenced approximately two years earlier. In addition, we were told that "… It requires quite a lot of work and it requires consideration of a number of other matters, in particular Plan Change 13 and the outcome of this hearing."[64]

[83] It was not possible for us to evaluate the appropriateness of the provisions of PC13 when it was not known what would be required to manage the airshed at a practical level.

A13 Requirements for resource consents

[84] PC13 effectively requires all BSM and log handling activities emitting PM_{10} in the MMA to apply for resource consents to discharge to air. The evidence was no clearer on how this process was to be managed.

[85] Ms Parcell stated in response to questions:[65]

> What I would like to see is – the applications and it can be a lot easier to determine exactly – or a pre-application for example to see the details of what is actually going to happen and we haven't come up with an exact idea of how we are going to deal with all of these on a case by case basis.
>
> … in this case it would be much more appropriate to work with industry to determine what they think the emission rate should be, what the airshed should be, because as we know determining the discharge from (inaudible 16:33:31) emissions is difficult, it can't be quantified easily so if we come to an agreement with industry to determine what those are I think that would be the best way forward in this case.

[64] Ms Parcell, NOE 2020, at page 77.
[65] NOE 2020, at pages 61 to 67.

[86] She said the Council had not undertaken any work with industry on emission rates or any work on compliance with the NESAQ significance threshold.[66]

[87] In response to a question about the processing of resource consent applications asking "So you're managing them individually but how are you managing them cumulatively?"[67] Ms Parcell replied that "It really is a matter sometimes of wait and see."[68]

[88] This approach would have presented serious difficulties for parties required to apply for resource consents, potentially affected parties and Council consenting officers, with significant potential for inequities among different emitters and almost certainly resulting in inconsistent and less than optimal outcomes.

A14 Technical complexity

[89] There are multiple sources of PM_{10} emissions in the MMA. These are described in **Appendix 1** as "Main activities discharging particulate and PM_{10} to air within the Mount Maunganui Airshed and their economic significance."

[90] They include BSM handling and log handling, which arise primarily from activities at the Port and which, based on the evidence, involve more than 30 different organisations. In the case of BSM handling activities, around 20[69] additional industrial sites are spread through the MMA. A number of different parties undertake their activities in the same areas of the Port. Emissions of PM_{10} from different sources outside the Port boundaries also occur in close proximity to each other in some locations.

[91] The emissions are diffuse in nature and can arise from wind action on exposed areas of the Port, such as log storage areas and roads, even when no or limited PM_{10} generating activities are occurring. There are no stacks or other point sources at which emissions can be monitored and in most, if not the majority of situations, it is

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[66] Ms Parcell, NOE 2020, at pages 77, 61 and 62.
[67] NOE 2020, at page 66.
[68] NOE 2020, at page 66.
[69] NOE 2022, at page 269.

impossible in any practical sense to measure how much PM_{10} is discharged to air from any particular emitter or activity.

[92] The air quality experts agreed that is it not possible for a monitoring site to quantify contributions from various operations.[70] Consequently, it is not possible to determine with certainty their contributions to elevated annual average concentrations of PM_{10}, exceedances of the PM_{10} Standard or to adverse effects on the mauri of air and human health. Computer modelling cannot be used to assist understanding and, overall, there are practical difficulties in determining the effectiveness of different management methods in advance of their implementation.

[93] The combination of circumstances that exist in the MMA means a number of traditional management approaches are not practicable.

[94] By way of illustration, Ms Hamm for PoTL submitted in opening that it did not propose that it would hold a resource consent on behalf of other users undertaking BSM handling activities at the Port. She stated that "Primarily, this is because it considers that stronger compliance from cargo importers and their contracted operators will be achieved if they hold the consent themselves and can be accountable for breaches."[71] The Council did not challenge this approach.

[95] Six air quality experts recommended that, "… due to the nature, scale, spatial extent and number of dust generating activities within the Port area, whose effects cannot be readily differentiated, that a more effective regime would be to manage these emissions from the Port as a single entity."[72] This is consistent with the recommendation of the Port Dust Audit.

[96] As a further example, in the information provided for use in expert conferencing, the Council proposed an airshed management approach based on a quantified incremental reduction target. The same air quality experts recommended that "A regime for requiring BPO to control diffuse sources of PM_{10} is more suitable

[70] JWSAQ#2 in response to Questions 6 and 13.
[71] Legal submissions on behalf of the Port of Tauranga Limited, 21 October 2020, at [8].
[72] JWSAQ#2 at [1](a).

than the quantified incremental reduction target approach that has been proposed in the draft interim PA rules. The experts consider that requiring BPO on operations will achieve improvements in air quality."[73]

[97] We note that no explanation was provided as to how an incremental reduction target would be determined or how it would be applied across different emitters and groups of emitters. In view of the expert advice that a best practicable option (**BPO**) approach was more appropriate, it was not necessary for us to inquire further as part of the PC13 appeals. However, it is something that should be considered in any future Airshed Management Plan in case the proposed controls do not achieve the objectives of PC13.

[98] We also note that while all parties agreed to accept the expert evidence to adopt a BPO approach to the control of PM_{10} emissions, it involves a high level of uncertainty as to what that means, with the potential for dispute as to what the BPO is for any particular emission source. Importantly, the adoption of the BPO does not provide the necessary level of clarity, certainty and enforceability necessary for a permitted activity rule.

[99] As will be seen later in this decision, to provide the necessary clarity, our amended provisions require that all existing PM_{10} emissions in the MMA be minimised to the greatest extent reasonably practicable until the objectives of PC13 are met. Dust management plans will need to demonstrate how this will be achieved by reference to an appropriately detailed evaluation of all reasonably practical options that have been implemented or could be implemented to reduce PM_{10} emissions from a subject site, together with their estimated costs and the estimated likely and range of PM_{10} reductions they would achieve.

[100] It will remain uncertain that such an approach on its own will ensure compliance with the PM_{10} Standard or the annual average air quality guideline necessary to protect public health. This will be particularly relevant if the new WHO guideline value of 15 $\mu g/m^3$ were to apply in the future. The provisions of PC13 need

[73] JWSAQ#2 at [1](b).

to recognise and/or provide for both of these uncertainties.

A15 Evaluation of the provisions of the Decisions Version of PC13

[101] We consider that the provisions of the Decisions Version of PC13 are not the most appropriate way to achieve the objectives[74], because they do not:

(a) achieve integrated management of the MMA; or

(b) include policies and methods necessary to ensure effective management of a polluted airshed; or

(c) provide a consenting framework that will allow existing emitters operating as permitted activities to obtain resource consents, subject to meeting the relevant requirements of the RMA; or

(d) include provisions necessary to address the concerns of Ngāi Te Rangi, which were not challenged through the hearing.

A16 Outline of the solution

[102] The case was unusual and perhaps unprecedented in that the plan against which appeals had been lodged had no clear legal way of being implemented based on a number of opening legal submissions. It was also unusual in terms of the very high levels of technical complexity and major unknowns and uncertainties that existed about the air quality environment in the airshed to be managed. It was clear that time would be required to work through the issues and equally certain that improvements in air quality needed to be made in the meantime and as soon as reasonably practicable.

[103] The evidence raised questions about whether PM_{10} emitting activities in the MMA had been operating lawfully. This required consideration of whether such activities were legally authorised or would need to be considered as new activities for the purpose of Regulation 17. In the period since the MMA was gazetted as a polluted airshed, the Port and some BSM operators outside the Port boundaries have recognised the need to reduce PM_{10} emissions from their activities and have

[74] As required s 32(1)(b) of the RMA.

implemented mitigation measures towards that end. The solution provides a mechanism by which emitters can demonstrate they either are or can be legally authorised and do not need to be considered as new activities.

[104] We saw the best solution as being to seek to work collaboratively with the Council and parties to the appeals to find an agreed way forward. A staged approach was adopted in which Stage 1 allows existing operations to continue if they can demonstrate compliance with standards set out in a new Interim Permitted Activity Rule (**IPAR**). Stage 2 requires applications for restricted discretionary consents to discharge to air to be made within three years of the IPAR becoming operative and the adoption on an iterative approach to managing the MMA to ensure the objectives of PC13 are met as soon as reasonably practicable.

[105] We set out clear boundaries for the IPAR from the outset, as follows:[75]

> In concept, any interim rule would apply only to existing emitters. It would enable no increase in existing emissions and would require a reduction in emissions to the extent practicable, which would accord with Policy AQ P3 in PC13. We also see this as ensuring any conflict with the NES is reduced or avoided sooner than any other option. Any interim rule would need to be of limited duration, pending finalisation of the appropriate rule framework to be included in PC13.

[106] There is no methodology available to demonstrate with absolute certainty that PM_{10} emissions from some sites at the end of the term of the IPAR will be less than those at specified start dates. Any comparison method will require consideration of multiple issues, some for which reliable data will not be available.

[107] The IPAR standards were developed to ensure, as far as possible, that a comparison of the "before" and "after" IPAR circumstances can be measured and compared. Improved performance may not be possible against every standard and in our view, the key requirement will be that emitters demonstrate an overall reduction in emissions.

[108] It will be necessary for emitters to satisfy the Council that mitigation measures implemented since the MMA was gazetted as a polluted airshed or proposed further

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[75] Minute dated 16 February 2021, at [15].

measures are or will be sufficient to bring the activities into compliance with the IPAR. Importantly, one of the standards in the IPAR is the identical dust standard to that in Rule 17.

[109] In the event that an emitter cannot demonstrate compliance with the IPAR standards they will require consent as a discretionary activity, given that it may be considered as a new activity for the purposes of Regulation 17. This should provide a strong incentive to emitters to ensure they comply with the IPAR.

[110] Section 139 of the RMA provides that a person may request a consent authority to issue a certificate of compliance (**CoC**) if an activity can be done lawfully in a particular location without a resource consent. The IPAR standards were developed to facilitate this process. However, it will be for the Council to determine whether an activity complies with the IPAR.

[111] In the event that applicants and the consent authority disagree as to whether a CoC with the IPAR can be granted, provision for independent review requires consideration.

[112] Once resource consents have been granted on expiry of the IPAR, the solution includes provision to review conditions at intervals to enable further reductions in PM_{10} emissions if MMA-wide monitoring demonstrates this is necessary to meet the objectives of PC13. Such reviews are also likely to be necessary in the event of any more restrictive health guidelines being introduced.

Section B

The Court process

B1 Hearings

[113] Three hearings took place as follows:

(a) An initial in-person hearing at Tauranga from 19 to 22 October 2020 (**2020 hearing**)

(b) A reconvened hearing by AVL on 25 March 2021(**2021 hearing**)

(c) A further reconvened hearing by AVL from 2 to 5 May 2022 (**2022 hearing**), preceded by judicial conferences on 9 February and 14 March 2022 to finalise hearing details.

B2 Expert conferences

[114] Three air quality expert conferences were held, each producing joint witness statements as follows:

JWSAQ#1 dated 18 September 2020, prior to the 2020 hearing

JWSAQ#2 dated 27 May 2021

JWSAQ#3 dated 7 March 2022

[115] Three planning expert conferences were held, each producing joint witness statements as follows:

JWSP#1 dated 23 September 2020, prior to the 2020 hearing

JWSP#2 dated 1 November 2021

JWSP#3 dated 3 March 2022

B3 Witnesses appearing

[116] A list of witnesses is included in **Appendix 2**.

B4 Our reviews of the evidence

[117] Over a three-month period immediately following completion of the 2020 hearing, and on an on-going basis since, we undertook comprehensive evaluations of the evolving evidence and submissions. Based on our overall final evaluation of the evidence for the purposes of this decision, the following are considered to be particularly important:

(a) Dr Miller's opinion that "… air quality is not being managed for the protection of human health and the current Regional Air Plan has failed to protect human health;"[76]

(b) The evidence of witnesses for Ngāi Te Rangi that "… the mauri of Whareroa is at a low level"[77] and their frustration and disappointment at the way the RPS is being applied in relation to matters of concern to Ngāi Te Rangi;

(c) The initial understanding of the air quality environment in the MMA and options available to manage it were insufficiently complete to enable properly informed decision-making;

(d) Uncertainty about the extent to which activities discharging particulates to air under permitted activity Rule 17 of the 2003 Regional Air Plan were lawfully established;

(e) Is there a legally available pathway for existing PM_{10} emitting activities operating as permitted activities in the MMA to obtain resource consents as required by PC13?

(f) The provisions of PC13 were not the most appropriate to achieve its objectives, as required by the RMA.

[76] Dr Miller, EIC, 7 August 2020, at [45]
[77] Mr Tuanau, EIC, 14 August 2020, at [29].

B5 Further information requirements

[118] There were important gaps in the original air quality evidence and a need for significant clarifications. To assist in improving our understanding, we reviewed the many reference documents cited in evidence, including MfE Guidelines. While such guidelines are not legally binding, they provide helpful guidance on key air quality management issues, which in our view are relevant to management of the MMA and were not given appropriate attention in the development of PC13.

[119] To meet our further information requirements, we directed further air quality expert conferencing, for which there was support from all parties.[78] We developed an agenda for use at the conference, with input from the parties and their experts, setting out the additional information we required in detail.

[120] The Council provided a draft IPAR for consideration by the air quality experts at their conference.

[121] Prior to conferencing, all air quality experts were briefed collectively by operations and maintenance experts from different operators familiar with BSM and log handing activities in the MMA. This ensured as far as possible that all experts had the same understanding of the issues and practicalities, rather than only those experts engaged by operators.

[122] We directed conferencing of planning experts following the air quality expert conference. Further rounds of air quality and planning expert conferencing were then directed to address issues arising as the process progressed.

[123] In essence, the outcomes of the first Court-directed air quality conference transformed understanding of the air quality issues in the MMA. The air quality experts identified that alternative management approaches to those initially proposed should be adopted and five of the six experts also considered that the Rail Yard South monitoring site is not suitable for evaluating compliance of the airshed with the PM_{10}

[78] Minute dated 1 April 2021 at [12] – [16].

Standard.[79]

[124] Further evidence was then presented at the 2022 hearing.

[79] JWSAQ#2 at [1] and response to Question 1.

Section C

The Decisions Version of PC13 and revised Rule AQ R22 agreed at mediation

C1 Objectives

[125] The objectives of PC13 are not subject to appeal and were not raised as an issue at any stage of the Court process. There has been no suggestion that the objectives are not the most appropriate to meet the purpose of the RMA, as required by s 32, and we accept that they are appropriate.

[126] The objectives are:

> **AQ O1 Protect air from adverse effects — Te tiaki i te hau mai i ngā pānga kino**
>
> *Protection of the mauri of air and human health from adverse effects of anthropogenic contaminant discharges to air.*
>
> **AQ O2 Ambient air quality — Te pai o te hau**
>
> *The region's ambient air quality meets the National Environmental Standards for Air Quality (2004) (or its amendment or replacement).*
>
> **AQ O3 Local air quality — Te pai o te hau o te rohe**
>
> *Sustainable management of discharges of contaminants to air according to their adverse effects on human health, cultural values, amenity values and the receiving environment*

C2 Relevant policies

[127] Policies of PC13 relevant to the appeals are:

> **AQ P1 Classification of activities — Te wehewehenga o ngā mahinga**
>
> Provide for the discharge of *contaminants* to air by:
>
> (a) permitting discharges from activities where the discharge can be suitably managed with general conditions to avoid, remedy or mitigate any adverse *effects* of the discharge;
>
> (b) managing all other discharges where (a) does not apply, as controlled, restricted discretionary, discretionary, or non-complying activities.
>
> **AQ P2 Hazardous substances — Ngā matū mōrearea**
>
> Seek to avoid adverse *effects* from discharges of hazardous substances and hazardous air pollutants to air and where avoidance is not practicable, remedy

or mitigate the adverse *effects* of the discharge using the *best practicable option.*

AQ P3 Management of discharges — Te whakahaere i ngā tukunga

Activities that discharge *contaminants* to air must be managed, including by use of the *best practicable option*, to:

(a) safeguard the life supporting capacity of the air, protect human health, and avoid, remedy or mitigate adverse *effects* on cultural values, amenity values, and the *environment*

(b) avoid the discharge of *contaminants* at a rate or volume that may cause an exceedance or breach of the **ambient air** quality standards of the National Environmental Standards for Air Quality (or its replacement or amendment)

(c) avoid reduction in visibility where it may cause adverse *effects* on vehicle, aircraft, or *ship* safety

(d) avoid, remedy or mitigate the discharge of *contaminants* that may cause adverse *effects* on regionally significant **infrastructure** or *regionally significant industry.*

For the purposes of this Policy AQ P3(d) *regionally significant industry* means industry based on the use of the natural and physical resources which have benefits that are significant at a regional or national scale. These may include social, economic or cultural benefits.

AQ P4 Matters to consider — Ngā take hei whiriwhiri

Have particular regard to the following matters when considering the acceptability of any discharge of *contaminants* to air:

(a) The proximity of sensitive areas to the discharge including the *effect* of new activities discharging *contaminants* into air near established sensitive areas.

(b) Areas where the discharge may cause an exceedance or breach of the ambient air quality standards of the National Environmental Standards for Air Quality or exceed the Health-based Guideline Values in Table 1 of the Ambient Air Quality Guidelines (or their replacements or amendments).

(c) Adverse *effects* on air quality values identified in the relevant iwi and hapū resource management plans during assessments of resource consent applications.

(d) The *effect* of the prevailing weather conditions, including rainfall, wind speed and wind direction.

(e) The *effect* of the discharge on human health, cultural values, amenity values, the *environment*, and regionally significant infrastructure.

(f) Cumulative *effects*.

(g) Whether a change to an activity expressly allowed by an existing resource

consent will cause a net increase of particulates into an airshed in breach of the ambient air quality standard for particulates of the National Environmental Standards for Air Quality.

(h) The operational requirements and locational constraints relevant to the discharge and/or activity, for example for *rural production activities*.

(i) Any other recognised air quality guidelines or standards (not listed) that are appropriate to the discharge.

(j) The FIDOL factors (frequency, intensity, duration, offensiveness, location) when determining adverse *effects* in relation to odour and dust discharges.

(k) The investment of existing infrastructure that mitigates adverse *effects* of discharges of *contaminants* to air.

(l) The nature of the background receiving environment.

C3 Relevant rules

[128] General permitted activity rule AQ R1 and discretionary rule AQ R2 are:

AQ R1 General activities – Permitted — Ngā mahinga noa – E whakaaehia ana

Any discharge of contaminants into air which is not subject to any other rule in this regional plan and excluding the discharge of dust to air associated with a plantation forestry activity, is a permitted activity provided the following conditions are complied with:

(a) The discharge must not be noxious or dangerous, offensive or objectionable beyond the boundary of the subject property or into any water body.

(b) The discharge of smoke or water vapour must not adversely affect the safety of any vehicle, aircraft, or ship.

Advice Note - Discharges of dust into air associated with activities within a plantation forestry activity are managed by the National Environment Standards for Plantation Forestry (2017). The plantation forestry activities are as listed in subparts 1-9 of the National Environment Standards for Plantation Forestry and do not include discharges or from roads or tracks managed by local authorities, the Department of Conservation or the New Zealand Transport Agency.

AQ R2 General activities – Discretionary — Ngā mahinga noa – Ka whiriwhirihia

Any discharge of contaminants into air that cannot comply with any permitted activity rule, and is not specifically addressed by any other rule of this Air Quality chapter, is a discretionary activity.

[129] Rule AQ R22 included in the Decisions Version is:

AQ R22 Handling of bulk solid materials – Discretionary –Ka whiriwhirihia

Unless otherwise permitted by AQ R26, the discharge of contaminants to air from the handling of bulk solid materials where:

(a) the rate of bulk solid material handling exceeds 20 tonnes in any hour, and the discharge occurs less than 100 metres from any sensitive area, or

(b) the rate of bulk solid material handling exceeds 50 tonnes in any hour, is a discretionary activity.

C4 Amended Rule AQ R22 agreed at mediation

[130] Rule AQ R22 as amended by agreement at mediation is:

AQ R22 Handling of bulk solid materials – Restricted Discretionary

Unless otherwise permitted by AQ R26, the discharge of *contaminants* to air from the **handling** of **bulk solid materials** where:

(a) the rate of **bulk solid material handling** exceeds 20 tonnes in any hour, and the discharge occurs less than 100 metres from any **sensitive area**, or

(b) the rate of **bulk solid material handling** exceeds 50 tonnes in any hour, is a restricted discretionary activity.

The Regional Council restricts its discretion to the following matters:

(c) consideration of all the matters raised in Policy AQ P4;

(d) consideration of the rate and volume of handling and character of the product;

(e) consideration of:

  (i) site management practices;

  (ii) use of best practice technology including operational requirements;

  (iii) operational constraints; and

  (iv) alternatives.

(f) contents and implementation of a dust management plan;

(g) air quality effects, including net contributions to particulate levels beyond the consent site

(h) actual or potential effects on neighbouring properties, including visibility,

sensitive areas and water bodies;

(i) complaints register and method of dealing with complaints arising from the exercise of the consent;

(j) lapse period, term of consent, and review of consent conditions;

(k) collecting, recording, monitoring and provision of information concerning exercise of resource consent.

[131] As indicated through the hearing, we had serious concerns about this rule. Referencing only Policy AQ P4 could be interpreted as meaning all other policy provisions are not relevant, which is not the case. The referenced policy does not have a strong direction and the rule is generic, rather than specific to the matters of discretion necessary to manage a polluted airshed. We reject the rule as appropriate for application in the MMA and in the context of the wider region. We have developed a new restricted discretionary activity rule for the MMA and discretionary activity status is to apply in the wider region as included in the Council decision.

C5 Definition of bulk solid materials

[132] We agree with the amended definition included in the draft consent order and reproduced in section A4 of this decision.

Section D

Resource Management (National Environmental Standards for Air Quality) Regulations 2004

[133] Every local authority and consent authority must observe national environmental standards.[80] Regulations of the NESAQ relevant to the MMA came into force on 1 June 2011. Section 44A(8) of the RMA requires that every local authority and consent authority must enforce the observance of national environmental standards to the extent to which their powers enable them to do so. Policy AQ P3 (b) of PC13 requires the discharge of contaminants to air must be managed, including by use of the BPO, to:

> avoid the discharge of *contaminants* at a rate or volume that may cause an exceedance or breach of the **ambient air** quality standards of the National Environmental Standards for Air Quality (or its replacement or amendment)

[134] The planning experts considered that a new policy is "… required because Policy AQ P3(b) requires the avoidance of discharges that may cause an exceedance or breach of ambient air quality guidelines in the NESAQ. This is a mandatory direction."[81]

[135] After further consideration, the planning experts revised their opinions, stating that:[82]

> … the chapeau of this policy sets the intention that the rules will require such activities to be managed, including by use of the best practicable option, to avoid an exceedance or breach. Taken in this context, Policy P3(b) does not necessarily mean that activities need to be avoided.

[136] We agree with the revised opinion but note the potential for future misinterpretation by others. To minimise this potential, we have made it clear in draft new policy AQ P12 that avoiding the discharge of contaminants at a rate or volume that may cause an exceedance or breach of the ambient air quality standards of the National Environmental Standards for Air Quality applies once the Airshed stops being a Polluted Airshed.

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[80] RMA s 44A(7)
[81] JWSP#2, at [31].
[82] Joint Witness Statement – Planning, 3 March 2022, (**JWSP#3**), at [43].

[137] Returning now to the NESAQ, the relevant PM_{10} Standard in Schedule 1 is that a 24-hour average concentration of 50 $\mu g/m^3$ of PM_{10} must not be exceeded more than once in a 12-month period.

[138] Regulation 17 of the NESAQ states:

> (1) A consent authority must decline an application for a resource consent (the **proposed consent**) to discharge PM_{10} if the discharge to be expressly allowed by the consent would be likely, at any time, to increase the concentration of PM_{10} (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. [*We refer to this as the* ***significance threshold*** *in this decision*].
>
> (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 PM_{10} 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 PM_{10} 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
>
> …

[139] Many of the PM_{10} generating activities undertaken within the MMA do not hold existing resource consents to discharge PM_{10} to air.

[140] As already noted, most counsel expressed the view that, based on a plain reading of Regulation 17, applications for consents for any existing activities currently operating as permitted activities and generating significant quantities of PM_{10} in the MMA could have to be declined. This would be the case unless they could demonstrate compliance with the significance threshold in Regulation 17(1).

[141] The expert air quality evidence is that:[83]

> The significance threshold should not be used as a management tool for monitoring existing activities to demonstrate compliance because it is within the margin of error of most monitoring methods and it is not possible to differentiate between sources at that low concentration (ie 2.5 micrograms per cubic metre).
>
> The experts note that it might be possible to demonstrate non-compliance with the significance threshold using monitoring.

[142] The MfE Ambient Air Quality guidelines, referenced in section A1 above, supports this evidence as they indicate that the level of detection of most monitoring methods is not accurate enough to measure PM_{10} concentrations of 2 $\mu g/m^3$ (compared to the significance threshold of 2.5 $\mu g/m^3$). The results of monitoring undertaken on behalf of Timberlands in response to a s 92 request for further information from the Council indicated that log handling activities could not demonstrate compliance.[84] Monitoring undertaken for VAA[85] confirmed the difficulty that would exist in demonstrating BSM activities could comply.

[143] Agenda items for the third air quality expert conference asked if the experts considered there is an expectation that BSM and log handling activities at the Port could demonstrate compliance with Regulation 17(1). The experts agreed that the current available data does not indicate that either BSM or log handling activities could demonstrate compliance.[86]

[144] In **Appendix 3** of this decision, we set out our understanding of the process followed in the development of the NESAQ. A clear and consistent theme through all the documents we reviewed is that Regulation 17 restrictions on granting consents to discharge PM_{10} in polluted airsheds was intended to apply to **new** industries and **new** discharges or **increases** in existing discharges. This is reinforced in the Cabinet Paper referred to in the Appendix, in which the Minister explained that "The large cost reductions in my preferred option arise from lower costs faced by industry. They

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[83] JWSAQ#2 in response to Question 18.
[84] Mote Limited, Emission Concentration Monitoring, Log Storage yard – emission concentration monitoring programme , 16 February 2021, Revised 28 April 2021.
[85] Port of Tauranga Air Quality Monitoring Report 02 March to 30 April 2021, International Nutritionals Limited t/a Agrifeeds, 17 May 2021.
[86] JWSAQ#3 in response to Questions 2 and 3.

would not be forced to close down or relocate as a result of the prohibition of resource consents."[87]

[145] The NESAQ s 32 Report states:[88]

> Existing restrictions on resource consents for significant discharges (refer Table 2) will be repealed from the date at which the amended regulations come into effect. This means applications for renewed discharges into non-compliant airsheds will not be subject to restrictions arising from the Regulations. They will still be subject to any restrictions imposed by the regional council, however, through normal resource consent processes.

[146] The above statements indicate to us that one of the reasons for the changes introduced to the NESAQ was to ensure industries do not have to close as a result of the NESAQ requirements, provided they meet the relevant provisions of the RMA.

[147] Under the provisions of PC13 in accordance with this decision, the amount and rate of PM_{10} discharges authorised will be managed:

(a) to be the same or less than the current discharges; and

(b) to ensure the degraded airshed improves and does not get any worse, resulting in improved health outcomes; and

(c) so that the terms of the IPAR and any future resource consents are no less stringent than and/or do not conflict with the NESAQ.

[148] As we find in Section G3, in our view, it would defy logic if Regulation 17 was to be interpreted as preventing a course of action necessary to achieve its purpose.

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87 Minister for the Environment 2011 *Amending the PM_{10} Air Quality Standards: Final Recommendations* Cabinet Paper prepared by Hon Dr Nicole Smith, Wellington., at [42].

88 Ministry for the Environment. 2011. *Revised National Environmental Standards for Air Quality – Evaluation under Section 32 of the Resource Management Act*. Wellington: Ministry for the Environment, at 4.2.

Section E

Air quality

E1 Sources and estimated quantities of PM_{10} emitted in the Mount Maunganui Airshed

[149] At the 2020 hearing, Mr Stacey provided the most comprehensive analysis of contributing sources to exceedances of the PM_{10} Standard.[89] Dr Wilton, Mx Wickham and Mr Curtis, the other air quality experts giving evidence at that time, agreed that his analysis provided a robust assessment approach.[90] Mr Stacey's evaluation showed the following contributing sources at different Council monitoring sites:[91]

Tauranga Bridge Marina	No evaluation as no exceedances of the Threshold
Whareroa Marae	Likely to be associated with fertiliser processing.
De Havilland Way	BSM processing and storage
Totara Street	Potentially associated with windblown fugitive dust emissions from log storage areas, potentially log loading and sources not obviously associated with any of the sources being considered in relation to PC13
Rail Yard South	Wind-blown fugitive emissions from the log storage area and rail corridor and bulk material unloading at Port, processing and storage
Rata Street	Wind-blown fugitive dust missions from log storage and the rail corridor.

[150] There was some disagreement between experts as to the extent to which BSM and log handling activities affect exceedances of the PM_{10} Standard at relatively remote sites at Whareroa Marae and Rata Street and at Rail Yard South over the two

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[89] Mr Stacey, EIC, 21 August 2022, at and Appendices C and D.
[90] Joint Witness Statement – Air Quality, 18 September 2020, (**JWSAQ#1**), at [19(i].)
[91] Mr Stacey, EIC, 21 August 2022, at and Appendix D.

years to March 2022. Having considered all the evidence, we consider it is possible that both BSM and log handling activities could contribute to exceedances at any of the monitoring sites at different times in the future.

[151] However, we consider that the likelihood, frequency and extent of effects from BSM activities at the Marae are likely to be significantly less than those at other monitoring sites because of the distance from sources. We do not see value in attempting to be any more precise based on present knowledge and management practices as it would be unlikely to result in any change in management approach in the immediate future.

[152] Other evidence of particular relevance to our decision is:

(a) All air quality experts agreed that the sources that should be targeted to achieve compliance with the PM_{10} Standard are: [92]
- Log transport, storage and handling;
- Unloading BSM from ships;
- BSM transport, storage, screening, crushing and handling; and
- Fugitive dust from exposed areas.

