

# BAY OF PLENTY REGIONAL COUNCIL

## DECISION OF HEARINGS PANEL

**RM20-0190**

**IN THE MATTER OF:** The Resource Management Act 1991  
and  
**A Hearing for an application to discharge contaminants to air**

**APPLICANT:** Higgins Group Holdings Limited (Higgins, the Applicant)

**SITE:** 92 Hewletts Road, Mount Maunganui (the site)

**PROPOSAL:** A replacement consent is sought to discharge contaminants, being particulate matter (PM<sub>10</sub>), odour, nitrogen dioxide (NO<sub>2</sub>), carbon monoxide (CO), and sulphur dioxide (SO<sub>2</sub>) to air from the production of asphalt and associated yard activities. A term of 10 years is sought.

**HEARING DETAILS:** The publicly notified application was heard by Independent Commissioners Gina Sweetman (Chair) and John Iseli, under authority delegated by the Bay of Plenty Regional Council, on Tuesday 6<sup>th</sup> and Wednesday 7<sup>th</sup> November 2023 at Mercury BayPark, 81 Truman Lane, Mount Maunganui.

The Hearing was adjourned on 7<sup>th</sup> November 2023 and closed on 18<sup>th</sup> December 2023.

**DECISION SUMMARY:** Consent is granted for the reasons given in this decision.

**HEARING  
ATTENDANCE**

The following people attended and presented evidence at the Hearing:

**For the Applicant, Higgins**

- Mr. Damon Norden, Northern Area Manager, Higgins Contractors Ltd (Higgins)
- Ms. Janette Campbell, Counsel
- Mr. Elliott Maassen, Counsel
- Mr. Dean Taylor, Bay of Plenty Regional Manager, Higgins
- Mr. Chris Bender, Service Leader Air Quality, Pattle Delamore Partners Ltd (PDP)
- Mr. Simon Greening, Technical Director – Environmental Planning, PDP

**For Bay of Plenty Regional Council (Council/BOPRC):**

- Ms. Danielle Petricevich, Principal Planning and Policy Consultant, 4Sight Consulting Ltd
- Mr. Rob Murray, Environmental Scientist, Air Matters

**Submitters:**

- Mr. Mark Jury, Tauranga Motor Company (TMC)
- Mr. Glenn Cameron, TMC
- Mr. Rory McLeod, Mount Steelcraft Engineering
- Mr. Neville Huddleston, TMC
- Dr. Terry Brady, Air Quality Expert acting for TMC
- Mr. Richard Coles, Planning Consultant, acting for TMC, TK Assets Ltd<sup>1</sup> and TKI Hewletts Ltd<sup>2</sup>
- Ms. Emma Jones, Clear the Air Mount Maunganui Charitable Trust
- Mr. Allan Goodhall
- Ms. Awhina Ngatuere, Ngāti Kuku Hapū Trust, accompanied by Mr. Joel Ngatuere
- Ms. Rosie Kelway
- Dr. Phil Shoemack, Medical Officer of Health, Te Whatu Ora
- Mx. Lou Wickham, Air Quality Expert, acting for Te Whatu Ora

**Others in attendance:**

- Ms. Mel Jones, Regulatory Coordination Team Leader, BOPRC
- Ms. Ella Tennent, Manager Consents, BOPRC
- Ms. Marlene Bosch, Principal Advisor, Consents, BOPRC
- Ms. Michelle Paddison, Counsel, Te Whatu Ora
- Ms. Annaka Davies, Te Whatu Ora
- Mr. Sam Kelway, 1News reporter<sup>3</sup>

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<sup>1</sup> Landlord for the showroom on 100 Hewletts Road

<sup>2</sup> Landlord for 96 Hewletts Road – the grooming shed and used car yard

<sup>3</sup> Mr. Kelway filmed and recorded the hearing from midday on Day 1 and all of Day 2. The Panel invited those in attendance who did not want to be filmed to advise Mr. Kelway of this.

