Court File Reference: ENV-2023-AKL-160

BEFORE THE ENVIRONMENT COURT

I MUA I TE KOOTI TAIAO O AOTEAROA

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
BETWEEN	**ALLIED ASPHALT LIMITED** **Applicant**
AND	**BAY OF PLENTY REGIONAL COUNCIL and TAURANGA CITY COUNCIL** **Consent Authorities**

CLOSING SUBMISSIONS FOR THE APPLICANT

20 June 2024

Judicial Officer: Judge Dickey

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MAY IT PLEASE THE COURT

Introduction

1 Allied Asphalt Limited (**AAL**) has applied for the resource consents necessary to enable it to construct and operate a new state-of-the-art asphalt manufacturing plant at its existing industrial zoned site in Mount Maunganui. The key permit sought is an air discharge permit.

2 An associated air discharge permit to allow the existing asphalt plant on the site to be operated for up to 2 years while the new plant is ordered, constructed and commissioned is also sought.

3 AAL and the consent authorities are aligned other than in relation to relatively minor condition wording.

4 Whether the air discharge permits should be granted at all, and if so on what conditions and for what terms, is the subject of disagreement between AAL and the consent authorities on one hand, and the section 274 parties on the other.

5 In these closing submissions I address matters raised in the hearing and in the closing submissions of the other parties. I rely on my opening submissions and seek not to repeat matters already covered therein.

6 Attached to these submissions are recommended consent conditions. The conditions recommended are those proposed in the closing submissions of the consent authorities dated 12 June 2024, with additional changes now proposed by the applicant shown as further tracked changes.

7 Several consents in addition to the air discharge permits are also required, but these are not the subject of disagreement, and I submit are able to be granted on the conditions recommended by the applicant and consent authorities, on advice of their respective planning experts.

Context – predicted effects, technology and BPO

8 The new plant for which consent is sought adopts best practicable option technologies to minimise discharges of contaminants to air. There is disagreement about the need to enclose the hot mix loadout area for management of odour and I discuss this below. With this exception I submit there is no evidence that AAL should or could be adopting

different or better technology and management approaches to avoid and reduce the discharge of contaminants to air to the greatest extent practicable.

9 A detailed and comprehensive air quality assessment (**AQA**) was prepared in support of the application indicating that on both individual and cumulative effects bases the air quality effects of the proposal are minor, with emissions well below relevant standards and guidelines for most contaminants as measured at the most sensitive receptors in the receiving environment, including residences and education facilities (schools and pre-schools).[1]

10 The AQA also addresses the ongoing interim operation of the existing plant and reaches the same conclusion.

11 A comprehensive health risk assessment (**HRA**) was also prepared which confirms the conclusions of the AQA.

12 The AQA and HRA were reviewed by experts engaged by the Councils.

13 The authors of the AQA and HRA, Ms Simpson and Dr Denison respectively, gave evidence in the hearing and were subject to questions from the Court and other parties. In my submission their conclusions that the effects of the proposal are small from air quality and health risk perspectives were not shaken in questioning, and are supported by the evidence of the Council experts Mr Murray and Dr Wilton.

14 A feature of the new plant is its ability to produce more asphalt per hour of operation than the existing plant (200 tonnes per hour for the new plant compared with 80 tonnes per hour for the existing plant). The AQA and HRA conservatively assumed continuous production from the new plant. This has given rise to a degree of confusion for parties which AAL has sought to address by:

a. Volunteering a cap on daily and annual production; and

b. Volunteering a condition that limits the amount of asphalt that is able to be exported outside the Bay of Plenty Region.

15 The purpose of those volunteered constraints is to give assurance that the new plant is not able to be used as a manufacturing base from which to produce large volumes of asphalt in excess of regional demand. AAL has no intention of doing this, and the physical qualities of asphalt are such that it has no incentive to do this – asphalt is produced to meet immediate demand, and its quality and usability reduce over time

[1] Clear the Air submits the application has failed to treat the application as a new application (Closing Legal Submissions, para 3). That is not correct. The AQA (and HRA) have fully assessed the predicted discharges of contaminants from both existing and new plants in accordance with accepted methods commmonly employed by experts in the relevant disciplines

(i.e., over hours) if not used. The new plant's purpose is to ensure AAL is able to meet the Bay of Plenty's infrastructural demand for asphalt now and into the future.

16 The conservative nature of the AQA and HRA are such that the Court can be confident that looking to the future the new plant will be able to operate without significant adverse effects on health, and with minimal potential for offensive odour. Importantly, these conclusions hold not just for existing production levels of around 70,000 tonnes per year, but also for any increases in production to meet assumed growth in the Bay of Plenty market. In this regard the suggestion from parties that production from the new plant should be limited to 75,000 tonnes per year[2] or 95,000 tonnes per year[3] are not justified on the evidence, and neither are caps on annual total emissions of PM_{10} and NO_x at levels significantly below those that would be associated with higher production rates that have in turn be assessed as not having significant adverse effects[4].

Policy context

17 Air quality in the Mount Maunganui area is impacted by a variety of sources including port-related and other industrial sources, transportation, and natural sources. The airshed is formally classified as polluted for PM_{10}.

18 The progressive improvement (reduction) in controllable sources of PM_{10} so that the airshed ceases to be polluted as soon as practicable is required to better protect public health. This is reflected in the Court's findings on Plan Change 13 to the Regional Natural Resource Plan, and in particular new policy 12 which is in the process of being finalised through a section 293 process.

19 I submit the AAL proposal is firmly aligned with the approach the Court expects as set out in PC 13 and policy 12 in terms of adoption of the best practicable options to reduce emissions, and an 'iterative management' approach requiring regular, mandatory and transparent BPO reviews together with formal Council-initiated review opportunities in the event that AAL is considered to not be adopting BPO.

