IN THE ENVIRONMENT COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI TAIAO O AOTEAROA
TĀMAKI MAKAURAU ROHE

ENV-2023-AKL-000160

IN THE MATTER	of an application for direct referral under s87G of the Resource Management Act 1991 (RMA)
BETWEEN	**ALLIED ASPHALT LIMITED**
	Applicant
AND	**TAURANGA CITY COUNCIL AND BAY OF PLENTY REGIONAL COUNCIL**
	Consenting Authorities
AND	**VARIOUS SECTION 274 PARTIES**

CLOSING LEGAL SUBMISSIONS OF COUNSEL ON BEHALF OF CLEAR THE AIR

12 June 2024

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MAY IT PLEASE THE COURT

Introduction

1 Clear the Air outlined four submissions in its opening submissions, those were:

(a) **Submission 1:** The 35-year consent for a new plant should be declined for the following reasons:

(i) The application has not been correctly assessed as a new discharge activity. If the correct approach is applied (comparing the effects of the new plant against the airshed without the existing plant in it), then it is clear that the effects would be significant within the Mount Maunganui Airshed (**MMA**); and/or

(ii) The assessment of alternative locations is substandard for a resource consent in the circumstances of this case; and/or

(iii) The consent term of 35-years is too lengthy for a polluted airshed;

(b) **Submission 2:** Alternatively, if consent for the new plant is to be granted, it should be:

(i) On a 10-year consent term; and

(ii) Have an asphalt production limit of 95,000 tonnes.

(c) **Submission 3:** The two-year consent as it is proposed should be declined for the following reasons:

(i) The 'consent envelope' applied to the National Environmental Standards for Air Quality Regulations 2004 (**NES-AQ**) is based on the average physical output of its current consent, not the amount Allied Asphalt can output 'up to' and therefore, this consent application does not pass the 'gateway'.

(d) **Submission 4:** Alternatively, if the Court does find that the two-year consent meets the 'gateway', the existing consent should have mitigation conditions imposed, which are generally in accordance with (but not limited to) the *Higgins* conditions.

2 These closing submissions follow the same format and comment to each of the four submissions.

Submission 1 – application for the new plant should be declined

Assessment against the existing and new plant

3 The opening submissions are adopted for this first legal argument.[1] Regulation 17 allows an offsetting analysis to the 'gateway' test for PM_{10}. However, when considering the substantive application, the offsetting approach is not provided for for other contaminants or effects. Therefore, the application has failed to treat the discharge application as a new application.

Assessment of alternatives

4 During the hearing, questions regarding s105 were raised by the Court. As the resource consent application relates to discharges, section 105 of the RMA is relevant: "*… have regard to ... any possible alternative method of discharge, including discharge into any other environment*". Schedule 4, clause 6(1)(a) and (d) of the RMA goes further and includes possible alternative locations and a description of the sensitivity of the receiving environment to adverse effects (which is also included in the definition of Best Practicable Option).[2] Section 104(1)(c) of the RMA also enables the consent authority to have regard to any other matter it considers relevant and reasonably necessary to determine the application.

5 It is submitted, in this situation, because the application relates to a polluted airshed, greater regard (i.e., weight) should be given to the assessment of alternatives.

6 It is submitted that the Applicant has:

(a) failed in its obligation in considering alternative locations; and/or

(b) incorrectly weighted its advantages and disadvantages; and/or

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[1] Note a slight amendment to the quotation from the consenting authorities where s104(1)(4) was referenced at paragraph 11 of Clear the Air's opening submissions and it should be s104(1)(b).

[2] RMA, s105(1)(c) *If an application is for a discharge permit or coastal permit to do something that would contravene section 15 or section 15B, the consent authority must, in addition to the matters in section 104(1), have regard to— any possible alternative methods of discharge, including discharge into any other receiving environment.* Also see Schedule 4, clause 6(1)(a) and (d) of the RMA. Section 2 of the RMA, definition of BPO: *best practicable option, in relation to a discharge of a contaminant or an emission of noise, means 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

(c) not considered discharging into another environment (another airshed), where there is not currently a significant risk to human health.

