Before the Environment Court
I Mua I Te Kooti Taiao o Aotearoa

ENV 2023 AKL 160

Under	the Resource Management Act 1991 (RMA)
In the matter	of applications for resource consents by Allied Asphalt Limited associated with the construction and operation of an asphalt plant (direct referral)
Between	Allied Asphalt Limited
	Applicant
And	Bay of Plenty Regional Council and Tauranga City Council
	Consent Authorities

Closing Submissions for Ngāti Kuku Hapū and Trustees of Whareroa Marae

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May it please the Court

1 It has long been recognized as difficult to resolve a cumulative effects issue on an individual proposal and resource consent basis. This is particularly the case where there are uncertainties relating to actual and potential impacts on sensitive receptors, such as the additive PM2.5 and PM10 effects of a proposal on the mauri of air, and the s6(e) RMA relationships of tangata whenua with their ancestral whenua, and their taonga (ability to exercise cultural practices at Whareroa Marae, the Whareroa kohunga reo, and the kaumatua and hapū that live on-site at Whareroa on their ancestral land). The duty of active protection under s8 RMA is itself engaged.[1]

2 These submissions adopt without repeating matters covered in opening. The relevant issues, include:

- Mauri of Air and Part 2 RMA
- Adverse cultural effects and information gaps
- Requirements of BPO
- Consideration of alternative locations
- Revised consent conditions
- Relief

3 For reasons set out in opening submissions, and the tangata whenua evidence given at Whareroa Marae, it is submitted that:

(a) The planning framework confirms that it is for tangata whenua to identify the nature and extent of adverse effects of the proposal on their s6(e) relationships and values, subject to that evidence being relevant and probative. This is the 'rule of reason' approach, discussed in opening, and endorsed by Whata J in *Ngāti Maru*.[2]

[1] References to Part 2 and s6(e) RMA is intended to include reference to the corresponding RPS provisions, noting that the s293 RMA planning process remains subject to completion.
[2] *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whai Maia Ltd* [2020] NZHC 2768 at [64], [116]-[117]

(b) The tangata whenua evidence confirms that the air quality effects are significant in context of cumulative and intergenerational health and wellbeing issues. Health and wellbeing (in particular, as viewed under Ngāti Kuku tikanga), are core s5 RMA factors.

(c) The renewal consent for the existing plant should be granted on a time-limited basis, based on the Applicant's latest consent conditions framework, of up to 5 years (albeit noting the Applicant's consent conditions look to an 18-month to 2 year time-frame, reliant on approval of the new plant). This allows 'run-out' time for the Applicant to locate an alternative site.

(d) Although the new plant is more efficient and creates less PM10 emissions than the existing plant, this is an irrelevant consideration, and there is no consented baseline set by the existing plant. It is implausible (and error of law) to attribute a positive effect to a proposal, where it is simply meeting a legal obligation under the statutory and planning framework (the BPO). The existing plant would not be granted consent to a longer duration than a run-out period, as it cannot meet the BPO without substantial investment.

(e) Consent should be refused for the new plant, which does not recognize and provide for the relevant s6(e) RMA relationships, including the related aspiration of tangata whenua for managed retreat of industrial emitters from the Mt Manganui airshed, and their ancestral whenua.

(f) If consent is not refused for the new plant, then for Ngāti Kuku / Whareroa Marae (as a first preference), the duration for the new plant should be time-limited to 5

years, which is the minimum default period identified by s123(d) RMA. As a second (and reluctant) preference, tangata whenua would otherwise support the position recommended by Toi te Ora, which involves a 10-year maximum term, together with amended consent conditions (which includes production caps, or their emissions equivalent).

(g) Putting to one side duration, Ngāti Kuku and Whareroa Marae seek additional consent conditions to address the relevant cultural effects.