20 Counsel for Ngāti Kuku/Whareroa Marae refers to "an acknowledged 'gap' in the planning framework" being addressed through the section 293 process by which policy 12 is being finalised[5]. The section 293 process is for the purpose of allowing appropriate input into the final wording of policy 12, in line with the principles

[2] Toi Te Ora Closing Legal Submissions para 62(b)
[3] Clear the Air Closing Legal Submissions, para 38
[4] Toi Te Ora Closing Legal Submissions para 62(a) and (b)
[5] Ngāti Kuku/Whareroa Marae Closing Legal Submissions para 3(i)

established by the Court[6]. I submit that the 'gap' being referred to by Ngāti Kuku/Whareroa Marae is not going to be addressed in the section 293 process, and is not a 'gap' in the sense of the regional plan not properly addressing an important matter. Rather, I suggest that what is being referred to is Ngāti Kuku/Whareroa Marae's preference for a 'managed retreat' of all emitting industry from the area in the short term. As Ms Ngātuere put it in answer to my question[7]:

Q. Does that mean that you disagree with the direction in policy 12?

A. No. I understand that there's an attempt within policy 12 to manage the pollution in the MMA, but what I'm saying is – if I was to make a comment to that, it needs to go further. It's good but it needs to go further. The protections of our taonga, being our air, as well, should be taking care of under Tiriti o Waitangi, is what I'm saying, which it's not.

21 While the preference for dramatic changes in land use in the Mount Maunganui area and associated changes to air emissions is genuinely held by Ngāti Kuku/Whareroa Marae, as well as by Clear the Air, it is not reflected in PC 13 and is not reflected in the provisions of the Tauranga City Plan. It is not reflected in the recently adopted Mount to Arataki Spatial Plan either (although industry transition zones around Whareroa Marae and in other areas at the interface of industry and other zones are indicated – none of which include the AAL site).

22 The section 293 process is not an opportunity to develop a policy with a different intent than that which has been indicated by the Court, and in my submission the policy framework that has been developed is comprehensive and should be applied in relation to this application. The AAL proposal is aligned with that framework. Contrary to the submission of Ngāti Kuku/Whareroa Marae this is not a case where the granting of the consents applied for would operate to prevent a future plan from being implemented[8]. Rather, the AAL proposal will result in a reduction in PM_{10} discharges from asphalt production relative to the status quo, and this is consistent with the policy intent behind both Regulation 17 of the NES-AQ and PC 13.

23 There is always the *possibility* that during the term of any resource consent there may be a change to the planning context within which that consent sits. In this case:

a. The relevant planning context has only recently been formally considered and reset via PC 13 so is unlikely to be reconsidered in the near term; and

[6] Set out in *Swap Stockfoods Ltd* v *BOPRC* [2023] NZEnvC 1 at [256] and discussed at paras 153 – 157 of my opening submissions

[7] Transcript, p 476 line 29

[8] Ngāti Kuku/Whareroa Marae Closing Legal Submissions para 3(i) and referring to *RFBPS* v *Waikato RC* [2007] NZRMA 439

b. The non-statutory Mount to Arataki Spatial Plan that has recently been adopted does not foreshadow any fundamental future changes that would affect this proposal.

24 I submit there is no evidential basis to support the idea that 'managed retreat' is a concept that should weigh heavily in the Court's mind as it considers the appropriateness of granting consents for this proposal.

25 If it does transpire that at some point in the future there is a major change to the planning context such that the activity status of the activity authorised by the consents changes (presumably from discretionary to non-complying) then this is a matter that could trigger a section 128 review by BOPRC[9].

Existing plant consent

NES-AQ, Regulation 17

26 Clear the Air submits that the application must be declined because it fails to pass the jurisdictional test in Reg 17 of the NES-AQ[10]. Alternatively, Clear the Air submits asphalt production from the existing plant should be restricted to 50,000 – 75,000 tonnes per annum in order to meet the jurisdictional test[11]. Exactly what Clear the Air is asking for is unclear as it also supports and adopts Toi Te Ora's submissions[12] which in turn confirm (consistent with the evidence of all the planners[13]) that the jurisdictional test in Reg 17 is met[14].

27 I submit the discussion around Regulation 17 of the NES-AQ, particularly in Toi Te Ora's submissions, is confused and unnecessarily complicated. It is common ground that the replacement of the existing plant with the proposed plant will result in a reduction in PM_{10} in the airshed. I submit:

a. Regulation 17(1) establishes a jurisdictional threshold for the granting of consents to discharge PM_{10} in an airshed that is polluted for that contaminant (as is the case with the MMA)

b. Where a *new activity* is being proposed that will increase PM_{10} concentrations in any part of the airshed by more than 2.5 micrograms per cubic metre no consent may be granted unless that increase is offset by an equivalent or greater reduction elsewhere in the airshed (Reg 17(3)). If the new plant is

[9] Proposed condition 58(e) of the air discharge permit for the new plant
[10] Clear the Air Closing Legal Submissions, para 1(c)
[11] Ibid, para 31
[12] Ibid, para 29
[13] JWS of the Planners page 1
[14] Toi Te Ora Closing Legal Submissions para 6

assessed as a new activity then this requirement is met as the existing, larger, PM_{10} contribution of the existing plant will be removed.

c. Where a consent is sought for an existing activity Regulation 17(2) provides that the restriction on the granting of a consent that will increase PM_{10} in any part of the airshed by more than 2.5 micrograms per cubic metre does not apply where the proposed consent is for the same activity on the same site, the amount of PM_{10} expressly allowed by the new consent is the same or less than is allowed under the existing consent. The existing consent contains an express limit on TSP but no operating hour or production limits. When the new consent for the existing plant is considered in light of this 'like-for-like' test no jurisdictional issue arises.

d. In any event, AAL has accepted a condition limiting annual production from the existing plant to 70,000 tonnes, pending commissioning of the new plant. The proposed conditions ensure that both plants cannot operate to produce PM_{10} discharges concurrently.