# 1 Description of the proposal

- (1) The application is described in:
  - (a) Section 2 of the Assessment of Environmental Effects (AEE) submitted with the application
  - (b) The summary letter provided by PDP dated 6 April 2023
  - (c) The updated assessment provided by PDP dated 4 October 2023
  - (d) The evidence submitted in advance of the hearing from Mr. Damon Noren, Mr. Dean Taylor, Mr. Chris Bender and Mr. Simon Greening
  - (e) Section 3 of the s42A report.
- (2) We have adopted these descriptions.
- (3) In summary, as at the time of the hearing of this application, the proposal is for:
  - (a) The continued operation of the existing asphalt plant and associated yard activities
  - (b) The continued discharge of contaminants, being particulate matter (PM<sub>10</sub>), odour, nitrogen dioxide (NO<sub>2</sub>), carbon monoxide (CO), and sulphur dioxide (SO<sub>2</sub>) to air from the production of asphalt and associated yard activities
  - (c) The operation of the asphalt plant for a maximum of 12 hours in any day
  - (d) A maximum annual production of 50,000 tonnes per year
  - (e) A maximum total suspended particle (TSP) emission rate of 1.5 kg/hr
  - (f) An increase in stack height from 16.6m to 19m, including the trialing of a cone on the top of the stack to increased the efflux velocity of the discharge
  - (g) A 10 year consent duration.
- (4) The Application describes the plant as being equipped with a venturi water scrubber to control particulate emissions. Combustion gases, dust, and bitumen related organic compounds are drawn by an induced fan through the venturi scrubber before being discharged to air via the stack.
- (5) The Applicant's evidence offered the following additional mitigation measures:
  - (a) A commitment to further volatile organic compound (VOC) monitoring at the adjacent Tauranga Motor Company site
  - (b) The installation of sprinklers around aggregate stockpile areas and in key heavy traffic routes<sup>4</sup>
  - (c) The establishment of a community liaison group (CLG)
  - (d) The establishment of a Kaitiaki Forum (KF).
- (6) We note that the asphalt plant has operated at the site since 1991. The Applicant is currently operating the plant under RC63317, which was granted on 6 December 2005 and expired on 30 September 2020. That consent can be relied upon as the Applicant applied for this resource consent more than six months prior to the expiry of RC63317.
- (7) We note that the stack height was increased after public notification and the close of submissions. We note that the increased stack height to 19m is a permitted activity under the Tauranga City Plan<sup>5</sup>.

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<sup>4</sup> Statement of evidence of Mr. Damon Norden

<sup>5</sup> Section 9 of the s42A report

- (8) The application was further amended through the hearing process. On 13 November 2023, the Applicant provided a memorandum and updated set of conditions, offering a condition that would require the Applicant to apply for a resource consent from Tauranga City Council to increase the stack height to approximately 28 metres in height, and then to subsequently implement that consent if granted. If the consent was not granted, a new offered consent condition would allow BOPRC to review the condition if the consent was declined. The Applicant also reduced the term of consent sought to 66 months (five and a half years). The planners<sup>6</sup> confirmed a resource consent would be required from the Tauranga City Council for a 28m stack height.
- (9) We have made our decision based on the application as it was finally described in the memorandum and conditions dated 13 November 2023.