(h) It is appropriate to limit the duration of a consent, where there are uncertainties or cumulative effects that require management by this proposal in combination with other existing emitters. This can be contrasted with *Ngāti Rangi* (CA) (a perceived lack of evidence did not provide a basis for making a decision to reduce the duration of consent in a manner which did not meet the RMA's sustainable purpose). By contrast, the question of duration has been one of the central issues in this appeal. There is no perceived lack of evidence and no (unlawful) requirement for a 'meeting of minds' approach.[3]

(i) There is an acknowledged gap in the planning framework, being addressed through the s293 RMA process. This framework is intended to proactively manage cumulative emissions to a greater extent than the current regional planning framework. In *Royal Forest & Bird v Waikato RC* [2007] NZRMA 439 (EC), the possibility that a relevant planning instrument could be in place sooner than the 20-year term granted by Council, and that exercise of that

[3] Discussed in *Ngāti Rangi Trust v Genesis Power Ltd* [2009] NZRMA 312 (CA)

consent could hinder the effectiveness of that instrument, influenced the Court to reduce the term to 12 years.

(k) Board room considerations as to viability and profit are not relevant RMA considerations. This has been settled law since at least Greig J's decision in *NZ Rail* [4] (and this part of that decision was not disturbed by the Supreme Court decision in *King Salmon*).[5] This is despite the Applicant's attempt to include viability as part of the consent conditions framework, including in their calculations of maximum annual output.

(j) Allied appears to be one of the 'first movers' for renewal. If the Court decides to grant a term longer than 5-10 years, then it is should submitted that the Court should expressly identify that this is a response to the merits of this proposal, to avoid creating expectations of like treatment for other industry applicants: see for example the discussion in *Woolley v Marlborough DC* [2014] NZEnvC204. The Applicant's planner was not willing to engage with the proposition that a common expiry term for related proposals in the Mt Manganui airshed has public interest and benefits.[6]

Mauri of Air and Part 2 RMA

4 There is no direct definition of the "mauri of air" in the RMA or the planning framework. "Mauri" is of course a tikanga-based and holistic concept. It is not linear. It must therefore take definition from context, particularly of the relevant tikanga, based on the relevant probative mātauranga (or evidence) of Ngāti Kuku hapū.

[4] *NZ Rail Ltd v Marlborough DC* [1994] NZRMA 70 (HC)
[5] *EDS v The NZ King Salmon Co Ltd* [2014] NZSC 38 at [166]-[176] (in relation to plan change framework)
[6] NOE at p448-449

5 The RPS uses the concept but does not purport to provide a comprehensive definition. The Mt Manganui airshed is an area of natural and physical resources that overlaps with the Whareroa Land Block, which has been confiscated from Ngāti Kuku over time, including through Raupatu and Public Works Act processes.

6 "Mauri" has both physical and spiritual components, because it relates to the health and wellbeing of tangata whenua. Improving the quality of air is a necessary but not sufficient component. The RPS anticipates that there needs to be better interpretation by decision-makers, as well as technical experts, of the effects of proposals on mauri; and that the mauri of air is safeguarded.[7] This does not include ignoring or disregarding those effects.

7 There are a range of directive policies that relative to recognizing and providing for the s6(e) RMA relationships of tangata whenua.[8] This policy signal must be addressed, through the resource consent process, including by active protection of the Ngāti Kuku relationship with their airshed, and the mauri of that air.

8 As stated by both tangata whenua witnesses, these increasing pressures of development on the health carrying capacity of the turangawaewae of tangata whenua forces them to look elsewhere to live, effectively imposing a requirement on them to translocate away from the places that connect them to their whenua and indeed their pasts.

9 There is no legal basis to apply a consented baseline to the existing (expired) air discharge consent, when considering the new plant, or to identify positive effects from approval of the new plant, vis-à-vis the existing plant. It is a false comparison. Both the existing and new plant consents must be considered on their

[7] NOE (Batchelor xxm) at p438
[8] NOE (Batchelor xxm) at p439-441

own terms. Regulation 17(2) of the NES-AQ only applies to the renewal of the existing plant air discharge consent.

10 For health and the mauri of air to be protected in the Airshed, air quality needs to improve. This requires any adverse increases to be avoided, regardless of how small they are assessed to be on an individual contribution basis.

11 For Ngāti Kuku, and Whareroa Marae, this is best managed through a managed retreat framework for industry emitters that are causing adverse impacts on the mauri of air, and preventing Ngāti Kuku from being able to undertake customary and contemporary practices on their Marae, and at their kohanga, without suffering headaches, asthma, or other illness caused by bad air. In *Manawatu DC v Manawatu DC* [2016] NZEnvC53, the Environment Court relevantly had regard to effects on mauri (as well as other considerations) in deciding that a limited term of 10 years was appropriate.