28 Toi Te Ora submits that the existing plant consent should include a condition limiting the mass discharge of PM_{10} to 2.3 kg per hour in addition to the proposed condition limiting total particulate to 2.9 kg per hour. I understand from Ms Simpson that the wet scrubber technology of the existing plant produces a 'wet' stack emission which cannot be tested for PM_{10} meaning that there would be no way to assess compliance with the condition suggested by Toi Te Ora.

29 A resource consent was recently granted for a different asphalt plant in the Mount Maunganui Airshed (the Higgins plant) and Clear the Air submits that if consent is granted for the continued operation of the existing plant several conditions from the consent for the Higgins plant should be applied to the consent for the existing AAL plant[15]. Toi to Ora supports Clear the Air's position.[16] These conditions are also discussed in the consent authorities' closing submissions[17]. In relation to these:

a. AAL accepts the consent authorities' recommended odour response condition

b. AAL agrees with the consent authorities' analysis and position in relation to increased stack height, emissions testing and compliance reporting.

c. AAL is willing to convert the existing plant to run on diesel rather than ULO (assuming the Court agrees that represents the BPO), and has proposed a

[15] Clear the Air Closing Legal Submissions, para 34
[16] Toi Te Ora Closing Legal Submissions, para 13
[17] Consent Authorities Closing Submission, para 32

condition to that effect. In relation to this I note that the AQA and HRA conclude that the existing plant can safely continue to operate using ULO and so on an effects basis the change does not appear justified. Notwithstanding this, AAL is aware that for some people in the community this change is perceived to have some benefits, and will result in very small reductions in sulphur and trace metals in the discharge. I note that there is some work to be done to convert fuel sources, so the proposed condition[18] would require AAL to stop using ULO as soon as practicable after commencement of the consent, and in any event within 4 months.

30 As a general proposition I submit that considerable care needs to be taken in simply transposing conditions from a consent for a different plant to the existing AAL plant. AAL is proposing to move as quickly as it can to replace the existing plant with a new low emission plant, and this puts it in a different position from the Higgins plant, where no action to reduce emissions was being advanced.

31 Clear the Air suggests the requested adoption of conditions from the Higgins consent is in part related to AAL's "history of non-compliance for the existing plant"[19]. There have been two abatement notices issued to AAL relating to specific incidents that AAL has addressed. The reference to a history of non-compliance could be taken to imply consistent or repeated non-compliance, and if this is the intent, AAL rejects the implication. There is a history of complaints that BOPRC has followed up in the discharge of its regulatory function, and with the exception of the abatement notices no enforcement action has been considered appropriate. The AAL operation has been and continues to be subject to close scrutiny as to its compliance, and I would submit the more appropriate characterisation is a history of compliance, subject to the exceptions noted above.

32 In relation to stack height, AAL opposes the imposition of a condition requiring a taller 28m stack to be installed. There is no modelling or other assessment to demonstrate what that would achieve in terms of effects reduction. Given the time to design and construct any such measure would undoubtedly be several months, and given the short time the existing plant will continue operating, any such requirement would not be justified.

33 While the proposed term of the consent for the existing plant is 2 years from commencement, AAL is comfortable with proposed condition 3 which would require it to minimise the period over which the existing plant continues to operate together

[18] Condition 13 of the existing plant air discharge permit
[19] Clear the Air Closing Legal Submissions, para 34

with a requirement to set out a plan that will aim to see the new plant commissioned and production from the existing plant cease within 18 months.

34 AAL opposes the submission by Ngāti Kuku/Whareroa Marae[20] that the consent for the existing plant should be for a longer 'run-out' term on the basis that a further consent application would be made to construct a new plant in a different, unknown location. This submission assumes that declining new or replacement consents for discharges from existing industry in the Mount Industrial Area is the appropriate planning response, and implies that PC 13 and policy 12 are inadequate. I submit that is not the position. Further, while AAL's contribution to overall airshed contaminant concentrations is small, and the improvements between the existing and proposed plant emissions are commensurately small in the overall airshed context, it is submitted those improvements are worthwhile and should be achieved as soon as practicable.

35 There is also a potential legal difficulty with the Ngāti Kuku/Whareroa Marae suggestion. If the inference is that AAL should be granted a longer 'run-out' consent that includes a condition requiring any future consent application for a new plant to be on a different site I submit this would not be lawful.

36 The present application has assessed the existing site as being suitable and appropriate for a new plant. Unless something were to change over the term of a 5 year 'run-out' consent it is likely AAL would still assess the existing site as being suitable. There is no indication that anything is likely to change over the next 5 years (the Mount to Arataki Spatial Plan would suggest the opposite) and on that basis it could be argued that all the Ngāti Kuku/Whareroa Marae proposal of a longer term for the existing plant consent achieves is to delay the improvements the new plant will bring to the airshed.

New plant consent

<u>Consideration of alternatives and the effects of the proposal</u>

37 Ngāti Kuku/Whareroa Marae submits that no genuine consideration was given to going elsewhere to avoid adverse cultural effects[21], and that the alternative site assessment did not assess whether there were alternative locations that would better avoid, remedy or mitigate the adverse cultural effects caused by discharges from the existing site[22].