## 2 The Site and Background

- (10) The site, surrounding area and background are described in Sections 1 and 5 of the AEE, Sections 2, 4, 5 and 9 of the BOPRC's s42A report. For the sake of brevity, we have adopted these descriptions.
- (11) The key issues we noted from these descriptions are:
- (a) The site is located in the Industrial Zone of the Tauranga City Plan. The surrounding industrial area is known as the Mount Industrial Area and contains activities such as Tauranga Airport, the Port of Tauranga, the rail network, and a variety of other commercial and industrial operations.
  - (b) The nearest residential dwellings are approximately 620m to the east of the site
  - (c) Mount Maunganui College is approximately 580m to the east of the site
  - (d) Whareroa Marae is approximately 1.4km to the west-southwest of the site
  - (e) The site is generally flat and low lying, being 2m above mean sea level
  - (f) The site is not subject to any statutory acknowledgements
  - (g) There are no known cultural features located within or nearby the site, and the nearest archaeological site is approximately 1.3km from the site
  - (h) The predominant winds are from between the west and south-west.
- (12) The Ministry for the Environment gazette the Mount Maunganui Airshed in October 2019 - Bay of Plenty Airshed Notice 2019 – Schedule 1 – Mount Maunganui Airshed SO 537485.
- (13) We were advised of four incidents involving significant non-compliance and the issuing of abatement and infringement notices, in 2012<sup>7</sup>, 2022<sup>8,9</sup> and 2023<sup>10</sup>. The BOPRC received fifteen complaints about the site between April 2018 and April 2020, and 22 complaints between 1 Jan 2022 and 27 Jan 2023. These complaints generally related to smoke and odour. We were advised that these complaints were received from the surrounding area and the residential area to the north and north-east of the site. We note that on 18 December 2023, we were forwarded an email received from Mr. Jury of the TMC dated 13 December 2023 which sets out concerns about odours from the application site following the installation of the 19m stack. Given that this was received following the

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<sup>6</sup> Ms. Petricevich, Mr. Greening and Mr. Coles

<sup>7</sup> A significant non-compliance after which the Applicant upgraded the scrubber and demister

<sup>8</sup> An abatement notice for the discharge of offensive and objectionable odour beyond the site; still in place

<sup>9</sup> An infringement notice for the discharge of offensive and objectionable odour beyond the site

<sup>10</sup> Two infringement notices for the discharge of offensive and objectionable odour beyond the site

hearing and the provision of the Applicant's closing submissions, we have not considered this in making our decision. The submitter should follow this up with the Council directly.

### 3 Procedural Matters

#### Written approvals, notification and submissions

- (14) The application was not accompanied by any written approvals.
- (15) The application was publicly notified on 14 April 2023, with submissions closing on 25 May 2023.
- (16) There were 35 submissions received on the application; with 34 being opposed and one neutral. The issues and outcomes sought through the submissions are described in section 8.2 of the s42A report. We have repeated these below:
- (a) Odour negatively affecting them at their residential dwellings, and their enjoyment (walking or driving) of the Mount Maunganui area.
  - (b) Aim to limit further air pollution in the area.
  - (c) Harmful effects on human health, including the imposition of avoidable risk to children and staff at local schools in the area, concern about respiratory issues.
  - (d) The Applicant is not mitigating the discharge appropriately (evidenced by abatement and infringement notices).
  - (e) Human health should be prioritised over a commercial company and the activity should relocate to a less sensitive environment.
  - (f) Amenity and health effects associated with the odour.
  - (g) The proposal is highly offensive to iwi and hapū and fails to avoid, remedy, or mitigate a range of adverse effects on iwi for several reasons:
    - The proposal is inconsistent with and fails to adequately assess several iwi and hapū long term management plans.
    - The proposal represents a further encroachment on traditional lands and the cumulative effects of this activity along with similar land uses in the area are unacceptable.
    - Air is a taonga to local mana whenua and iwi, and the degradation of air quality lessens its mauri.
    - Insufficient consultation or cultural impact assessment has been undertaken to assess adverse effects generated by the proposal on iwi, culminating in a breach of natural justice.
- (17) Several of the submissions sought the consent be declined. Some submitters sought mitigation measures or conditions as follows:
- No unpleasant odour beyond the site boundary.
  - Regulate when and how contaminants can be released, including no discharge when wind direction would increase potential negative impacts on residents (south, west, or south-west directions).
  - Any future breaches of conditions of consent to result in significant impact on Higgins Group ability to manufacture asphalt at the current location.
  - Require air monitoring stations to be installed in schools and nearby businesses.
  - Installation of monitoring equipment that posts live updates to the Council's website.
  - Reduction in allowed annual production level.