(b) All air quality experts agreed that existing consented activities can also contribute to breaches of the PM_{10} Standard.[93]

(c) Mr Stacey, Ms Simpson and Mr Curtis considered the Rata Street Site is being impacted by localised emissions from an adjacent unsealed yard.[94]

(d) Mr Curtis considered that shipping emissions contribute to exceedances at the RYS Site.[95]

[153] Reliably predicting or estimating quantities of PM_{10} emissions in an airshed such as the MMA where there are multiple diffuse sources in close proximity is problematic. The Council used an emissions inventory method to estimate anthropological sources of PM_{10} which, after updating, the air quality experts relied

[92] JWSAQ#2 in response to Question 28.
[93] JWSAQ#2 in response to Question 28.
[94] JWSAQ#2 in response to Question 4.
[95] Mr Curtis, EIC, August 2020, at [4.9].

on to estimate emissions from different source types during their second expert conference.[96] They also included estimated quantities of PM_{10} emissions from natural sources. We have adopted these estimates for the purposes of this decision.

[154] The estimated annual quantities of PM_{10} emissions set out in the JWSAQ#2 with the indicative percentages of total emissions shown in brackets are:[97]

(a)	Bulk solid materials from warehouses (17%)	37 tonnes
(b)	Bulk solid materials from cargo handling at the port (13%)	29 tonnes
(c)	Log handling and storage at the Port (6%)	14 tonnes
(d)	Fugitive emissions from exposed areas (13.5%)	30 tonnes
(e)	Shipping post implementation of the International Convention for the Prevention of Pollution from Ships (**MARPOL**) (13.5%)	30 tonnes
(f)	Other industrial processes (18%)	39 tonnes
(g)	Other sources including domestic heating	1 tonne
(h)	Rail and road transport[98] (3%)	6 tonnes
(i)	Natural sources (16%)	35 tonnes
	Estimated (indicative) total	**221 tonnes**

E2 Uncertainty associated with PM_{10} emission estimates

[155] The air quality experts agreed that the estimated emissions from log handling at the Port appear low, relative to BSM, and that "… the two sources that we are most

[96] JWSAQ#2 in response to Question 23.
[97] JWSAQ#2 in response to Question 23.
[98] There are some minor discrepancies on this figure in the JWSAQ#2 but these have no significant effect on this decision.

interested in (log handling and BSM) have the greatest uncertainty."[99] This is supported by the evidence, with different experts' estimates of uncertainty being 20%, 40 to 50%, 50% or more in places, 100 to 300% and an order of magnitude of 1000%.[100] This brings into question the reliance that can be put on the estimates of PM_{10} emissions from BSM and log handling activities in particular.

[156] The Decisions Version of PC13 identified BSM handling activities as requiring control by way of a specific rule, and we agree that was appropriate and necessary. No equivalent rule was proposed for log handling, which based on the evidence before the Court is at least equally necessary and probably more so.

[157] Targeted monitoring of log handling activities described in **Appendix 4** showed increases in PM_{10} emissions of 7.4 $\mu g/m^3$ at the Port boundary from log storage. Targeted monitoring of BSM handling activities described in the same Appendix found an "increase in average concentration (2.4 $\mu g/m^3$) is observed at BOPRC-RYS during periods where stockfood handling is occurring, and the wind is blowing from Berths 7 and 8 towards this monitoring station."

[158] We acknowledge some experts raised concerns about aspects of the BSM monitoring. Despite that, the results serve to confirm the need to ensure the effective control of BSM handling activities within the Port boundaries. In combination, the monitoring to date suggests increases in PM_{10} emissions at Port boundaries resulting from log handling are significantly greater than those from BSM handling. This means there needs to be a much greater focus on the control of emissions from that source than had been anticipated based on the evidence before the Council Hearing Panel.

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[99] JWSAQ#2 in response to Question 23.

[100] Dr Wilton, EIC, 7 August 2020, Annexure A: Environet *Tauranga Air Emission Inventory 2018* prepared for Bay of Plenty Regional Council, March 2019 at [5.5]; Dr Wilton, EIC, 7 August 2020, at [28]; Mr Stacey, EIC, 21 August 2020, at [47] and 2016 Port of Tauranga Dust Audit under "Limitations of audit".

E3 Ability to quantify PM_{10} emissions from individual activities within the Mount Maunganui Airshed

[159] The air quality experts agreed[101] that PM_{10} emissions from an industrial activity within the MMA, except those from a stack, cannot be accurately quantified as they are not continuous. They further stated that:[102]

> It is not possible to measure the emissions and undertake dispersion modelling to accurately calculate downwind concentrations, or use reverse modelling to characterise the emission source.
>
> Source apportionment techniques looking at chemical composition in this case could not differentiate between dust from log handling, grains and stock foods.
>
> … additional monitoring will not quantify the sources contributing to NES breaches.

[160] They confirmed it will not be possible to differentiate between individual emitters within the MMA where multiple BSM activities and/or logs operate in close proximity to each other, for example at De Havilland Way or within the Port boundaries.[103]

E4 Ensuring an equitable approach to managing PM_{10} emissions from different sources in the Mount Maunganui Airshed

[161] The air quality experts estimated that around 65% of the annual PM_{10} emissions can be controlled under the RMA, but note that this does not represent the manageable component of exceedances of the PM_{10} Standard. The estimate is subject to the uncertainty limitations referred to in section E2.[104]

[162] BSM and log handling activities account for just over half of the 65%. These are the only activities the Council proposed to manage under PC13 and it is appropriate that they are effectively managed. It is equally appropriate that fugitive emissions from exposed areas are effectively managed, which the Council proposed to introduce through PC18 but which, in our view, would not result in effective integrated management of the MMA.

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[101] JWSAQ#2 in response to Questions 12 and 13.
[102] JWSAQ#2 in response to Questions 12 and 13.
[103] JWSAQ#2 in response to Question 14.
[104] JWSAQ#2 in response to Question 26.

[163] PM_{10} emissions from other industrial sources account for more than 25% of the total estimated by the air quality experts to be generated by anthropogenic activities in the MMA. If PC13 is to be equitable and to be seen as such, a review of emissions from all sources, including already consented industrial sources, must be undertaken.

[164] At the Strategy and Policy Committee workshop on 29 September 2020, Councillors stated a "… desire for provisions that were equitable for all members of the community within the airshed, based on the following approach"[105] and "New provisions must provide fairness for the community, businesses and workers."[106] It is clear that the Council and the Court agree that an equitable approach must be adopted.

[165] The review is essential as one component of an overall programme to reduce PM_{10} emissions in the MMA as soon as reasonably practicable, recognising possible resourcing constraints and the need to prioritise actions. As recorded elsewhere, the Council's advice to officers was that a review should be undertaken. We do not accept Ms Zame's submission that:[107]

> … the Regional Council considers it to be premature to trigger reviews of existing resource consents (many of which have been granted on the basis that they already have mitigation measures in place to address air discharges), when they have not been identified by the air quality experts as being 'main contributors' to PM_{10} NES-AQ exceedances; and the 'main contributors' have not yet moved into a BPO approach under the provisions of the IPAR.

[166] We consider the review to be essential because the health effects of air pollution and particulate matter are well established and are not in dispute. The health effects are serious, and we agree with Dr Miller's opinion outlined in section A8 that air quality is not being managed for the protection of human health and the current Regional Air Plan has failed to protect human health.

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[105] Joint Memorandum, 26 February 2021, Appendix 1: Strategy and Policy Committee Agenda, at Executive Summary of the Strategy and Policy Committee Memorandum, dated 16 February 2021.

[106] Joint Memorandum, 26 February 2021, Appendix 1: Strategy and Policy Committee Agenda, at Executive Summary and 1.2.

[107] Opening submissions for Bay of Plenty Regional Council, 29 April 2022, at [135].

[167] Of the 35% of discharges that cannot be controlled under the RMA, approximately half are from natural sources and no form of control is possible. Of the remainder, shipping is the main contributor of PM_{10} and the estimated quantity set out above is after significant reductions that were predicted to result once MARPOL Annex VI scenario is fully implemented. Ms Simpson's evidence is that:[108]

> [27] … the global marine fuel sulphur content under MARPOL Annex VI was lowered to 0.5 %w/w in January 2020. Almost all ocean-going vessels that visit New Zealand are flagged to countries that have acceded to MARPOL Annex VI. Therefore most of associated reduction in PM_{10} emissions from shipping has already been realised.
>
> [28] The most recent advice from Ministry of Transport was that New Zealand was expected to accede to MARPOL Annex VI in April 2022, with the provisions coming into effect three months later. There are a small number of New Zealand coastal ships that are understood to currently use fuel with a sulphur content exceeding 0.5 %w/w. These ships will need to transition to a compliant fuel and there will be an associated reduction in PM_{10} emissions.
>
> [29] The vast majority of coastal ships in New Zealand use automotive diesel that has a low sulphur content. … I have not attempted to calculate the quantum of offset that will be achieved by shifting these vessels to low sulphur fuel, but note that it will be modest.

[168] The change to low sulphur fuel also resulted in reductions in PM_{10} emissions. Dr Wilton projected that, by 2022, there would be a 20% reduction from 2019 PM_{10} concentrations within the MMA as a result of new MARPOL Regulations introduced in January 2020.[109]

[169] The Council has indicated an intention to investigate the use of reductions achieved under MARPOL Annex VI for offsetting emissions from existing BSM and log handling activities currently operating as permitted activities in accordance with Regulation 17(3) of the NESAQ.

[170] While not a matter for determination, we simply observe that it would not be appropriate to allow a reduction in the benefits achieved by way of an international maritime agreement, simply to benefit emitters from land-based activities known to

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[108] Ms Simpson, EIC, 8 April 2022.

[109] "Quantification of PM_{10} emissions in MMA airshed by source." Dated 30 April 2021, where MARPOL means Annex VI of the International Convention for the Prevention of Pollution from Ships, Page 2.

be causing serious health effects and required to manage their effects on air quality in the MMA in accordance with the RMA. Future PM_{10} emissions from shipping that potentially may be available for offsets, if offsets are required at all, will be those emissions remaining after the full implementation of MARPOL. Based on current estimates, that is 30 tonnes of PM_{10} a year.

[171] One further opportunity to reduce PM_{10} emissions that cannot be controlled under the RMA exists by way of advocacy by the Council to KiwiRail. Dust from unsealed areas near Rata Street has been identified by a number of air quality experts as a likely contributor to exceedances of the PM_{10} Standard in that location. The annual average PM_{10} concentration is also elevated in the locality to levels well above the MfE "acceptable" level discussed in section E6.

[172] Significant areas of the rail corridor are unsealed in that general area. PoTL has held initial discussions with KiwiRail on mitigation of engine emissions. While solely a matter for the Council, we consider it desirable that all avenues to improve the degraded state of the MMA, including advocacy, should be progressed with a minimum of delay.

E5 Air quality standards and guidelines

[173] These are set out in section A1.

E6 Need to consider both chronic and short-term exposure to PM_{10}

[174] The NESAQ addresses short-term effects on health and the MfE Ambient Air Quality Guidelines provide guidance on annual average concentrations necessary to address long-term effects. Mx Wickham stated:[110]

> [8] … Of relevance for the Court is the explicit guidance from WHO that long-term air quality guideline levels are more health protective than short-term air quality guideline levels (WHO, 2021).
>
> [9] Put simply, compliance with the daily NES for PM_{10} is only one aspect of air quality management (and by direct implication public health protection) that BOPRC is tasked with addressing in the regional plan. The epidemiology is clear that more people are adversely affected, more seriously, through chronic

[110] Mx Wickham, Supplementary evidence, 28 March 2022, at [8], [9] and [26].

> exposure to PM than through short-term exposure.
>
> [26] … chronic exposure to elevated PM_{10} has greater import for public health than acute exposure. It follows that similarly, exceedance of 1-hr and 12-hr trigger thresholds are less important than exceedance of chronic ambient air quality criteria.

[175] Dr Wilton referred to the setting of air quality objectives by reference to the Ambient Air Quality Guidelines 2002, which can be set in consultation with the community, depending on the desired air quality. She stated that the annual average (or chronic) guideline of 20 $\mu g/m^3$ is the MfE "action" level and the MfE "acceptable" level is 13 $\mu g/m^3$.

[176] We find that the setting of this guideline is a key starting point for determining the extent of air quality remediation work required in the MMA. There was limited primary evidence to assist us on this issue, and monitored results were compared by experts to the MfE action level not the "acceptable" level referred to in the table below. Because of the known adverse health effects in the MMA, careful consideration should be given to what is the appropriate guideline to be used.

[177] In view of the significance of this issue, we reviewed the MfE Ambient Air Quality Guidelines. Section 3.1 states: "The national guideline values can be used to set quantifiable region-specific criteria (a concentration-based goal for air quality) based on local monitoring results and community consultation." It also explains that:[111]

> Table 3 shows that pollution levels recorded above 66% of any national guideline value fall within the 'alert' category, as defined by the EPI Programme. This warning level indicates that the guideline value could be exceeded if upward trends are not curbed. In a sense, this provides a definition of degraded air because it implies that 66% of the guideline is the threshold above which it is necessary to consider taking action to maintain or reduce emissions into the air shed. In this situation it may be necessary to develop policies aimed at curbing a potential upward trend, or at enhancing air quality − depending on the circumstances, local community aspirations and the costs and benefits of the actions required.

[111] MfE Ambient Air Quality Guidelines 2002, at page 35.

[178] Table 3 is reproduced below. A footnote to the Table advises that the 'excellent' category should not be applied to PM_{10} because the level of detection of most monitoring methods is not accurate enough. We discussed this earlier when considering the practicability of complying with the significance threshold of Regulation 17.

Table 3: EPI programme air quality categories

Category	Measured value	Comment
Action	Exceeds the guideline value	Exceedances of the guideline are a cause for concern and warrant action, particularly if they occur on a regular basis
Alert	Between 66% and 100% of the guideline value	This is a warning level, which can lead to exceedances if trends are not curbed
Acceptable	Between 33% and 66% of the guideline value	This is a broad category, where maximum values might be of concern in some sensitive locations, but are generally at a level that does not warrant urgent action.
Excellent	Less than 10% of the guideline value	Of little concern: if maximum values are less than a 10th of the guideline, average values are likely to be much less

[179] The setting of ambient air quality guidelines needs to take into account not only the requirements of the NESAQ and MfE Guidelines which apply to people present for 24 hours or year-round respectively, but also the fact that large areas of the MMA are work sites covered by Workplace Exposure Standards, which can be higher because, in part, of the limited duration of time spent at work.

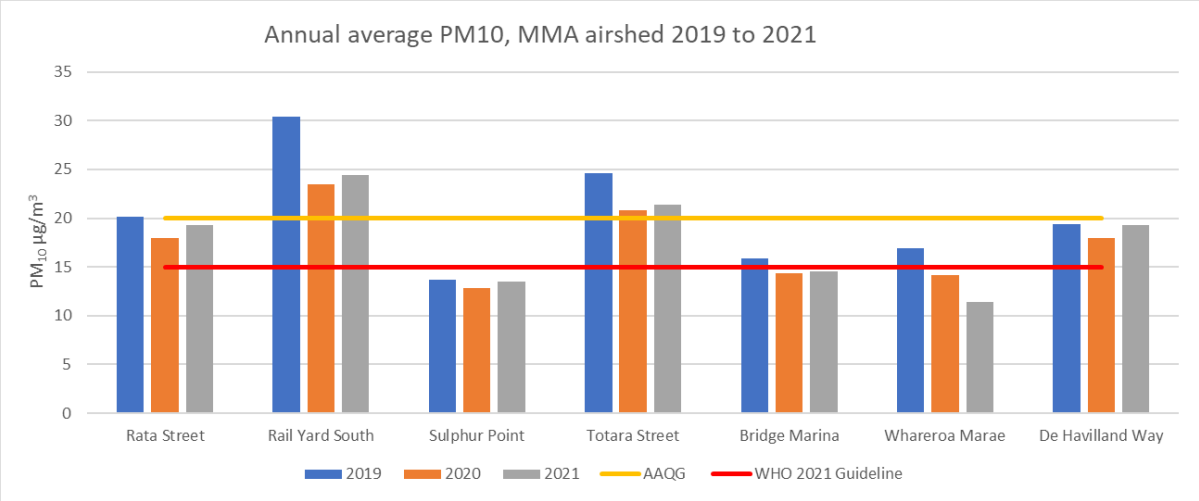
[180] We cannot take this matter further, but in view of the undisputed adverse effects on health occurring in the MMA it is essential that the Council reviews the annual average guideline value, including to take into account any revised national values set by MfE. For the purposes of our decision, we have compared

concentrations measured in the MMA with both the current MfE "action" and "acceptable" levels. Setting guidelines will be particularly challenging where residential properties exist alongside or within land zoned for industry, as in the case of the MMA.

E7 Monitoring results

MMA-wide monitoring

[181] Dr Wilton produced the following figure showing annual average PM_{10} concentrations in the MMA from 2019 -2021.[112]



[182] She stated that even with airshed reductions occurring between 2019 and 2021 PM_{10} concentrations in the MMA still exceed the 2021 WHO recommended annual average guideline at Rata Street, Rail Yard South, Totara Street, and De Havilland Way and therefore remain unacceptable.[113] It appears all sites remain close to or exceed the MfE "Acceptable level" in the above Table 3.

[183] Dr Wilton also provided the following table,[114] which shows (highlighted in red) the number of exceedances of the PM_{10} Standard and the maximum and annual average PM_{10} concentrations recorded at each of the seven Council PM_{10} monitoring

[112] Dr Wilton, EIC, 25 March 2022, at [37], Figure 1.
[113] Dr Wilton, EIC, 25 March 2022, at [108].
[114] Dr Wilton, EIC, 25 March 2022, at Appendix B, Table B1.

sites in the MMA in 2019, 2020 and 2021.

NES exceedance	Rata Street	Rail Yard South	Sulphur Point	Totara Street	Bridge Marina	Whareroa Marae	De Havilland Way
2019	[redacted]	16	0	1	[redacted]	[redacted]	3
2020	2	5	0	0	0	1	0
2021	1	1	0	1	[redacted]	[redacted]	0
Maximum PM10 (24-hour average)							
2019	44	70	31	57	39	50	63
2020	87	115	28	47	35	65	45
2021	62	52	32	51	43	34	49
Annual average							
2019	20	31	14	25	16	17	20
2020	18	23	13	21	14	14	18
2021	19	24	13	21	15	11	19

[184] To provide an understanding of 2022 results to date, we referred to the Council's web site, which recorded one exceedance each on the same day in April at Rata Street and Bridge Marina. In August, the most recent date for which results were provided, there were exceedances on the same two consecutive days at each of De Havilland Way, Bridge Marina, Rail Yard South and Rata Street, and one at Totara Street on the second of those days. The total for the year to date is 11.

[185] It is not clear from the web site if any of the exceedances were caused by exceptional circumstances, so it is not possible to draw conclusions on trends, particularly in view of the very limited period of record. However, there is no certainty that recent improvements in mitigation measures are sufficient to ensure the PM_{10} Standard will be met in the future.

[186] For completeness, we record that Dr Wilton stated in her evidence-in-chief that TSP trigger levels were exceeded at all monitoring sites within the MMA, and prior to January 2019 had been exceeded by more than a factor of two at the Totara Street monitoring site.[115]

[115] Dr Wilton EIC, 25 March 2022, at [35], based on the Council's 2020 Air Quality Monitoring Report.

Monitoring of log handling activities

[187] Timberlands engaged Mote Limited to undertake monitoring of PM_{10} emissions from log handling activities at the Port. The results are summarised in **Appendix 4**. The executive summary of the Report stated:[116]

> It was found that activities at the port, including those within the log storage area did have a measurable impact on PM_{10} concentrations and that this impact was detectable at the Port Boundary. The total average increase in the ambient 24-hour PM_{10} at the port boundary was found to be approximately 12 micrograms per cubic metre during westerly winds. Of this, approximately 7.4 micrograms per cubic metre or 62% of emissions could be attributed to activities within the log storage area. It should be noted that this figure is likely to be overestimated due to the inability to distinguish between emissions from log storage and ship unloading operations. For this reason, this study adopted a precautionary approach and assumed that any increase in emissions results from log storage operations.
>
> The investigation found that the daily PM_{10} contribution varied considerably with the log storage area contributing anywhere between approximately 20% and 95% of the total increase in PM_{10} concentration at the boundary on any given day.

Monitoring of BSM activities

[188] The results of monitoring of BSM handling activities at the Port are also summarised in **Appendix 4.** A key finding was that "A relatively small increase in average concentration (2.4 $\mu g/m^3$) is observed at BOPRC-RYS during periods where stockfood handling is occurring, and the wind is blowing from Berths 7 and 8 towards this monitoring station."[117] An evaluation of four exceedances of the PM_{10} Standard recorded during the period 9 December 2020 to July 2021 was undertaken and concluded two of them were not caused by BSM handling activities and the other two were unlikely to have been caused by such activities.

[189] There were disagreements about some aspects of the methodology by other experts. However, these do not affect our overall evaluation.

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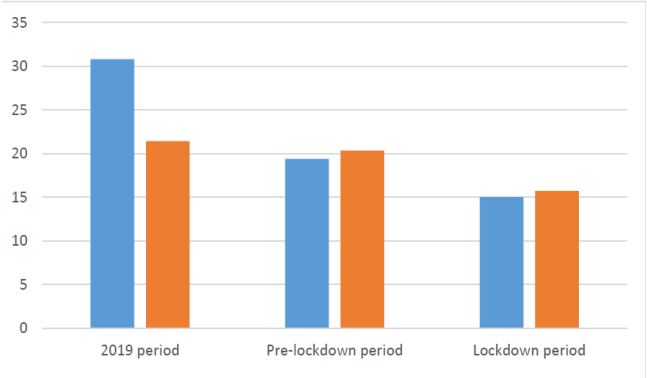
[116] Mote Limited, Emission Concentration Monitoring, Log Storage yard – emission concentration monitoring programme , 16 February 2021, Revised 28 April 2021, at page 3.

[117] Dr Wilton, EIC, 7 August 2020, at [35].

Monitoring undertaken by PoTL following the Covid 19 lockdown

[190] The results of this monitoring are also summarised in **Appendix 4**. The graph below illustrates mean PM_{10} concentrations during the three monitoring periods.



E8 The Mount Maunganui Airshed - wide monitoring network

Overview

[191] The locations of all sites in the MMA at which PM_{10} is currently monitored are shown on Figure X in section A2 above. The air quality experts agreed that the monitoring which has been undertaken by the Council provides a comprehensive understanding of air quality in the MMA. We agree, subject to the second matter raised in the next paragraph.

[192] Two issues arose during the hearing in relation to the network. While they were not the subject of appeal, and are matters for the Council to decide, they are of sufficient importance in terms of the effective management of the MMA to require us to record them in this decision for consideration by the Council. One relates to concerns raised about the appropriateness of the Rail Yard South site for monitoring compliance with the PM_{10} Standard and the other relates to a lack of data about PM_{10} concentrations in the residential area immediately to the east of the MMA.

[193] In terms of what the monitoring is showing, the sites at Rata Street, Whareroa Marae and De Havilland Way are all located in areas where people are present 24 hours a day and are well located to monitor compliance with the PM_{10} Standard. All

existing monitoring locations and the network as a whole are critical to future management of the MMA, but not necessarily for monitoring compliance with the PM_{10} Standard. We address matters arising in evidence in relation to individual sites below.

Rata Street

[194] The fourth figure in Section A2 above indicates there are almost 50 dwellings in the general vicinity of the Rata Street site. There have been exceedances of the PM_{10} Standard at the site and annual ambient PM_{10} concentrations are elevated and close to the current MfE "action level". The exposed area of KiwiRail land in the vicinity has been identified as a likely contributing factor to elevated PM_{10} concentrations by a number of air quality experts. In the Court's view, it would be appropriate for the Council to use advocacy to encourage KiwRail to investigate and implement practicable mitigation measures.

Whareroa Marae

[195] A plan of the Whareroa Marae site is included in section A2 and illustrates its immediate proximity to industrially zoned land. PM_{10} concentrations at the site have trended downwards and may achieve the objectives of PC13 on a continuous basis if the same trends continue. They may also more consistently reach levels which 2021 WHO guideline values indicate are necessary for the protection of human health. It will require several years of further monitoring before this can be confirmed.

[196] Whatever that outcome, the mauri of the air is poor and there has been a history of adverse effects on cultural values and health arising from degraded air quality in the Marae locality. This has significantly compromised the ability of Ngāi Te Rangi to "… live as Maori on their turangawaewae, breathe fresh clean air and not have to worry about getting sick or leaving our tamariki with a legacy of ill health, poor living conditions and zero incentive to come home."[118]

[118] Ms Bennett, EIC, 14 August 2020, at [110].

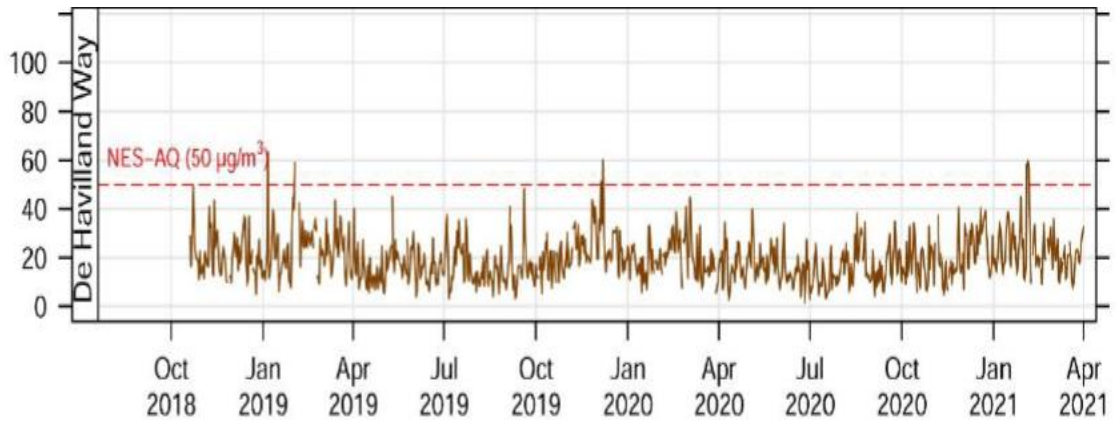
[197] Under the specific circumstances that exist, we consider a strong case can be made in accordance with s6(e), 7(a) and 8 of the RMA and in accordance with IR 1B of the RPS[119] to ensure that any future guideline value set by the Council for the locality of the Marae reflects the 2021 WHO guideline value of 15 μg/m^3.

De Havilland Way

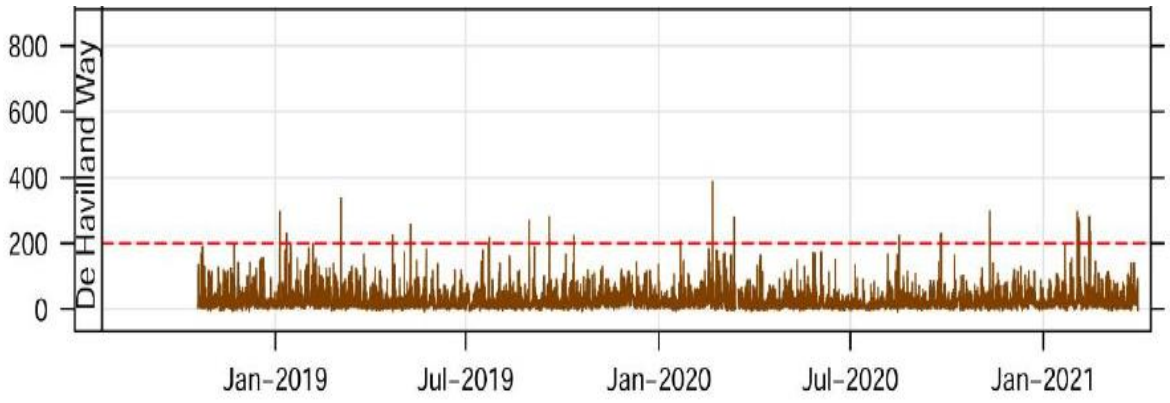
[198] PM_{10} concentrations at the De Havilland Way site have been at elevated levels of concern in terms of the PM_{10} Standard and annual average guidelines for some years. A plan of the general site locality is included in section A2. The site includes both industrial and residential activities within the same cadastral boundary, which has presented difficulties in enforcing compliance under the RMA.

[199] In response to a request from the Court for an update on air quality issues at the site, the Council produced a Report on De Havilland Way Monitoring Site – for purposes of Air Quality Expert Conferencing relating to appeals against Rule AQ R22 (Plan Change 13) dated 29 April 2021.

[200] The following graphs show daily mean PM_{10} and 1-hour mean TSP data from the Council's De Havilland Way monitoring site respectively.[120]



[119] Applying a precautionary approach to managing natural and physical resources.
[120] Reproduced from the Council's Air Quality Data Update dated 30 April 2021.



[201] Key findings in the De Havilland Way report included:

(a) There was "a reduction in recorded maximum particulate values, but no noticeable change in the 90th percentile and mean values. Overall this indicates that while complaints have decreased and levels have decreased slightly, dust levels in the area are still elevated in relation to the ambient air quality guideline".[121]

(b) The Council "continues to receive requests for information (LGOIMA requests) from residents surrounding the De Haviland Way facility, who remain concerned regarding the health impacts associated with operations at the facility".[122]

(c) The "Council's compliance investigations show that the loading operation in its entirety causes dust discharges. This includes truck movements from the road onto the yard, removal of covers, driving into the storage shed, dumping loads with loading bay doors open, and deliberate sharp braking to release product from the trailer. Once trucks are unloaded, front end loaders create dust by handling the product in the shed while dust escapes through open doors". [123]

(d) Council compliance staff have since "observed the installation of a concrete wall erected alongside the monitor, water misting over doors and sweeper

[121] BOPRC Report on De Havilland Way Monitoring Site – for purpose of Air Quality Expert Conferencing relating to appeals against Rule AQ R22 (Plan Change 13) (**De Havilland Report**), at page 3.
[122] De Havilland Report, at page 3.
[123] De Havilland Report), at page 3.

trucks".[124]

(e) Nutrinza (who operate from the facility) summarised the improvements made at their facility as:[125]

- "Installed automated doors at both ends of load out bay. At no stage can both doors be opened to create a wind tunnel that lifts dust;
- Installed dust extractors in the main blend shed;
- Installed a water and oil mixer in the emulsion plant that is sprayed onto blends before being sent to load out bay;
- Employed more staff to do more cleaning and sweeping; and
- In process of purchasing a large electric sweeper to improve dust management".