7 The Applicant is in a different position than the Port. The Port cannot move. The Applicant does not have a functional link or need to be permanently located in its current location. The Applicant has a choice.

Significant adverse effect

8 Schedule 4, clause 6(1)(a) of the RMA also addresses alternatives if the activity will result in any significant adverse effect. That section requires a description of any possible alternative locations or methods for undertaking the activity.[3] The adverse effect of any activity that discharges any PM_{10} (and other pollutants) into a polluted airshed contributes cumulatively to the significant adverse effect of premature death. Therefore, Schedule 4, clause 6(1)(a) is also a consideration for the alternatives assessment in this case.

Ability to require an Assessment of Alternatives

Section 104(1)(c) and Schedule 4, clause 2(3)(c)

9 A consent authority may, in accordance with section 88(3), find that an applicant's assessment of effects is insufficient and return the application as incomplete. Furthermore, in accordance with section 92(1), a consent authority can request further information relating to alternatives in the event that it determines that the proposal will have a *significant adverse effect.*

10 In *Lakes District Rural Landowners Soc Inc*, the Environment Court indicated that in some situations where important resource management issues are raised, the consent authority should look at alternatives irrespective of whether they are within the capacity of the applicant to arrange.[4] The High Court described the environment in the appeal of this case as an "exceptionally fragile resource requiring extremely careful management."[5] While the High Court found that the consent authority is

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[3] RMA, sch 4, cl 6(a).

[4] *Lakes District Rural Landowners Society Inc v Queenstown Lakes District Council E*NC Christchurch C162/2001, 20 September 2001 at [65].

[5] *Queenstown-Lakes District Council v Lakes District Rural Landowners Society Inc*, HC Christchurch AP33/01, 21 November 2001 at [21].

not required to assess the effects arising from an alternative location, it is required to take into account the 'big picture'.[6]

11 While *Lakes District Rural Landowners Society Inc* related to alternatives being included as a rule in a district plan, the principle of alternatives that should be adopted here is one where the consent authority should be forced to make a *fully informed* decision before granting any consents. Being *fully informed* is more important when a completely new plant is being considered for operation ad there is such a fragile resource.[7] *Lakes District Rural Landowners Soc Inc* stated (in relation to a rule on alternatives): [8]

> The consent authority is not being asked to embark upon comparisons or even to predict whether there will be applications in relation to those alternative locations. Rather, it is being directed to approach the matter with its eyes fully open by taking into account the existence of alternative locations and methods.

12 In the more recent decision, *Waimea Plains Landscape Preservation Soc Inc,* the Court held that evidence of alternative locations for a bridge was mandatory under schedule 4, clause 6(1) of the RMA. This was because there would be significant adverse visual effects. Consent was declined and one of the basis for declining consent was the shortcomings of the Council's assessment process to assessing alternatives (which had not been adequately addressed).[9] Despite a different activity in this current case, this point is relevant here because consent should simply not be granted while there were unresolved deficiencies with the effects assessment and its consideration of alternative locations.

13 Mr Palmer under cross-examination stated that Allied had to make up its mind on location when the application process started in 2019.[10] Mr Batchelar started looking at alternatives in 2022.[11] It is clear that the Applicant decided to stay before having looked at alternatives. Mr Batchelar has provided a bullet-point list of alternatives with advantages

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[6] *Queenstown-Lakes District Council v Lakes District Rural Landowners Society Inc*, HC Christchurch AP33/01, 21 November 2001 at [28].
[7] Also see the comments of Scott EIC at [141] EB 944.
[8] *Queenstown-Lakes District Council v Lakes District Rural Landowners Society Inc*, HC Christchurch AP33/01, 21 November 2001 at [27].
[9] *Waimea Plains Landscape Preservation Soc Inc v Gore District Council and Southland Regional Council* [2022] NZEnvC 29 at [145].
[10] Mr Palmer cross-examined by Ms Muggeridge, Transcript page 96, lines 4-8. Also see Mr Pamler cross-examined by Mr Enright, Transcript page 99, lines 25- 33.
[11] Mr Batchelar cross-examined by Ms Muggeridge, Transcript page 259, lines 29-31.

and disadvantages. During the hearing there was a focus on Rangiuru Business Park, as Ms Jones had produced a letter from the developer with an offer of an alternative site and confirmation there is natural gas. From cross-examination of Mr Batchelar, many of the disadvantages for Rangiuru were adjusted.[12] It is submitted that there are unresolved deficiencies to the assessment of alternatives.