- Move away from urban Mount Manganui in the next three to five years.
- Transition to better mitigation (three to five years), including requirement for industry best practice.
- Maximum consent term of three years.

#### **Officer's recommendation**

- (18) Ms. Petricevich recommended that the application be declined on the basis of:
- (a) The Applicant having not proposed any reduction of contaminants at source
  - (b) The Applicant having not undertaken a comprehensive analysis of alternatives and the Best Practicable Option (BPO)
  - (c) The Environment Court Interim Decision on Plan Change 13 requires an overall improvement in air quality
  - (d) The adverse effects (in particular, of odour and PM<sub>10</sub>) are unacceptable when considering the receiving environment and contribution to cumulative effects
  - (e) Cumulative effects are having an impact on the cultural values of Ngāti Kuku
  - (f) Discharges from the Mount Maunganui Industrial Area are resulting in adverse effects on human health
  - (g) She has been unable to conclude that the proposal is consistent with relevant planning documents and the Tauranga Moana Iwi Management Plan.

#### **Hearing, appearances and site visit**

- (19) The Hearing was held on Tuesday 6<sup>th</sup> and Wednesday 7<sup>th</sup> November 2023 at Mercury BayPark, 81 Truman Lane, Mount Maunganui. We undertook an informal site visit of the surrounding area on the late afternoon of Monday 5<sup>th</sup> November and a formal site visit to the site on the morning of the 6<sup>th</sup> November after hearing from the Applicant.
- (20) Evidence from the Applicant, the TMC and Te Whatu Ora was pre-provided in conformance with Minute 1. Copies of the briefs of evidence are held by BOPRC.
- (21) We have not separately summarised the matters covered at the Hearing in this section, but we have referred to or quoted from that material as appropriate in the remainder of this decision.
- (22) The Hearing focused on the matters raised in the submissions and the s42A report and covered:
- (a) Effects of particulate matter
  - (b) Odour effects
  - (c) Other discharge effects
  - (d) Cultural values
  - (e) Duration of consent
- (23) We took our own notes of any answers given to verbal questions that we posed to Hearing participants, and we also relied on notes taken by Ms. Jones and Ms. Musgrave, to whom we are very grateful.
- (24) On Day 1 of the hearing, we asked the Applicant to undertake modelling to show the difference in effects resulting from the proposed stack height, and stack heights of 28m and 37m, and factoring in the maximum height that shipping containers on the adjacent site may be stacked to. The results of this were presented to us on Day 2.

- (25) After hearing from the Applicant and submitters, Ms. Petricevich maintained her recommendation that the application should be declined.
- (26) We adjourned the Hearing on 7<sup>th</sup> November 2023 and issued Minute 2. This Minute asked the Applicant to provide the results of further stack modelling (including isopleth maps) and a final proposal for consideration, including any updates to the proffered suite of conditions. The Minute then set out steps for submitters to review and comment on the suite of conditions, for expert conferencing to occur between the air quality experts and subsequently the planners, and for the Applicant to provide a final right of reply.
- (27) We received feedback from Ms. Jones, Te Whatu Ora and the TMC on 28 November 2023. We received the Air Quality Experts' Joint Witness Statement (Air-JWS) on 1 December 2023, Ms. Petricevich's comments on the proposed conditions on the 5 December 2023, and Mr. Coles' comments on 6 December 2023.
- (28) We received the Applicant's closing submissions, including the revised stack dispersion modelling, final proposal and updated suite of conditions on the 13<sup>th</sup> December 2023<sup>11</sup>.
- (29) We closed the Hearing on 18<sup>th</sup> December 2023.

## 4 Reasons for Consent

### Regional Natural Resources Plan (RNRP)

- (30) Section 6.1 of the s42A report set out the reasons for consent sought under the RNRP, as set out below:
- The discharge of contaminants to air from asphalt or bitumen manufacturing or processing is a discretionary activity under Rule AIR-15(2).