[20] Ngāti Kuku/Whareroa Marae Closing Legal Submissions para 3(c)
[21] Ngāti Kuku/Whareroa Marae Closing Legal Submissions para 16
[22] Ibid, para 18

38 I submit the evidence does not support those propositions. AAL's planner Mr Batchelar was asked questions about the consideration of alternative locations by Mr Enright[23]:

Q. Do you accept that a failing in the alternatives assessment, is that – when you were looking at different locations, no consideration was given to effects on tangata whenua or cultural effects?

A. The assessment table that I produced doesn't reference those matters. It's basically – having a look at that issue, it's encapsulated in the consideration of sensitive locations and the separation of the site, so it could have been more explicit about that.

Q. Isn't that just retrofitting? It seemed pretty clear on its face, with respect, that the alternatives assessment simply didn't consider effects on tangata whenua, otherwise you would have listed disadvantage existing location, Whareroa Marae, or something like that.

A. The primary reason for doing the assessment of alternative locations was cultural effects, because all the other effects were assessed as the driving reason for the consideration of influence was cultural effects.

Q. Well, in that case, as a minimum, the alternative assessment is lacking, isn't it, because it didn't reference those or rate them in the pros and cons for each location.

A. Yes, that's a fair comment. It wasn't addressed in those criteria that we applied. It was – as I said, the reason why it was done and the intention was clearly looking at sites that were outside the Mount Maunganui airshed, which is a recognition of the cultural concern around the plant re-establishing in the Mount. So that was the reason alternative sites were looked at in the first place.

Q. Okay. But you accept – you acknowledge that the problem with how it's portrayed?

A. Yes, it could have been explained more clearly.

Q. I mean, the other point – and it's probably the final point, really, is if you're going to undertake an alternatives assessment looking at alternative locations, normally you would involve tangata whenua in that exercise, wouldn't you?

A. That would have been preferable and I think throughout our application process, we did put quite a lot of energy into trying to engage throughout the – our first hui, which was in March 2022, it was an online hui. I haven't got the date in front of me but because of COVID, we had an online hui where we did some assessment work and endeavoured to re-engage once we had some information to share. From that point, several months passed where we were working on some of the assessments within the application and our intention was to engage and discuss those as those were developed since December 2022 when we were really not going to make anything before the end of the year, we shared some preliminary information, the health assessment, the air quality assessment, and then things rolled over into the new year. Unfortunately, we were under significant pressure to get the application and notifications.

[23] Transcript, page 452 line 14 – page 454 line 3

Q. Thank you for that. I can take you back to those meeting minutes. I've already put them to other witnesses, and there was a meeting by Zoom on 3 March 2022 and a meeting on 23 March 2023. In both of those hui, the topic of moving elsewhere wasn't on the table. This was about explaining, consulting or engaging on the subject proposal. That's correct, isn't it?

A. That was the primary discussion, yes. But particularly the issue of relocating was significant.

Q. Well, it was raised certainly by Awhina Ngātuere as recognised in the minutes. It wasn't something – that wasn't the purpose from the applicant's point of view, though, of the meeting, to identify alternative locations. Otherwise that would have been carried through into your process.

A. Yes. It was an information-sharing meeting.

39 I submit the position is as Mr Batchelar explained. The technical assessment work commissioned by AAL in support of its application concluded the proposal would not give rise to significant adverse effects. While there was only limited engagement between Ngāti Kuku/Whareroa Marae and AAL as the application was being prepared that engagement included an indication from Ngāti Kuku/Whareroa Marae that they considered the effects on their values were significant and a preference for an alternative location was expressed. Those concerns were the primary reason for looking at alternative locations.

40 All the alternative locations considered have the advantage of being further from Whareroa Marae than the application site, and it is reasonable to infer that the effects on Ngāti Kuku/Whareroa Marae values from such a site would be less than from the application site. That does not translate into a valid conclusion that the application for the new plant should be declined.

41 Because this is an application for a discharge permit section 105 RMA is engaged. This section requires the Court to have regard to:

a. The nature of the discharge and the sensitivity of the receiving environment to adverse effects; and

b. The applicant's reasons for the proposed choice; and

c. Any possible alternative methods of discharge, including discharge into any other receiving environment.

42 The Court has extensive evidence on these matters, including evidence on the scale and significance of adverse effects that arise from the proposal and assessments that consider alternative locations. That material is relied on in support of AAL's choice to make the application it made.

43 Before turning to briefly comment on the Ngāti Kuku/Whareroa Marae evidence on effects I note that PC 13, which expresses what Part 2 of the RMA requires in order to promote sustainable management in the specific context of the polluted MMA, does not suggest that adverse effects arising from air quality are to be entirely avoided. That would be impractical. Instead, Objective AQ O3 is "Sustainable management of discharges of contaminants to air according to their adverse effects on human health, cultural values, amenity values and the receiving environment". This and other objectives are in turn reflected in the various policies that allow for a proportionate response to the management of discharges to air, as opposed to a simple 'avoidance' approach. And all of this is within the context of an imperative to see overall levels of PM_{10} reduce, such that the airshed is no longer polluted as quickly as that may be practicably achieved.

44 Are the adverse effects on Ngāti Kuku/Whareroa Marae values of the proposal to construct a new plant on the AAL site that has the discharges described by the technical experts so significant that the only appropriate response is to decline consent? I respectfully submit that is not the position.

45 Without doubt, the Whareroa Marae's location in proximity to other land uses means that its community is subject to a range of adverse effects. Those effects are described in the evidence of Ms and Mr Ngātuere. The Court sat on the Marae for a day and we all had the opportunity to experience the distinctive smell of the nearby fertiliser works, and to feel what it is like when the whaikōrero are drowned out by the noise of planes taking off from the airport.