14 Schedule 4, clause 2(3)(c) of the RMA also states that: *An application must also include an assessment of the activity's effects on the environment that includes such detail as corresponds with the scale and significance of the effects that the activity may have on the environment*,[13] The assessment of alternatives should include a level of detail which corresponds with the scale and significance of the effects that this activity will have on the environment, including that of other airsheds with less sensitive receivers and not classed as 'polluted'.

15 It appears that only one of these locations (the current preferred location) has considered the receiving environment as a 'polluted airshed'[14] and for the other sites, a 'non-polluted airshed' has not been considered. Given the significant adverse effects arising from location within a polluted airshed, a non-polluted airshed should have been considered.

Submission 2

16 Alternatively, if consent for the new plant is to be granted, it should be:

(i) On a 10-year consent term; and

(ii) With production limited to 95,000 tonnes; and

(iii) With a fully enclosed loadout area; and

(iv) Only enable to operate on natural gas.

Consent Term

17 The Applicant has provided a reduced consent term for the new plant to 25 years. This is still considered an excessive length of consent in relation to a resource that has reached its limit. While this appears to be justified

[12] Transcript pages 259-263.
[13] RMA, sch 4, cl 2(3).
[14] Existing Allied Asphalt site, Batchelar EIC, Annexure 1, EB 502.

on the basis of financial investment, the Court has not seen any financial evidence to suggest that 25 years is appropriate given the level of investment. A more appropriate term would be 10 years and that accounts for the vulnerable nature of the resource, new technology (given the lack of technology upgrades the applicant took under its current consent when new technology was available), further managed retreat situations, and the lack of resourcing the Council has to complete s128 reviews.

18 The Applicant may complain about the 10 years versus the investment cost but:

(a) The Applicant has not said it will not proceed if granted 10 years and as set out above, no financial information supports the Applicant's assertion as to return of investment; and

(b) The Applicant has options. It can invest elsewhere and likely obtain a much longer consent term.

Production limit

19 Throughout the hearing, the evidence on the need for the asphalt tonnage sought by the Applicant included incorporating Higgins tonnage (so to account for the scenario if Higgins did not obtain a new consent), but there was no credit approach taken for asphalt being delivered from Hamilton to balance out this requirement if needed. Given the context of a polluted airshed, production limits should be not based on 'what if' scenarios.

20 Clear the Air recognises that there is investment being made for new technology and submits (in this alternative submission) that an appropriate amount as a tonnage limit is 95,000 tonnes, with no option to increase for capital works projects. This is an increase to current production, but also allows for a sharing approach to be adopted to other industries within the sensitive resource.

Fully enclosed loadout area

21 As to the loadout issue, the BPO has been the focus for requirements for the new plant. Proposed condition 35 suggests that odour testing be completed within 6 months from plant operation. Then within three months of the survey, investigate whether to enclose or partially enclose and then report to the Regional Council the timeframes to then enclose. The timeframes to retrofit an enclosed/partially enclosed loadout is unknown.

Provided the timeframe are strictly met, we are looking at a minimum 9-month period to decide if enclosure/partial enclosure should be used.

22 Various experts were questioned on the loadout area. Ms Simpson stated:[15]

> *A. …I think that partial enclosure from the first principles of how enclosure works would be likely to improve the extraction efficiency, but I still maintain that that is something that can be checked after the plant is operating because if the collection efficiency was inadequate it seems strange to me that (inaudible 10:26:03) would be providing this as part of their proprietary equipment – it is not the first time that this type of equipment has been installed.*
>
> …