- (31) Section 6.1 of the s42A report sets out that at the time the application was lodged, consents were required under both the Regional Air Plan and Plan Change 13 to the RNRP. However, all appeals to PC13 that are relevant to this application have been resolved and PC13 has now been made operative and incorporated into the RNRP. Therefore, the Regional Air Plan is no longer relevant to this application.

### National Environmental Standards for Air Quality (NESAQ)

- (32) Section 6.2 of the s42A report sets out the relevant regulations of the NESAQ to this application. In summary:
- (a) In respect of Regulation 17, while the discharge of PM<sub>10</sub> is located within a gazette airshed, it is the same activity as currently authorised and there is no requirement to decline consent.
  - (b) Regulation 20 applies as the discharge contains CO, oxides of nitrogen and VOCs. Regulation 20 sets out the circumstances where a consent authority must decline an application.
  - (c) Regulation 21 applies as the discharge contains SO<sub>2</sub>. Regulation 21 sets out the circumstances where a consent authority must decline an application.

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<sup>11</sup> This was dated 10<sup>th</sup> November 2023.

- (33) The s42A reporting officer concludes in respect of Regulations 20 and 21 that it is unlikely that the activity will cause the relevant contaminant concentrations in the airshed to breach their ambient air quality standard.
- (34) The s42A report states that the National Environmental Standard for Greenhouse Gas Emissions from Industrial Process Heat 2023 (NES-GHG) is not relevant to this application, as the application was publicly notified prior to the NES-GHG coming into effect on 27 July 2023. We accept this advice and do not consider the NES-GHG further.
- (35) In summary, we conclude that the application is a discretionary activity under the RNRP.

## 5 Statutory Framework

- (36) Section 104 of the RMA sets out the matters we must have regard to when considering the application, as set out below:

### **104 Consideration of applications**

- (1) *When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to—*
- (a) *any actual and potential effects on the environment of allowing the activity; and*
  - (ab) *any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; and*
  - (b) *any relevant provisions of—*
    - (i) *a national environmental standard;*
    - (ii) *other regulations;*
    - (iii) *a national policy statement;*
    - (iv) *a New Zealand coastal policy statement;*
    - (v) *a regional policy statement or proposed regional policy statement;*
    - (vi) *a plan or proposed plan; and*
  - (c) *any other matter the consent authority considers relevant and reasonably necessary to determine the application.*
- (2) *When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.*
- (2A) ...<sup>12</sup>
- (3) *A consent authority must not,—*
- (a) *when considering an application, have regard to—*
    - (i) *trade competition or the effects of trade competition; or*
    - (ii) *any effect on a person who has given written approval to the application;*
  - (c) *grant a resource consent contrary to—*
    - (i) *section 107, 107A, or 217;*
    - (ii) *an Order in Council in force under section 152;*
    - (iii) *any regulations;*

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<sup>12</sup> Not relevant to this application.



- (iv) *wāhi tapu conditions included in a customary marine title order or agreement:*
  - (v) *section 55(2) of the Marine and Coastal Area (Takutai Moana) Act 2011:*
  - (d) *grant a resource consent if the application should have been notified and was not.*
  - (4) *A consent authority considering an application must ignore subsection (3)(a)(ii) if the person withdraws the approval in a written notice received by the consent authority before the date of the hearing, if there is one, or, if there is not, before the application is determined.*
  - (5) *A consent authority may grant a resource consent on the basis that the activity is a controlled activity, a restricted discretionary activity, a discretionary activity, or a non-complying activity, regardless of what type of activity the application was expressed to be for.*
  - (6) *A consent authority may decline an application for a resource consent on the grounds that it has inadequate information to determine the application.*
  - (7) *In making an assessment on the adequacy of the information, the consent authority must have regard to whether any request made of the applicant for further information or reports resulted in further information or any report being available.*
- (37) Section 104B of the RMA outlines the matters for which the Council can have regard to when considering an application for a discretionary activity.
- After considering an application for a resource consent for a discretionary activity or non-complying activity, a consent authority—*
- (a) *may grant or refuse the application; and*
  - (b) *if it grants the application, may impose conditions under section 108.*
- (38) Section 105 of the RMA outlines additional matters that must be had regard to, as follows:
- (1) *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—*
    - (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.*
- (39) Section 105 of the RMA is relevant as the application involves the discharge of a contaminant from an industrial premises into air that is not permitted under the NES-AQ or the RNRP or a resource consent (see s15 of the RMA).