(f) "Operator changes in relation to handling and emission control are understood to have occurred during the period of record."[126]

(g) "Overall, despite some low-tech mitigation measures implemented by the industries in this area, there has been little improvement in air quality in the immediate area. Particulate levels remain elevated."[127]

(h) The operator does not currently have its own monitoring devices installed at the DHW facility and utilises the monitoring data provided from the DHW monitor to adjust its on-site practices in order to demonstrate compliance with the NES.

(i) "The continual operation of the DHW monitor is an unbudgeted expense that costs the Regional Council (and therefore the community) approximately $4,500 per month."[128]

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[124] De Havilland Report, at page 3.
[125] De Havilland Report, at page 4.
[126] De Havilland Report, at page 4.
[127] De Havilland Report, at page 4.
[128] De Havilland Report, at page 4.

[202] In May 2021, the air quality experts stated there had been no measured exceedances of the NESAQ value for PM_{10} attributable to the De Havilland Way site since December 2019.[129] We were told that there was an exceedance during that period but that it was due to an exceptional circumstance in accordance with Regulation 16A of the NESAQ. It is unclear if the exceedances recorded in August 2022 were actual exceedances or caused by exceptional circumstances.

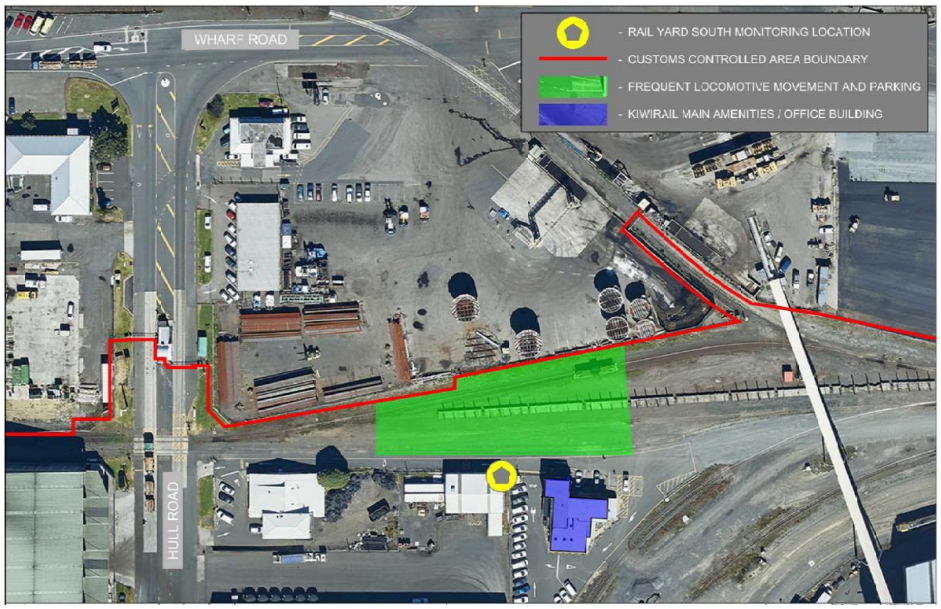
[203] The annual mean PM_{10} concentrations for the last three calendar years were just below the current MfE "action level" of 20 ug/m^3 but significantly above the 2021 WHO guideline of 15 ug/m^3 and the MfE "acceptable" concentration of approximately 13 ug/m^3. Efforts to date to reduce PM_{10} emissions to the extent required have been unsuccessful by a large margin.

[204] We find that PM_{10} emissions from this site are causing adverse effects on human health, which is contrary to the purpose of the RMA. We find that substantial improvements in the management and reductions of PM_{10} emissions from these BSM handling activities must be implemented.

Rail Yard South

[205] Mr Curtis expressed his concerns about the Rail Yard South monitoring location and whether it is appropriate given its location immediately adjacent to a building and the wind tunnel effects it is likely to experience being located between two buildings.[130] The site is located within industrially zoned land and amongst PM_{10} generating activities as shown on the following figure, reproduced from Figure 1 in the PoTL letter referred to below.

[129] JWSAQ#1 in response to Question 22.
[130] JWSAQ#1.



[206] In view of Mr Curtis' concern and because 16 out of the 20 exceedances of the PM_{10} Standard which occurred in the 12 months to November 2019 were recorded at the site, we asked the air quality experts for their view on the appropriateness of the Rail Yard South site for long-term air quality monitoring purposes.

[207] Five of the experts answered as follows:[131]

> It is not suitable for evaluating compliance of the airshed with the NES for PM_{10} … because the site is industrial and not representative of a location where people could be present and exposed for 24-hour periods. The 24-hour period is an implicit requirement of Schedule 1 of the NES-AQ to regulation 14(1)(c), as defined in Regulation 13(3) (threshold concentration).

[208] Dr Wilton considered the site is suitable and does not consider a 24-hour exposure requirement in the vicinity of the monitoring site to be implicit in the NESAQ.

[209] As a result of information provided for use at the expert conference, we became aware that PoTL had written to the MfE on 5 June 2020 expressing concern

[131] JWSAQ#2 in response to Question 1.

about the suitability of the site for assessing compliance with the PM_{10} Standard.[132] The Port's letter stated:[133]

> … this particular location is not consistent with best practice for ambient air quality monitoring. Overall, it is not representative of a location within the airshed where a person could reasonably be expected to be exposed over for 24-hour period and is therefore unsuitable for monitoring against the NESAQ.
>
> …
>
> The site is located in an active rail yard near the main amenities/office building and car park for KiwiRail (Figure 1). This is a private industrial outdoor workplace site with access generally restricted to KiwiRail workers and contractors. There is no potential for a person to be present continuously over a 24-hour period.

[210] The letter included references to a number of good practice guides in use in New Zealand, including:[134]

> Section 3.1.1 of the GPG 2009[135] titled "National environmental standards (NES) for ambient air quality" states "*The NES for air quality apply at any place in the open air where a person might reasonably be expected to be exposed to the contaminant over the relevant averaging period. This does not include tunnels, indoor areas or outdoor workplace sites, whose emissions are covered by occupational Safety and Health regulations".*
>
> Table 3 of the GPG Industry 2016[136] located in Section 4.1 titled "National environmental standards for air quality" (Figure 2) states that NES standards represented as a 24 hour average, as is the case with PM_{10}, details that *"any location where people are not likely to be exposed for 24 hours - for examples roads, footpaths and industrial areas where residential use is not allowe*d", is a location where assessment against the ambient standards should **not** apply.

[211] With regard to each guideline, the Port stated respectively that:[137]

> … The number of people and the duration of exposure of those people in the vicinity of the site is low.

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[132] Copy provided to the air quality experts in advance of the second air quality expert conference.

[133] Letter to MfE: Appropriateness of PM_{10} Site, Rail Yard South, dated 5 June 2020, pages 2 and 5.

[134] Letter to MfE: Appropriateness of PM_{10} Site, Rail Yard South, dated 5 June 2020, pages 3-4.

[135] *Good Practice Guide* for *Air Quality Monitoring and Data Management 2009. Wellington: Ministry for the Environment.*

[136] Ministry for the Environment. 2016. *Good Practice Guide for Assessing Discharges to Air from Industry.* Wellington: Ministry for the Environment.

[137] Letter to MfE: Appropriateness of PM_{10} Site, Rail Yard South, dated 5 June 2020, pages 3 and 4.

> … The site is both within an outdoor workplace and in an area where it is not reasonably expected that someone would be present for a 24 hour period.
>
> … The site is located in an industrial area where people are not likely to be exposed for 24 hours.

[212] Based on the evidence, the Court has no doubt that the Rail Yard South site is well-chosen for many reasons, including that it provides data that PoTL uses to mitigate adverse effects. At the second air quality expert conference,[138] the experts agreed that the site and monitoring record are suitable for identifying possible sources; evaluating the effectiveness of dust mitigation measures; assessing long term air quality trends; investigation of elevated dust events; and representing peak PM_{10} concentrations at an industrial site in the MMA. These are important functions that provide essential information and we do not question the need for the site to remain part of the monitoring network.

[213] That does not mean the site is appropriate necessarily as a site for monitoring compliance with the PM_{10} Standard.

[214] The suitability of the site was not raised in any appeal. The Court was not asked to make a declaration on the matter. Nevertheless, the issue is critical to the future management of the MMA, and one which we consider needs to be drawn to the attention of the Council. Matters requiring consideration are:

(a) Air quality standards are determined to reflect the time a person is expected to be present in an area. The MFE annual mean guideline for PM_{10} is 20 $\mu g/m^3$ and the NESAQ 24-hour PM_{10} Standard is 50 $\mu g/m^3$.

(b) As stated in the Port letter referred to above, the "The NES for air quality apply at any place in the open air where a person might reasonably be expected to be exposed to the contaminant over the relevant averaging period."[139] That means the concentration of 50 $\mu g/m^3$ is the standard to be met when a person is present for 24 hours.

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[138] JWSAQ#2 in response to Question 1.
[139] Letter to MfE: Appropriateness of PM_{10} Site, Rail Yard South, dated 5 June 2020, page 3.

(c) Table 3 of the Good Practice Guide Industry 2016 referred to by PoTL sets out "Location and applicability of the ambient standards for assessment purposes".[140] It states the 24-hour averaging period "… includes all outdoor locations where members of the public might reasonably be exposed for 24 hours."[141] It further states that the Standards should not apply in "Any location where people are not likely to be exposed for 24 hours – for example roads, footpaths and industrial areas where residential use is not allowed."[142]

[215] The Council's own 2020 Monitoring Report states "Rail Yard South is the obvious standout in relation to NESAQ exceedances. It is not unexpected given its location in a busy part of the airshed and proximity to a range of dusty activities.[143]

[216] The key issue in dispute between the experts was whether people need to be present on a 24-hour a day basis for the PM_{10} Standard to apply. We agree with the majority of the experts that the 24-hour exposure requirement is implicit and that the NESAQ does not apply to roads, footpaths and industrial areas where residential use is not allowed.

[217] The site is located some distance from residentially zoned land and while we acknowledge the map provided by Dr Wilton showed "dwellings" within the industrial zone, the Council's experts were not able to verify if there are such dwellings or if there are other sensitive activities in the locality. This information needs to be ascertained before any decision as to the suitability of the RYS site for monitoring compliance with the PM_{10} Standard can be made.

[218] The consequences of inappropriately using the Rail Yard South site for compliance monitoring purposes are also matters the Council may wish to consider.

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[140] Letter to MfE: Appropriateness of PM_{10} Site, Rail Yard South, dated 5 June 2020, page 4, figure 2.

[141] Letter to MfE: Appropriateness of PM_{10} Site, Rail Yard South, dated 5 June 2020, page 4, figure 2

[142] Letter to MfE: Appropriateness of PM_{10} Site, Rail Yard South, dated 5 June 2020, page 4, figure 2.

[143] Ambient Air Quality Data Update 2020, Bay of Plenty Regional Council Publication 2020/03

The planning experts agreed that "Considering some concerns about the location of existing monitors used for ambient air quality, it is almost certain there will be exceedances of the NES-AQ PM_{10} standard".[144] This would extend unnecessarily the period the MMA would be designated as a polluted airshed.

[219] Inappropriate siting could also lead to some industries being required to implement more stringent and costly control measures than necessary to ensure compliance with the PM_{10} Standard.

Totara Street

[220] No one raised concerns about the suitability of the Totara Street monitoring site, which is located as shown in the following figure reproduced from Figure C3 of Mx Wickham's evidence-in-chief. However, the site is also located in the middle of an industrial area with PM_{10} generating activities on at least three sides and is an even greater distance from areas zoned for residential purposes than the Rail Yard South site. It would be prudent for the Council to be satisfied that people will be present in the locality on a 24-hour basis if the site is to continue to be used for monitoring compliance with the PM_{10} Standard.

[221] This is a key issue in terms of the mitigation of PM_{10} emissions from log handling activities at the Port that will be required.

[144] JWSP#2. at [31].

E9 Understanding of air quality in the residential areas to the east of the Mount Maunganui Airshed

[222] The current monitoring network provides no information about PM_{10} concentrations in these residential areas,[145] where large numbers of people reside and where the PM_{10} Standard is clearly applicable. We raised this issue at the 2022 hearing.

[223] Dr Wilton had given consideration to how far PM_{10} can travel in response to earlier questions, stating:[146]

> I have realised is that there are correlations between PM_{10} concentrations at different monitoring sites and what that suggests to me is that we should be more concerned in terms of the implications for broader air quality exposures because where you have high elevated concentrations that correlate across different sites, is quite indicative that the airshed as a whole is retaining quite high concentrations, so whilst we don't know in terms of what the monitoring data is for out there, we, there is enough evidence there to, well we do know that it is a problem.

[224] Mx Wickham considered that to obtain meaningful data, a single monitoring site within the residential area would not be enough and it would be necessary to add a string of additional sites in the area.[147] Mr Curtis' opinion is that the PM_{10} concentrations in the residential areas could be "somewhere between 15 and 19 $\mu g/m^3$" and will vary.[148]

[225] Mr Stacey acknowledged he did not have any better information on what concentrations might be, and that it would be purely speculation on his part. He considered that, if he was to make an estimate, as the concentration at Rata Street is 19 $\mu g/m^3$ and at Totara Street it is 22 $\mu g/m^3$, the concentrations along the boundary of the airshed could be somewhere between 19 and 22 $\mu g/m^3$, and less going towards the east. "That would be my guess."[149] Mr Stacey considered there would definitely be merit in understanding what PM_{10} concentrations people in the area are exposed to.[150]

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[145] Dr Wilton, NOE 2022, at page 137.
[146] NOE 2022, at pages 137 and 138.
[147] NOE 2022, at page 144.
[148] NOE 2022, at page 181.
[149] NOE 2022, at page 224.
[150] NOE 2022, at page 224.

[226] Based on the reductions in PM_{10} concentrations observed in almost a year of BSM monitoring of the Port, there is no clear evidence that residential areas distant from the main PM_{10} generating activities will be subject to annual average PM_{10} concentrations above guideline values. Nevertheless, uncertainty remains.

[227] Any decision on whether additional monitoring is required in the residential area to the east is a matter for the Council. However, it is difficult to understand how properly informed decisions can be made about protecting human health, complying with the PM_{10} Standard and ensuring appropriate mitigation measures are implemented by PM_{10} emitters when, understandably, none of the air quality experts were able to provide guidance on what existing PM_{10} concentrations are in the largest residential area potentially affected.

E10 Reductions in PM_{10} that could be required to meet annual average PM_{10} guidelines

[228] Annual average air quality is related to MMA-wide PM_{10} concentrations.[151] Accordingly, MMA-wide reductions or possibly reductions in certain parts of the MMA will be required if the guideline value is exceeded.

[229] The following diagram is reproduced from a document entitled "Quantification of PM_{10} emissions in MMA airshed by source", prepared by Dr Wilton for the second air quality expert conference. It shows that the 20 $\mu g/m^3$ guideline could be met in theory if the reduction predicted through the implementation of MARPOL Annex VI scenario[152] is achieved. If a lower guideline value is determined by the Council in future, the figure indicates the estimated PM_{10} concentrations resulting from different sources, which could assist in determining future management options. However, as the estimated PM_{10} emissions from log handling activities were considered to be low by the air quality experts, and we agree, the low contributions from log handling and storage in the figure should not be relied on.

[151] JWSAQ#2 in response to Question 27.
[152] Annex VI of the International Convention for the Prevention of Pollution from Ships

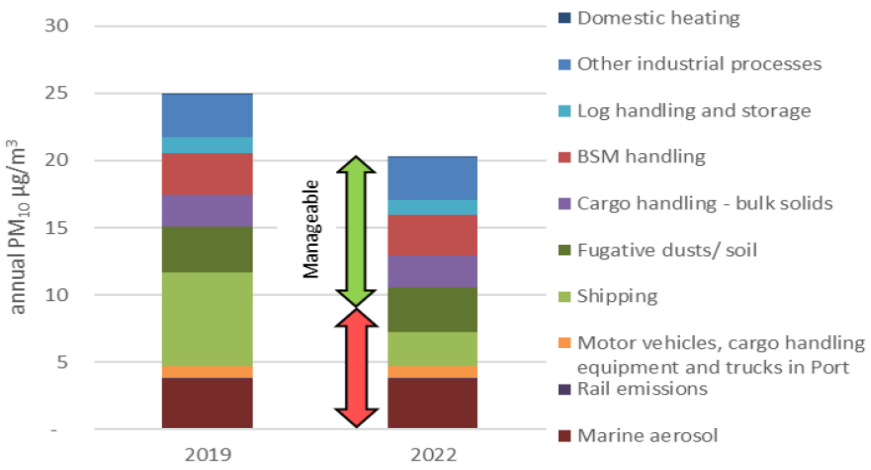

Figure 2: Relative contribution of sources to airshed PM_{10} pre and post Marpol implementation for New Zealand.

[230] Independent of what guideline values apply, airshed wide monitoring will be required to confirm predictions. Monitoring to the end of 2021, which the evidence indicates should show some reductions as a result of MARPOL, indicates that the current "action" guideline value in Table 3 of the Ambient Air Quality Guidelines was met at all existing monitoring sites except Rail Yard South and Totara Street during the previous three-year period. Several more years of monitoring will be required before compliance will be able to be assured.

E11 Reductions in PM_{10} that could be required to comply with the NESAQ PM_{10} Standard

[231] The air quality experts agreed that NESAQ breaches occur as a result of localised sources. Therefore, MMA-wide PM_{10} reductions cannot ensure compliance with the PM_{10} Standard. The experts agreed that compliance with the Standard will only be achieved through a BPO approach targeting the key contributors to breaches at each site and that these may vary between events and sites. As we have previously stated, they further agreed that emissions from BSM and log handling activities, fugitive emissions from exposed areas and existing consented activities all contribute to elevated concentrations in the MMA, meaning they should all be targeted to achieve compliance with the PM_{10} Standard.[153]

[153] JWSAQ#2 in response to Questions 27 and 28.

[232] They agreed that because of the unique nature of the MMA, "… it is not possible to quantify the reductions to be allocated to each industry type or site."[154]

E12 Proposed management of activities discharging particulate and PM_{10} to air within the Mount Maunganui Airshed

[233] A description of the activities and current management practises by emitters is included in **Appendix 1**, together with an overview of their economic significance. Management responsibilities within the Port are complex, with many different organisations involved and many different sources of PM_{10} emissions on the one site, whose effects the air quality experts state cannot be readily differentiated.[155] Since 2020, the Port has taken a proactive approach to mitigation of air quality effects within its site, working with BSM and log handling organisations, as described in the Appendix. Some off-Port BSM handling activities have implemented mitigation measures.

[234] There was considerable discussion during the hearing about the need for an airshed action plan.[156] Ms Parcell considered that an action plan is not necessarily required but it is good practice.[157] Mr Serjeant considered one to be important. [158] Mr Ngatuere said they had been waiting for an action plan for years.[159]

[235] The National Air Quality Compliance Strategy provides guidance on the development of airshed action plans and where the PM_{10} standard is exceeded states[160] "Councils are encouraged to consider developing airshed action plans as soon as possible to move towards compliance with the ambient PM_{10} standard." It notes this is not a mandatory requirement.

[236] The MfE Users' Guide recommends that "… action plans be prepared in a transparent manner so that affected parties, which include the general public and

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154 JWSAQ#2 in response to Question 29.
155 JWSAQ#2 at Part A, Item 1(a).
156 NOE 2020, at page 140.
157 Ms Parcell, NOE 2020, at page 94.
158 Mr Serjeant, NOE 2020, at page 108.
159 Mr Ngatuere, NOE 2020, at page 148.
160 The National Air Quality Compliance Strategy to Meet the PM_{10} Standard, Ministry for the Environment, August 2011 at Section 4.7.1, page 36.

industry, are informed and able to participate."[161] We noted that the s32 Evaluation Report for the NESAQ refers to regional councils being required to produce "airshed implementation plans" where an airshed does not meet the PM_{10} Standard.[162]

[237] We consider the lack of MMA-specific policy direction in PC13 and the unavailability of information about the proposed future management of the MMA was a significant gap in the information required by the Court to make a properly informed decision on the appeals. The information is important in terms of providing certainty for existing BSM and log handling activities operating in the MMA as to what they will be required to do to obtain resource consents. The information is equally important in terms of providing certainty for Ngāi Te Rangi and Toi Te Ora as to how their concerns will be addressed.

[238] As noted above, the expert evidence that a BPO and iterative approach is the most appropriate way to achieve compliance with the PM_{10} Standard was accepted by all parties. However, in addition to needing clarity as to how the BPO is to be determined, there is a need to be clear on what is meant by an iterative approach and what standards need to be included in the IPAR to provide the clarity, certainty and enforceability necessary for an activity to be permitted. These matters are interlinked and cannot be considered in isolation.

[239] Further, there is no certainty that a BPO type approach alone will be sufficient to meet the objectives of PC13. It would be inappropriate to take a "wait and see" approach. Development of an MMA Airshed Management Plan[163] in consultation with emitters and affected parties should be undertaken without undue delay.

[240] The evidence now before the Court not only confirms the need to reduce PM_{10} emissions from all significant sources but highlights the need to ensure their

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[161] 2011 Users' Guide to the Revised NES for Air Quality, updated 2014, at Section 4.12.2 and Table 8.

[162] MfE 2011 Revised National Environmental Standards for Air Quality – Evaluation Under s32 of the Resource Management Act, at section 4.6.

[163] We have used "Airshed Management Plan" as opposed to "Action Plan", "Implementation Plan" or any other name because it best describes the purpose of the plan, which is to manage the MMA so that it becomes unpolluted in terms of the NESAQ and remains unpolluted.

effects are mitigated in particular in the localities of Whareroa Marae, De Havilland Way and Rata Street. Depending on whether residential dwellings are present in the locality of the Rail Yard South and Totara Street monitoring sites, significant reductions in emissions from log handling at the Port could be required.

Section F

Effects on Whareroa Marae

F1 Relevant planning provisions

[241] The Regional Policy Statement includes the following objectives and policies of particular relevance:

Objective 13	Kaitiakitanga is recognised and the principles of the Treaty of Waitangi (Te Tiriti o Waitangi) are systematically taken into account in the practice of resource management
Objective 17	The mauri of water, land, air and geothermal resources is safeguarded and where it is degraded, where appropriate, it is enhanced over time
Policy AQ 1A	Discouraging reverse sensitivity associated with odours, chemicals and particulates
Policy IW 2B	Recognising matters of significance to Māori
Policy IW 3B	Recognising the Treaty in the exercise of functions and powers under the Act
Policy IW 4B	Taking into account iwi and hapū resource management plans
Policy IW 5B	Adverse effects on matters of significance to Māori
Policy IW 6B	Encouraging tangata whenua to identify measures to avoid, remedy or mitigate adverse cultural effects

[242] Objectives O1 and O2 of PC13 are, respectively:

> **AQ O1 Protect air from adverse effects — Te tiaki i te hau mai i ngā pānga kino**
>
> Protection of the mauri of air and human health from adverse effects of anthropogenic contaminant discharges to air.
>
> **AQ O3 Local air quality — Te pai o te hau o te rohe**
>
> Sustainable management of discharges of contaminants to air according to their adverse effects on human health, cultural values, amenity values and the receiving environment.

[243] Policies AQ P3 and AQ P4 include, respectively:

> **AQ P3 Management of discharges — Te whakahaere i ngā tukunga**
>
> Activities that discharge *contaminants* to air must be managed, including by use of the *best practicable option*, to:
>
> (a) safeguard the life supporting capacity of the air, protect human health, and avoid, remedy or mitigate adverse *effects* on cultural values, amenity values, and the *environment*
>
> …

AQ P4 Matters to consider — Ngā take hei whiriwhiri

Have particular regard to the following matters when considering the acceptability of any discharge of *contaminants* to air:

…

(e) The *effect* of the discharge on human health, cultural values, amenity values, the *environment*, and regionally significant infrastructure.

F2 Evidence on effects of existing air discharges on Whareroa Marae

[244] We summarised some of the effects on human health and mauri in section A9, including the following evidence from Mr Ngatuere:[164]

> Living in a community that is subjected to PM_{10} and seeing/experiencing the real harm to human health and quality of life; I am of the firm belief that Plan Change 13 (PC13) is too weak and does not go far enough to keep Whareroa — my children and kaumatua safe.

[245] Mr Tuanau stated that:[165]

> Mauri is an important aspect for the well-being of a person and of a people. Mauri is the essence that enables us to connect and relate through one's whakapapa to their identity, their belonging in the world, and to their whenua.
>
> …
>
> Mauri is what relates and connects us to our world as tangata whenua. It is a life force that enables the spiritual dimension and the physical dimension to be in the same space at the same time.
>
> …
>
> If the Mauri is diminished, then the physical and mental well-being of tangata whenua also diminishes.
>
> …
>
> In terms of mauri, for me, the tangata whenua and their well being is the greatest indicator of mauri. From what I can see, and what I hear from the tangata whenua at Whareroa, the mauri of Whareroa is at a low level.
>
> …
>
> It is hard times for tangata whenua to carry out their tikanga and their kawa on their marae in the knowledge that their manuhiri are exposed to harmful particulates in the air.
>
> …

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[164] Mr Ngatuere, EIC, 7 August 2020, at [29]
[165] Mr Tuanau, EIC, 14 August 2020, at [12] to [17] and [29] to [33].

> The mauri of the Whareroa community is in a bad state.

[246] Ms Bennett's evidence was that:[166]

> Our rangatiratanga and kaitiakitanga are vital aspects of our indigeneity. As mana whenua, we have an intergenerational responsibility to be rangatira and kaitiaki for our people and environment. Because the wellbeing of our natural world and taonga and our own are intertwined, proposals or activities that may diminish the mauri of our taonga or our relationship with our taonga need careful examination from a manawhenua-kaitiaki perspective. This cannot happen if we, the mana whenua, are locked out of the process.

[247] To illustrate the effects of industry on the Whareroa Marae, Ms Bennett included a map of the area, which is included in **Appendix 5**. She stated:[167]

> On one hand it is confronting to see the reality of our surroundings. Looked at a different way, it is a powerful way to illustrate how the system has failed to protect Ngāi Te Rangi and how it has diminished and diluted our very existence in favour of the spread of heavy industry.

[248] She spoke of the resource consent process as an opportunity for tāngata whenua to be heard, stating, in addition to the evidence referred to in Section A9 about her frustration and disappointment at the way the RPS is being applied in relation to matters of concern to Ngāi Te Rangi:[168]

> It is meant to be the time where we get to identify aspects of a proposal that maybe culturally detrimental and advise appropriate ways to address any identified adverse effects. It is meant to respect our mana. It is meant to respect our tikanga processes and our way of knowing (our mātauranga) in relation to the identification and evaluation of effects.
>
> …
>
> It is critical that the rules are robust and not diluted to suit certain groups and their misconceptions.
>
> …
>
> Our fear is that if the activity of bulk handling and storage becomes a permitted or controlled activity, we will lose one of the only mechanisms that assists our efforts as kaitiaki, to engage in a process that affects us and have our concerns met in an appropriate manner.
>
> …

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[166] Ms Bennett, EIC, 14 August 2020, at [13].
[167] Ms Bennett, EIC, 14 August 2020, a[71].
[168] Ms Bennett, EIC, 14 August 2020 at [19] to [101].

> Ngāi Te Rangi strongly believes that the legacy issues created by the current industries within the Mount Maunganui airshed need to be addressed due to the long-term and continuous exposure of people and whānau living within this airshed.
>
> …
>
> Every operator located within the airshed needs to accept their part in the problem and their part in the solution.
>
> …
>
> The Air Plan would benefit from the foresight that our RPS has. The RPS anticipated the need to look at innovative planning mechanisms to manage air quality and to protect peoples health. Improving the air with a view to protecting the health of our whanau at Whareroa is our highest priority underpinning our participation within these proceedings.
>
> …
>
> The Air Plan contains a singular reference to iwi. That reference is in AQ P4. (Iwi/Hapu Management Plans are a matter to be considered)

[249] Ms Bennett raised serious questions about how the interests of tāngata whenua are being provided for in relation to the effects of industry on Whareroa Marae. Her evidence made distressing reading. It was not challenged.

[250] She stated that:[169]

> We expect that Rule AQ R22 and the assessment criteria contains wording that:
>
> a. protects our whanau at Whareroa;
>
> b. recognises Ngāi Te Rangi and provides for our relationship, culture and traditions with our taonga.
>
> c. directs that applications for resource consent must be able to demonstrate how particular regard to the exercise of Ngāi Te Rangi kaitiakitanga is achieved.

F3 Findings in relation to effects of existing air discharges on Whareroa Marae

[251] We find that there have been serious adverse effects on the mauri of air and human health at Whareroa Marae over an extended period as a result of the way

[169] Ms Bennett, EIC, 14 August 2020, at [104].

discharges of PM_{10} to air have been managed in the MMA. This cannot be allowed to continue.

[252] Recognising and providing for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga is a matter of national importance. In making any decisions about the content and administration of plans or applications for resource consent, there is an expectation that the Regional Council will recognise and provide for those matters. In this case, that relationship includes not just the lands of the Whareroa Marae but also the air people breathe. It is important that the marae and iwi be involved in resource consent applications for discharges of PM_{10}. We have therefore proposed a rule which addresses the notification of such applications.

Section G

Developing a way forward

G1 Determining the appropriate provisions

[253] We determined that the following were key components:

(a) The objectives of PC13 are the starting point.[170]
(b) Establishing principles to be used to develop the plan provisions.
(c) The extent to which Regulation 17 constrains or prevents the granting of resource consents to existing activities currently operating as permitted activities.
(d) The duty to achieve integrated management of the natural and physical resources of the region.[171].
(e) Ensuring the provisions provide a pathway to compliance with the NESAQ to the extent the Council's powers enable them to do so.[172]
(f) Giving effect to the relevant provisions of the RPS.[173]
(g) Developing Interim Permitted Activity Rule AQ R22A.
(h) Developing Rule AQ R22B, which will apply on expiry of the IPAR.
(i) Developing new policy and consideration of other relevant planning issues.
(j) Assessing the efficiency and effectiveness of the provisions in achieving the objectives[174] and completing a s 32AA Evaluation.[175]
(k) Ordering changes to PC13 in accordance with s 293 RMA in relation to PM_{10} emissions from unsealed yards and new Policy AQ P12.
(l) Overall evaluation and findings

[254] Items (b) to (f) are addressed in this section G. Other items are addressed in their own subsequent sections.