23 Later on, when Ms Simpson was asked on the greatest extent practicable, she stated:[16]

> *Q. … I just want to look at the words you have used there – greatest extent practicable. Just in terms of air quality. So, we don't know whether it is practicable to fully enclose the loadout area? (inaudible 12:09:41)*
>
> *A. Yes, it can be done.*
>
> *Q. So, then whether it becomes practicable in a wider sense will take into account issues such as the financial or operating procedures before that?*
>
> *A. Yes.*
>
> *Q. In terms of your expertise, you are air quality. So, from an air quality perspective the greatest extent practicable is fully enclosed, right?*
>
> *A. Yes, subject to those things that are not within my air quality remit, yes.*

24 Mr Murray stated:[17]

> *A. Well, I think the BPO I mean the blue smoke filter is BPO (inaudible 15:28:32) but blue smoke has to get there. If it doesn't get there – that's my concern is there is a simple test you can do if you hold your hand in front of your face and blow, if you can feel it, you are safe. If you can't that shows you how close you need to be. And that is my concern, that the wind will blow the (inaudible 15:28:57) so partial enclosure I think will add, give you that certainty that the smoke won't be blown away before it is captured.*

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[15] Ms Simpson cross-examined by Ms Hill, Transcript, page 138, lines 26-33.
[16] Ms Simpson cross-examined by Mr Branch, Transcript page 163, lines 4-14.
[17] Mr Murray cross-examined by Mr Christenson, Transcript, pages 302-303, lines 30-20.
Mr Murray cross-examined by My Branch, Transcript, pages 307-308, lines 30-6.
Mr Murray retreated a little under questioning by Commissioner Hodges as to timing, Transcript, pages 308-310.

Q. And that opinion is based on first principles rather than an empirical analysis of wind blows or the capacity of the extraction system?

A. Yeah, I understand the details of the extraction system and those specifications were provided, but general principles for extraction your area of extraction decreases very quickly from the face of the extraction unit so my point is that the truck is, the trucks will be a metre or two below where the loadout comes and (inaudible 15:29:53) so when you apply that you are decreasing the efficiency of that extraction system.

Q. If the extraction system – I am still thinking about it without enclosure. If the extraction system doesn't capture all fugitive odour, but captures some or most – won't the question arise as to how significant the non-captured portion is?

A. Yeah, but I feel if. I feel that it would either be (inaudible 15:30:35) so it is not going to (inaudible 15:30:37) and on days there is no wind I agree it will be captured. Those days aren't that common. So, I still believe that partial enclosure, I imagine it is fairly straightforward to impose three sides on the loadout area to try that first. That's my opinion.

…

Q. … So, in relation to the questions about the extraction system, do you see evidence of any detail or performance criteria or abilities with this extraction unit in this area?

A. Can you just confirm which

Q. For the loadout.

A. For the proposed one?

Q. Yes.

A. No, I haven't seen any sketch or plans, which I think I alluded to. I haven't been provided any details around that.

Q. And I think the question I put to Ms Simpson was putting to one side practicalities, would she accept that on an air quality perspective only fully enclosing the loadout would be beneficial for air quality? And I think she said yes, but regardless of that what would you say to that proposition?

A. Yes, it would. But I think if you can – the key is what we are talking about is enclosure will just increase your efficiency for capturing that blue smoke. You may be able to achieve that same outcome with partial enclosure, but I don't believe that will be achieved with no enclosure. And some of the things you remember around that are the load – the effects from the loadout and the odour are going to be for your – more for your immediate neighbours. So I guess yeah, yes I still my opinion is that partial enclosure should be effective and if it is not I would like – I have already suggested in the condition that was suggested that that monitoring is brought forward and some tweaks around what actually happens – to ensure that if it is not effective that's rectified as soon as possible.