## 6 SECTION 104 ASSESSMENT

### Section 104(1)(a) Effects on the Environment Assessment

#### Existing environment and permitted effects

- (40) The existing environment is well described in the s42A report and the AEE. We adopt those descriptions and refer back to them as necessary. Of particular note is that this application seeks the replacement of the existing air discharge consent. There was discussion during the hearing about the appropriate PM<sub>10</sub> background concentration to be used in assessment of cumulative effects of the discharge against the NES-AQ. This was also traversed through the Air-JWS. In summary, the Air Quality Experts agreed:
- (a) That hourly average concentrations from Da Havilland Way and Rata Street monitoring locations, as background contributions in the CALPUFF model, will give a reasonable approximation for modelling (only) of cumulative effects for PM<sub>10</sub>. The monitoring data represents near field (De Havilland Way) and Residential Areas (Rata Street).
  - (b) To provide a range of 98<sup>th</sup> and 99<sup>th</sup> percentile values in addition to considering hourly measured data of PM<sub>10</sub> as background concentrations.
- (41) Ms. Campbell addressed how, since both the Higgins and Allied consents have expired, they are not part of the existing environment. She submitted that, however, the data set everyone is using is real data that includes the existing discharges, resulting therefore in the Higgins discharge being double-counted. Her position was that the Higgins discharge is very insubstantial, and that while in law, regard is not given to those existing consents, in practice, they are part of the data set, and therefore counted. She also confirmed that if granted, Higgins would not be operating the old consent.
- (42) We address the relevance of the existing environment and its impact on the assessment of this application on an individual and cumulative basis further in the effects assessment.
- (43) The permitted baseline was not raised as matter of relevance to the application, and we agree.

#### Positive effects

- (44) Mr. Greening and Ms. Petricevich both agreed that there would be positive effects arising from the renewal of the consent, and would include:
- (a) Contribution to local employment and the regional economy
  - (b) Support for important infrastructural needs for the Region, including the Port of Tauranga and roading construction and maintenance projects
  - (c) Contribution to the overall resilience of the Region to enable rebuild of damaged infrastructure and buildings.
- (45) We accept the planners' advice and find that there will be positive effects arising from the renewal of the consent.

## Effects in contention

- (46) After analysis of the application and evidence (including the offered and proposed mitigation measures), reviewing the s42A report, reviewing the submissions and concluding the Hearing process, we consider that the proposed activity raises the following outstanding effects in contention:
- a) Particulate matter
  - b) Odour
  - c) Other contaminants
  - d) Cultural values

- (47) We address these effects in turn.