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[170] Refer to Part C of this decision.
[171] RMA s 30(1)(a) and Objective 11 and Policy IR 3B of the Bay of Plenty Regional Policy Statement, updated 9 October 2018.
[172] RMA s 44A(7) and (8).
[173] RMA s 67(3)(c).
[174] RMA s 32(1)(b)(ii).
[175] RMA s 32AA.

[255] For the avoidance of doubt, we found from an early stage of the appeal process that the environmental, economic, social, and cultural effects that are anticipated from the implementation of the plan change are of a local, regional and/or national scale and significance. The level of detail included in this decision, which forms part of our evaluation under s 32AA, reflects that.

G2 Principles used to develop the plan framework

[256] Having sought feedback from the parties and having considered that feedback, the evidence, the issues arising and the need for procedural fairness, we adopted the following modified principles for the purposes of our overall evaluation and decision:

1 Improvements in air quality in the MMA and compliance with the NESAQ must be achieved as soon as reasonably practicable.

2 The protection of human health requires compliance with both the NESAQ PM_{10} Standard and an annual mean concentration appropriate for the local environment.[176]

3 All industries emitting PM_{10} to air within the MMA must contribute to the airshed's remediation.[177]

4 Existing emitters of PM_{10} in the MMA who relied on permitted activity Rule 17 of the 2003 Regional Air Plan to operate must demonstrate compliance with new PC13 Interim Permitted Activity Rule AQ R22A to the Council's satisfaction and subsequently must obtain a restricted discretionary activity resource consent to authorise continued operation.

5 Future management must require that PM_{10} emissions from all existing emitters of PM_{10} in the MMA be minimised to the greatest extent

[176] This concentration cannot be set in PC13 as it requires determination by the Council. In the Court's view, the evidence demonstrates a need for a target to be set to reflect local conditions in the MMA and adjacent residential areas, following consultation with those affected.

[177] Consistent with the statement in the Memorandum of counsel on behalf of Bay of Plenty Regional Council, Timberlands Limited, Toi Te Ora Public Health and Te Runanga O Ngai Te Rangi Iwi Trust dated 26 February 2021, Appendix 1, section 2.3.

reasonably practicable until the objectives of PC13 are met. Policy provision must include iterative management to ensure that is achieved.

6 The rule framework must ensure that the required outcomes are clear (on their face), certain and enforceable, within the law and must be applied equitably across different emission sources.

7 The rule framework and its application must recognise and give effect to RPS provisions relating to mana whenua and provide opportunities for involvement in resource consent processes by Whareroa Marae.

8 Only changes to the provisions in the Decisions Version of PC13 necessary to ensure effective management of the MMA as a polluted airshed will be made.

G3 The extent to which Regulation 17 constrains or prevents the granting of resource consents to existing activities currently operating as permitted activities

[257] This was a matter of serious and understandable concern to existing emitters of PM_{10} currently operating as permitted activities. The majority expressed the view that, based on a plain reading of Regulation 17, applications for consents for any such existing activities generating significant quantities of PM_{10} in the MMA could need to be declined. It is a matter we considered at length.

[258] As we stated in Part D, a clear and consistent theme through all the background documents we reviewed is that Regulation 17 restrictions on granting consents to discharge PM_{10} in polluted airsheds was intended to apply to **new** industries and **new** discharges or **increases** in existing discharges. As also stated, the documents indicated to us that one of the reasons for the changes introduced to the NESAQ was to ensure industries do not have to close as a result of the NESAQ requirements, provided they meet the relevant provisions of the RMA.

[259] The purpose of Regulation 17 is to ensure that any future consent granted for an existing discharge will not "… be likely, at any time, to increase the concentration of PM_{10} (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."[178]

[260] For a consent to be granted for any existing discharge under the provisions of PC13 in accordance with this decision, and on expiry of their IPAR, an applicant will have had to demonstrate that the amount and rate of PM_{10} discharge authorised will be the same or less than the discharges on the date the MMA was gazetted as a polluted airshed.[179] In our view, as the MMA is a polluted airshed in which there were 20 exceedances of the PM_{10} Standard in the first full year of monitoring, compared to the one allowed in the NESAQ, we consider there needs to be a strong emphasis on "less", rather than "the same".

[261] This will ensure there will be no more PM_{10} discharged to air than was being discharged at the time the MMA was gazetted as a polluted airshed. The MMA will improve and will not get any worse as a result of the consenting of the discharge, resulting in improved health outcomes. It will also ensure that the terms of the IPAR and any future resource consents are no less stringent than and/or do not conflict with the NESAQ.

[262] Put another way, based on a plain reading of Regulation 17 as a whole, its purpose will be met. The policies and rules now embodied in PC13 will provide a clear pathway to ensure compliance with the PM_{10} Standard in a timeframe which we consider is likely to be no longer than any other option available and more likely shorter. As it is less than three years since the technically complex and uncertain MMA was designated as a polluted airshed, it is difficult to see any way in which a shorter pathway to compliance could have been possible. In our view, it would defy logic if Regulation 17 was to be interpreted as preventing a course of action necessary to achieve its purpose.

[263] If the IPAR is not included, based on the evidence in section A8, doubts would remain as to whether the activities were capable of complying with Rule 17 and, as a

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[178] Bay of Plenty Regional Council s 32 report – Plan Change 13 (Air Quality) to the Regional Natural Resources Plan, dated 27 February 2018 at Appendix G, section 17(1).
[179] NESAQ Regulation 17(2)(b).

result, could be said to have been operating unlawfully. Without that certainty, they could need to be considered as previously unauthorised and new activities for the purposes of the consents required under Regulation 17. Based on the results of monitoring, there is no certainty that the NESAQ significance threshold could be met or that consents could be granted. This should provide a compelling reason for all existing emitters of PM_{10} in the MMA to "go the extra mile" to ensure compliance with the IPAR, or risk being unable to continue operating within the MMA.

G4 Duty to achieve integrated management of the Mount Maunganui Airshed

[264] There is an explicit requirement under s 30(1)(a) of the RMA, reinforced through the RPS, to achieve integrated management of the MMA. PC13 is concerned only with the management of PM_{10} and other particulate matter. The Decisions Version does not achieve integrated management.

[265] Integrated management will only be achieved when PM_{10} emissions from the handling of BSM and logs, unsealed yards and existing consented activities are managed under a consistent policy and rule framework, supported by defined non-regulatory methods.

G5 Provisions of the RPS to be given effect to in PC13

[266] Objectives and policies of particular relevance to managing effects on mana whenua and particularly Whareroa Marae are set out section F1.

[267] Other relevant objectives are:

10 Cumulative effects of existing and new activities are appropriately managed

11 An integrated approach to resource management issues is adopted by resource users and decision makers

12 The timely exchange, consideration of and response to relevant information by all parties with an interest in the resolution of a resource management issue

[268] Other relevant policies are:

AQ 1A: Discouraging reverse sensitivity associated with odours, chemicals and particulates

CE 14B Providing for ports

IR 1B: Applying a precautionary approach to managing natural and physical resources

IR 3B: Adopting an integrated approach

IR 4B: Using consultation in the identification and resolution of resource management issues

IR 5B: Assessing cumulative effects

[269] We draw attention to Policy AQ 1A in view of Ms Bennett's evidence relating to an application to establish a bulk handling and storage facility across the road from the Ngāi Te Rangi headquarters at Whareroa and that:[180]

> As a discretionary activity under the RNRP, and due to the pressing air quality issues at Whareroa, we believed that the process should then need to involve mana whenua, and that the RPS supported our view. What ensued was not consistent with our understanding of how an application should be progressed.

[270] As we have noted earlier in this decision, Ms Bennett's evidence was not challenged. We anticipate Policy AQ 1A would have needed to be considered in relation to an application to discharge to air from a BSM handling development across the road from the Marae and could be relevant to other such applications in the future.

G6 Iwi Management Plans

[271] While Policy AQ P4(c) of PC13 requires particular regard to be had to adverse effects on air quality values identified in the relevant iwi and hapū resource management plans during assessment of resource consent applications, not plan preparation, the RMA requires the Council to have regard to management plans,[181] making it relevant when considering policy that will guide those assessments.

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[180] Ms Bennett, EIC, 14 August 2020, at [23].
[181] Section 66(2)(c)(i) of the RMA.

[272] Ms Bennett referred to the Tauranga Moana Joint-Iwi Management Plan[182] and that in relation to Ngāti Ranginui, Ngāi Te Rangi and Ngāti Pūkenga (collectively), the plan articulates environmental issues of significance, including Objective 2 and Policy 24, which sets out the expectation of engagement:

> Objective 2: Landuse in the Tauranga Moana Joint-Iwi Management Plan:
>
> The mauri of air within Tauranga Moana is protected and where possible enhanced. This means that the air we breathe is clean and our wellbeing is not impacted by the discharge of contaminants to air.
>
> Policy 24: Managing the effects of rural and urban air discharges on the health and wellbeing of our people.
>
> 24.1 Involve Iwi and hapū in resource consent processes for industrial air discharges close to marae, papakainga, kura kaupapa or kohanga reo.

[273] Policy 24.1 supports our view that PC13 should include a rule addressing notification of Whareroa Marae of any future resource consent applications to discharge PM_{10} to air in the MMA, unless the application demonstrates unequivocally that the discharge to air will not have or is not likely to have adverse effects, including cumulative adverse effects on the Marae that are more than minor.[183]

[274] Ms Parcell summarised issues included in other Iwi Management Plans, a number of which identified concerns about the effects of industrial air discharges on air quality.[184]

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[182] MS Bennett, EIC, 14 August 2020, at [96] and [102].
[183] In accordance with RMA s 77D and s 95A(8)(b).
[184] Ms Parcell, EIC, 7 August 2020, at Table 4.1.

Section H

Interim Permitted Activity Rule

H1 Introduction

[275] Development of the IPAR was a collaborative process. Several iterations were proposed by different parties over a period of approximately a year.

[276] Our decision addresses each component of the draft IPAR and our reasons for adopting the wording in each case, where matters remained in dispute and if significantly different to that proposed by the parties. Submissions will be invited to identify any issues relating to clarity, interpretation, enforceability and *vires*, which we will take into account before issuing our final decision. Our draft amended version of the IPAR is included in **Appendix 6**.

[277] Unless there are obvious flaws in our wording or a demonstrably better approach, no attempt should be made to relitigate previous positions that are not provided for in this decision.

H2 What is to be consented

[278] There was considerable debate through the IPAR development process as to whether consents should be issued based on activities, discharges or effects.

[279] The Council has the function of controlling discharges to air under RMA s 30(1)(f) and s15. While the control of activities is normally a necessary requirement to ensure that the effects of the discharge are managed appropriately, it is the effects of discharges that the Council must control and that is what PC13 must provide for.

H3 Ensuring the effects of PM_{10} emissions are minimised

[280] As we have made clear previously, the most critical element of the IPAR is to ensure that future emissions are minimised to the greatest extent reasonably practicable as a first step. PC 13 Policy AQ P3 requires that discharges of contaminants to air must be managed, including by use of the BPO. This policy is

not the subject of appeal.

[281] Despite that, and for the avoidance of doubt, we considered the requirements of RMA s70(2) relating to a requirement to adopt the BPO, as modified in this decision, to prevent or minimise any actual or likely adverse effect on the environment of any contaminant discharge. We are satisfied that the inclusion of such a provision in the plan forms one component of overall provisions that are the most efficient and effective means of preventing or minimising the adverse effects on the environment. However, the need to minimise PM_{10} emissions to concentrations that will protect human health in the MMA is an overriding requirement and there must be certainty as to how this will be achieved.

[282] Importantly, Regulation 17(2)(b) requires that the amount and rate of PM_{10} discharge to be expressly allowed by a proposed consent are the same as or less than under the current discharge. For this reason, and the need to reduce PM_{10} emissions to comply with the NESAQ, PC13 must ensure that PM_{10} emissions in the MMA will be less than they were on the date the MMA was gazetted as a polluted airshed.

[283] Further, we find that under the circumstances that exist in the MMA, RPS Policy IR 1B: Applying a precautionary approach to managing natural and physical resources, must be given considerable weight. This supports minimising emissions to the greatest extent reasonably practicable until the objectives of PC13 are met.

[284] In transitioning from the IPAR to a resource consent, RMA s 20A requires consideration. To enable an activity to continue for a time, it requires that the effects of the activity must be the same or similar in character, intensity, and scale to the effects that existed before the rule took legal effect and the plan became operative.

[285] Having considered these required outcomes, we have determined that the discharge of PM_{10} must be the same or similar in character and the same or less in scale and intensity than that occurring on 28 November 2019. The IPAR includes standards to be met to demonstrate compliance with these outcomes.

[286] At a very practical level, within the term of the IPAR, assessment against any of the standards will allow a broad determination only of whether the emissions and their effects will be the same or whether they will be less than they are at present. Our view is that it will be in the interests of emitters to be able to demonstrate, when later applying for resource consents, that the emissions will be less.

H4 Sources of emissions to be covered by the Interim Permitted Activity Rule

[287] There was agreement by all parties and experts that the IPAR should include emissions from both BSM and log handling activities and counsel agreed this would be in scope. We agree.

H5 General standards

[288] General standards 1 (a) to (f) apply to all emissions in the MMA. Additional standards apply depending on whether the emissions are from log handling anywhere in the MMA or from BSM unloading at the Port or from an off-wharf BSM storage and handling facility.

H6 Compliance requirements

[289] There is no methodology available to demonstrate with complete certainty that PM_{10} emissions from some sites at the end of the term of the IPAR will be less than those at the dates included in the IPAR. Any comparison method will require consideration of multiple issues, for some of which reliable data will not be available. Improved performance may not be possible against every standard and in our view, the key requirement will be to achieve an overall improvement in emission management and reduction in emissions at every site.

Product throughput

[290] The first priority when setting compliance requirements must be to ensure reductions in existing PM_{10} emissions within the MMA. While we understand the practical management issues that could arise by the imposition of product limits, we consider those issues do not override the first priority. Until such time as there is

reasonable certainty that PM_{10} emissions have been minimised sufficiently to achieve the objectives of PC13, it would be inconsistent with the precautionary approach and inappropriate to dilute the benefits of initial mitigation measures by allowing potentially premature claw-back by increasing product throughputs. Accordingly, we consider product limits must be imposed for the term of the IPAR. However, we included in the IPAR very limited exceptions to this requirement in relation to gypsum and in the following section H7.

[291] To provide certainty that the standards in the IPAR are not more lenient than the NESAQ, the future product throughput would need to be the same or less than the throughput prior to 28 November 2019, the date the gazettal of the MMA as a polluted airshed took effect. We understand there is agreement this date is appropriate for log handling, as the volume or tonnages handled in the previous 12 months were the maximum handled in the last 10 years.

[292] We also understand that volumes or tonnages of BSM handled in the intervening period have been greater than they were in the 12 months before 28 November 2019, and setting that as a compliance date could result in process failure or have potentially significant consequences that have not been determined. We will invite submissions from parties on options to overcome this conundrum but that is not an open invitation to increase volumes or tonnages. If volumes or tonnages greater than those handled and/or stored in the 12 months before 28 November 2019 are sought, any proposal should include measurable mitigation measures to ensure that PM_{10} emissions at the expiry of the IPAR will be the same or less than they were at the compliance date. We anticipate the improvement measures implemented by ADM could be one option.

[293] Subject to satisfactory resolution of the conundrum, as the IPAR will only be in place for three years, we do not consider the standard unreasonably constrains existing operations, particularly because of the need for reductions as soon as reasonably practicable. We received no evidence that there is a demonstrated need to provide for increased throughputs, other than in the case of gypsum, which has been on the forecast to come across the Port for some time. We received advice that the unloading of gypsum is a low-risk product with the consistency of wet beach sand,

which does not cause visual dust generation.

[294] It is not known if this product would result in an increase in total throughput as that will depend on the amount of other cargos that come through the Port. We were told it could represent around 10% of current throughput and that it "… may present an issue."[185] We consider this is a matter that will need to be addressed in the Port's dust management plan, with a requirement to demonstrate that its unloading will not result in non-compliance with Regulation 17.

[295] In terms of the potential for future increases in product throughput to be constrained at the time of and within the term of any future resource consents granted, the responsibility for demonstrating the provisions of Regulation 17 will be met will rest with consent applicants.

Log handling inside and outside the Port of Tauranga Industry Area

[296] It is unclear why logs would be brought into the MMA unless intended for export. If that is not the case, we consider the same requirements should apply to both areas as all logs will ultimately be loaded onto vessels within the Port Industry Area.

Monitoring requirements

[297] Based on the evidence of the air quality experts, we do not see monitoring as providing a sufficient level of certainty within the term of the IPAR that emissions will be the same or less, particularly as there is no baseline monitoring data available for comparison purposes. However, as all experts have agreed that monitoring should be provided, we accept their evidence and that the results will provide some additional data for comparison purposes.

[298] Nevertheless, we remain concerned to ensure that the costs of requiring each owner or occupier to fund at least one monitor is justified by any benefits obtained. We accept the proposed monitoring programme as reasonable in normal

[185] NOE 2022, at page 81.

circumstances but have reservations about monitor siting and uncertainties arising when emissions from different subject sites occur in the same general locality in the MMA. We consider this is an issue where further guidance from the Council should be provided before monitoring programmes are finalised.

H7 Sharing of benefits of mitigation

[299] While there was much debate about sharing the benefits of mitigation between the airshed and emitters, until the PM_{10} Standard and annual average PM_{10} guideline value have been met, there will be uncertainty as to what capacity for sharing, if any, will be available. As that will not be known within the term of the IPAR, and again to be consistent with Policy IR 1B, there will need to be exceptional circumstances before any increase in product volumes can be permitted within that term. We also consider that will remain the case at the time of future resource consent applications, unless there is reasonable certainty that the PM_{10} Standard and annual mean PM_{10} guideline value will not be exceeded.

[300] In circumstances where an emitter implements measures to substantially reduce PM_{10} emissions to the point where they can be considered to all intents and purposes to be avoided, some increase in product throughput could be acceptable provided the effects are not significantly increased again. A possible example could be where all BSM handling and storage activities are undertaken in a fully enclosed building with an effective dust extraction system, as suggested by Mr Stacey.[186] Provision for this is included in Standard (2) of the IPAR.

H8 Term of the Interim Permitted Activity Rule

[301] The term of the IPAR is three years from the date of our final decision, except as provided in the following paragraph. We consider this term to be necessary to provide time to prepare and provide audited Dust Management Plans (**DMP**) to the Council, complete a full year of monitoring in accordance with clause (6) of AIRSHED 2, implement and amend as necessary all PM_{10} mitigation measures, substantially complete any physical mitigation works identified as necessary in the

[186] Mr Stacey, EIC, 11 April 2022, at [31] to [34].

DMP, apply for and obtain a CoC from the Council if desired and submit a comprehensive resource consent application in accordance with guidelines to be provided by the Council prior to the expiry of the term.

[302] That term may extend by operation of s 20A of the RMA if an application for a resource consent for the activity is made before the expiry of the IPAR.

H9 Geographical area to which the Interim Permitted Activity Rule applies

[303] There was agreement by all planning experts except Mr Whyte, who did not have sufficient information to draw the same conclusion,[187] that the IPAR should include log handling activities in the MMA but not outside. We had no evidence to consider its application to areas outside the MMA for either BSM or log handling and we agree that it should apply only in the MMA.

H10 Subject site

[304] The planning experts recommended the following definition of subject site:

> **Subject site** means the **property** except where otherwise mapped in AIRSCHED3

[305] This was accepted by all parties and the Court. PoTL provided a plan of the Port Industry Area, or "subject site", which is included in the amended PC 13 provisions attached to this decision.

[306] The planning experts recommended that a plan of 101 Aerodrome Road is also included as the site comprises multiple operations and associated particulate emission sources. They provided a plan that defines the boundary of the subject site in a way that matches the fenced boundary of that site. That plan is also included in the amended PC 13 provisions attached to this decision.

[307] We accept the recommendations and the plans provided.

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[187] JWSP#2, at [15].

H11 New activities and relocation of existing activities within the Mount Maunganui Airshed

[308] Swap, supported initially by some supporting s274 parties, sought provision in PC13 for new activities and relocation of existing activities within the MMA. Our view on the appropriateness of that was from the outset; that the IPAR was to apply only to existing activities. Allowing new or the relocation of existing sites to be provided for would not be consistent with the provisions of Regulation 17.

[309] The IPAR will apply only to existing activities on their existing sites within the MMA.

[310] For the avoidance of doubt, any relocation of log handling or BSM handling activities within the Port site which could increase adverse effects of PM_{10} emissions on dwellings existing on 1 January 2023 will not be covered by the IPAR and will require a discretionary activity resource consent in accordance with Rule AQ R2 unless it can be demonstrated that the relocation complies with Regulation 17.

H12 Inclusion of "noxious or dangerous" in a general standard

[311] The experts agreed that "noxious or dangerous" relates to the management of health effects of PM_{10}, while "offensive or objectionable", the other part of the standard they proposed, relates to managing effects from coarser particulate matter that can cause amenity or nuisance effects. There was general agreement by the air quality experts that the inclusion of "noxious and dangerous" is essential because "… it provides the mechanism by which Council can determine that the residual effects following the implementation of the DMP are unacceptable, and take regulatory action."[188]

[312] Dr Wilton and Mx Wickham considered a regulatory backstop condition relating to offensive, noxious, dangerous or objectionable effects can be very difficult and inefficient for councils to implement owing to difficulties in determining the relative contribution of sources to monitored PM_{10} concentrations.[189] Ms Robson

[188] JWSAQ#3 in response to Question 18.
[189] JWSAQ#3 in response to Question 8.

expressed concern that "… this is an absolute statement (with no *de minimus*). As there is no safe level of PM_{10} technically no one can comply."

[313] One of the purposes of the IPAR is to enable existing operators to demonstrate that they can meet appropriate permitted activity standards on an interim basis for the reasons set out above. Rule 17 of the 2003 Regional Air Plan required that the discharge must not result in objectionable or offensive odour or particulates beyond the boundary of the subject property, with no reference to noxious or dangerous. As this is the specific standard that the activities were required to meet, we do not consider omitting "noxious and dangerous" from Standard 1(f) would be more lenient than what was required originally.

[314] Our overall finding is that "noxious and dangerous" should not be included in a general standard in the IPAR as not doing so is consistent with previous Rule 17.

H13 Responsibility for preparing dust management plans and the definition and roles of Suitably Qualified and Experienced Air Quality Persons (SQEP)

[315] We generally agree with the contents of the Council's preferred version of the IPAR in relation to these matters. However, we consider the definition of "SQEP" should be amended to "**S**uitably **Q**ualified and **E**xperienced <u>independent</u> **P**erson".

H14 Communications with Whareroa Marae

[316] There is no provision under the RMA to require operators authorised as permitted activities to consult or communicate with mana whenua. However, in view of the particular circumstances that exist in the MMA,[190] we strongly encourage all emitters relying on the IPAR to consider how they could assist in building a long-term relationship with representatives of the Marae, and with the Council, as part of a unified approach to meeting the air quality objectives of PC13 as soon as reasonably practicable.

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[190] Where Whareroa Marae is directly affected by PM_{10} emissions to air from industrial premises resulting in degraded air quality

[317] We have addressed notification of the Marae of future applications for air discharge consents within the MMA and there will be benefit to all parties if good working relationships can be established in advance of any formal resource consent stage.

H15 Date at which Rule AQ R22A will take effect

[318] Rule AQ R22A will take effect on the date of our final decision.

Section I

Rule AQ R22B – Rule to apply on expiry of the IPAR

I1 The most appropriate activity status for BSM handling activities

[319] We have determined that BSM handling will be a restricted discretionary activity (**RDA**) on expiry of the IPAR. In view of the complexity of the airshed and the need for consistency of consent processing for all emitters of PM_{10} within the MMA, we accept the views expressed by the majority of planning experts[191] that RDA status is the most appropriate. However, there are other considerations, as outlined below.

I2 The most appropriate activity status for log handling activities

[320] In the Decisions Version, log handling was intended to default to a discretionary activity under Rule AQ R2 if it could not comply with the permitted activity standards in Rule AQ R1. The RDA Rule proposed by the planning experts includes logs and was not opposed by any party. We are satisfied this would be in scope and consider in the interests of consistency, the same activity status and matters of discretion should apply to both log and BSM handling.

I3 Potential for precedents and inconsistencies between PC13 and the Council's proposed further plan change PC18

[321] As indicated in section A11, the Council was considering a further plan change, PC18, prior to the start of the Court hearing process and has since resolved to proceed with it. This raised a number of significant concerns, including PC13 establishing a precedent as to activity status for other air discharges in the MMA; potential inconsistencies over the application of the BPO and the proposed iterative approach to managing the MMA.

[322] The experts agreed there would be the potential for a precedent to be set for PC18 and any other related planning process, for example a s 293 process.[192] They

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[191] Mr Whyte considered permitted activity status should remain on expiry of the IPAR.
[192] JWSP#3, at [30].

also agreed that there is potential for inconsistencies to arise between PC13 and PC18 in terms of how the BPO approach is applied in policies and rules. However, the planners note that the potential for inconsistency can be avoided by ensuring all significant dischargers in the MMA are addressed as part of this PC13 process, including the use of s293.[193]

[323] The planners also acknowledge that there is the potential for inconsistency if the drafting of policy for an iterative approach for the other sources of PM_{10} in the MMA occurs when finalising PC13.[194]

[324] We interpreted them to mean that if the policy was finalised in PC13, a different policy could result through the PC18 process.

[325] When told of the Council's intention to prepare a second plan change, we were concerned that the promulgation of two separate plan changes managing different aspects of PM_{10} in the same airshed, one immediately following the other, would not achieve integrated management. The potential for a precedent to be set and for inconsistencies to result between the two plan changes adds significant weight to these concerns and indicates a need to bring the two plan changes together if the provisions are to be the most effective to achieve the objectives of PC13.

I4 Rules proposed by the planning experts

The permitted activity rule proposed by Mr Whyte

[326] Mr Whyte proposed a permitted activity rule. The inappropriateness of a long-term permitted activity rule in the circumstances existing in the MMA had been canvassed at length much earlier in the hearing.

[327] It is essential that the Council has the ability to require more stringent controls on PM_{10} emissions in the future, if the use of the BPO-type approach alone is insufficient to achieve the objectives of PC13, for reasons we have already outlined. Further, there is the need to consider emissions on a case-by-case basis and manage

[193] JWSP#3, at [31].
[194] JWSP#3, at [37].

cumulative effects and the need for the Council to decline to authorise emissions if the circumstances necessitate.

[328] Accordingly, we reject the inclusion of a long-term permitted activity rule.

Further planning evidence at the 2022 hearing

[329] While Ms Jepsen confirmed her support for RDA status for BSM in the MMA, she identified a significant number of the proposed matters of discretion which she considered unnecessary. She proposed that the only matters of discretion should be:[195]

> …
>
> (c) contents and implementation of a dust management plan;
>
> (d) air quality effects, including net contributions to particulate levels beyond the consent site, on neighbouring properties, including visibility, sensitive areas and water bodies.

[330] Mr Hansen also confirmed his support for RDA status for BSM and log handling. Mr Serjeant confirmed his support for RDA status for BSM handling. He added that:[196]

> … Despite the matters of discretion being relatively extensive for the proposed restricted discretionary rule I nevertheless consider that listing these matters provides a useful guide to both the applicant and Council as to what is expected in the application. …

[331] From our understanding of Ms Parcell's evidence over time, she did not have a strong view as to whether the appropriate activity status for BSM handling on expiry of the IPAR should be RDA or discretionary.

I5 The Court's findings relating to Rule AQ R22B

[332] For the reasons explained above, the IPAR is a critical component of PC13 to establish that existing PM_{10} emitting activities operating as permitted activities were and are able to comply with permitted activity standards. When determining matters

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[195] Ms Jepsen, EIC, 11 April 2022, at attachment 1.
[196] Mr Serjeant, EIC, 25 Marcy 2022, at [25].

of discretion for the RDA Rule to apply on expiry of the IPAR, one consideration should be the extent a reduction in PM_{10} emissions has been achieved since 28 November 2019.

[333] Consideration also needs to be given to the appropriateness of the matters of discretion for application to other PM_{10} emission sources that will be subject to control under the Regional Air Plan to ensure consistency and equity. We remain concerned to ensure that the matters of discretion are necessary, directly applicable to the unique circumstances of the MMA and unambiguous, with minimum potential for different interpretations by applicants and Council consent processing officers.

[334] We consider this to be particularly important in an air environment as complex as the MMA, where a number of traditional management approaches cannot be relied on. We do not consider it would be good resource management practice, as proposed by the Council, to rely heavily on cross-referencing policy matters to be "had particular regard to" when they were prepared for use in a generally unpolluted airshed and contain limited clear direction to assist in managing a polluted airshed.

[335] Our amended RDA Rule is as follows:

> **AQ R22B: Handling of bulk solid materials and handling of logs on expiry of Rule AQ R22A – Restricted Discretionary**
>
> Within the **Mount Maunganui Airshed**, unless otherwise permitted by AQ R26, AQ R3, AQ R 21(f) or managed by AQ R20, the discharge of *contaminants* to air from:
>
> **(A)** **Handling of logs** where:
>
> (a) the area used for the **handling of logs** exceeds 1 hectare
>
> OR
>
> **(B)** **Handling of bulk solid materials** on a **subject site** where:
>
> (a) the rate of **bulk solid materials handling** exceeds 20 tonnes in any hour, and the discharge occurs less than 100 metres from any **sensitive area**, or
>
> (b) the rate of **bulk solid materials handling** exceeds 50 tonnes in any hour,
>
> is a restricted discretionary activity subject to the following standards:

(1) Dust management plans must be developed and implemented for all discharges of PM_{10} to air, both inside and outside the Port Industry Area, to:

(a) reduce PM_{10} discharges to minimise adverse effects on human health and the mauri of air to the greatest extent reasonably practicable until the objectives of PC13 are met; and

(b) subsequently, if necessary to ensure compliance with the PM_{10} Standard in the National Environmental Standards for Air Quality and any applicable ambient annual average air quality guidelines to reduce the discharge of PM_{10} to air in accordance with the iterative management approach outlined in Policy AQ P12.

All dust management plans must be approved by the Regional Council.

(2) For discharges associated with activities within the **Port Industry Area**:

(a) At least one of the consent applicants is a **port company;**

(b) There is a dust management plan to manage the discharges of *contaminants* collectively within the **Port Industry Area subject site;** and

(c) The dust management plan specifies procedures that must be followed and by whom for the **handling of logs** or **bulk solid materials** within the **Port Industry Area**; and

Where standards (1) or (2) are not met, the discharge is a discretionary activity under AQ R2.