46 It is not difficult to accept that those effects can be significant, and have a cultural dimension as Ms Ngātuere in particular described when presenting to the Court[24].

47 The evidence is that the non-cultural air quality effects of the proposal experienced at Whareroa are very small as described in the AQA and in the expert air quality and health risk evidence. This is because the large separation distance between the application site and the Marae operates to ensure that any contaminants that come from the site in the direction of the Marae are diluted to the point that the concentrations are very small, if they are measurable at all. That in turn means that the cumulative air quality effects of the AAL discharge combined with other discharges are not materially different from the air quality effects at the Marae assuming no contribution from AAL.

[24] Transcript, page 467 line 8 – page 468 line 17

48 I submit that the same must be true of the specific cultural effects as described by Ms Ngātuere. Those effects are tied to the level of contaminants in the air.

49 Ms Ngātuere explains at page 468 line 7 of the Transcript:

> I suppose a key question, then, I let the Court know that air is a taonga and it has its own mauri and lifeforce and that undoubtedly it's been impacted. The question, then, is how might we remedy this effect or how might we avoid this effect? I've been sitting with that question in mind, especially in the light of this case here. The only thing I can think of is the avoidance of pollution in our area and I can't think of any other way at this stage.

50 While it is not difficult to understand that sources of contaminants close to the Marae are having an impact, what is not explained in the evidence is how the emissions from the existing AAL asphalt plant some distance away make a difference to the cultural effects experienced at the Marae. And the evidence does not address how a different and even smaller contribution to contaminants at the Marae under the new plant scenario would translate into a change in cultural effects.

51 PC 13 and policy 12 are all about progressively improving PM_{10} in the airshed by having emitters take responsibility for their discharges, adopting BPO, and iterative management with a view to meeting the NES-AQ limit so that the airshed is no longer polluted for PM_{10}. As that occurs it must be the case that the cultural and non-cultural adverse effects experienced by Ngāti Kuku/Whareroa Marae and residents in the wider Mount area will progressively reduce. While Ngāti Kuku/Whareroa Marae may prefer that adverse effects were avoided entirely, the implication would necessarily be the cessation of emitting industrial activity in the area, and this would not promote sustainable management.

52 Similarly, while Clear the Air wishes to see a 'managed retreat' of emitting industry from the area and adopts a principled approach to that by insisting that a new asphalt plant must be built elsewhere, that approach overlooks the direction of PC 13 and policy 12 and fails to engage with the expert evidence as to the low level of actual and predicted effects of what is being proposed.

53 Ultimately the application needs to be considered on its merits. What are the effects of what is proposed, and how does that sit alongside the direction set in the regional plan? I submit the answers are clear on the evidence. While regard must be had to alternatives, I submit the Court can be satisfied that alternatives were appropriately considered and that AAL made a reasoned choice to pursue the application before the Court.

54 Clear The Air's closing submissions[25] refer to *Lakes District Rural Landowners Society Inc* v *QLDC*[26] and the need for the Council to take into account the 'big picture', including looking at alternatives, as part of its plan making function in the context of an "exceptionally fragile resource requiring extremely careful management". To the extent that the MMA as a polluted airshed for PM_{10} could be likened to an exceptionally fragile resource requiring extremely careful management, what Clear the Air's submission overlooks is that "extremely careful management" is exactly what the Court has provided for in PC 13.

55 In relation to Clear the Air's submission referencing *Waimea Plains Landscape Preservation Society Inc* v *Gore DC and Southland RC*[27] I note that in that case it was held that the proposal (a new bridge and water pipelines across the Mataura River) would result in significant adverse visual effects and the decision to decline consent was based on that finding, and a finding that the proposal was part of a transportation route, and that the particular plan provisions relevant to that activity required alternative routes to be properly considered as part of controlling adverse effects[28]. I submit the case is not on all fours with the present application where the requirement to consider alternatives simply arises under section 105 (and Schedule 4) and not under the relevant planning instruments.

56 RNRP Policy AQ P4 Matters to consider – Ngā take hei whiriwhiri states:

> Have particular regard to the following matters when considering the acceptability of any discharge of contaminants to air:
>
> …
>
> h. the operational requirements and locational constraints relevant to the discharge and/or activity
>
> …

57 This policy does not require consideration of functional need for the location and instead recognises the need for balancing of operational requirements and discharges, consistent with the overall policy approach of PC 13. The consideration of alternative locations by AAL addresses operational requirements and locational constraints as required under this policy[29].

[25] Clear the Air Closing Legal Submissions, para 10 - 11
[26] Environment Court C162/2021
[27] [2022] NZEnvC 29
[28] Ibid at [131] – [141]
[29] Batchelar EIR Para 62, Evidence Bundle Tab 25, p 551

58 In relation to Schedule 4, Clear the Air[30] references clause 2(3)(c) as requiring a greater level of detail in a consideration of alternatives than AAL has provided. In my submission that is not to be inferred by clause 2(3)(c). That clause concerns the level of detail that should be included in an assessment of the activity's effects. A consideration of alternatives is a different thing.

59 To the extent that the Court feels it needs to engage with the consideration of alternatives it is relevant to note that it is the totality of the material before the Court (i.e., the application documentation, written evidence, and oral evidence) that is relevant for that purpose.

Mātauranga Māori Environmental Monitoring Plan conditions

60 Mr Batchelar proposed some conditions around a Mātauranga Māori Environmental Monitoring Plan. These were proposed in good faith and in the absence of any helpful engagement with Ngāti Kuku.