### *Particulate matter*

- (48) The existing asphalt plant has operated at the site for many years. Particulate matter (PM) emissions are controlled by wet scrubber. The air quality experts for the parties (Mx. Wickham, Dr Brady, Mr. Bender and Mr. Murray) agreed that wet scrubbing is no longer consistent with best practice for modern asphalt plants. They noted that bag filtration is current good practice for new asphalt plants<sup>13</sup>. The Applicant accepts that the plant requires replacement and is seeking a short-term consent to allow for the consenting and installation of a modern asphalt plant. Mr. Norden stated that a new plant built on the site would be expected to be fitted with a baghouse, have an enclosed loadout area to reduce fugitive discharges, and would burn gas.
- (49) Te Whatu Ora have raised concerns regarding the contribution of the PM discharge to the polluted Mount Maunganui airshed where monitored PM<sub>10</sub> concentrations already exceed the NES-AQ of 50µg/m<sup>3</sup> (24-hour average). Dr Shoemack noted that the NES-AQ should not be treated as a target and emission reductions are required from industrial sources such as the Higgins plant to improve concentrations in the airshed. Mx. Wickham expressed concern regarding the accuracy of dispersion modelling predictions and considered that consent should not be granted in circumstances where the discharge is likely to cause the NES-AQ to be exceeded. They submitted that the duration of any consent granted is a key consideration in this case.
- (50) During the hearing the Applicant stated that consent would be sought to raise the asphalt plant stack to 28m above ground level. Dispersion modelling of the discharge from the initially proposed 19m high stack indicated a substantial contribution of PM<sub>10</sub> and PM<sub>2.5</sub> to background concentrations in the local industrial area. Dr Brady and Mx. Wickham had also raised concerns regarding the accuracy of the modelling, particularly in relation to downwash effects caused by containers stacked on the adjacent property. We note that the mitigation now proposed (raised 28m stack height) will improve the dispersion of PM (and odour) but will not reduce the mass emission rate itself to the airshed.
- (51) Mr. Bender noted<sup>14</sup> that the sources of PM<sub>10</sub> discharged to the Mount Maunganui Airshed were assessed by air quality experts in the PC13 Environment Court Hearing (Joint Witness Statement – Air Quality, dated 27 May 2021). Emissions of dust from unsealed yards and the bulk storage and handling of materials with potential for dust generation were identified as being the source of the majority of the PM<sub>10</sub> in the Mount Maunganui

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<sup>13</sup> Joint Witness Statement: Air Quality Experts – Section 4

<sup>14</sup> Evidence in Chief of Chris Bender, 24 October 2023 -para 74

Airshed. Mr. Bender pointed out that industrial discharges make up a relatively small contribution to the airshed at 18% of the total. Using these values and assuming an hourly emission rate for PM<sub>10</sub> of 0.83 kg/hour, he calculated that the contribution from the Higgins discharge is less than 5% of the industrial discharges and less than 1% of the total PM<sub>10</sub> discharged to the airshed.

- (52) Revised CALPUFF dispersion modelling was undertaken by Mr. Bender, based on discharge from the 28m stack now proposed. The updated modelling included stacked shipping containers to 16m height on an adjacent site that the experts agreed appropriately represented building downwash effects. The potential impact of the stacked containers on dispersion of the asphalt plant discharge was raised by Dr Brady at the hearing. Updated modelling results for the proposed 28m high stack were appended to the Joint Witness Statement (JWS) of the air quality experts, prepared based on caucusing following the hearing. The updated modelling results included consideration of night-time operation and revised PM<sub>10</sub> and PM<sub>2.5</sub> background concentrations agreed by the experts in the JWS.
- (53) The revised modelling results<sup>15</sup> indicate that substantial improvements to predicted PM concentrations for close receptors in the neighbouring industrial area would be achieved as a result of increasing the stack height to 28m. Excluding background concentrations, the predicted peak PM<sub>10</sub> concentration off-site is 11µg/m<sup>3</sup> (24-hour average), reduced from 29 µg/m<sup>3</sup> (24-hour average) for the current discharge from a 19m high stack. At the nearest residential areas, PM<sub>10</sub> concentrations caused by the Higgins discharge are predicted to reduce from 2.2 µg/m<sup>3</sup> (24-hour average) currently to 1.2 µg/m<sup>3</sup> (24-hour average) for the 28m high stack scenario. Similar proportional reductions are predicted for PM<sub>2.5</sub>.
- (54) Including 99<sup>th</sup> percentile 24-hour average PM<sub>10</sub> monitoring data from representative sites<sup>16</sup> predicts peak cumulative PM<sub>10</sub> concentrations of approximately 50µg/m<sup>3</sup> (24-hour average) in the neighbouring industrial area and 40µg/m<sup>3</sup> (24-hour average) at the most affected residential area. The peak predictions for the industrial area are equivalent to the NES-AQ of 50µg/m<sup>3</sup> (24-hour average) and will potentially exceed the NES-AQ on a small number of days when background concentrations are very high.
- (55) The greatest predicted concentrations caused by the discharge occur at adjacent industrial sites. Most people working in this area will not be exposed for a full 24-hour period. Consequently, properties within the industrial zone are typically regarded as less sensitive in terms of health impacts of fine PM, relative to residential areas. However, Dr Shoemack submitted that it is likely that there will be several people living in industrial sites within the Airshed. He stated that a higher level of harm should not be accepted in an industrial zone.
- (56) Based on caucusing between the air quality experts, predictions of cumulative PM concentrations were also made using representative hourly monitoring data for the modelling period<sup>17</sup>. The inclusion of hour-by-hour background concentrations in the modelling results in predicted exceedances of the NES-AQ for PM<sub>10</sub> for all scenarios. However, Mr. Bender noted this is due to the existing exceedances measured at the