The Regional Council restricts its discretion to the following matters:

(a) consideration of *effects* on human health, including by considering the proximity of the **subject site** to sensitive areas, including any areas where people are likely to be present 24-hours a day;

(b) consideration of cultural *effects*, taking into account the extent to which consultation with representatives of Whareroa Marae has occurred and been taken into account, including:

(i) actual or potential *effects* on the health of whanau at Whareroa Marae;

(ii) recognising and providing for the relationship, culture, traditions and taonga of Ngāi Te Rangi within the **Mount Maunganui Airshed**;

(iii) the extent to which the exercise of kaitiakitanga by Ngāi Te Rangi is provided for; and

(iv) adverse *effects* on air quality values identified in the relevant iwi and hapū resource management plans;

(c) consideration of cumulative and amenity effects;

(d) the extent to which the amount and rate of PM_{10} discharge is the same or less than those occurring on 28 November 2019;

(e) the extent to which best practice technology and operating procedures and PM_{10} discharge mitigation options are incorporated in the dust management plan;

(f) other methods available to further reduce PM_{10} emissions and the reasons why they are not included in the dust management plan;

(g) the extent by which any increase in PM_{10} emissions that could result from an increase in volume of product throughput or change in product character has been compensated for by improved mitigation measures compared to those in place before the increase occurs;

(h) the investment in existing **infrastructure** that mitigates adverse *effects* of discharges of *contaminants* to air;

(i) The extent of any exceedances of trigger levels included in AIRSHED2 of the IPAR;

(j) The history of complaints, abatement notices and enforcement orders at the **subject site** and methods of dealing with them.

(k) The lapse period, term of consent, and review of consent conditions;

(l) The collection, recording, monitoring and provision of information related to the exercise of the resource consent.

For the avoidance of doubt

1 For activities within the Port Industry Area, where a discharge is not identified and managed by the dust management plan, that individual discharge will be non-compliant with standard (1) and will require resource consent under general discretionary rule AQ R2. For the further avoidance of doubt, this does not mean that all discharges within the Port Industry Area require resource consent under general discretionary rule AQ R2.

2 Any discharge authorised by a certificate of compliance must cease on the grant of a resource consent for the same discharge to air under this Rule.

I6 Rule AQ R22C: Notification

[336] We propose a new rule governing notification of applications for resource consent for the above restricted discretionary activity and for discretionary activities

involving PM_{10} emissions:

> Any application for resource consent under Rule AQ R22B or Rule AQ R2 will be subject to the normal tests for notification under the relevant sections of the Resource Management Act 1991. When deciding who is an affected person in relation to any activity for the purposes of s95E of the Resource Management Act 1991 the Council will give specific consideration to the people of Whareroa Marae and Ngāi Te Rangi.

Section J

Planning issues

J1 Introduction

[337] A wide range of diverse planning issues arose during the case. Many of them emerged in response to the evolving understanding of issues, some of which gave rise to issues of scope. We discuss them to the extent relevant to our decision.

J2 Recommendation to adopt the Best Practicable Option

[338] The air quality experts recommended that management of the MMA should be based on a BPO approach. The key requirement is to ensure that emissions of PM_{10} are minimised to the greatest extent reasonably practicable until the objectives of PC13 are met. There must be clarity, certainty and enforceability of the IPAR standards as far as this is possible within the complex MMA environment.

[339] BPO in relation to a discharge is defined in the RMA to mean the best method for preventing or minimising the adverse effects on the environment having regard, among other things, to:

(a) the nature of the discharge or emission and the sensitivity of the receiving environment to adverse effects; and

(b) the financial implications, and the effects on the environment, of that option when compared with other options; and

(c) the current state of technical knowledge and the likelihood that the option can be successfully applied

[340] We accept that it is not possible to specify how the BPO is to be determined in the diverse circumstances that exist in the MMA. However, when assessing what constitutes the BPO, the following must be given considerable weight:

(a) In terms of (a) above, PM_{10} is a contaminant for which there is no safe limit, it is invisible to the eye, can remain suspended in air for long periods and travel long distances. Areas where people live, in particular, are at the high end of sensitivity which means Whareroa

Marae, De Havilland Way and housing near Rata Street are particularly sensitive. There may be other similarly sensitive areas, depending on the findings of any Council investigations of dwellings within the industrial area.

(b) In terms of (b), serious adverse effects on human health and the mauri of air are occurring as a result of the discharge of PM_{10} in the MMA. Minimising contaminant discharges to ensure the protection of human health should be the key consideration in terms of meeting the objectives of PC13 and the purpose of the RMA and the way in which the BPO should be applied.

(c) Also in terms of (b), costs are clearly a relevant consideration, but ensuring the effective control of PM_{10} must be considered as a necessary cost of doing business.

(d) In terms of (c), while there is considerable technical uncertainty in some areas, there is little uncertainty in others, such as the benefits of handling and storing BSM in fully enclosed buildings with effective dust management controls.

(e) Also in terms of (c), options for activities such as more effective BSM handling from ships, debarking all logs and better control of dust on storage areas and roads need to be robustly evaluated and costed, with timeframes, as part of the process to determine the BPO.

[341] It was submitted that you "don't have to adopt the most expensive option or something that is unrealistic in order to be able to undertake your activities."[197] We find that because of the undisputed adverse effects on human health at Whareroa Marae and De Havilland Way, the protection of human health must be the first priority, adopting a precautionary approach as required by RPS Policy IR 1B. If it is not practicable to undertake an activity without having significant adverse effects on human health, allowing the activity to continue would be contrary to the purpose of the RMA.

[197] Ms Chappell, NOE 2022, at page 78.

J3 Further Court directed expert conferencing relating to policy

[342] To assist in addressing our concerns about policies and other plan provisions, we directed further expert conferencing of planning experts to address specific questions, some of which are described below. Our minute dated 1 September 2021 included the following observations and directions to the planning experts:

> **New policy**
>
> [28] As parties will be aware, we have been concerned about the lack of clear policy direction from the time of the hearing and remain so. We acknowledge that PC13 Policy AQ P3 is "Activities that discharge contaminants to air must be managed, including by use of the best practicable option: ..." However, this provides no clear guidance in relation to how the policy is to be applied in the MMA, a complex polluted airshed, to achieve the objectives of PC13, meet the NES Standard, or give effect to other PC13 policies relating to cumulative effects. The air quality expert advice provides useful guidance in relation to:
>
> (a) adopting an iterative approach to Airshed management to ensure compliance with the NESAQ Standard and ambient air quality targets as soon as practicable; and
>
> (b) adopting the best practicable option as soon as practicable.
>
> [29] Our present thinking is that a policy will be required setting out requirements relating to the permitted activity rule and subsequent applications for resource consents. Clarity should be provided on other key issues, including:
>
> (a) Initiating a s128 review of resource consents that currently authorise particulate emissions in the MMA;
>
> (b) Using advocacy and education to encourage emitters of particulate matter that cannot be controlled under the RMA to adopt the best practicable option to reduce their emissions.

[343] The JWS prepared by the planning experts (**JWSP#2**) included a number of other relevant opinions, including:

> 13 PC13 (Decisions Version) included no non-regulatory methods. However, these may be necessary to support achievement of the objectives.
>
> 14 Further Court processes (i.e. section 293) may be necessary to revise PC13 (Decisions Version) to achieve some of the above outcomes.
>
> 28 Ideally, the purpose of PC13 would be better achieved if all PM_{10}-emitting activities were captured by the IPAR, and were therefore contributing to the remediation of the MMA.

J4 Proposed new Policy AQ P11

Reasons a new policy is required

[344] The planning experts agreed that a new policy is required to support the IPAR and agreed the following draft policy in JWSP#2.

> **New Policy AQ P11 – Handling of bulk solid materials and logs as existing activities in the Mount Maunganui Airshed**
>
> Provide for discharges of particulates to air within the Mount Maunganui Airshed from bulk solid material handling and log handling activities for an interim period, by requiring that they must be managed by use of the *best practicable option*, to:
>
> (a) avoid, remedy or mitigate adverse *effects* on human health in **sensitive areas.**
>
> (b) reduce particulate discharge from the activities in a way that contributes to achieving Objective AQ O2 and Policies AQ P3(b) and AQ P4(b).

[345] The experts confirmed that the new policy is fundamental to the effectiveness of PC13.[198]

[346] The following additional outcomes of the second planning expert conference require consideration:

(a) s128 RMA provides for the Council to undertake consent reviews where a National Environmental Standard exists.

(b) In s32 terms, integrated management with a single resource consent for each of the Port and De Havilland Way sites has benefits which outweigh costs compared to a rule framework involving multiple individual resource consents for activities within those sites.[199]

(c) Regardless of what activity status applies and whether the consent was for an interim period or subsequently, the planners consider that adopting a BPO approach expressed through a Dust Management Plan is crucial and would have the same costs and benefits.[200]

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[198] JWSP#3, at [73].
[199] JWSP#2, at [76].
[200] JWSP#2, at [82].

Findings in relation to proposed new Policy AQ P11

[347] All parties agreed that a new policy is required and is within scope. We find that the policy is fundamental to the effectiveness of PC13. However, it requires amendment to reflect its purpose in confirming an activity can operate lawfully as a permitted activity.

[348] The policy needs to be clear that there is a specific requirement to reduce emissions of PM_{10} within the MMA and meet the objectives of PC13 to the greatest extent reasonably practicable.

[349] Therefore, the policy is to be amended as follows:

> **New Policy AQ P11 – Handling of bulk solid materials and logs as existing activities in the Mount Maunganui Airshed for an interim period**
>
> Provide for discharges of PM_{10} and other particulates to air within the Mount Maunganui Airshed from bulk solid material handling and log handling activities for an interim period, by requiring that the discharge of PM_{10} from any **subject site** must be minimised to reduce adverse effects on air quality in the **Mount Maunganui Airshed** to the greatest extent reasonably practicable through application of an Interim Permitted Activity Rule defaulting to a discretionary activity, and to:
>
> (a) reduce PM_{10} and other particulate discharges from the activities in a way that contributes to achieving Objectives AQ O1, AQ O2 and AQ O3 and Policies AQ P3(b) and AQ P4(b); and
>
> (b) ensure that the PM_{10} mitigation measures in place on the **subject site** must be no less effective than the most effective mitigation measures in place and operating efficiently at any date prior to or on [the date of issue of the Environment Court decision].

J5 Existing Policy AQ P4(h)

[350] The planning experts also agreed that existing Policy AQ P4 (h) would benefit from the additional text underlined and shown below. They considered this "… would clarify that the Port of Tauranga and its related industries that need waterside access and infrastructure are very relevant examples of where any assessment of the acceptability of discharges of contaminants to air should take account of the emission sources' operational and locational constraints."[201]

[201] JWSP#2, at [37] and Annex 1.

> The operational requirements and locational constraints relevant to the discharge and/or activity, for example, Port of Tauranga and its related industries that benefit from a close proximity to the port, or for rural production activities.

[351] This was not the subject of appeal, it was not addressed in opening submissions or primary evidence, it is not necessary for the purposes of PC13 and would have implications for a wider range of parties than affected by the PC13 appeals. Accordingly, we find it would be inappropriate to amend PC13 as proposed.

J6 New Policy AQ P12 proposed by planning experts

[352] The planning experts proposed the following new Policy AQ P12 because BSM and log handling activities need to be located in the MMA due to proximity to the Port. Consequently, they considered these specific activities need to have priority over other activities that could be located outside the MMA. They considered the additional policy is required because, through the IPAR, BSM and log handing activities have their own provisions in PC13.

> Prioritising between emitters. Functional and/or Operational Need.
>
> **New Policy AQ P12 - Functional and/or Operational Need in the Mount Maunganui Airshed**
>
> To recognise the functional and/or operational need for the Port of Tauranga and for bulk solid material handling and log handling activities, and their associated discharges to air, to be located within the Mount Maunganui Airshed as a reason for prioritising discharges to air from these activities over those that have access to alternative locations.

[353] This was not the subject of appeal, was not addressed in opening submissions or primary evidence, is not necessary for the purposes of PC13 and would have implications for a wider range of parties than affected by the PC13 appeals. In particular, we received no evidence to make a case that BSM handling activities, other than unloading and transport from ships, need to be located in the MMA as opposed to outside it. We were advised that Agrifeeds does not operate from facilities within the MMA,[202] which appears to confirm that it is not necessary for such activities to be located in the MMA.

[202] Memorandum of counsel dated 3 May 2021, Annexure 1 at [17].

[354] Accordingly, we determine that it is inappropriate to amend PC13 as proposed.

J7 New policy AQ P13 proposed by planning experts

[355] As noted above, we sought clarity on other key issues, including:

(a) Initiating a s128 review of resource consents that currently authorise particulate emissions in the MMA;

(b) Using advocacy and education to encourage emitters of particulate matter that cannot be controlled under the RMA to adopt the best practicable option to reduce their emissions.

[356] This was consistent with matters identified by the Council as needing to be addressed, as described in section J2.

[357] The following new Policy AQP13 was proposed and agreed by all planners except Ms Parcell and Ms Robson, who considered the additional policy is not within the scope of the appeals with clause (e) being the focus of their views.

> Advocacy and education to further reduce emissions including those that cannot be managed under this plan.
>
> **New Policy AQ P13 – Other methods to continually improve air quality in the Mount Maunganui Airshed**
>
> To continually improve air quality in the Mount Maunganui Airshed through:
>
> (a) Education and advocacy;
>
> (b) Facilitating an industry and community interest forum, to assist with communicating ongoing monitoring results, and sharing information;
>
> (c) Encouraging and facilitating the development and implementation of industry-based best management practices, codes of practice, environmental management systems, and self-monitoring programmes that avoid, remedy or mitigate the adverse effects of discharges of contaminants to air;
>
> (d) Actively supporting, funding, and promoting initiatives to reduce emissions for those activities that are not regulated under the Resource Management Act 1991 e.g. providing on-shore energy connections to shipping while berthed, alternative transport options with zero or reduced emissions; and
>
> (e) Initiating a review of existing resource consents that authorise PM_{10} emissions with a view to actively reducing those existing emissions;

[358] We agree that (a) is desirable and that a method would be beneficial. However this was not appealed and was not addressed at the hearing. There is no scope to

include a method without using a s293 process, which we consider would be inappropriate. It is a matter the Council could implement as a non-statutory method as a further component of an integrated management approach.

[359] We have already expressed our view about the desirability of the Council adopting an advocacy role to encourage initiatives to reduce PM_{10} emissions from those activities that are not regulated under the RMA. We consider this is a proper and necessary role for the Council in this case.

[360] We were advised by Ms Parcell that (b) already occurs, but we consider it would be worth reviewing the effectiveness of current methods at addressing issues arising from the management of PM_{10} in the MMA.

[361] With regard to (c), the Court previously asked the air quality experts whether a best practice guide would make a beneficial contribution to reducing emissions in the MMA. They agreed that a site-by-site analysis would be preferable.

[362] With regard to (d), it would be inappropriate for the Court to include a policy that addresses Council funding unless offered by the Council, which is not the case here.

[363] As to (e), we have previously stated our view that a review of existing resource consents authorising the discharge of PM_{10} in the MMA is a necessary and important component of the integrated management of the MMA. We note the Councillors' guidance to staff at the Strategy and Policy Committee meeting in September 2020 about the need "… for a policy for cumulative effects to assist with reviewing resource consents in a set timeframe."[203] Counsel for the Council considered "… that all industries within the Airshed responsible for emissions to air have a responsibility to contribute to the Airshed's remediation."[204] Section 128 of the RMA provides for the Council to undertake consent reviews where a NES exists.[205]

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[203] Joint Memorandum 26 February 2021, Appendix 1: Strategy and Policy Committee Agenda, at page 59.
[204] Joint Memorandum 26 February 2021, Appendix 1: Strategy and Policy Committee Agenda, at 2.3.
[205] Section 128(1)(ba) RMA

[364] We understand it is the Council's intention that reviews will be undertaken. In our view, reviews should be initiated as soon as reasonably practicable to contribute to improved air quality in the MMA.

J8 New Policy AQ P14 proposed by planning experts

[365] The planning experts proposed Policy AQP14 to manage offsets in the MMA, as set out below. All planners except Ms Parcell supported the new policy in principle but acknowledged there would be a number of legal and technical issues to be resolved.

> MARPOL Annex VI and its application to offsetting
>
> **New Policy AQ P14 – Managing offsets in the Mount Maunganui Airshed**
>
> To facilitate and actively manage the allocation of offsets in the Mount Maunganui Airshed through the resource consent process. This may include transferring emissions including those outside the regulation of the Resource Management Act 1991 e.g. International Convention of the Prevention of Pollution from Ships (MARPOL Annex VI).

[366] As previously indicated, the Court does not consider it appropriate to rely on offsets already achieved by way of an international maritime agreement as a means of addressing Regulation 17(1). Offsets, if required, will need to be addressed by the Council at the time resource consent applications are made. There was no appeal in relation to offsets, we received no evidence to support the need for a policy to address offsets and we consider the proposed Policy unnecessary, inappropriate and potentially *ultra vires*.

J9 New Policy AQ P 12 - Iterative management

Reasons a new policy is required

[367] As noted in section A7, the Council considers a specific MMA policy to be necessary, with the airshed as a control mechanism and prioritising the development of air quality management plans where necessary to prevent further degradation of air quality. It also considered a policy on cumulative effects to be necessary to assist when reviewing existing resource consents.

[368] The parties, relying on the evidence of the air quality experts, accepted that future management of the MMA should be by requiring the adoption of the BPO and an iterative approach. We also accept this evidence in principle.

[369] We have set out our findings in relation to how the BPO is to be applied. In the absence of any proposals as to how iterative management was to be implemented, at the 2022 hearing we raised the possibility of including a policy to support an iterative management approach in PC13. In closing submissions, the Council proposed the following new policy, which we refer to as Policy AQ P12, as follows:

> **New Policy AQP12 - Iterative management for resource consents for PM_{10} within the Mount Maunganui Airshed**
>
> Implementation of Policy AQ P3 requires the active management of PM_{10} discharges into the **Mount Maunganui Airshed** including through resource consent conditions with an adaptive iterative management approach, to ensure there are no exceedances of the NESAQ (or its replacement or amendment).

[370] In other closing submissions, the parties generally supported or did not object to the inclusion of such a policy,[206] although Ngāi Te Rangi did not comment. The Council submitted that the Policy "…clarifies the intent of Policy AQ P3 further, …",[207] which the planning experts had previously identified could be subject to different interpretations. PoTL considered it necessary to support the long-term RDA Rule and suggested a new version of Policy AQ P3(b).[208] VAA supported the inclusion of wording that an adaptive management approach contributes to an improvement in air quality.[209]

[371] In other words, while there was agreement that a policy was necessary, there were significantly different views on the wording of the policy.

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[206] PoTL at [66]; Swap at [19]; Timberlands at [3.4]; Toi Te Ora at [25]; and VAA at [18].
[207] Closing submissions of Bay of Plenty Regional Council, 1 July 2022, at [35].
[208] Closing submissions of Port of Tauranga Limited, 17 June 2022, at [80] and [69].
[209] Closing submissions of VAA, 19 June 2022, at [18].

Findings in relation to proposed new Policy AQ P12

[372] We find that a policy is necessary and consider it must:

(a) apply to all PM_{10} generating activities in the MMA to ensure integrated management, subject to the outcome of a s 293 process to enable PM_{10} emissions from unsealed yards to be included in PC13;

(b) be consistent with, rather than reword Policy AQ P3(b), which is settled and beyond appeal;

(c) require emissions of PM_{10} to be minimised to the greatest extent reasonably practicable and necessary to meet the objectives of PC13 to be consistent with the expert evidence and because Policy AQ P11 will no longer apply;

(d) require adoption of an iterative management approach to be consistent with the expert evidence;

(e) require consideration of cumulative effects; and

(f) provide clarity as to what is meant by iterative management and how it will be implemented.

[373] Our proposed policy is:

New Policy AQP12 - Iterative management of air quality within the Mount Maunganui Airshed

Activities which discharge PM_{10} and other particulates to air within the Mount Maunganui Airshed, other than those in compliance with Interim Permitted Activity Rule AQ R22A, must be managed by implementing an iterative management approach to:

(a) recognise that the Airshed is a polluted airshed as defined in Regulation 17(4)(a) of the National Environmental Standards for Air Quality (Polluted Airshed); and

(b) improve air quality and ensure the Airshed stops being a Polluted Airshed as soon as reasonably practicable, including by managing cumulative effects; and

(c) ensure that once the Airshed stops being a Polluted Airshed, the discharge of contaminants at a rate or volume that may cause an exceedance or breach of the ambient air quality standards of the National Environmental Standards for Air Quality is avoided; and

(d) safeguard the life supporting capacity of the air and protect human health, including by complying with annual average PM_{10} concentrations determined as appropriate by the Regional Council from time to time; and

(e) avoid, remedy or mitigate adverse *effects* on cultural values, amenity values, and the *environment*.

The iterative management process may include, but not necessarily be limited to:

(f) requiring each **subject site** to minimise discharges of PM_{10} to air to the greatest extent reasonably practicable and at the time of resource consent applications to take account of the effectiveness of mitigation measures and operating procedures implemented in accordance with the Interim Permitted Activity Rule AQ R22A; and

(g) assessing changes in Airshed-wide air quality based on monitoring results to 31 December 2025, to determine the extent to which compliance with the National Environmental Standards for Air Quality and with the annual average PM_{10} concentration determined as appropriate by the Regional Council (**compliance**) is likely to be achieved based on the Airshed-wide mitigation measures implemented to that time; and

(h) setting resource consent conditions based on (f) and (g) that can be expected to ensure compliance; and

(i) assessing Airshed-wide air quality based on monitoring results at no greater than two-yearly intervals until compliance is achieved and reviewing consent conditions as necessary to ensure compliance is achieved as soon as reasonably practicable.

[374] This policy will apply to applications for resource consent. Provided parties to the current appeals and the holders of existing resource consents to discharge to air in the MMA have the opportunity to participate in the s 293 process to include emissions from unsealed yards and the potential impacts of this policy, we consider no issues of natural justice or procedural fairness will arise if amendments to Policy AQ P12 are made as a result of the s 293 process.

J10 Scope to include new Policies AQ P11 and AQ P12 and Rules AQ R22A, AQ R22B and AQ R22C in PC 13

[375] In her closing submissions to the 2022 hearing, Ms Zame submitted:[210]

> In my submission, and as addressed in opening, the IPAR (and its supporting policy AQ P11) do reasonably fall within the scope of submissions and the consequential appeals by Swaps and Timberlands based on those submissions. Similarly, the long term rule, and its supporting policy AQ P15 [*the Court's AQ P12*] requiring iterative management of these discharges in the MMA, also reasonably fall within scope. Those matters do not appear to be in dispute between the parties.

[376] The Court is not aware of any dispute between parties on this matter; rather, where any indications were provided, they were in support. Following a review of the grounds of appeal in the Swap and Timberlands appeals, we agree with Ms Zame that

[210] Closing Submissions of Bay of Plenty Regional Council, 1 July 2022, at [15].

they provide scope to include the new policies and rules as outlined. Further, we consider that new Rule AQ R22C is a consequential amendment arising from the other rule amendments.

J11 Certificates of compliance (CoC)

Reasons for considering the use of CoC

[377] Ms Hamm first raised the possibility of using s 139 of the RMA, which provides that consent authorities must issue CoCs when requested by a person if an activity could be done lawfully in a particular location without a resource consent.

[378] Any certificate issued is treated as if it were an appropriate resource consent, subject to s 20A(2) RMA. This requires that if a rule in a regional plan becomes operative and requires an activity to obtain a resource consent, the person carrying on the activity must have:

> … applied for a resource consent from the appropriate consent authority within 6 months after the date the rule became operative and the application has not been decided or any appeals have not been determined.

[379] We explained earlier the relevance of this to Regulation 17(2)(a).

[380] To emphasise this further, Ms Zame submitted in closing submissions at the 2020 hearing that "… it is not clear whether all existing operators could demonstrate compliance with (previous Rule 17) or Rule AQ R1 that would support the issuing of a CoC." [211]

[381] We agree with Ms Zame and accept that there is no practical way in which compliance with previous Rule 17 can now be determined.

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[211] Closing Submissions of Bay of Plenty Regional Council, 1 July 2022, at [77].

The position of the parties regarding the use of CoC

[382] The use of CoC was subject to considerable debate and submissions through the hearing process. In submissions to the 2022 hearing, the positions of the parties were:

(a) The Council "… in principle does not have an issue with the CoC pathway."[212] However, Ms Zame pointed out that a CoC application requires a 'point by point' scrutiny against the relevant rules.[213]

(b) Swap accepted that the "deemed consent" status under s 139 potentially provides a useful pathway for transition of existing emissions to a consent pathway which accords with the spirit of Regulation 17.[214] However, it also expressed concerns about the legal viability of the CoC pathway, and submitted that more weight should be given to a long term permitted activity pathway to protect existing business at the Port.[215]

(c) Timberlands did not state its position explicitly in its submissions to the 2022 hearing other than to restate its position that the reference in standard 1(e) to "noxious and dangerous" as included in the Council's Revised Version of the IPAR presents an impediment to the granting of a CoC.[216] We take this as support for the adoption of a CoC approach.

(d) Toi Te Ora supported the use of CoC, considering them to be part of the most appropriate process to allow transition into a consent regime within a set period of time, together with the IPAR.[217]

(e) VAA adopted Toi Te Ora's submissions with respect to the CoC issue and agreed with the conclusion that "… by reference to *North*

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[212] Closing submissions of Bay of Plenty Regional Council, 1 July 2022, at [91].
[213] *Culpan v Vose* (1993) 2 NZRMA 380; *Waitutu Inc v Southland District Council* C068/94, from the closing submissions of the Bay of Plenty Regional Council, 1 July 2022, at [77].
[214] Closing submissions of Swap Stockfoods Limited, 17 June 2022, at [9].
[215] Closing submissions of Swap Stockfoods Limited, 17 June 2022, at [10] –[13].
[216] Closing submissions by Timberlands Limited, 17 June 2022, at [4.3].
[217] Opening submissions of Toi Te Ora Public Health Limited, 29 April 2022, at [4].

Canterbury Clay Target Association[218] and other relevant decisions that there is no bar to the grant of a CoC under s 139 for an existing activity operating under a permitted activity rule."[219]

(f) Ngāi Te Rangi did not address the issue of CoC in its opening or closing submissions to the 2022 hearing. However, in opening, Mr Gear submitted:[220]

> Ensuring that industry within the MMA comply with the National Environment Standard Air Quality (**NESAQ**) is a priority for Ngāi Te Rangi. This requirement is both urgent and necessary because of the recognised adverse health effects resulting from prolonged exposure to PM_{10} levels.

(g) PoTL submitted in closing that:[221]

> … there does not appear to be a clear barrier to a certificate of compliance that is treated as a resource consent under s 139 of the Act from being treated as an existing resource consent under Regulation 17(2) of the NESAQ.

Relevant case law

[383] Ms Paddison helpfully provided a summary of relevant case law in her opening submissions to the 2022 hearing.[222] With regard to the relevant rules to be considered, she considered that as the issue relates only to discharges to air, the only relevant rule is Rule AQ R22A (the IPAR). We agree with Ms Paddison.

[384] Picking up further on Ms Zame's submission about a 'point by point' scrutiny against the relevant rules, Ms Paddison referred to the Court of Appeal decision *Pring v Wanganui District Council*,[223] which she submitted is authority for the principle that in issuing a CoC, the Council is required to carry out a point-by-point analysis of an activity, quoting as follows:[224]

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[218] *North Canterbury Clay Target Association v Waimakariri District Council* [2016] NZCA 305.
[219] Opening submissions of VAA, 2 May 2022, at [74].
[220] Opening submissions by Te Runanga o Ngāi Te Rangi Iwi Trust, 2 May 2022, at [6].
[221] Closing submissions of Port of Tauranga, 17 June 2022, at [16].
[222] Closing submissions of Port of Tauranga, 17 June 2022, at [21] to [31].
[223] [1999] NZRMA 519.
[224] Opening submissions of Toi Te Ora Public Health Limited, 29 April 2022, at [22], citing *Pring v Wanganui District Council* [1999] NZRMA 519, at [10].

> If a proposal complies, s 139 requires the consent authority to issue a certificate within the short specified statutory time-frame. The authority must first be satisfied that there is compliance. Before it can be properly satisfied it must have sufficient information in order to be able to make a thorough comparison of the proposal with the applicable rules. It must therefore ensure it has an adequate description of the subject matter, of what is proposed. It is given power to ask for further information relating to the request for a certificate (subs(2)). What the authority needs to know will depend upon the nature of the proposal and upon the particular rules which must be complied with. …

[385] We are satisfied that the information necessary to demonstrate compliance with the IPAR is clear from Rule AQ R22A. While subjectivity will be impossible to avoid when assessing against some requirements, requiring a pragmatic approach to be adopted by all parties, we do not see this as an impediment to establishing compliance with the IPAR if supported by expert opinion. This is particularly the case as no party was able to identify an alternative that avoided the need for pragmatism.

[386] We note Ms Zame's submission that "… any attempt to combine a resource consent application and CoC is invalid."[225] This is relevant to Timberlands' and other existing discretionary activity consent applications because log handling is now included in both Rules AQ R22A and AQ R22B. It appears that the consent applications will either have to be withdrawn or log handling excluded from Rules AQ R22A and AQ R22B.

[387] Ms Zame[226] and Ms Paddison[227] also made submissions addressing the extent to which existing activities can be granted CoC, including the Court of Appeal decision in *North Canterbury Clay Target Association*,[228] which stated:

> ….Certificates are aimed at uses not yet established. We note that this is not to assume that they offer no utility at all for those who enjoy existing use rights. There may be circumstances in which official confirmation that an existing use is permitted has some value.

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[225] Opening submissions of Bay of Plenty Regional Council, 29 April 2022, citing *Just One Life v Queenstown Lakes District Council* (2020) 21 ELRNZ 806, at [49].
[226] Opening submissions of Bay of Plenty Regional Council, 29 April 2022, at [121] to [126].
[227] Opening submissions of Toi Te Ora Public Health Limited, 29 April 2022, at [21] to [31].
[228] [2016] NZCA 3015, at [33].

[388] We agree with Ms Paddison that the *Kelvin Grove Residents Association Inc v Palmerston North City Council* and *Duncan v Dunedin City Council* decisions[229] are not authority for the proposition that a CoC may only be prospective in effect. An activity that is already operating can apply for a CoC.