12 Ngāti Kuku hapū and Whareroa Marae have exercised te tino rangatiratanga on their whenua prior to establishment of Whareroa Marae in 1873. Their whakapapa to the whenua, and their exercise of ahi kā within their rohe, which includes the Mt Manganui Airshed, is unquestioned.

13 Section 5 RMA refers to safeguarding the life-supporting capacity of air, and the airshed exceeds World Health guidelines for PM10 as well as PM2.5. Importantly, Te Tiriti o Waitangi anticipates the active protection of the taonga of Ngāti Kuku, and this is reflected in the planning framework. While active protection is frequently raised in RMA cases for land and water, it equally applies to air.

Alternatives

14 Council in opening submissions appears to accept that the BPO assessment enables consideration of alternative locations:

> "[37] The BPO concept contemplates an assessment of alternative options, including alternative locations, as does the assessment under s105(1)(c).."

15 It is submitted this analysis is correct, and the reference to "methods" in the s2 RMA definition of BPO does not preclude consideration of alternative sites. The Applicant's evidence on site-selection was superficial and inadequate, and there is a strong suggestion in the evidence that consideration of other sites was symbolic rather than substantive, because the Applicant always intended to stay with their existing site.

16 In Mr Palmer's own words, Allied made up its mind 'some years ago' about the site, if not the technology and plant. His candid answer reinforces that no genuine consideration was given to going elsewhere, to avoid the adverse cultural effects:

> A. At this moment in time, no. We've made a reasoned application and a reasoned decision to make the application for the site that we're currently on.
> Q. Wouldn't that suggest that Allied has made up its mind in terms of location?
> A. I think from Allied's point of view, we had to make up our minds some years ago. When we started the application process, we had to start – back in 2019 with the original application. (NOE at page 96) [9]

17 The subsequent focus (particularly in evidence) was to a large extent on the pros and cons of transport factors, with the subject site ranking 2nd on a gravity assessment, and 1st following a sensitivity adjustment. The latter adjustment was to some extent arbitrary, as agreed by Ms Makinson, and based on Smart Growth predictions that were outside her expertise[10]).

18 The alternative site assessment did not assess whether there were practicable alternative sites that would better avoid, remedy

[9] This impression was reinforced in subsequent answers by Mr Palmer about the site (as distinct from the emissions technology and plant). See NOE at pp99-100 in relation to the site
[10] Ms Makinson evidence, NOE at pp223-225

and mitigate the significant adverse cultural effects caused by the subject site.

19 Mr Batchelor in evidence suggested that cultural effects were an underlying driver for the assessment of alternative sites. But he essentially accepted the pros and cons of the cultural effects of alternative sites were not considered at all, and did not form part of the assessment criteria. This is consistent with Mr Batchelor's admission that Ngāti Kuku and Whareroa Marae were not involved in the site assessment process; and consistent with Messrs Palmer and Eastham, who accepted they did not meet with Ngāti Kuku and Whareroa Marae until relatively late in the process.[11]

20 It is submitted that the Applicant has not met the BPO because it has failed to adequately assess alternative sites, given the presence of s6(e) factors, the identified significant s6(e) effects, and the wider expectation of the planning framework to consider alternatives where relevant to cultural effects: see for example, the discussion in *King Salmon (ibid)* and T*ranspower*.[12]

21 At [38] of Council's legal submissions, it was submitted that the Court should be wary of balancing trade-offs between benefits to the airshed (in terms of production caps), and benefits to 'industry', in terms of this proposal:

> "[38] While some of the experts have expressed views as to whether the proposed production cap for the new plant should be reduced further, to allow more "benefits" to be apportioned to the airshed rather than to "industry", it is submitted that the weighing of benefits in this way risks stepping outside of the role of a consent authority and into the role of a planning authority."