61 Mr Scott identified some deficiencies and improvements with what had been proposed in his evidence.

62 In response to this Mr Batchelar made some amendments to the proposed conditions.

63 In my submission the conditions as proposed provide for appropriate and flexible engagement with Ngāti Kuku in the development, implementation and monitoring of a cultural effects monitoring plan, if Ngāti Kuku elects to engage with AAL. The conditions as proposed do not prescribe the detail on how the Mātauranga Māori Environmental Monitoring Plan should be prepared and what it should contain. There is broad scope for this to be designed by Ngāti Kuku in collaboration with AAL.

64 Advice Note 2 recognises the opportunity the development of a broader mātauranga monitoring framework would provide (as opposed to separate conditions requiring similar things in multiple consents) and allows for participation in such a broader approach, should it be developed, to satisfy the requirements of the AAL.

65 I note that the Mātauranga Māori Environmental Monitoring Plan conditions sit within the air discharge permit. AAL would have no opposition to the scope of the plan being broadened to include other environmental matters such as stormwater discharge and ground water contamination, both issues being of interest to manawhenua. Rather than repeating the same condition in the earthworks and stormwater discharge

[30] Clear the Air Closing Legal Submissions, para 14

consents, AAL proposes to add to the air discharge conditions the following on an Augier basis:

> "a Mātauranga Māori Environmental Monitoring Plan may…also include the consideration of stormwater and soil/groundwater contamination under the stormwater and earthworks consents associated with the new asphalt plant"

66 Ngāti Kuku/Whareroa Marae submits that if the Court decides to grant consent for the new plant an interim decision should be issued to enable Ngāti Kuku and Whareroa Marae to review the conditions[31]. The consent authorities do not support such an approach, noting that the staggering of reply submissions provides an opportunity to comment on the applicant's proposed conditions[32].

67 AAL would prefer the Court to make a final decision on the basis that the conditions that are proposed are reasonable and flexible, and can be made to work if those concerned have the will to do so. An interim decision will serve to delay the final determination of the application, and assuming AAL is successful, the ordering and commissioning of the new plant. The inability to achieve good engagement between AAL and Ngāti Kuku/Whareroa Marae has been a feature of this application.

68 Nevertheless, if the Court determines that some further engagement on the Mātauranga Māori Environmental Monitoring Plan conditions is needed, AAL will do its best to achieve that. Any such direction from the Court should require a strict and swift date for AAL to report back on the outcome of further engagement, and the consent authorities will need to be given the opportunity to comment on any amended condition wording that might be proposed.

<u>Production limits</u>

69 Asphalt production limits for the new plant are set out in proposed condition 9 - 12. These provide for a nuanced approach to production increases allowing for both market growth over time (up to 200,000 tonnes per year), and the possibility of "one-off" spikes in demand on account of major capital works projects or natural disaster recovery (up to an additional 100,000 tonnes in a calendar year or 300,000 tonnes in total in that year).

70 That nuanced approach is supported by the consent authorities[33].

71 Toi te Ora seeks annual mass emission limits on PM_{10} and NO_x of 0.5 and 1 tonnes per year respectively. I discuss this below. In the alternative Toi te Ora seeks a production

[31] Ngāti Kuku/Whareroa Marae Closing Legal Submissions para 23
[32] Consent Authorities Closing Submission, para 36
[33] Consent Authorities Closing Submission, para 9 - 11

limit of 75,000 tonnes per year. This limit is opposed by AAL. It is essentially a cap at the existing production level and makes no allowance for the manufacturing of essential asphalt to support infrastructure as the Bay of Plenty market grows over the life of the consent, and would be unlikely to result in the new plant being constructed. Detailed incremental and cumulative effects modelling of all key contaminants has been provided in the AQA at full production and at 300,000 tonnes per year (with a further proportional reduction in contaminant concentrations able to be calculated at 200,000 tonnes per year normal maximum production) and this confirms that effects are small. These findings are corroborated in the independent HRA. I submit there is no proper justification on an effects basis for a production cap of 75,000 tonnes per year.

72 Toi te Ora's suggested need for a production limit of 75,000 tonnes per year for the proposed plant is based on the social damage cost analysis set out at paragraph 26 in the Closing Legal Submissions. Mx Wickham's evidence states that the social cost approach is not as accurate as air quality assessments and detailed risk assessments and does not account for the emissions being from a tall stack[34].

73 The social cost analysis in the Toi te Ora submission reaches the opposite conclusion to the HRA as it suggests that the social health costs of the proposed plant (at 300,000 tonnes per year) are significantly higher than the existing plant (at 68,000 tonnes per year).

74 Looking at the HRA outputs as set out in Dr Denison's EIR Table 4[35], the effect of the proposed plant (at 300,000 tonnes per year) is a net reduction in health risk of $PM_{2.5}$ and NO_2 compared to the existing plant (at 68,000 tonnes per year).

75 The risk of premature mortality from exposure to $PM_{2.5}$ is reduced (- 0.03 x 10^{-5}) by a greater margin than the small increase in risk (+ 0.02 x 10^{-5}) from exposure to slightly more NO_2 (assuming the new plant was operating on diesel). This means there is an overall health benefit and, by inference, the health social costs will be reduced, not increased as suggested in the Toi te Ora submission.

76 Limiting production to 200,000 tonnes per year would further increase the net improvement in effects.

77 Therefore I submit the suggestion that it is necessary to limit production to ensure there is a net positive health risk impact of the proposed plant compared to the existing plant is incorrect based on the more robust HRA outputs.