[389] We consider that in the particular circumstances of PC13, it is desirable there be a mechanism by which a determination can be made as to whether an existing activity can be done lawfully. A useful tool is by way of a CoC pathway. It is necessary to keep in mind that any activity that obtains a CoC will still need to meet the relevant provisions of the RMA by way of a subsequent resource consent process.

Findings in relation to Certificates of Compliance

[390] We find that:

(a) a way to establish that existing activities can be done lawfully is by way of a CoC pathway.

(b) an activity will be able to be undertaken lawfully without a resource consent if operating in accordance with the IPAR once PC13 is operative.

(c) the activity authorised is the discharge of PM_{10} and other particulates to air within the MMA, meaning the IPAR is the only Rule against which a point-by- point comparison is required when the Council considers a request for a CoC.

(d) an application for a restricted discretionary resource consent will need to be made in accordance with Rule AQ R22B within three years of PC13 becoming operative,[230] so as to ensure the activity can continue in accordance s 20A of the RMA.

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[229] *Kelvin Grove Residents Association Inc v Palmerston North City Council* [1999] NZRMA 497 and *Duncan v Dunedin City Council* (2004) 10 ELRNZ 315 respectively.
[230] As required by RMA s20A(2).

J12 Activity status if the Interim Permitted Activity Rule standards are not met

[391] The activity status will default to discretionary in accordance with Rule AQ R2.

[392] While there have been discussions about changing the default status to restricted discretionary, we find there should be a minimum of incentive to not comply with the IPAR.

J13 New definitions[231]

[393] The following new definitions are to be included:

> **Bulk solid material** means materials consisting of, or including, fragments that could be discharged as dust or **particulates**. These materials include but are not limited to: gravel, quarried rock, **fertiliser**, coal, cement, flour, rock aggregate, grains, compost, palm kernel extract, tapioca, and woodchip (but do not include logs).[232]
>
> **"Handling"** in relation to logs means conveying, transferring, loading, unloading, storage, and debarking of logs, and ancillary activities within the Mount Maunganui Airshed, but does not include fumigation.[233]
>
> **Mount Maunganui Airshed** means the area of Mount Maunganui and Tauranga specified by the Minister for the Environment as a separate **airshed,** by notice in the *New Zealand Gazette* [234] on 31 October 2019
>
> **Port company** is as defined by the Port Companies Act 1988
>
> **Port Industry Area** means the area shown within the red polygon in Figure. 1 in AIRSCHED3.
>
> **SQEP** (for the purposes of the Air Quality chapter only) means a **S**uitably **Q**ualified and **E**xperienced independent **P**erson who has professional qualification, training, skills, and experience relating to discharges to air, and can give authoritative independent assessment, advice and analysis on performance relating to the subject matter using relevant national and international standards and guidelines.[235]
>
> **Subject site** means the **property** except where otherwise mapped in AIRSCHED3.

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[231] As agreed by the parties unless footnoted otherwise.
[232] In accordance with the agreed draft consent order, dated 18 December 2019.
[233] Amended by Court in accordance with RMA s292(1)(a) in response to submission from PoTL to remove uncertainty as to whether fumigation is included.
[234] Bay of Plenty Regional Airshed Notice 2019
[235] "independent" added to provide certainty of expectation.

[394] With regard to the definition of "handling", we note that Ms Hamm submitted that there is still a risk that unless road is excluded from the definition of *handling*, it could be encompassed by the IPAR and the restricted discretionary rule.[236] The Council has no jurisdiction to control dust emissions on public roads under the IPAR or the replacement Rule AQ R22B. We do not consider the definition of handling requires amendment to exclude public roads.

J14 Log handling activities outside the MMA

[395] We received insufficient evidence to justify any change from the Decisions Version of PC13.

J15 Composting and compost as a bulk solid material

[396] Ms Parcell suggested a minor amendment in relation to composting and compost as a bulk solid material.[237] She considers compost to be a bulk solid material, and therefore it should remain in the definition. However, to prevent confusion, she considers that rules AQ R3 and AQ R21(f) should be added to the exclusions from AQ R22A to assist with clarity and implementation and considers that the Court could make this amendment as a minor amendment. We have incorporated this amendment in Rules AQ R22A and AQ R22B.

J16 Types of bulk solid materials other than stockfeed

[397] We received no or insufficient evidence relating to PM_{10} and other particulate emissions from types of BSM other than stockfeed to justify any amendment to the terms of Rules AQ R22A and AQ R22B. Accordingly, unless an activity emitting minor quantities of PM_{10} or other particulates complies with Rule AQ R1, it will need to comply with Rules AQ R22A and AQ R22B.

[398] The Council or any other party may make submissions if they consider this is inappropriate and, if so, for what reasons and what alternative provisions should be considered by the Court.

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[236] Closing submissions of Port of Tauranga, 17 June 2022, at [108].
[237] Ms Parcell, Reply evidence, 2 October 2020, at [89] and [90].

J17 PM_{10} emissions from unsealed yards

[399] Emissions from unsealed yards are the only sources identified by the air quality experts as emitting significant quantities of PM_{10} not covered by the provisions of PC13. Subject to the Council undertaking a review of existing air discharge consents in the MMA and implementing non-regulatory policies relating to advocacy, education and communication with affected parties, excluding such emissions from the provisions of PC13 will be the only reason why integrated management of the MMA is not achieved.

[400] Ms Parcell considered in relation to unsealed yards that:[238]

> … rules AQ R1 and AQ R2 are general activity rules designed to apply only when no other rule has been provided in the plan. In order to require a resource consent under AQ R2 the Regional Council would need to establish that an activity does not comply with the general activity conditions of AQ R1. As the air quality experts have explained, in particular in the answer to Question 12 (JWSAQ#2) "it is not possible to measure the emissions and undertake dispersion modelling to accurately calculate downwind concentrations, or use reverse modelling to characterise the emission source." Therefore the burden (and all costs) of proving non-compliance with AQ R1 falls to the Regional Council, with very little chance of success due to not being able to identify which site is responsible. In a polluted airshed with several sources contributing to a cumulative effect, it is more effective to target known significant sources with a specific rule.

[401] The Council had intended to include such a rule in its proposed PC18. However, the Council has now confirmed[239] that if the Court considers a s293 process should be followed to incorporate fugitive emissions from unsealed yards in PC13, it would support its use.

[402] We asked Mr Curtis if he could provide an indication of what sort of reduction in PM_{10} emissions might be possible if an unsealed area is sealed. He was unable to provide an exact number without referring to calculations, but replied "… if I had to give you a ballpark number I would have said it has to be at least 50% and it might be 80% but I can't do anything better than that."[240]

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[238] JWSP#2, at [73].
[239] Ms Zame at a judicial conference held on 14 March 2022, see Minute dated 5 March 2022, at [4].
[240] NOE 2022, at page 181.

[403] In Table 1 of his supplementary evidence dated 8 April 2022, Mr Curtis estimated that PM_{10} emissions from unsealed yards, excluding KiwiRail land, were in the order of 17 t/y. The air quality experts, including Mr Curtis, had previously agreed that estimated emissions from exposed areas were 30 t/y.[241] It appears that PM_{10} reductions of between 10 and 20 t/y could be possible if unsealed yards are sealed, with the mid-point representing around 10% of all emissions that can be controlled under the RMA. Based on Figure 2 in section E9, it could result in a reduction in mean annual PM_{10} concentration of 1 to 2 $\mu g/m^3$.

[404] We find that is a significant reduction which should be achieved as soon as reasonably practicable, and sufficient reason to direct changes to PC13 to include unsealed yards. The Council will be directed to consult with all parties to the PC13 appeals, holders of consents to discharge contaminants to air in the MMA and other affected parties, and to submit changes for our approval in accordance with s 293(1) RMA.

[405] There is a compelling resource management reason to reduce PM_{10} emissions from unsealed yards because of their contribution to existing adverse effects on human health and the mauri of air in the MMA. It is not to provide offsets to allow other emitters to continue emitting at higher rates. This is a case, using Dr Wilton's terminology, where the benefit must go to the airshed. That is particularly the case until the PM_{10} Standard and annual average PM_{10} concentrations necessary to protect human health have both been achieved consistently in the MMA for a minimum of five years.

J18 Giving effect to the Regional Policy Statement provisions relating to the protection of the mauri of air, kaitiakitanga and the need to recognise Te Tiriti o Waitangi and other matters of significance to Māori

[406] As noted in section F2, Ms Bennett expressed her frustration and disappointment at the way the RPS is being applied in relation to matters of concern to Ngāi Te Rangi:[242] She raised serious questions about how the interests of tāngata

[241] JWSAQ#2 in response to Question 23.
[242] Ms Bennett, EIC, 14 August 2020, at [19] to [17].

whenua are being provided for in relation to the effects of industry on Whareroa Marae.

[407] When opposing long-term permitted activity status, Mr Gear submitted in his closing to the 2022 hearing that:[243]

> While Mr Whyte suggests that there are alternative ways for tangata whenua to influence how the handling of bulk solid materials and log handling are undertaken, those options do not provide the same amount of engagement and influence that can be achieved through notification and engagement in a consenting process. Due to the significance of the Whareroa community being one of the main residential communities within the Mount Maunganui Airshed, it is appropriate that Regional Council does not exclude tangata whenua from providing valuable input into a consenting process by classifying these activities as permitted.

[408] We agree with the Council which, with the support of Mr Gear,[244] proposes a matter of discretion in Rule AQ R22B requiring the consideration of cultural effects. That is included in our version of the rule.

[409] It is essential that PC13 provides the opportunity for representatives of the Marae to participate in future air discharge consent processes with the potential to adversely affect and have more than minor effects on the Marae. There is no dispute that, historically, emissions of PM_{10} in the MMA have had adverse effects on the Marae that are more than minor by significant margins. It is understandable and, in our view, necessary for those with kaitiakitanga responsibilities to want to participate in consent application processes that affect their future in the circumstances that exist in the MMA. We have included a rule which addresses notification.

J19 Further Evaluation Report

[410] In accordance with the requirements of RMA s 32AA, we have undertaken a further evaluation to address the inclusion of Policies AQ P11 and AQ P12, Rules AQ R22A, AQ R22B and AQ R22C and, using a s 293 process, unsealed yards within the MMA. Our evaluation was undertaken in accordance with s32(1) to (4).

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[243] Closing submissions of Te Runanga o Ngai Te Rangi Iwi Trust, 17 June 2022, at [6].
[244] Closing submissions of Te Runanga o Ngai Te Rangi Iwi Trust, 17 June 2022, at [7].

[411] This decision forms a key part of our evaluation, with the level of detail reflecting the scale and significance of the changes. Our evaluation is summarised below.

Evaluation summary

Criterion	With changes	Without changes
Effectiveness at meeting objectives of PC13	Does not meet objectives but provides a clear pathway to meet them as soon as reasonably practicable	Does not meet objectives and will require a further plan change before doing so, adding to the time required before they are met
Effectiveness at ensuring integrated management in accordance with RPS Objective 11 and Policy IR 3B	Includes relevant provisions	Does not achieve integrated management and would rely on a further plan change to do so
Effectiveness at addressing cumulative effects in accordance with RPS Objective 10 and Policy IR 5B	Includes relevant provisions	Would rely on a further plan change
Effectiveness at giving effect to RPS provisions relating to the protection of the mauri of air, kaitiakitanga and the need to recognise Te Tiriti and other matters of significance to Māori	Includes matters of discretion requiring consideration of cultural effects and requires that Whareroa Marae is notified of any air discharge consent applications with the potential to cause effects which will or are likely to have adverse effects on those living there	No specific provisions included
Effectiveness at giving effect to RPS Policy CE 14B: Providing for Ports	Provides a pathway to allow consents to be granted to allow continued BSM and log handling activities at the Port	Requires resource consents for future BSM and log handling activities with significant potential for them to be declined because of Regulation 17

Effectiveness at managing the MMA as a polluted airshed under the Resource Management (National Environment Standards for Air Quality) Regulations 2004	Includes MMA-specific policies and rules sufficient to effectively manage the MMA	Includes no MMA specific-policies and one MMA-specific rule relating to BSM handling activities, with a significant potential that resource consents could not be granted
Ability to respond to any future changes in guidelines for the protection of human health	Includes a specific iterative management policy to enable effective response	No specific provisions
Ability to improve air quality and achieve compliance with the NESAQ in the MMA as soon as reasonably practicable	All necessary provisions included	Additional provisions would be required by way of a further plan change
Effectiveness at ensuring all industries emitting PM_{10} to air within the MMA contribute to the Airshed's remediation	All necessary provisions included but requires the Council to implement non-regulatory methods and review existing consents	Additional provisions would be required by way of a further plan change and require the Council to implement non-regulatory methods and review existing consents
Extent to which management methods are clear, reasonable and enforceable and within the law and able to be applied equitably across different emission sources	Provisions developed through a collaborative process to improve effectiveness and ensure clarity of expectations	Management methods uncertain with no clear guidance, some emission sources not included and a significant potential that resource consents could not be granted - Would rely on a further plan change

[412] We consider that the amended provisions are the most appropriate to achieve the objectives of PC13 because, subject to the directions we will make under s293, they:

(a) include all necessary policies and rules to manage PM_{10} emissions in the MMA in an integrated manner without the need for a further plan change, subject to the Council implementing appropriate non-regulatory methods;

(b) are the most appropriate to manage the MMA as a polluted airshed and bring it into compliance with the NESAQ and meet annual average PM_{10} concentration guidelines as soon as reasonably practicable;

(c) provide flexibility through Policy AQ P12 to respond to possible future changes in air quality standards and guidelines without the need for a further plan change;

(d) provide a pathway for the Port and existing BSM and log handling activities that form key elements of its operations to obtain resource consents, subject to the relevant provisions of the RMA;

(e) recognise and provide for the concerns of Ngāi Te Rangi, subject to them being notified of all applications to discharge PM_{10} to air in the MMA which will or are likely to have adverse effects on Whareroa Marae that are more than minor;

(f) give full effect to the objectives and policies of the RPS, subject to the Council implementing appropriate non-regulatory methods;

(g) provide clarity on how the MMA is to be managed in a way that is equitable to all emitters and affected parties.

[413] The full effectiveness of the provisions will also rely on the Council undertaking a review of existing resource consents to discharge PM_{10} to air in the MMA.

[414] Proceeding with the provisions of PC13 in the Decisions Version without amendment as proposed would likely mean that many or all current BSM and log handling operations in the MMA could be treated as new activities for the purposes of Regulation 17. There would be real potential for curtailment of activities. If curtailed, any decision may be tested through the courts, which no doubt would be a protracted process, during which PM_{10} emissions would continue at current levels with the consequent adverse effects.

[415] This possibility was not contemplated in the Council's s 32 Report and no assessment of those implications was provided in evidence. Nevertheless, the potential economic consequences would be such as to have local, regional and national significance. The value of log exports through the Port were estimated at almost $1,200 million in 2019.[245] Mr Clemens stated that across the differing products and industry supplies being imported through the Port, Swap estimates that the value of bulk product industry at just under $700M per annum.[246]

[416] There would be benefits in terms of improved human health and reduced annual health care costs of an estimated $9.8 million in 2020[247], improvements in the mauri of the air and other cultural benefits. However, other social costs would be substantial in terms of lost work opportunities and disruptions to supply chains, with the effects being felt well beyond the Bay of Plenty.

[417] We remain of the view that pragmatism is required in setting the way forward and we are satisfied that the amended provisions are the most effective to achieve the objectives of PC13 in the challenging circumstances that exist in the MMA. We also find they are the most efficient provisions to achieve the objectives as they do so in a single plan change process which will result in improved air quality as soon as reasonably practicable. It will minimise the potential for conflict between two separate plan changes managing different aspects of PM_{10} and other particulates in the same airshed.

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[245] NOE 2022, at page 72.
[246] Mr Clemens, EIC, 21 August 2019, at [3.2].
[247] Mx Wickham, EIC, 7 August 2020, Attachment D, at [2.0].

[418] A high level of uncertainty remains as to how effective the application of the BPO will be, on its own, in meeting the objectives, and what additional measures will be necessary if it is not, and how responsibility for any further reductions in emissions will be allocated. The answers will not be known for at least three years and possibly much longer. By acting now, progress towards meeting the objectives will be made, whereas not acting would inevitably extend the period before they were met. For that reason, the risk of not acting is substantially greater than the risk of acting.

[419] With regard to s 32(4), the amended provisions do not impose a greater or lesser restriction than that required by the NESAQ, except to the extent that they require PM_{10} emissions to be minimised as far as reasonably practicable. That is required to enable the Council to ensure compliance with the NESAQ to the extent to which its powers enable it to do so.

Section K

Other findings and directions

K1 Monitored increases in PM_{10} concentrations in the Mount Maunganui Airshed

[420] From the limited monitoring data available, PM_{10} concentrations in Totara Street increased from 15.7 μ/m^3 in 2008/9 to an average of around 23 μ/m^3 between 2019 and 2021, an increase of approximately 50%. This is a very significant increase over a relatively short period of time. [248]

K2 Contributions to elevated PM_{10} concentrations at the Port boundary

[421] While both BSM and log handling activities contribute large quantities of PM_{10} to air in the MMA, which must both be minimised, the monitoring evidence before the Court indicates that log handling at the Port is a much greater contributor to elevated PM_{10} concentrations at the Port boundary than BSM handling. This needs to be addressed in future management processes.

K3 PM_{10} emissions from BSM handling and storage at Aerodrome Road/De Havilland Way

[422] Elevated PM_{10} concentrations in and around the Aerodrome Road/De Havilland Way BSM handling and storage facility, both historically and currently, are of particular and serious concern in terms of adverse effects on human health and the mauri of air. Council's April 2021 Report about the current status of air quality at De Havilland Way[249] found that "Overall, despite some low-tech mitigation measures implemented by the industries in this area, there has been little improvement in air quality in the immediate area. Particulate levels remain elevated."

[423] Without significantly and possibly substantially more effective mitigation being implemented as part of the IPAR process, we anticipate the emitters will have

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[248] The Bay of Plenty Regional Council Mount Maunganui Dust Monitoring Report, February 2012, at section 5.1.5.

[249] De Havilland Report.

difficulty demonstrating the activity is lawfully being carried on without a resource consent, making it a new activity for the purpose of Rule AQ R22B and Regulation 17.

K4 Need for greater certainty on potential effects of PM_{10} emissions on people present at locations on a 24-hour a day basis

[424] The evidence provided no certainty on the extent to which people are present within the main industrial areas of the MMA on a 24-hour a day basis, which is the criterion against which compliance with the NESAQ must be measured. We heard evidence that activities in the MMA include the Port and a mix of heavy industrial, light industrial, and commercial activities. Residential activities were identified as being located around the edges of the industrially zoned land but there was no mention of dwellings within the area.

[425] This is potentially a significant issue in terms of whether the Rail Yard South and Totara Street monitoring locations are appropriate for monitoring compliance with the PM_{10} Standard. This requires investigation, including if and why residential dwellings exist within an industrial area with the characteristics of the MMA, were they legally authorised and can they be relocated?

[426] There is also uncertainty as to the extent to which people living in the main residential area of Mount Maunganui to the east of the MMA are exposed to concentrations of PM_{10} that could affect their health. This is a matter the Council may wish to consider further.

K5 Need for an Airshed Management Plan

[427] There was much discussion during the 2020 hearing on the need for an Airshed Action Plan or Management Plan, as summarised in section E12. We acknowledge that such plans are not mandatory. However, there was no dispute that they represent good practice.

[428] The National Air Quality Compliance Strategy to Meet the PM_{10} Standard states:[250]

> Councils are required to attain compliance with the standard for their areas and will need to develop action plans for improving air quality in polluted airsheds.
>
> Councils are encouraged to consider developing airshed action plans as soon as possible to move towards compliance with the ambient PM_{10} standard.

[429] There are many matters in relation to which emitters within the MMA will require guidance from the Council to ensure efficiency of process. Careful thought needs to be given to equitable methods of reducing PM_{10} emissions further if the proposed modified BPO process alone is insufficient or if lower PM_{10} concentrations are necessary to protect human health. The many different but inter-related issues identified through the development of PC13 need to be coordinated and integrated through a structured process undertaken with those affected. In our view an Airshed Management Plan is needed to achieve effective and efficient outcomes.

[430] Any decision to prepare an airshed management plan rests with the Council but we are strongly of the view that one should be prepared.

K6 Directions

[431] The content of this decision reflects the many complexities and uncertainties that have needed to be addressed in this case and the diverse views of parties on the framing of provisions. We reiterate an earlier statement we made[251] that whatever our final decision on this matter, we consider the willingness of the parties to these appeals and others to work collaboratively and constructively to implement practicable, yet effective particulate emission strategies, will be a key requirement for a successful outcome.

[432] The amended draft provisions are based on our assessment of all the proposals suggested by the parties and their experts and represent what we consider to be the

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[250] Ministry for the Environment. 2011. *Clean Healthy Air for All New Zealanders: The National Air Quality Compliance Strategy to Meet the PM_{10} Standard*. Wellington: Ministry for the Environment, at [1.2] and [4.7.1].

[251] Minute dated 16 February 2021, at [16].

most practical, certain and equitable way forward.

[433] There are no precedents to guide the way forward and, unavoidably, some of the concepts embodied in the draft provisions fall outside traditional resource management practice in New Zealand. For that reason, we seek final submissions from parties on the following matters:

(a) Are there any matters of fact, expert opinion or law of direct relevance to the issues that have not been referenced?

(b) Are there any issues of drafting; relating to clarity, interpretation, enforceability and *vires* with respect to the policy and rule framework comprising:

(i) the proposed way forward

(ii) Policy AQ P11

(iii) Policy AQ P12

(iv) Rule AQ R 22A

(v) Rule AQ R22B

(vi) Rule AQ R22C.

[434] We also seek submissions of the following:

(a) Is there a need for an AVL conference to finalise the IPAR standards or any other aspect of this decision?

(b) Is there a need for an independent review process in the event of disagreement between emitters and the Council in relation to determination of the BPO and compliance with the standards in the IPAR?

(c) Should separate categories of BSM be provided for and if so, what should they be, and do any amendments need to be made to Rules AQ R22A and AQ R22B in respect of BSM handling activities other than stockfeed?

(d) Why is it necessary to manage log handling differently, depending on whether they are stored inside or outside of the Port Industry Area?

(e) Are there compelling reasons why PM_{10} emissions should not be the same or less than they were on the date the gazetting of the MMA as a polluted airshed took effect, or reasons why other dates than those included in this decision should be used instead?

(f) Is it the intention to withdraw existing consent applications for log handling activities within the MMA?

[435] Our preference would be to receive a joint memorandum of counsel in response but accept that some parties may wish to make separate submissions. Submissions must be made no later than **5 p.m. on Friday 17 February 2023**.

[436] In our final decision we will direct the Council in terms of s293 of the Act to prepare changes to PC13 in accordance with s 293 of the RMA to include the control of emissions of particulate matter less than 10 microns in diameter (**PM_{10}**) from unsealed yards to contribute to integrated management of the Mount Maunganui Airshed.

Acknowledgement

[437] The Court acknowledges the work of Commissioner Hodges in the preparation of this decision.

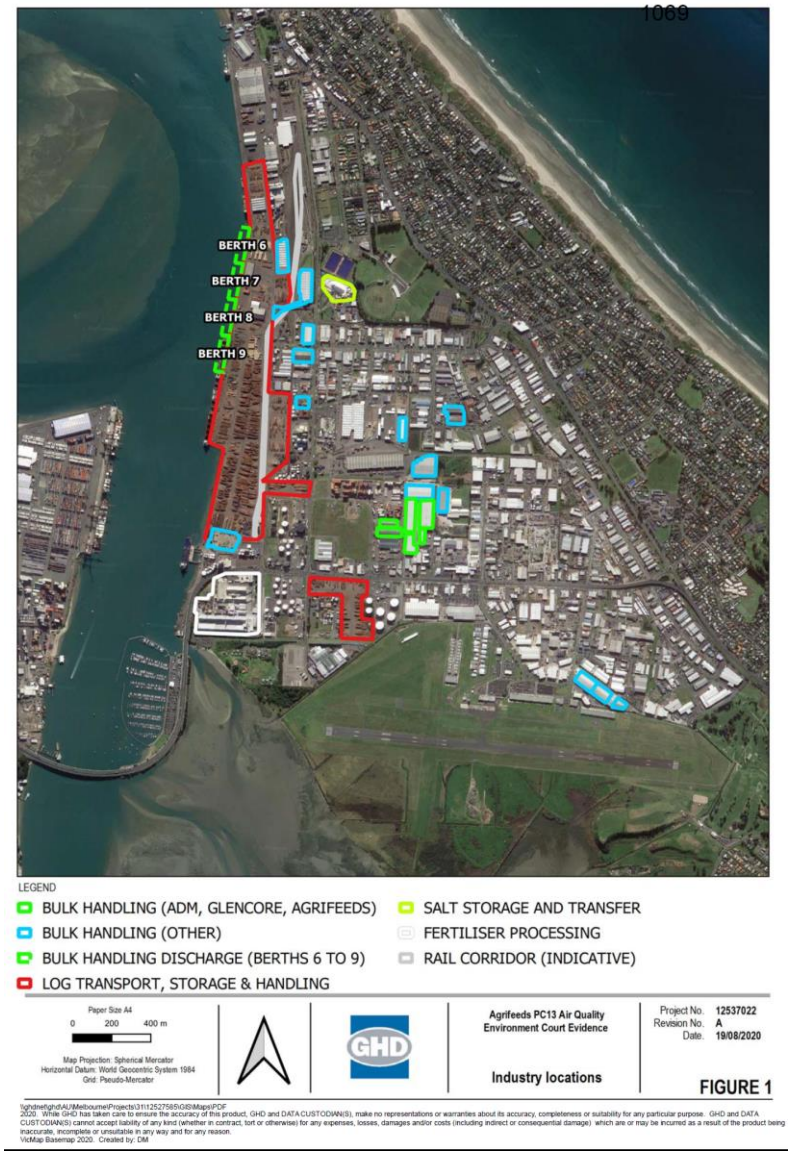
For the Court:

MJL Dickey
Environment Judge

Appendix 1

Main activities discharging particulate and PM_{10} to air within the Mount Maunganui Airshed and their economic significance

[1] The following Figure 1 shows the location of the Port and PM_{10} emitting industries.[252]



[252] Reproduced from Mr Stacey's EIC, 21 August 2020, Appendix B.

Log handling and BSM handling activities at the Port

[2] Based on the evidence:

(a) Log handling activities are undertaken in the log storage and marshalling areas shown on Figure 1, also in the roadways surrounding these areas, and on Berths 9, 10 and 11, with Berths 10 and 11 being located immediately south of Berth 9. Bulk solids handling is undertaken most commonly on Berths 7 and 8[253] but can also occur at berths 6 and 9 as shown in Figure 1.

(b) Logs from more than 20 log sources are exported through the Port. Log lease areas are provided to the three wood owners/exporters who move larger volumes of wood through the port. They are granted leases to operate by the Port, with areas of 13.5 ha, 6.4 ha and 1.1 ha respectively.[254]

(c) Common storage areas are assigned to smaller wood owners.

(d) Two log marshalling companies and, we understand, two stevedore companies undertake log handling and loading.

(e) There are currently four stevedore parties that undertake bulk cargo unloading at the Port and approximately 13 importing parties that handle bulk solids in this fashion, of which Swap and its supporting s274 parties account for four.[255]

Operational responsibilities at the Port

[3] A range of different parties operate within a log storage area, including but not limited to log marshallers, who move and handle logs once they arrive, yard cleaning services (bark recovery and vacuum sweeping), log truck transport providers and some log exporter parties. The two log marshalling companies are the principal

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[253] McKenzie presentation, at section 4.
[254] Background information for expert caucusing addressing operational considerations for log operations at the Port of Tauranga, prepared by Timberlands.
[255] McKenzie presentation, at Section 6.

operators in this area for safety reasons. They may be engaged by either the wood owner or the exporter. Operational log berths and their associated pre-load/staging areas are also under the operational control of the stevedores, who load the logs onto the ships, and marshallers operate in these areas. [256]

[4] A range of different parties also operate within BSM handling areas of the Port. These include the 13 owners of the product being handled, who will engage a stevedore to unload their cargo from the vessel and a transport provider(s) to transport that cargo to a storage facility off site. In some instances, the cargo owner will engage a shipping management contractor who will step in on behalf of the cargo owner for certain activities on the Port.

[5] Operational responsibilities are inter-related and complex, with the Port, the owners, stevedores and transport operators each having elements of responsibility. The Port has assigned the stevedores as the party responsible for ensuring compliance in these areas. The Port undertakes inspections and monitoring of BSM unloading operations and in the event of one or more non-compliances, can issue a warning against the stevedores and require an operation to be shut down for a period.[257]

[6] The Port owns and provides the hoppers into which BSM are placed for loading onto trucks.[258]

[7] The Port assigns berths at which loading and unloading will occur.

[8] The Port has developed air emission management and control procedures that all third-parties operating on the Port site must comply with.

[9] The Port manages and sets operational rules for all users of roadways in and around log handling and BSM handling activity areas and throughout the Port.[259]

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[256] McKenzie presentation, at Sections 4 and 10.
[257] McKenzie presentation, at Section 6.
[258] McKenzie presentation, at Section 6.
[259] McKenzie presentation, at Section 11.

[10] The Port directly engages Daltons to undertake the majority of bark collection and sweeping on the Port site, but there are limited exclusions, which generally apply to small areas. As examples:

(a) sweeping of the wharf area is the responsibility of the port users, and is completed by the stevedore party;

(b) stevedores and marshallers may undertake bark ploughing at times;

[11] In the event of a sweeper truck breakdown or servicing, the Port may bring in another sweeper provider to assist in housekeeping, if required. It may also bring in additional sweeping services in addition to the three Daltons sweepers if required.[260]

Management of PM_{10} emissions within the Port boundaries

[12] All air quality experts agree that:

(a) The effects of dust generating activities within the Port boundaries cannot be readily differentiated because of the nature, scale, spatial extent and number of dust generating activities on that site.[261]

(b) It is not possible to differentiate between individual emitters within the MMA where multiple BSM activities and/or logs operate in close proximity to each other, such as occurs within the Port boundaries.[262]

(c) PM_{10} emissions rates are highly variable from log handling activities[263] and from BSM handling activities[264], two of the main PM_{10} generating activities within the Port boundaries. On any particular day, depending on activities occurring, location of the site and weather conditions in particular, either log handling or BSM may be the major contributor to PM_{10} emissions and effects on human health.