22 In response, it is submitted that the assessment of trade-offs is inherent to the s104 RMA assessment. Any decision to grant

[11] NOE at pp452-453; and see transcript for Messrs Palmer, Garton, and Eastham

[12] *Tauranga Environmental Protection Society Inc v Tauranga City Council & Ors* [2021] NZHC 1201 (**the Transpower decision**).

approval has a potential impact on the cumulative health of the Mt Manganui airshed, as part of the receiving environment.

Proposed consent conditions

23 If the Court decides to grant consent, then an interim decision is sought, to enable review of the proposed cultural conditions framework which has been proposed without the active participation of Ngāti Kuku and Whareroa Marae; the conditions do not adequately recognize and provide for (and do not actively protect) their rangatiratanga, kaitiakitanga and tikanga.

24 Allied has adopted a template approach to consent conditions from an unrelated site in Hamilton with a different planning framework. Allied corporate witnesses properly acknowledged difficulties with the engagement and consultation process (including resourcing) during cross examination.

25 It is submitted that the consent conditions framework as it relates to cultural effects is inadequate, following on as it did from an inadequate and poorly informed engagement/consultation process. The consent conditions framework is however fundamental to assessing the presence/absence of cultural effects and therefore consentability.

26 It is not appropriate to place material weight on the approach taken to duration in the *Marina* decision, given that involved a controlled status activity, the Court was unable to address the customary marine title aspirations of the hapū in respect of duration (because no final determination on title was available under the Takutai Moana legislation), the Court was unable to decline consent, and the different (more limited) planning considerations: *Ngāti Kuku Hapū v Bay of Plenty RC* [2023] NZEnvC163.

27 In summary, Ngāti Kuku hapū and Whareroa Marae seek that a limited duration is granted for the existing plant (effectively, a run-out consent, albeit that conditions must be imposed to mitigate the short-term effects while this consent continues); and that the new plant consent is declined.

28 If the Court decides to grant consent to the new plant, then an interim decision is requested, with a consent being granted on the basis of a 5 year or 10 year duration, including production caps recommended by Mx Wickhan, and other general drafting improvements as recommended by Mr Scott and Toi te Ora.

29 In summary, Ngāti Kuku hapū and Whareroa Marae:

(a) Support the additional amendments to consent conditions proposed by Toi te Ora in closing submissions (albeit noting the preference for a shorter duration 5-year consent for the new plant);

(b) Support the wider analysis of Toi te Ora in relation to general cumulative effects;

(c) Submit that proposed condition 10 of the Air Discharge consent (New Plant) has been refined, but remains problematic.[13] It is arguable whether Council's certification role should extend to enabling an additional 100,000 tonnes production on the basis of the criteria, which invite qualitative assessment. The extra capacity has not been justified, other than on the growth projections prepared by the Applicant (which were predicated on assumptions). Any future assessment of the consented envelope for this

[13] The annual asphalt production volume may be increased to up to 300,000 tonnes in any calendar year where the consent holder provides information to the Bay of Plenty Regional Council demonstrating that an increase in volume is necessary to supply asphalt for the purposes specified in Condition 11 and this increase is certified by the Bay of Plenty Regional Council as being in accordance with the parameters set in Conditions 11(a) and/or (b).

consent (as part of the receiving environment) will need to factor in the potential increased production capacity.

(d) There is no consented baseline for the new plant, in relation to discharges to air. It is not '..a new consent for the same activity..' in terms of s124(1)(a) RMA. Air discharges from the existing plant are not part of a consented baseline.

(e) Granting approval to the new proposed plant does not improve the mauri of air. It enables an additive effect to a cumulative adverse problem, the 'death by 1000 cuts' referenced by tangata whenua evidence. A decline of consent or materially reduced duration are sought as the primary relief.

(f) References in s5 RMA, and the planning framework, to the "life-supporting capacity of air" must be viewed from a mātauranga Māori as well as western science lens. This includes the wider conception of health and wellbeing identified by Joel Ngatuere and Awhina Ngatuere in their evidence. Terms and conditions of consent (including duration) must serve the purpose of the Act.

(g) The proposal is inconsistent with those parts of the planning framework which require recognition and provision for the s6(e) relationships of Ngāti Kuku and Whareroa Marae with their whenua and taonga, including their relationship with air.

Dated this 13th June 2024

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