[34] Wickham EIC para 75, Evidence Bundle Tab 30 p718
[35] Denison EIR Table 4, Evidence Bundle Tab 9 p269

78 Toi te Ora's alternative suggestion of setting annual mass emission limits[36] is unnecessary from a compliance perspective. The limits proposed in the consent on hourly pollutant emissions and annual asphalt production effectively limit the amount of pollutant that can be released on an annual basis. A separate limit on annual pollutant emissions is therefore redundant. If the Court thought it was important (noting that the consent authorities do not identify this as something they want) the amount of PM_{10} or NO_2 emitted each year could be included in the annual monitoring and compliance report[37].

Use of diesel

79 The new plant is intended to run on natural gas and strict criteria must be met if the plant is to run on diesel.[38]

80 Toi te Ora submits there should be no provision made for the new plant to run on diesel whatsoever.[39] In the alternative the submission is that when running on diesel the output should be limited to 2.1 tonnes of NO_x per annum. I submit it is not reasonable to make no provision for ongoing production in the event that the supply of natural gas is interrupted or becomes unsustainably expensive. I submit the conditions as proposed are a reasonable response to that possibility and are supported by the AQA and HRA evidence. I understand the maximum 2.1 tonnes of NO_x per annum proposed in the alternative would reflect Toi Te Ora's preference for production to be capped at 78,000tpa. The correct approach in AAL's view is to use the production limits proposed in the consent and the maximum hourly discharge rate of 3.9kg/hr[40] to limit NO_x.

Low NO_x burner specification

81 Toi te Ora seeks the addition of a detailed specification for low NO_x burners[41]. AAL opposes this. The reference provided by Mx Wickham in her correction statement is from United States regulations (Regulation 62.5 Standard 5.2 https://www.epa.gov/system/files/documents/2022-09/62.5%20-%20Std%205.2.pdf). This reference was provided in a correction to their evidence and was not able to be addressed by Ms Simpson at the hearing.

82 Ms Simpson advises:

[36] Toi Te Ora Closing Legal Submissions, para 28 - 34
[37] Proposed condition 54(a)
[38] Proposed conditions 14 - 20
[39] Toi Te Ora Closing Legal Submissions, para 39
[40] Proposed condition 28
[41] Toi Te Ora Closing Legal Submissions, para 55

a. Section I of the Standard indicates that "Portable sources such as asphalt plants or concrete batch plants are only exempt from the standard requirements in Section III". Given that concrete batch plants are never mobile, it is not clear whether this exemption is intended to apply to asphalt plants (and concrete batch plants) more generally.

b. Section III contains a table of Source Types and an applicable Control Technology and/or Emission Limit. The specific emission limit cited by Mx Wickham is for natural gas-fired boilers and is not relevant to asphalt plants (as evidenced by the reference to standard oxygen conditions, which are unique to boilers). Other types of process plant, such as cement kilns and lime kilns are listed in the table. If Section III is intended to apply to asphalt plants, they would fall under the category of "Fuel combustion sources not otherwise specified". The applicable standard is "Low NOx burners or equivalent technology capable of achieving 30% reduction from uncontrolled levels."

c. The proposed burner is described by the supplier as a low-NOx burner and is capable of achieving a NOx emission limit of 100 mg/Nm^3. This is consistent with a greater than 30% reduction competed to uncontrolled NOx emissions (typically stated as 350 mg/Nm^3).

83 On this basis I submit the technical specification now suggested by Toi Te Ora is not appropriate. No specification is required in the conditions as the activity must be undertaken generally in accordance with the application documents[42] but if the Court determines a condition is necessary it should specify that the plant must be fitted with a NO_x burner capable of achieving an emission of less than 100mg/Nm^3 NO_x.

<u>Loadout enclosure</u>

84 Toi te Ora and Clear the Air request that if consent is granted for the new plant it be made subject to a condition requiring the loadout area to be fully enclosed.

85 Proposed condition 23(c) requires air from the hotmix storage bins to be extracted to a bluesmoke aerosol filtration system and discharged via the asphalt plant stack. The intent of this condition is to ensure that fugitive odour from the new plant's storage and loadout area is not offensive or objectionable beyond the boundary of the site by capturing and destroying odour in the bluesmoke.

86 At issue is whether the engineered capture system will be sufficient, or whether some sort of enclosure of the loadout area is needed to supplement the extraction system. As Mr Murray explained the principle of enclosure is simply to reduce the prospect that air moving through the loadout area will reduce the efficiency of the extraction system to the extent that it is unable to do the job properly.

[42] Proposed condition 4

87 To address this possibility condition 36 is proposed which requires field odour surveys to be undertaken under a range of meteorological conditions within 6 months of the new plant being commissioned to determine if odour at the site boundary attributable to the loadout area is causing offensive and objectionable odours. That timeframe (up to 6 months) will be sufficient to ensure that a full range of meteorological conditions are able to be considered in the odour assessments. If it is found that fugitive odour is an issue, AAL will be required to enclose or partially enclose the area.

88 Mr Murray has reviewed this approach on behalf of the consent authorities and considers what is proposed to be satisfactory[43].

89 I submit the alternative approach contended for – that the area be fully enclosed from the outset regardless of whether that is needed to control fugitive odour – is not reasonable or indicated on the evidence. While it is accepted that it is possible to construct a full enclosure (in the sense that it is physically able to be done) that is not the test to apply in determining whether such a requirement should be imposed as a condition of consent.

90 Such a condition should only be imposed if the Court was satisfied it was a necessary response to address an effect.

91 I submit:

a. The proposed extraction system may be effective in all meteorological conditions such that enclosure is redundant. That proposition will be tested as per proposed condition 36

b. If some sort of enclosure is needed, then the most appropriate enclosure (including extent and location) will need to be determined and informed by the results of the odour surveys (i.e., in what conditions is odour an issue, and therefore what sort of enclosure is best to address those conditions) and cannot be determined now.

c. Requiring full enclosure on construction is a disproportionate response.