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[260] McKenzie presentation, at Section 13.
[261] JWSAQ#2, at [1(a)].
[262] JWSAQ#2 in response to Question 14.
[263] JWSAQ#2 in response to Question 6.
[264] JWSAQ#2 in response to Question 8.

(d) It is not possible to measure the emissions and undertake dispersion modelling to accurately calculate downwind concentrations or use reverse modelling to characterise the emission source.[265]

[13] As is to be expected, any third party operating within the Port boundaries must do so in accordance with procedures set by the Port, including environmental procedures. All Port users must ensure that adverse effects and the risk of adverse effects to the environment are managed and mitigated to standards acceptable to the Port.[266]

[14] Some procedures apply to activities that occur throughout the Port site and are carried out by or under contract to the Port. The Port directly manages the use and control of all roads and the sweeping of dust from the majority of working surfaces within the Port and in any practical sense is the only organisation that can hold resource consents to discharge to air from these activities.

[15] With regards to activities generally at the Port, the air quality expert opinion is that:[267]

> … due to the nature, scale, spatial extent and number of dust generating activities within the Port area, whose effects cannot be readily differentiated, that a more effective regime would be to manage these emissions from the Port as a single entity.

Mitigation

[16] Timberlands debarks most of its logs prior to transport to the Port, which reduces the quantity of wood fibre and mineral soil of relatively fine particle size that can be generated at the Port by log handling activities.[268] In late 2019, it became apparent to the Port that log handling activities were a significant contributor to PM_{10} exceedances being measured adjacent to the Port.[269] The Port in association with Port users, including Timberlands, looked at ways in which discharges of particulate matter

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[265] JWSAQ#2 in response to Question 12.
[266] Bulk Cargo Handling Procedures, Version 4 April 2021, at [1.1].
[267] JWSAQ#2, at [1(a)].
[268] Ms Robson, EIC, 4 September 2020, at [3.2].
[269] McKenzie presentation, at Section 16.

(including PM_{10}) to air could be mitigated. It is clear that the parties involved have put considerable effort into looking for and starting to implement mitigation measures.

[17] The Port produced a document entitled "Mitigation measures installed at Port of Tauranga to reduce particulate discharges to air, PC13" as a reference for use by the air quality experts at their conference in May 2021 (**Port mitigation report**). This described 18 separate actions that have been or are being implemented. Those that are particularly relevant to ensuring improved air quality in the MMA are summarised below.

[18] Several initiatives have been progressively introduced since February 2020 to reduce dust emissions resulting from travel by road vehicles, including controls to restrict non-essential travel through log storage areas, speed restrictions on roads and driver education and awareness programmes to improve behaviour. Several initiatives have been implemented to improve the effectiveness of bark collection and sweeping of surfaces to minimise dust emissions from roads and log and BSM handling areas. A move to loading all logs by trailer instead of bunk operations is underway. Monitoring undertaken by the Port indicated that this resulted in approximately 50% less air borne PM_{10} emissions.

[19] Improvements in Bulk Cargo Handling Procedures (BCHP) were due to come into effect on 1 July 2021, increased monitoring and enforcement of existing procedures is taking place and the voluntary use of fine water misting hoppers for transferring BSM from ships to trucks is now available. The new BCHP require the use of grabs capable of gradual or slow release, such as hydraulic grabs, and operated with slow/gradual release when handling BSM determined to have higher risk of airborne particulate/dust generation, which are listed. Investigation of more effective controls on BSM during elevated wind conditions is now possible with the introduction of wind speed visual alarms.

[20] Physical works to reduce the potential for the direct transmission of dust towards site boundaries have been implemented. The works included realignment of the Berth 9 access road to avoid an existing wind tunnel effect that was considered

likely to be contributing to elevated particulate levels towards the Port boundary in the general locality of the Rail Yard South site. They also include an eight metre-high 160 metre-long wind break fence installed in February 2020 along a section of boundary identified as high risk for elevated airborne particulate, also in the general locality of the Rail Yard South site. 780 metres of wind break fence have been installed in other areas of the port log yards prior to this and another 700 metres of wind break fence were scheduled to be installed before October 2021.

[21] The Port has held discussions with KiwiRail and Blue Scope Steel to see if reductions could be achieved in PM_{10} emissions from engine idling and unsealed areas on their sites respectively. These are advocacy type activities that would logically be undertaken by the Council. The reduction in emissions from unsealed industrial sites, in particular, appears to us to be an initiative that could be taken up within the industrial discharge provisions of PC13. Similarly, it would be beneficial for the Council to initiate approaches to KiwiRail to build on the discussions already started by the Port, and to the Port to follow up on the advice of the air quality experts that the use of shore generated power instead of ship generated power is an option to reduce PM_{10} emissions to the MMA.[270]

Other sites where BSM activities occur within the MMA

[22] The locations of the sites are shown on Figure 1.

[23] Swap has warehouses at five sites within the MMA at 63 Portside Drive, 86 Hull Rd (under construction), 132 Totara St, 64 Newton St and 114 Totara Street. The handling process involves no manufacturing or additions to the product. Trucks drive into the warehouse covered, to unload and be loaded. Product is moved around the warehouse with wheel loaders and excavators.

[24] Management measures are implemented to ensure that particulate matter discharges are minimised and several innovative measures have been trialled to decrease discharge levels. While these were listed, we were unable to gain any

[270] JWSAQ#2 in response to Question 23.

understanding of their effectiveness. At the warehouse under construction, the installation of a dust extraction and treatment system, being an extraction and baghouse unit, will be included.[271]

[25] ADM operates a storage facility located at 124 Hewletts Road. The store is used for the unloading, loading, processing, and storage of BSM. While all loading and unloading activity takes place inside, there is still the potential for fugitive dust to escape into the forecourt area. ADM is constructing an enclosed canopy over the entire forecourt area. This was expected to be completed in June 2021.

[26] The canopy includes a fully enclosed roof and sides. There is provision for doors at the road end to further mitigate dust risk. Loading and unloading will continue to occur inside the stores (not in the enclosed forecourt). ADM has also introduced an industrial sweeper to clean fugitive dust from the forecourt. The sweeper has been in operation since late 2020.[272]

[27] Glencore operates from two locations within the MMA - Waimarie Street and Hewletts Road. Glencore is committed to undertaking physical mitigation works at these facilities. The primary mitigation method was planned to be the installation of enclosed canopies at both store facilities, similar to ADM's, and designed to achieve the same mitigation and be undertaken by the same contracting firm.[273] It is not clear if or how far this work has progressed.

[28] We were advised that Agrifeeds does not operate from facilities within the MMA.[274]

Economic significance of BSM and log handling activities within the MMA

[29] The appellants and supporting s274 parties who handle BSM and logs described the significance of their operations within the MMA to their businesses, to the region and to New Zealand. Briefly, the evidence of Mr Clemens, Environmental

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[271] Mr Clemens, EIC, 21 August 2019, at Section 5.
[272] Memorandum of counsel dated 3 May 2021, Annexure 1 at [2] to [6].
[273] Memorandum of counsel dated 3 May 2021, Annexure 1 at [7] to [16].
[274] Memorandum of counsel dated 3 May 2021, Annexure [1] at [17].

Manager for the Swap Group of Companies, stated: [275]

> For the industry, several larger companies are involved in the same or similar bulk solids activity. Through the POTL, Glencore Agriculture (NZ) Ltd are estimated as the largest bulk stockfood importer by volume, with Swap estimated as being the second largest importer. Agrifeeds (International Nutritional Ltd) and ADM New Zealand Ltd make up the top four. Other smaller competitors include Dahudi and Nutrinza. Companies such as Champion and Inghams import bulk feed for different industries such as for poultry.
>
> Across the differing products and industries supplied being imported through the POTL, SSL estimates that the value of bulk product industry at just under $700M per annum.

[30] Mr KG Mayall, a General Manager for ADM, Mr BM Waite, a General Manager of Agrifeeds and Mr BC Mills, the Operations Manager for Glencore Agriculture (NZ) Limited (NZCN 285414) (Glencore) provided further evidence of the regional and national significance of their companies' stock feed operations at the Port. These witnesses explained that their organisations are responsible for approximately 75% of the Port's annual bulk grain and stock feed material imports. They said the Port is critical to these imports as there are no other proximate seaports with sufficient draft and handling capacity to service the greater Waikato, Bay of Plenty, King Country, and Thames Valley regions.

[31] They described the importance of the dairy industry in the areas they serve and that the use of imported stock feeds plays a significant role in ensuring there are no feed shortages and allowing farmers the means to protect their on-farm milk production levels. They noted that the essential nature of the BSM operations was recognised as an "essential service" by the Government during the last COVID-19 lockdown.

[32] Ms Robson gave evidence that Timberlands manages 189,000 hectares of planted production forest in the Central North Island of which 120,000 hectares is in the Bay of Plenty region, producing over 4.5 million tonnes of logs per annum. About 1.5 million tonnes are transported to its log yard at the Port for export. 90% is transported by rail. Ms Robson said she had prepared discretionary activity resource

[275] Mr Clemens, EIC, 21 August 2019, at [3.1] and [3.2].

consent applications for Timberlands and two other log yard users, being Rayonier Matariki Forests Ltd and TPT Forests Ltd, which she estimates, collectively, are responsible for about 80% of the log yard storage area at the Port.

Appendix 2

List of witnesses appearing

Bay of Plenty Regional Council

Ms KE Parcell, Team Leader Kaiwhakatinana at the Regional Council, planning

Dr EV Wilton, Environet Limited, air quality

Mr GJ Morris, Senior compliance officer at the Regional Council

J Swap Limited

Mr DJ Clemens, Environmental Manager for the Swap Group of Companies

Mr DG Whyte, AECOM, planning

Mr A Curtis, Pattle Delamore Limited, air quality

Timberlands

Ms CB Robson, Eland, planning

Mr P Baynham, Mote Limited, air quality

Toi Te Ora Public Health

Dr JM Miller, Medical Officer of Health

Mr DF Serjeant, independent planning consultant

Mx CL Wickham, Emissions Impossible, air quality

Ngāi Te Rangi

Mr JH Ngatuere, who manages environmental issues at Whareroa Marae and gave evidence on behalf of the marae, Te Kohanga Reo o Whareroa, the tāngata whenua of Whareroa, and the Whareroa resident community

Mr RR Tuanau, Pou Herenga at Te Rūnanga o Ngāi Te Rangi Iwi Trust

Ms PC Bennett, Manager of the Environment and Natural Resource Management Portfolio at Te Rūnanga o Ngāi Te Rangi Iwi Trust

VAA (previously Glencore)

Mr BC Mills, Operations Manager for VAA
Ms AC Jepson, Business Group Leader, National Planning, GHD Limited
Mr PW Stacey, GHD Limited, air quality

Agrifeeds

Mr BM Waite, General Manager of International Nutritionals Limited trading as Agrifeeds

ADM New Zealand Limited

Mr KG Mayall, General Manager for ADM New Zealand Ltd

Port of Tauranga Limited

Mr JW McKenzie, Environmental Manager at PoTL
Mr R Hansen Principal Environmental Planner at Tonkin & Taylor Ltd
Ms J Simpson, air quality

Appendix 3

Background to what Regulation 17 of the NESAQ requires

[1] The MfE User's Guide,[276] which has no legal status, states under the heading "What does Regulation 17 require?":

> The Regulation is not intended to require the offsetting of emissions that are permitted activities according to regional plans.
>
> The second policy intent of the Regulation is that it should apply only to applications for new or increased discharges of PM_{10} (where they trigger a specific threshold). …The policy intent is that the "same activity" is the discharge *per se* (the discharge of PM_{10} to air), …
>
> …
>
> 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.
>
> …
>
> Another parameter in this assessment is the likelihood that a discharge will exceed the threshold. This is a matter for the consent authority to determine, based on the evidence available to them and their assessment of that evidence.

[2] The Users' Guide references the non-Regulatory MfE Quality Compliance Strategy.[277] This document is consistent with the Users' Guide in the way in which it describes Regulation 17, stating that "This regulation is intended to ensure that the state of a degraded airshed does not get any worse as a result of a new discharge …" and that it " … applies to resource consent applications to discharge PM_{10} in polluted airsheds where the applications … are for new discharges and increases in existing discharges".[278]

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[276] MfE 2011 Users' Guide to the revised National Environmental Standards for Air Quality Updated 2014, pages 73 to 74.

[277] Clean Healthy Air for all New Zealanders: The National Air Quality Compliance Strategy to Meet the PM_{10} Standard, (Ministry for the Environment 2011), published 2011.

[278]. Clean Healthy Air for all New Zealanders: The National Air Quality Compliance Strategy to Meet the PM_{10} Standard, (Ministry for the Environment 2011), Published 2011, at 4.3.1.

[3] We were told during the hearing that a s32 Evaluation Report (NES-AQ s32 Report) was prepared for the NES, which we reviewed.[279] The introduction states that in June 2009, the Minister for the Environment notified his intent to review three aspects of the Regulations relating to PM_{10}, one of which was "whether disallowing industry consents (as required by the Regulations after 2013) is equitable when industry contributes a relatively small proportion of pollutants." This was by comparison with emissions from domestic sources.

[4] The MMA was not a polluted airshed at the time the NESAQ s32 Report was prepared, so it was not identified as an airshed that was unlikely to meet current 2013 target compliance date, whereas 15 other airsheds were. This suggests to us that the circumstances that now exist in the MMA, where industry is by far the major contributor, was not considered in the NESAQ s32 Report.

[5] The policy objectives behind the Regulations in 2004 (as there were no objectives in the NESAQ) were to: [280]

- give industry greater certainty by providing a "level-playing field" which clarifies environmental expectations prior to the resource consent process
- support protection of public health and the environment by providing a bottom-line standard that should not be breached
- provide greater certainty in resource consent decision-making and regional plan preparation at the local level.

[6] The NESAQ s32 Report considered the status quo and four options when assessing the efficiency and effectiveness of the provisions in achieving the objectives.[281] Put simply, the status quo required resource consents for significant discharges to be declined or offset if the PM_{10} concentration was likely to exceed the PM_{10} Standard by 2013. Each of the options was based on removing "… all current restrictions on industry consents for significant discharges of PM_{10}" and requiring "… offsets for resource consents for significant **new** $\mathbf{PM_{10}}$ discharges in non-compliant airsheds" (*Bolding as the description of Option 1 in the NESAQ s32 Report).*[282]

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[279] Ministry for the Environment. 2011. *Revised National Environmental Standards for Air Quality – Evaluation under Section 32 of the Resource Management Act*. Wellington: Ministry for the Environment, April 2011

[280] NES-AQ s32 Report at [1.2].

[281] NES-AQ s32 Report at [3].

[282] NES-AQ s32 Report at [3].

[7] The summary of the status quo and options included a statement that the status quo would "Prohibit all industrial consents post 2013"[283] but all of the options would not. More specifically, the NESAQ s32 Report states:[284]

> Existing restrictions on resource consents for significant discharges (refer Table 2) will be repealed from the date at which the amended regulations come into effect. This means applications for renewed discharges into non-compliant airsheds will not be subject to restrictions arising from the Regulations. They will still be subject to any restrictions imposed by the regional council, however, through normal resource consent processes.

[8] Of relevance to the current appeals, the NESAQ s32 Report states: [285]

> Similarly, *new* industry (for the purposes of mandatory offsets) will be defined as an industry that applies for consent for new emissions to the airshed. This may be a new industry that is proposing to establish itself or an existing industry that is proposing to increase emissions.

[9] The NESAQ s32 Report considers that "An intervention is efficient if the total benefits exceed the total costs, as demonstrated through a cost benefit analysis."[286] The cost benefit analyses made no allowance in any of the options (as opposed to the status quo) for relocating industry out of the MMA, should that be required.

[10] Appendix 1 of the Evaluation Report explained that under the regulatory regime applying prior to the new NESAQ coming into effect (the status quo), "**all** industrial consents for PM_{10} discharges will be declined in non-compliant airsheds." If this were to eventuate, the MfE assumed:[287]

> The cost of industry closing down and being lost to a region is estimated to be $22 million per site, per year, based on a review of industry with significant PM_{10} discharges in the Auckland Regional Council Industry Economic Model.

[11] A paper presented to the Cabinet Business Committee by the Minister for the Environment setting out final recommendations for amending the PM_{10} Air Quality Standards[288] set out his proposals as including:

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[283] NES-AQ s32 Report at Table 3.
[284] NES-AQ s32 Report at [4.2].
[285] NES-AQ s32 Report at [4.3].
[286] NES-AQ s32 Report at [5.1.1].
[287] NES-AQ s32 Report at Appendix 1
[288] Minister for the Environment 2011 *Amending the PM_{10} Air Quality Standards: Final Recommendations* Cabinet Paper prepared by Hon Dr Nicole Smith, Wellington.

(a) remove existing restrictions on industry consents for significant discharges of PM_{10};

(b) require mandatory offsets for resource consents permits for significant new PM_{10} discharges in over allocated airsheds from 1 September 2012;

(c) new industry (for the purpose of mandatory offsets) will be defined as an industry that applies for consent for new emissions to the airshed. This may be a new industry that is proposing to establish itself or an existing industry that is proposing to increase emissions.

Appendix 4

Additional air quality monitoring results

Monitoring of log handling activities

[1] Timberlands engaged Mote Limited to undertake emission concentration monitoring between 10 October 2020 and 22 December 2020 to investigate the impact that their log storage area had on downwind PM_{10} concentrations at the Port.[289] This was undertaken as part of a s92 request for further information related to their resource consent application. The executive summary of the Report stated:[290]

> It was found that activities at the port, including those within the log storage area did have a measurable impact on PM_{10} concentrations and that this impact was detectable at the Port Boundary. The total average increase in the ambient 24-hour PM_{10} at the port boundary was found to be approximately 12 micrograms per cubic metre during westerly winds. Of this, approximately 7.4 micrograms per cubic metre or 62% of emissions could be attributed to activities within the log storage area. It should be noted that this figure is likely to be overestimated due to the inability to distinguish between emissions from log storage and ship unloading operations. For this reason, this study adopted a precautionary approach and assumed that any increase in emissions results from log storage operations.
>
> The investigation found that the daily PM_{10} contribution varied considerably with the log storage area contributing anywhere between approximately 20% and 95% of the total increase in PM_{10} concentration at the boundary on any given day.

[2] The Report identified the following difficulties when attempting to interpret the ambient PM_{10} monitoring data based simply on wind direction:[291]

> 1. The Port of Tauranga is a complex environment with many structures and objects that impact wind flow. Some of these objects move (Vessels, Logs) further modifying the wind direction – particularly during lower wind speeds.
>
> 2. There are multiple activities taking place on the wharf and log storage area at any one time including ship loading and unloading, vehicle

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[289] Mote Limited, Emission Concentration Monitoring, Log Storage yard – emission concentration monitoring programme , 16 February 2021, Revised 28 April 2021.

[290] Mote Limited, Emission Concentration Monitoring, Log Storage yard – emission concentration monitoring programme , 16 February 2021, Revised 28 April 2021, at page 3.

[291] Mote Limited, Emission Concentration Monitoring, Log Storage yard – emission concentration monitoring programme , 16 February 2021, Revised 28 April 2021, at page 10.

> movements (trucks, trains, cranes), log movement and scraping/cleaning operations. …

[3] The Report identified that wind speeds greater than 5m/s occur less than 0.5% of the time, but they have a significant effect on PM_{10} concentrations as the PM_{10} fraction becomes entrained during moderate wind events. The Report also noted that:[292]

> The final category (No activity evident) indicates that even when there does not appear to be any activities evident in the log storage area, there still appears to be a small increase in ambient PM_{10} concentration during westerly winds. This is assumed to be due to particle entrainment as the wind traverses the area between the wharf and the Port boundary.
>
> Finally, while this assessment has been focussed on the activities associated with one log storage area, the orientation (south to north) of multiple log storage areas mean that south westerly or north westerly winds could also increase boundary concentrations due to the potential accumulated emissions from what amounts to a line source. …

Monitoring of BSM activities

[4] We were not assisted greatly by the Report entitled "Dust Monitoring of Stock Food Unloading – Glencore Agriculture"[293] because no interpretation was provided as to how the results should be applied to the circumstances existing in the MMA. Similarly, we were able to give little weight to the Ecocific Environmental Services Monitoring Report[294] and interpretation of the results by Mr Curtis. Our reasons for this included but were not limited to the use of very short monitoring durations and the way in which the power law function was applied.

[5] International Nutritionals Limited (trading as Agrifeeds) commissioned GHD to undertake monitoring of BSM activities at the Port between 3 March 2021 and 28 February 2022.[295] Monitoring was undertaken at the four main sites M1 to M4 shown on the following figure reproduced from GHD Figure 2.1.

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[292] Mote Limited, Emission Concentration Monitoring, Log Storage yard – emission concentration monitoring programme , 16 February 2021, Revised 28 April 2021, at page 19.

[293] Mr Stacey, EIC, 21 August 2020, Appendix E.

[294] Mr Clemens, EIC, 21 August 2019, Appendix 2.

[295] Port of Tauranga Air Quality Monitoring, GHD Ltd 02 March to 30 November 2021, GHD dated 18 January 2022.

[6] The Report provided to the Court included monitoring results from 2 March to 30 November 2021. It evaluated four exceedances of the PM_{10} Standard recorded during the period 9 December 2020 to July 2021 and concluded two of them were not caused by BSM handling activities and the other two were unlikely to have been caused by such activities.

[7] The average PM_{10} concentration recorded during the monitoring period at the Rail Yard South site was 24.5 $\mu g/m^3$ compared to 13.2 $\mu g/m^3$ at Sulphur Point.

[8] Conclusions reached were that:

> At BOPRC-RYS, the average concentration of PM_{10} reduced by 0.5 $\mu g/m^3$ during periods of stockfood handling when compared with periods where no material handling was occurring. The reduction in concentration is not associated with the activities but is likely a result of the random variability in concentrations throughout the monitoring period. However, the result shows at least that there is no material increase in average PM_{10} concentration at BOPRC-RYS during periods of stockfood handling.
>
> A relatively small increase in average concentration (2.4 $\mu g/m^3$) is observed at BOPRC-RYS during periods where stockfood handling is occurring, and the wind is blowing from Berths 7 and 8 towards this monitoring station. This compares with the small decrease in concentrations observed when wind direction is not taken into consideration. Overall, the contribution of PM_{10} from stockfood handling activities towards measurements at BOPRC-RYS is not considered to be significant.
>
> While the average concentration of PM_{10} measured at BOPRC-RYS, during periods where stockfood was being handled, and winds were blowing from the berths

> towards BOPRC-RYS, was found to be slightly below (2.4 µg/m³) the NESAQ significance criteria, GHD considers it to be inappropriate to conclude that stockfood handling activities at the port comply with the requirements of Regulation 17(1). This is because Regulation 17(1) requires the 2.5 µg/m³ criterion to be complied with "at any time", not just on an average basis. Consequently, given how close the average contribution is to the criterion, there will undoubtedly be periods where 24-hour average contributions from stockfood handling are significantly higher than the average value (i.e. worst-case days), and therefore the activity will be unable to comply with the Regulation.
>
> Nevertheless, the relatively small PM_{10} contribution from stockfood handling, together with the lack of any NESAQ exceedances over the past 12 months relating to this activity, supports the notion that current **stockfood handling activities at the port,** undertaken as per the PoT's bulk cargo handling procedures, are **unlikely to be a significant contributor towards NESAQ exceedance events.**
>
> While the data shows that there are a large proportion of "high PM_{10} hours" occurring during periods where BSM is being handled (including fertiliser, clinker etc.), the majority (65%) of these periods were not aligned with winds blowing from the berths towards the monitors. This strongly indicates that elevated PM_{10} concentrations are caused by truck movements across the dusty paved areas of the Port (i.e., wheel-driven dust-generating fugitive discharges) rather than grab/hopper discharges.
>
> While it could be said that these emissions are related to BSM handling (stockfood and 'other'), the underlying cause of the issue appears to be from dust generated by a variety of sources (most notably log handling), with it being **unlikely that a significant portion of this material is from fugitive emissions associated with the handling of stockfood.**

[9] We note the monitoring shows that other materials defined as BSM can result in greater discharges of PM_{10} than from materials handled by VAA and Swap. This is something that will need to be considered when dust management plans are prepared to demonstrate compliance with the IPAR, at the time a CoC is applied for and at the time of any resource consent applications, but we do not consider it affects our evaluation to any significant extent.

[10] While we have not attempted to analyse the data in any detail, it appears a comparison between PM_{10} concentrations at monitoring sites M4, M2 and/or M3 and Rail Yard South could provide useful information about the rates at which concentrations reduce over distance.

[11] We acknowledge other air quality experts raised issues with some aspects of the methodology used and, having reviewed their concerns and Mr Stacey's responses, we do not consider any differences arising affect our overall evaluation. However,

they may need to be resolved by the Council at an appropriate time.

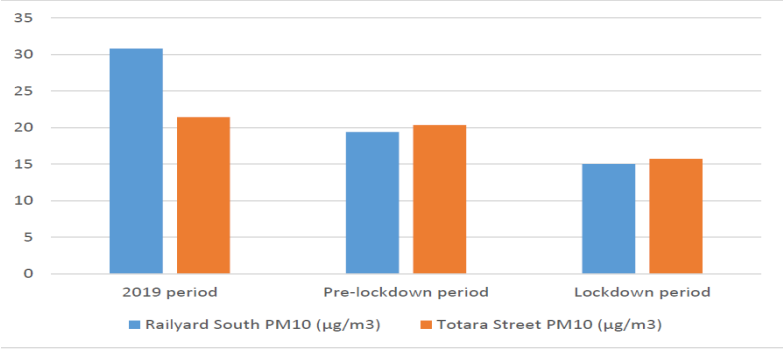
[12] For the purposes of our decision, the report contributed to our understanding of some of the dynamics of the MMA. It was of interest to learn through the exchanges between experts that BSM activities were potentially occurring 83% of the time during the monitoring period or, as Mr Stacey said, "they are almost always occurring."[296] It was not clear previously how extensive the operations are.

Monitoring undertaken by PoTL following the Covid 19 lockdown

[13] PoTL undertook a comparison of particulate emissions, including PM_{10}, at the Rail Yard South and Totara Street monitoring sites during the Covid lockdown (26 March to 28 April 2020), a pre-lockdown period (1 March to 25 March 2020) and the same time period as the lockdown in 2019.[297] It was determined that comparison with the pre-lockdown period was more appropriate for this investigation due to more similar environmental conditions being present in those two periods.

[14] Not all work ceased at the Port during lockdown and many complex variables were at play and had to be considered, meaning the results must be considered cautiously. Nevertheless, we note the following based on our review of the Report, which are potentially relevant to the future management of air quality in the MMA:

(a) The graph below illustrates mean PM_{10} concentrations during the three monitoring periods.



[296] Mr Stacey, EIC, 11 April 2022, at [81].
[297] Assessment of PM_{10} and TSP concentrations measured at air monitoring sites adjacent to Port of Tauranga during the COVID-19 level four lockdown period.

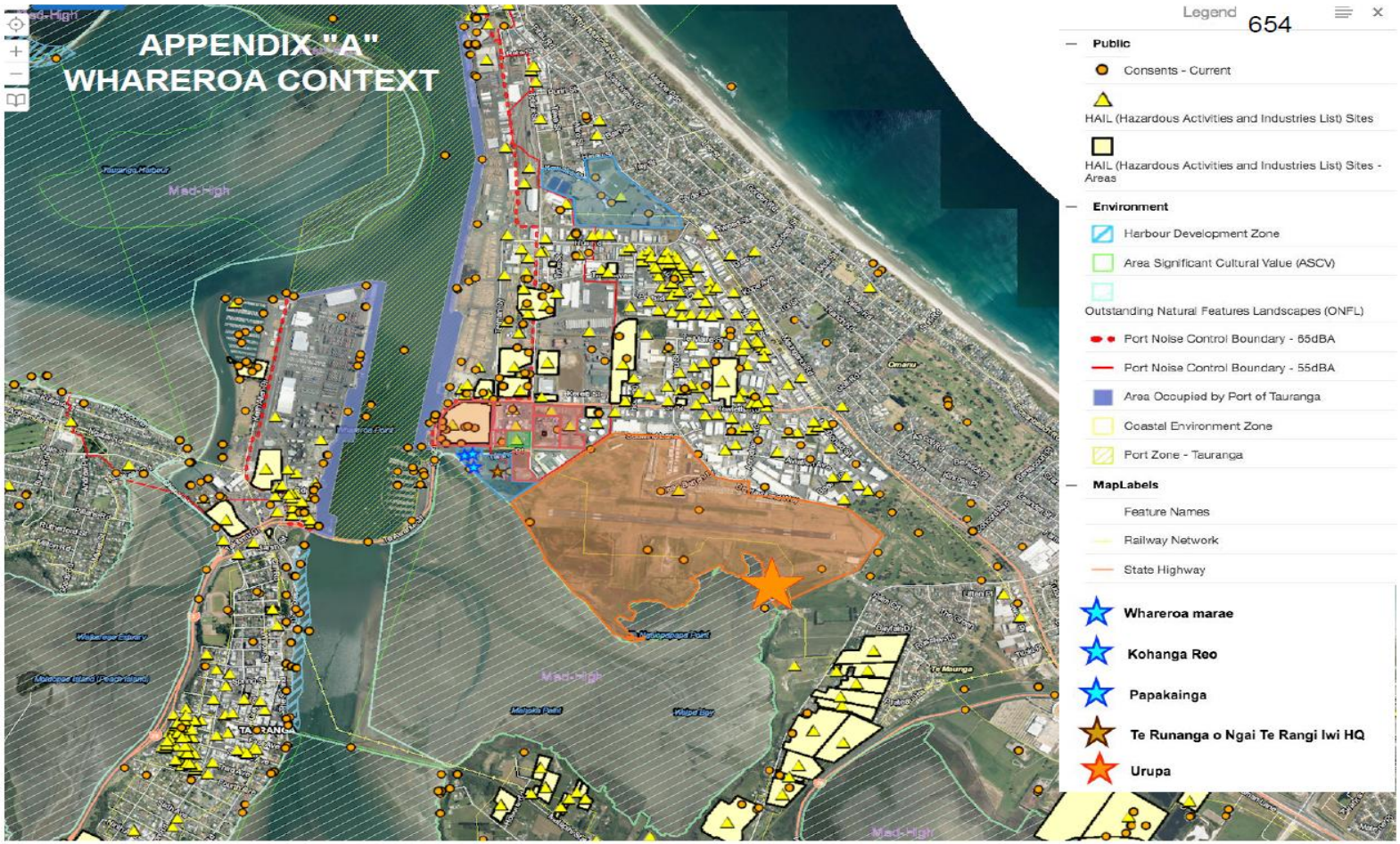
(b) PM_{10} emissions were lower during lockdown, with the graph providing a general indication of the extent to which the Port contributes to elevated PM_{10} concentrations in the MMA.