Q. *If I understand that correctly, then you are saying you would start off from day one with two side (inaudible 16:02:10) and some testing regime to be able to determine whether that is good enough or not?*

A. *That's what I believe would be appropriate, yes.*

Q. *And do I also take it from what you just said that you had been thinking that testing should be as early in the new production phase as possible?*

A. *Yes. I think I forget initially it was sort of six months, but I think one thing to remember with odour – and something like this – is that you want to capture it under different environmental conditions. So, if you do it too quickly, for example if you have to do it within a week, and you get still weather and calm conditions, then that system may be working effectively. So that is why I feel you need a bit of time to make sure you can capture those environmental conditions without going too far and if then is a problem, then that goes on for a period where it doesn't actually be captured. So, I guess it's getting a balance, the right balance there.*

Q. *So, some care and time should be taken to work out when the testing should start (inaudible 16:03:27)?*

A. *Yes, it needs to be done over multiple days so that you can capture those different conditions.*

25 Mx Wickham stated:[18]

Q. *Thank you. So, where you say that the new proposed plant is largely consistent with best practice except for enclosed loadout and low NOx burners which are not proposed. With the proposal that is now being advanced with the low NOx technology option, does that address the low NOx burner part of your concern?*

A. *Subject to us amending that condition, yes it would.*

Q. *Yes. And in relation to the loadout issue – so this is about enclosing the loadout.*

A. *Enclosure. Yes.*

Q. *Yes. I imagine that you were in Court to hear the discussion around loadout yesterday?*

A. *Yes.*

Q. *And so the proposal that has been advanced by the Applicant is that there should be an adaptive approach to loadout enclosure, to determine whether it is required, what is the best way of doing it and how effective it is going to be rather than from day one requiring a certain amount of enclosure. Do you think that is a reasonable approach?*

A. *For a new plant, my position is a little bit different. And I went back to the asphalt plant that was consented in the McCain's case, the CPM asphalt plant where I was acting for Council. That is a good example of best*

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[18] Mx Wickham cross-examined by Mr Christensen, Transcript, pages 371-373.

practice. And it is in a location that is much more sensitive than this, with neighbours just across the road (inaudible 12:56:55) food manufacturing export. For my view of this, my (inaudible 12:57:00) was talking about (inaudible 12:57:02) largely consistent with best practice but not completely. My view is that (inaudible 12:57:05) we should be having enclosed loadout, and I went back and checked that plant is in existence and how it has fully enclosed loadout with carbon monoxide monitors indoors, fully automated doors. It also has activated carbon filters on the bitumen heater storage tanks so that there are no odour complaints from that site. And it works very well in practice. One of the issues that – I read through the reasons that were put forward as to why full enclosure was (inaudible 12:57:31) because not practicable and it was related to genuine health and safety issues they experienced at another plant, but those issues, when I read them all seemed to relate to the change from an open loadout system to a fully enclosed. So, it wasn't designed properly, as such, and they had them kind of retro fitted. Given that the asphalt plant in Hawke's Bay is running perfectly fine with fully enclosed loadout, it seems to me that it would be reasonable to say that is a better example of best practice for a new asphalt plant. And that the problems that were encountered previously could be managed by design (inaudible 12:58:08) and training people to use that system properly.

Q. Does that other plant you refer to have the odour extraction fan system that has been proposed here?

A. No, it doesn't have the (inaudible 12:58:22) system. It does have a similar extraction system and in essence it is very similar, so they do extract it from that enclosed loadout area. The reason they haven't fully enclosed (inaudible 12:58:32) capture all cumulative discharges to air and I appreciate that (inaudible 12:58:37) in that case was to do with odours at the nearest (inaudible 12:58:43) receptors and that, I understand that this application that the neighbouring industrial activities have not indicated any concerns with odour. My take on it is that for a new plant, this is a plant that will make in addition to odour (inaudible 12:58:58) with other fugitive DOCs that are coming off from that process that could be contained and extracted and managed. So that was my recommendation

26 Ms Simpson (when cross-examined by Mr Branch) and Mx Wickham (when cross-examined by Mr Christensen) stated that full enclosure from an air quality perspective is best. Mr Murray concluded that full enclosure would also be beneficial for air quality. He went further to say that you may be able to achieve the same with partial enclosure, but that it would not be achieved with no enclosure.

27 Discussions during the hearing on retrofitting enclosures also highlighted potential health and safety issues. It is clear here that the focus of the new plant is on the BPO. The BPO from the conclusions of the experts is that enclosure is used. If in doubt of the extent of enclosure, the most conservative approach should be taken in the context of a polluted airshed and that is full enclosure. But at the very least the BPO should require

partial enclosure, but designed in a way that full enclosure is straight forward if required.