<u>Duration</u>

92 In my opening submissions I commented on the appropriate duration of consent and suggested a 35 year term was appropriate[44].

[43] Consent Authorities Closing Submission, para 14
[44] AAL Opening Legal Submissions, para 174 - 191

93 Subsequently, and prompted by Commissioner Hodges' comments and questions, Mr Batchelar indicated, and AAL has accepted, that a 25 year duration would be acceptable, and Ms Petricevich has agreed with that as the consent authorities' planning expert.

94 I offer the following additional comments:

a. The proffered BPO and section 128 review conditions[45] are very strong. The conditions provide a sound basis for expecting that throughout the term of the consent AAL will need to ensure the plant and its operation keep up-to-date with advances in technology and societal expectations as expressed through statutory planning documents

b. This is consistent with the policy intent behind the statutory limit on consent duration of 20 years under the NES-GHG (noting that this NES does not apply to this application)

c. A 25 year term works well with the proposed formal 10-yearly technology reviews, noting that the second review (at year 20) will be required to consider plant replacement options and the reconsenting programme[46].

95 In the section 128 review condition there is a somewhat unusual review trigger that addresses 'managed retreat' and provides that if a statutory planning document is formally adopted that requires industry to retreat from the subject site and/or changes the district plan zoning of the site, then the regional council may initiate a formal review of consent conditions. While there is no current expectation that 'managed retreat' is likely to find favour in the statutory planning documents, were that to change this proposed trigger provides an opportunity to respond to that change. In this connection I note also that any such change in the planning context is likely to be reflected in the BPO reports AAL must commission and provide to the regional council[47].

96 Ms Hill and Ms Hollis raise a fair point at paragraph 22(a) of their closing legal submissions for the consent authorities in relation to when the new plant discharge consent commences. Mr Batchelar has addressed this in the attached proposed condition wording[48].

[45] Proposed conditions 56 - 58
[46] Proposed condiiton 56(d)
[47] Proposed condition 56(c)
[48] Proposed condition 60

97 In relation to a reduced term of 10 years as requested by Clear the Air and Toi te Ora I note (contrary to Clear the Air's closing legal submissions at paragraph 18) that Mr Palmer addressed this in questions from Mr Enright and has indicated that it would not be financially viable for AAL to invest in the new plant for a shorter term[49]. For the avoidance of doubt I can advise the Court that I am instructed the new plant would not be built by AAL if it only had the security of a 10 year consent to operate.

Concluding comments

98 The status of the MMA as a polluted airshed for PM_{10} and the associated public health risks that entails have provided the impetus for a major resetting of regional policy around how industrial and other activities able to be controlled under the RMA should be managed.

99 The resulting policy shift places much greater onus on all emitting industries in the MMA to take responsibility for the effects of their activities. The expectation is that all industry should adopt the best practicable options to lower their emissions, and should keep on top of things by adopting an iterative approach. In a technology and operations sense that means getting it right now, and continuing to get it right as things evolve in the future. It does not mean that industry that emits in the MMA needs to cease or relocate. The expected environmental outcome is that if the new policy requirements are implemented successfully the quality of air in the MMA will improve, with associated reductions in adverse health risks and other adverse effects (including on cultural values), and in time the airshed will cease to be polluted.

100 AAL finds itself at the front of the queue in applying this new approach. AAL's contribution to overall air quality in the MMA is small, and the improvements it is able to make to overall airshed air quality by moving to a new state-of-the-art asphalt plant are also small.

101 While those improvements on their own will not substantively 'move the dial' towards achieving the objective of removing the airshed's polluted status, they are highly relevant in setting the standard for what is able to be, and needs to be, achieved by all emitting industry as the community at large strives to improve air quality while also enabling the important contributions that industry makes to continue.

102 The alternative approach contended for by the section 274 parties that argue a new plant should be somewhere else is not supported by the planning framework, and is

[49] Transcript p 107, line 29 - 34

not a necessary response to the evidence as to effects. Such an outcome would in my submission serve to undermine the new policy approach while the ink is still wet.

103 Through the consenting process it is important to note that significant changes and improvements to AAL's proposal have been made in response to questions and issues that have come from the consent authorities and submitters. Those changes include:

a. Prescribed best practice trade waste and multi-stage stormwater treatment solution

b. Confirmation of low risk from contaminated land/soil

c. Improved access safety

d. Prescribed production limits for both existing and new plants

e. Switch from ULO to diesel as the burner fuel for existing plant

f. Adoption of natural gas as the burner fuel for new plant

g. Completion of a formal health risk assessment

h. Adoption of a Greenhouse gas emissions reduction plan

i. Prescribed odour response requirements

j. Boundary monitoring of PM_{10}

k. Greater precision on condition limits for PM_{10}, $PM_{2.5}$, and NO_2 for stack emissions monitoring and compliance

l. More comprehensive conditions on yard management for fugitive dust emissions

m. Adaptive management for odour emissions of load out area

n. Improved scope of Mātauranga Māori Environmental Monitoring Plan, including provision for a positive duty to respond to issues and resourcing

o. Enhanced BPO review condition every 10 years and final review consideration of plant replacement options and programme for reconsenting.

p. Additional triggers for section 128 review

q. Reduction in the term of consent sought

104 I submit the consents applied for should be granted on the conditions now proposed.

Stephen Christensen

Counsel for Allied Asphalt Limited

20 June 2024