(c) Decreases are evident in mean PM_{10} concentrations in the pre-lockdown and lockdown periods compared to the 2019 period, with a large decrease evident at the Rail Yard South Site. This is despite environmental conditions in the 2019 period being more favourable for reduced PM_{10} emissions. This could potentially indicate improved site management in the Port area, but longer-term monitoring will be required before firm conclusions can be drawn.

(d) Reductions in mean PM_{10} concentrations were evident at the Rail Yard South and Totara Street monitoring sites over the lockdown period when the Port area was upwind of the monitoring stations when compared to the pre-lockdown period. The reductions were in the order of 22%. Again, longer-term monitoring will be required before firm conclusions can be drawn.

Appendix 5

Map produced in evidence by Ms Bennett



Appendix 6

Interim Permitted Activity Rule (IPAR) for Existing Activities in the MMA

AQ R22A Handling of bulk solid materials and logs within the Mount Maunganui Airshed until [date 3 years from Environment Court decision] – Permitted

Within the **Mount Maunganui Airshed,** unless otherwise permitted by AQ R3, AQ R 21(f) or AQ R26, or managed by AQ R20, the discharge of *contaminants* to air from:

(A) the **handling of logs** on or within a **subject site** where:

(a) the area used for the **handling of logs** exceeds 1 hectare;

OR

(B) the **handling** of **bulk solid materials** on or within a **subject site** where:

(a) The rate of **bulk solid materials handling** exceeds 20 tonnes in any hour and the discharge occurs less than 100 metres from any **sensitive area**, or

(b) The rate of **bulk solid materials handling** exceeds 50 tonnes in any hour,

is a permitted activity until:

(C) [date 3 years from Environment Court decision]; or

(D) a resource consent application for the discharge proposed under Rule AQ R2 or AQ R22B has been accepted by the Regional Council under s 88 of the RMA prior to [date 3 years from Environment Court decision] and a resource consent for the discharge is either:

(a) granted and all appeals are determined; or

(b) declined and all appeals are determined.

Provided that the following standards are complied with:

(1) General standards applying to all discharges of PM_{10}

(a) The discharge of PM_{10} must be the same or similar in character and the same or less in scale and intensity than that occurring on 28 November 2019, as measured in accordance with the following standards; and

(b) The discharge of PM_{10} from the **handling** of logs or **handling** of **bulk solid materials** must be on the same **subject site** as the existing discharge as at 1 October 2020 and must have been occurring on 28 November 2019; and

(c) The discharge must not have been discontinued for a continuous period of more than 6 months since 28 November 2019; and

(d) The discharge does not cause any offensive or objectionable *effect* beyond the boundary of the **subject site;** and

(e) The annual product volumes or tonnages of logs and **bulk solid materials** handled in the product types listed below must be the same or less than in the 12 months ending 28 November 2019; and

(f) The PM_{10} mitigation measures in place on the **subject site** must be no less effective than the most effective mitigation measures in place and operating efficiently at any date prior to or on [the date of issue of the Environment Court decision]; and

In addition to standards (1) (a) to (f), the following standards apply to PM_{10} emissions from log handling activities within the MMA, both inside and outside the Port Industry Area

(g) The locations in which logs are stored and handled must be the same as they were on 28 November 2019 and the area must be the same or

less than the area in which they were stored and handled in the 12 months prior to 28 November 2019; and

(h) The volume or tonnage of logs loaded onto vessels in any month must be the same or less than the maximum volume or tonnage loaded in any month in the 12 months prior to 28 November 2019; and

(i) The average volume or tonnage and average percentage of logs loaded via trailers at the point of vessel loading in any 12-month period must be the same or greater than the corresponding average volume or tonnage and average percentage in the 12 months to 28 November 2019; and

(j) The average volume or tonnage and average percentage of fully debarked logs delivered to site and at the point of loading onto vessels must be the same or greater than the corresponding average volume or tonnage and average percentage in the 12 months to 28 November 2019; and

(k) Measures to control dust, including PM_{10}, and to control the movement of vehicles contributing to the resuspension of dust must be the same or greater than the measures in place in the 12 months to 28 November 2019; and

(l) There must be no change in the number and location of berths used for loading logs onto vessels compared to the 12-month period prior to 28 November 2019.

In addition to standards 1(a) to (f), the following standards apply to PM_{10} emissions from the unloading of bulk solid materials and handling at the Port

(m) The volume or tonnage of **bulk solid materials** unloaded and handled in the above product types from vessels in any month must be the same or less than the maximum volume or tonnage unloaded in any month of the 12 months prior to 28 November 2019; and

(n) The nature and character of **bulk solid materials** handled must be the same or similar to those handled in the 12-month period prior to 28 November 2019, taking into account density, free moisture content, hygroscopic nature and particle size distribution which could result in increased emissions of PM_{10}; and

(o) The number and size of hoppers used for unloading **bulk solid materials** from vessels must be the same or less than those used in the 12-month period to 28 November 2019; and

(p) Dust, including PM_{10}, control measures incorporated in the hoppers used for unloading **bulk solid materials** from vessels must be the same or greater than those incorporated in the 12-month period to 28 November 2019; and

(q) Only slow-release grabs must be used for unloading **bulk solid materials** from ships after 3 March 2022; and

(r) All trucks used for transporting **bulk solid materials** shall be always covered, except when being loaded or unloaded, to avoid the escape of dust during transport as far as reasonably practicable; and

(s) There must be no change in the number and location of berths used for unloading **bulk solid materials** from vessels compared to the 12-month period prior to 28 November 2019.

In addition to standards 1(a) to (f), the following standards apply to PM_{10} emissions from off-wharf bulk solid materials handling or storage facilities, except as provided in (2)

(t) The volume or tonnage of **bulk solid materials** handled or stored on the **subject site** in any month must be the same or less than the maximum volume or tonnage handled or stored in any month in the 12 months prior to 28 November 2019; and

(u) The volume or tonnage of **bulk solid materials** handled or stored outside any building enclosure on the **subject site** in any month must be the same or less than the maximum volume or tonnage handled or stored outside in any month in the 12 months prior to 28 November 2019; and

(v) The nature and character of **bulk solid materials** handled or stored must be the same or similar to those handled or stored in the 12-month period prior to 28 November 2019, taking into account density, free moisture content, hygroscopic nature and particle size distribution which could result in increased emissions of PM_{10}; and

(w) The combined maximum daily truck numbers arriving at and departing from the site must be the same or less than the maximum daily number in the 12-month period to 28 November 2019; and

(x) All trucks used for transporting **bulk solid materials** shall be always covered, except when being loaded or unloaded, to avoid the escape of dust during transport as far as reasonably practicable; and

(y) The maximum processing capacity on the **subject site** must be the same or less than the maximum capacity available in the 12-month period to 28 November 2019; and

(z) Dust containment measures in place on the **subject site** must be the same or greater than those in place in the 12-month period to 28 November 2019, including the extent to which sealing building openings and the installation of dust extraction and filtering equipment are incorporated, as examples.

(2) Circumstances in which standards (t), (w) and (y) may not apply to bulk solid materials handling activities outside the Port Operational Area

Standards (t), (w) and (y) may not apply if it can be demonstrated to the satisfaction of the Regional Council that dust containment measures on the

subject site are sufficient to avoid any adverse effects of PM_{10} emissions from the site on sensitive receivers.

(3) Dust management plan

(a) For discharges associated with activities located outside the **Port Industry Area**, the owner or occupier of the **subject site** where the activity is carried out must engage a **SQEP** who has visited the **subject site** to prepare a dust management plan in accordance with the requirements of AIRSCHED2.

(b) For discharges associated with activities located within the **Port Industry Area**

(i) the **port company** must engage a **SQEP** who has visited the **Port Industry Area** to prepare a dust management plan in accordance with the requirements of AIRSCHED2.

(ii) The discharge is identified and managed by the dust management plan; and

(iii) The dust management plan must specify procedures that must be followed and specify who must carry out those procedures, when **handling bulk solid materials** or **handling** logs within the **Port Industry Area.**

(c) The dust management plan required by (3)(a) or 3(b) must be:

(i) peer reviewed by another **SQEP** prior to submission to the Regional Council; and

(ii) revised to address the peer review comments prior to submission to Regional Council, or where the comments are not addressed to the satisfaction of the peer reviewer, the reasons must be stated; and

(iii) provided to the Regional Council within three months of this rule becoming operative, together with the peer review required by (3)(c)) (i); or for the **Port Industry Area**, provided to the Regional Council and Ngāi te Rangi within six months of this rule becoming operative, together with the peer review required by (3)(c)(i); and

(iv) reviewed by a **SQEP** at least once every calendar year and any updated version of the dust management plan provided to the Regional Council and to Ngāi te Rangi for the **Port Industry Area**, within one month of its review.

(d) The dust management plan required by (3)(a) or 3(b) shall always remain on site, capital works required to minimise PM_{10} emissions must be completed as soon as practicable and the dust management plan must be complied with at all times by all persons undertaking the **bulk solid material**s or log handling activity as soon as practicable following the dust management plan being finalised under (3)(c)(ii), (3)(c)(iv) or (3)(e).

(e) In the event of an exceedance of the trigger level in Part A Clause (7) of AIRSCHED2 and following an investigation as required by Part B Clause (11) of AIRSCHED2, the dust management plan must be amended by a **SQEP** to include actions to avoid or minimise future exceedances of the trigger level and resubmitted to Regional Council, and to Ngāi te Rangi for the **Port Industry Area**, within one month of its amendment.

(f) To demonstrate compliance with standards, the DMP must:

(i) Set out the baseline in the 12-months prior to 28 November 2019 or other compliance date set out above against which compliance with each standard is to be measured; and

(ii) Demonstrate how each standard is or will be met; and

(iii) Describe any additional measures that will be implemented during the term of the IPAR to reduce PM_{10} emissions from the **subject site** to the greatest extent reasonably practicable until the objectives if PC13 are met; and

(iv) Demonstrate that the proposal will minimise PM_{10} emissions to the greatest extent reasonably practicable until the objectives if PC13 are met within the term of the IPAR, or within a defined period thereafter, after describing and evaluating all reasonably practical options that have been implemented or could be implemented to reduce PM_{10} emissions from the subject site, together with their estimated costs and the estimated likely and range of PM_{10} reductions they would achieve.

(g) The DMP must require that records are kept of:

(i) The number and significance of complaints received; and.

(ii) Any exceedances of the PM_{10} Standard attributable to the subject site, abatement notices and enforcement action taken from [the date of the Environment Court decision].

AIRSCHED2 – Dust Management Plans for the Mount Maunganui Airshed

These requirements apply to dust management plans prepared under Rule AQ R22A and can be used as a guide for dust management plans prepared under Rule AQ R22B.

Part A: Contents

A dust management plan must be prepared for each **subject site** and contain:

(1) Title

(2) A purpose to ensure that the discharge of **PM_{10}** into the **Mount Maunganui Airshed** is minimised to the greatest extent reasonably practicable to contribute to meeting the objectives of PC13 without undue delay, to meet the general standards and to be consistent with Policy AQ P3 to achieve improvements in air quality.

(3) A map that includes a scale, a north point, the location of the **subject site**, distance to all **sensitive areas,** including any isolated dwellings within the industrial area and predominant wind directions at the **subject site.**

(4) Process description and method of operation including:

  (a) A detailed description of the subject site, activity, and discharges to air;

  (b) A description of the potential sources of dust emissions;

  (c) Any locational or operating constraints relevant to the management of **handling** of **bulk solid materials** and/or **logs**; and

  (d) the type(s), volume(s) and frequency of handling of **bulk solid materials** or logs at the **subject site.**

(5) Methods of mitigation and standard operating procedures for the **subject site** which must include details of dust emission reduction processes and practices including:

(a) for all activities:

(i) Product movement paths, storage, and processing areas including conveyance systems, and whether these are indoors or outdoors;

(ii) Use of dust suppression (e.g. sprinkler/fog/misting) systems;

(iii) Use of wind speed limits relating to the subject site when operations must cease;

(iv) Vehicle speed limits and vehicle unloading procedures to minimise dust;

(v) Site sweeping/vacuuming and containment protocols including hours of operation and sweeping frequency;

(vi) Inventory of mitigation measures in place on or about 28 November 2019;

(vii) Inventory of current mitigation measures, including equipment, materials and procedures;

(viii) Proposed further mitigation measures, including equipment, materials and procedures

(ix) Frequency of equipment maintenance programmes; and

(x) Contingency procedures.

(b) for **bulk solid materials** only:

(i) Exclusion or buffer areas within the subject site where no outdoor storage is permitted;

(ii) Use of covers or containment systems for outdoor storage areas;

(iii) For enclosed operations, emission pathways and general containment provisions , the extent of air extraction and treatment systems installed and their performance specifications; and

(iv) Materials spill management response protocols

(6) A monitoring programme which shall:

(a) Be designed by a **SQEP** to monitor ambient **PM_{10}** concentrations in accordance with relevant good practice;

(b) Include a description of types and locations of devices for **PM_{10}** and meteorological conditions monitoring;

(c) Provide data that allows for a technically robust comparison with the trigger values in Part A clause (7);

(d) Be continuous monitoring with a minimum of ten-minute resolution;

(e) Be telemetered with alarms;

(f) Be installed, commissioned, operated, serviced, and maintained in accordance with the manufacturer's instructions and any appropriate standards;

(g) Have as a minimum one monitor funded by the owner or occupier of the subject site;

(h) Produce validated data in accordance with the Good Practice Guide for Air Quality Monitoring and Data Management, including the valid data requirements of 75% for averaging and 95% for data capture;

(i) Specify monitors compliant with either NESAQ Schedule 2 or equivalency as demonstrated through AS 3580.9.17-2018 or EN 12341:2014;

(j) Require that all monitoring data collected must be provided to the Regional Council as follows:

(i) Raw monthly data to be provided via electronic access to the Regional Council by the 5th day of the following month;

(ii) Validated quarterly data to be provided via electronic access to the Regional Council on 1 February, 1 May, 1 August, and 1 November of every year; and

(iii) Any exceedance of the trigger values set out in Part A clause (7) must be notified to the Regional Council in writing within 5 working days of the exceedance.

(k) Requires records to be kept, including documentation of maintenance and control parameters.

(7) The following **PM_{10}** trigger values for use in Part B and IPAR standard (3)(e):

(a) 150 micrograms per cubic metre (calculated as a rolling 1-hour average concentration under Schedule 1 NESAQ) recorded by the monitoring devices in the monitoring programme set out in clause 6;

OR

(b) 65 micrograms per cubic metre (calculated as a rolling 12-hour average concentration under Schedule 1 NESAQ) recorded by the monitoring devices in the monitoring programme set out in clause 6.

(8) Complaints procedures must include:

(a) The name of the contact person and contact details for complaints from the community;

(b) Complaints procedures for staff;

(c) Maintenance of a complaints/incidents register that includes any actions undertaken to respond to the complaint, including further dust control measures;

(d) A complaint response protocol, including methods for recording of any on-site activity, including type and approximate volume of material being handled, dust mitigation measures in place at the time, and wind conditions at the time of complaint; and procedures for investigating and remedying the cause of complaint and providing response to complainant;

(e) A protocol for determining further mitigation measures that may be required on site;

(f) Timeframes for communication to the Regional Council and complainant; and

(g) Reporting requirements that include the complaints/incidents register which must be submitted to the Regional Council at least once per calendar year.

(9) Staff training procedures must include:

(a) Components of the dust management plan that staff are to be trained in;

(b) Methods used to train staff;

(c) Frequency of staff training; and

(d) How and where staff training records are to be kept.

(10) System review and reporting procedures must include:

(a) The process for reviewing the overall dust management system performance;

(b) Types and frequency of reports not otherwise provided to the Regional Council such as site/process/equipment upgrades; and

(c) External audits and ISO certification (optional).

Part B: Investigation and Reporting

(a) In the event that either of the trigger values set out in Part A Clause (7) are exceeded, then an investigation shall be undertaken as soon as reasonably practicable by, or under the direction of, a **SQEP** to:

(i) Determine the cause of and reasons for the trigger value being exceeded;

(ii) Identify corrective actions required to minimise the potential for the trigger value being exceeded in the future; and

(iii) Set out the timeframes for implementation of the identified corrective actions;

(b) The investigation results and findings shall be documented by the **SQEP** in an Investigation Report;

(c) The Investigation Report in (b) shall be provided to the Regional Council within two months of the trigger value being exceeded;

(d) The owner of the **subject site** and/or the parties responsible for the activity/operation that caused the exceedance of the trigger values must implement the corrective actions within the timeframes identified by the **SQEP** in the Investigation Report and shall provide written confirmation to the Regional Council within 5 working days of completion of the actions.

(e) An annual report prepared by a **SQEP** must be provided to the Regional Council and to Ngāi te Rangi for the **Port Industry Area**, on 30 June of every year containing the following:

(i) A summary of the year's monitoring data;

(ii) Details of investigations into all exceedances of the trigger value;

(iii) Steps taken to implement corrective actions;

(iv) Ongoing actions to reduce discharges of contaminants from the site; and

(v) Changes/modifications to the air quality monitoring programme; and

(f) For the **Port Industry Area,** the port company must hold and shall invite Ngāi te Rangi and operators identified within the dust management plan to an annual meeting with Ngāi te Rangi to share the results of the annual report required by (e).

Explanatory note 1

For the purposes of Part A (4)(d) as it applies to the type(s), volume(s) and frequency of handling of logs:

- Types refers to barked or debarked; and
- Volume and frequency refers to monthly export throughput.

Explanatory note 2

Examples of process improvements include: targets for debarking logs; and targets for improvement in technology (e.g. improved hopper design) and methodology (e.g. trailer-style loading in preference to bunk loading).

Explanatory note 3

For Standard Operating Procedures, not all elements apply to log handling.

AIRSCHED3: Definitions of Port of Tauranga and De Havilland Way subject sites

(A) Port of Tauranga

The proposed boundary of the **subject site** for the purposes of Rule AQ R22A and Rule AQ R22B as applies to the Port of Tauranga (**PoTL**) is shown as the **Port Industry Area** (the red polygon in Figure 1.) which forms one **subject site.**

The rationale for the location of the proposed boundary is that effects on air quality, namely discharge of particulate to air, occurring in this area as a result of numerous bulk solids material handling and log handling activities would not be readily differentiated from one another, and therefore should be managed as a single subject site not numerous sites.

There are some complexities and nuances with the ownership and control of certain areas encompassed with the red polygon; these are outlined below for reference and understanding.

The majority of the area encompassed within the red polygon has been left unshaded and this is the area in which PoTL is the landowner (or in some instances lessee who, in some instances, sub leases land to other parties). In the unshaded areas, PoTL allows parties to handle bulk solid materials and/or logs so long as these activities are undertaken in compliance with the PoTL's Bulk Cargo Handling Procedures and the Log Handling Procedures.

The areas identified in orange are sites which, for the most part, are not operated or overseen by PoTL. PoTL does not regulate the handling of bulk solids materials or logs with its procedures in these areas and does not currently maintain any operational control of activities. These areas are further detailed below.

(1) Z Block operated by ISO

Whilst this site is within the port customs-controlled area, it is owned by Quay Holdings Limited and is leased to ISO limited. The site is utilised for the storage of plant owned by ISO and has been used in the past as a log storage area. PoTL does not currently regulate activities in this area. Bulk materials and/or logs could be

stored here in the future. Effects on air quality from log handling at this site would be unlikely to be readily differentiated from air quality effects in the remainder of the custom-controlled area of the port.

(2) Swap Stockfoods Limited storage shed

This facility is outside of the port customs-controlled area and is owned by Portside Properties Limited and operated by Swaps Stockfood Limited. This facility is utilised for bulk solids material storage, namely, stock food storage. PoTL has no operational control of this area and the operations in this area are not regulated by port procedures; however, effects on air quality from bulk solids material handling occurring at this site may not be readily able to be differentiated from air quality effects associated with the greater port operations.

(3) Coal handling site operated by C3 for Genesis Energy

A purpose-built enclosed coal handling facility is operated on the KiwiRail site. This facility is located on land which is owned by KiwiRail and leased to PoTL. PoTL then leases both the land and the facility to Genesis Energy who contract C3 to operate the site. The handling of coal is undertaken within the greater KiwiRail operational area. PoTL has no operational control of this site and the operations in this area are not regulated by port procedures; however, effects on air quality from bulk solids material handling occurring at this site may not be readily able to be differentiated from air quality effects associated to the greater port operations.

(4) Champion grain shed operated by Swap Stockfoods

This facility is outside of the port customs-controlled area, the land is owned by PoTL and leased to Champion Flour. The storage facility is owned by Champion Flour and is used to store Champion Flour's product. Operations undertaken in this facility are undertaken by Swaps Stockfood Limited. PoTL has no operational control of this site and the operations in this area are not regulated by port procedures; however, effects on air quality from bulk solids material handling occurring at this site may not be readily able to be differentiated from air quality effects associated to the greater port operations.

Figure 1: Aerial image showing the extent of the Port of Tauranga "subject site" for the purpose of the PC13 rules

(B) 101 Aerodrome Road

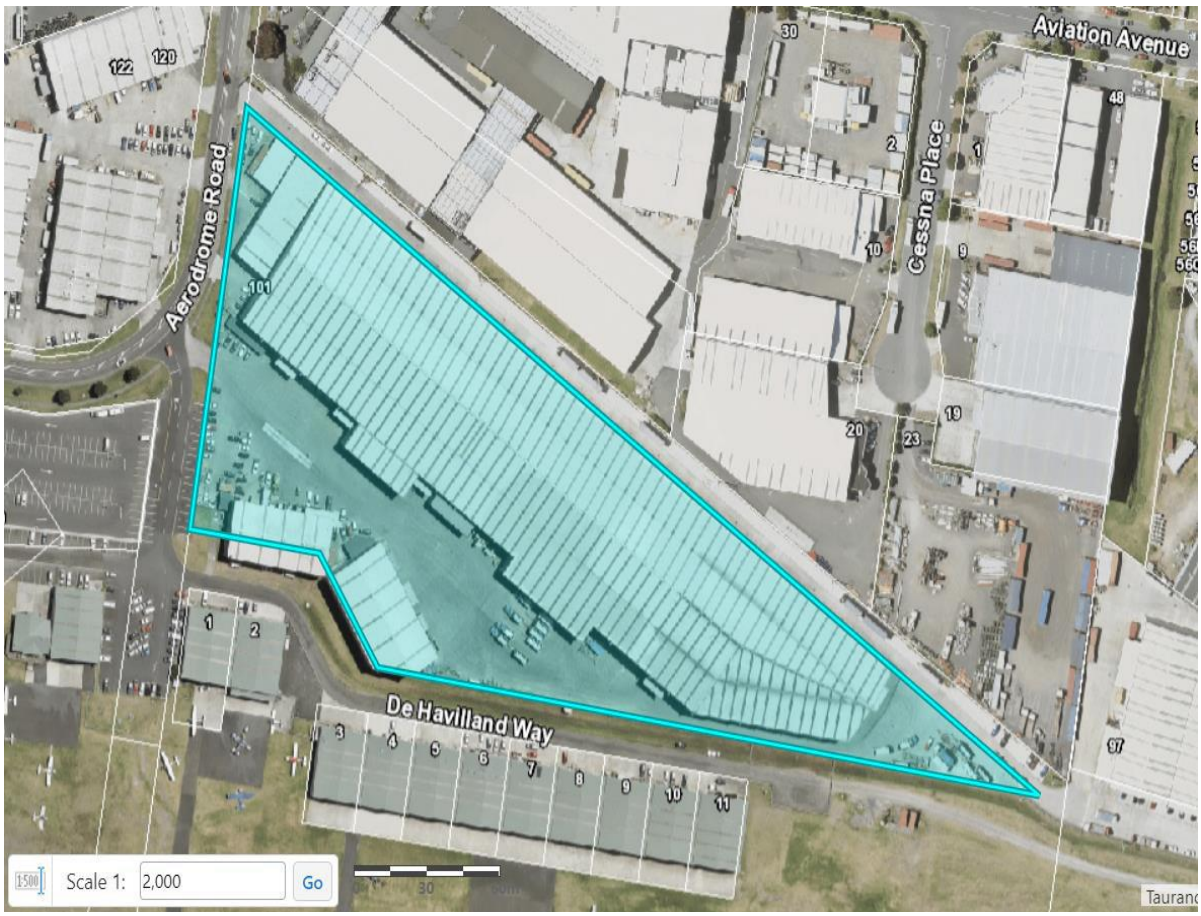
The subject site shall be the leasehold area of 3.1417 hectares as defined as Lot 1 DP 403092 and described in Record of Title 410120. The Record of Title shows the owner of the lease as MM Group 3 Limited with the lease extending to 30 April 2049 and there is a fencing covenant relating to the lease. Refer to Figure 2 and Figure 3.

The leasehold area is part of a larger site of 54.4858 hectares owned by Tauranga City Council (Whareroa 2A2B1 Block) as described in Record of Title SA2B/115. That land extends from 101 Aerodrome Road (this being the leasehold area), across De Havilland Way (not legal road reserve), to the 11 hangars that are shown in Figure 2, and part of the runway of Tauranga Airport, and the southern boundary being the Tauranga Harbour.

Within 101 Aerodrome Road there are several warehouse buildings that may be occupied by different tenants and supporting a range of activities within the site. In the past the site has often had a mix of activities, including handling of different bulk solid materials and different operators. Since this is a large site with a mix of separate activities within it, it is appropriately considered as a subject site in the same way as the Port of Tauranga and managed through a single Dust Management Plan.

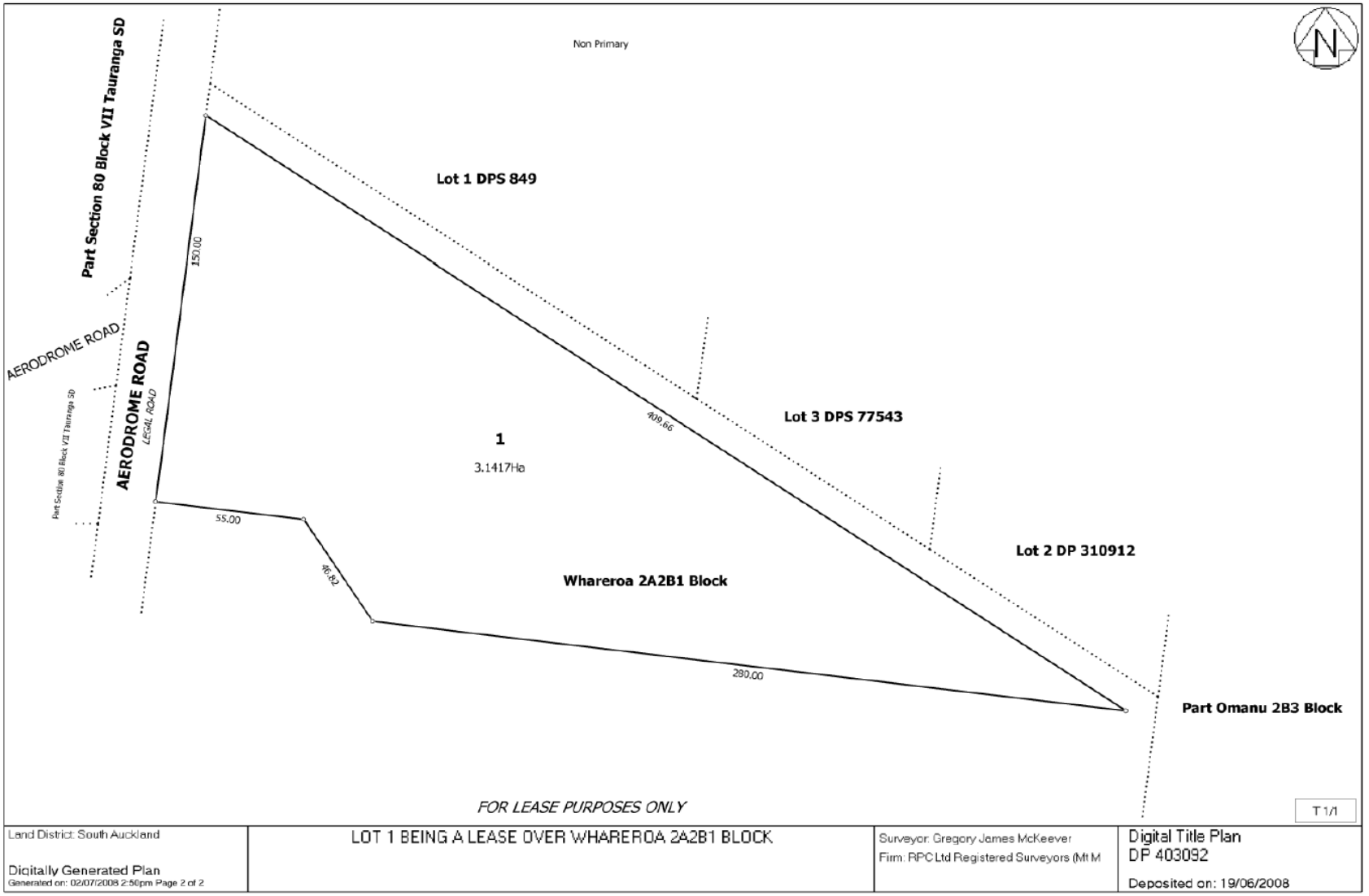
The leasehold area is a legally defined area that is certain, and that this is the fenced area for all activities within 101 Aerodrome Road. It is acknowledged that that the concrete walls of the buildings in the south-west corner of the subject site form the boundary at that location without the need for a physical fence since there are no openings (windows, or doors) along these walls.

Figure 2: Aerial image showing cadastral boundary of 101 Aerodrome Road Lease Area



Source: MAPI- Tauranga City Council

Figure 3: Lease Plan



Source: Record of Title 410120, Land Record Search (linz.govt.nz)