Submission 3

28 It is important to have a ruling from the Court on what *expressly allowed* is in accordance with the NES-AQ, Regulation 17. This will assist other applications for their calculations.

29 Clear the Air has been provided with a copy of the draft legal submissions for Toi Te Ora which outlines what both Ms Simpson and Mx Wickham conclude on what is 'expressly allowed/the emission/consent envelope' for the existing consent has it relates to the NES-AQ. Clear the Air supports and adopts Toi Te Ora's submissions on this point.

30 The Court will need to make a decision on what is expressly allowed under the existing consent. If there are any doubts, it is submitted that the most conservative approach should be adopted. The more conservative approach is the opinion provided by Mx Wickham. Notably, Mx Wickham's opinion is closer to the actual production from the Applicant.

31 If this approach is adopted, and the Applicant is limited to 50,000-75,000 tonnes of asphalt per year, it is submitted that the existing plant will pass through the gateway of NES-AQ, Regulation 17.

Submission 4

32 It is submitted that if the existing plant makes it through the gateway, mitigation conditions should be adopted and given effect to as soon as possible. During the hearing, the *Higgins* conditions were introduced as a starting point for consideration of mitigation for the existing plant.

33 The *Higgins* conditions relate to a three-year term for its existing plant. The Applicant has a history of non-compliance for the existing plant, and it is suggested by the Applicant through its latest consent conditions to have little to no improvement over the minimum two years it is seeking to operate the existing plant.

34 It is submitted that based on the *Higgins* consent, and the way Higgins operates, similar conditions should be adopted for the Applicant's existing plant include (but are not limited to):

(a) The stack height must be increased from 19 metres to 28 metres within six months from the issuing of consent (*Higgins condition 14*)

– the Applicant's proposed condition keeps the stack the same height;

(b) The AQMP is required to be submitted within one month (*Higgins Condition 21*) – the Applicant has suggested three months;

(c) Odour assessments are to be completed (*Higgins condition 26*) – the Applicant has no requirement to undertake a general odour assessment (only in relation to the loadout area), despite this being the reason for abatement notices;

(d) A Community Liaison Group is to be established (*Higgins condition 31*) – the Applicant has no suggested liaison groups.

(e) The existing plant should be required to operate on diesel because:

(i) Mr Batchelar confirmed under cross-examination that the Higgins plant and the Applicant's plant are much the same in terms of technology.[19] To mitigate the current effects (which it is submitted are serious based on the evidence of Clear the Air and Ngāti Kuku), new conditions should be adopted.

(ii) Mr Murray for the Consenting Authorities supported switching to diesel from waste oil. As to effect of the switch, he said: *"So it will improve emissions. You will get improvements around particulate discharge, sulphur dioxide that ma[y] be in that used oil. So I would support that switch if it is possible to be done."*[20]

35 It is still Clear the Air's submission that a lengthier consent period (three years) for the existing consent is supported on the basis that the Applicant seek a new location for the new plant and mitigation is put in place now for the existing plant. Essentially activating a managed retreat approach now.

Conclusion

36 As stated in opening submissions, Clear the Air is not opposed to the industry type. It understands the need for roading and for the industry to be localised. However, there are other appropriately located and accessible areas within the Bay of Plenty that do not have a polluted

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[19] Mr Batchelar cross-examined by Mr Branch, Transcript, page 266, lines 32-33.
[20] Mr Murray, Transcript page 299, lines 6-9.

Airshed. Clear the Air supports a condition that allows the Applicant sufficient time in which to follow that route, subject to significantly improving its current operations.

37 Clear the Air submits that consent for the new plant should be declined based on the comparison exercise given to all effects and the inadequate assessment of effects.

38 If the Court finds that consent for the new plant is to be granted, Clear the Air submits that asphalt production should be limited to 95,000 tonnes per year, a 10-year consent term should be granted, a fully enclosed loadout area to be built into the new plant upon construction, and only natural gas to be used.

39 For the existing plant on its shorter term, mitigation conditions should be imposed.

Dated 12 June 2024

C Muggeridge

Counsel for Clear the Air