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<sup>15</sup> Joint Witness Statement: Air Quality Experts – Appendix 3

<sup>16</sup> Joint Witness Statement: Air Quality Experts – Appendix 3, Table 2

<sup>17</sup> Joint Witness Statement: Air Quality Experts – Appendix 3, Table 3

monitoring sites. He considered that the incremental increases of PM due to Higgins' discharges are relatively minor in the industrial area and are negligible in the residential area. Mr. Bender added that the addition of the Higgins discharges to the measured background concentrations of PM<sub>10</sub> do not result in any additional exceedances of the NES-AQ over what was measured at the monitoring sites.

- (57) We accept the expert evidence that the updated modelling assumptions, particularly the presence of stacked containers near the site boundary and consideration of night-time operation, will result in appropriately conservative predictions. The results indicate that dispersion from a 28m high stack would result in a significant reduction in the contribution of the discharge to localised PM<sub>10</sub> and PM<sub>2.5</sub> concentrations, particularly in the industrial area. The evidence is that the contribution in the residential area is relatively small. Nevertheless, Mx. Wickham points out that while the extended stack would reduce downwind concentrations, the contribution of PM<sub>10</sub> and PM<sub>2.5</sub> to the airshed remains significant.
- (58) We are conscious of the expert evidence that in the medium to longer term, ongoing discharge of PM from the existing asphalt plant would not be consistent with the Best Practicable Option (BPO). Given the need to reduce cumulative emissions to the Mount Maunganui Airshed to achieve the NES-AQ, we find that any consent should be for a short term not exceeding three years. The proposed work to commission a replacement asphalt plant with bag filtration should proceed with haste.
- (59) Annual monitoring for PM in the stack discharge is proposed, to assess compliance with the limits of 1.5kg/hour and 150mg/m<sup>3</sup> (corrected to standard conditions) PM. We find that such emission testing is appropriate. The evidence is that addition of lime to the asphalt mix may have potential to increase PM emissions. Given that the Applicant states that they wish to retain the ability to use lime in future, we find that additional stack testing should occur following commencement of any use of lime in the asphalt mix.
- (60) Monitoring of PM<sub>10</sub> at the site boundary was suggested by Mx. Wickham and Mr. Murray. Bearing in mind the short term of consent we have imposed, and the tall stack now proposed, we find that such monitoring would offer limited value. We note that there would be substantial costs associated with such monitoring. We accept the evidence of Mr. Bender that in-stack monitoring is appropriate in this case.
- (61) In our evaluation of potential cumulative effects, we have considered information provided in evidence regarding the nearby Allied asphalt plant. We have also considered the approach taken by BOPRC to other discharges into the airshed, including the recently granted HR Cement consent. We are mindful, taking into account cumulative effects, that the Airshed is over-allocated and a reduction in PM emissions is required from all sources to achieve the NES-AQ.
- (62) The revised modelling results detailed in the expert JWS indicate that the 28m high stack will result in improved PM<sub>10</sub> and PM<sub>2.5</sub> cumulative concentration to the extent that the adverse effects of fine PM are likely to be acceptable in the short term (up to a period of three years). Based on the modelling results for discharge from the 19m high stack (up to 29µg/m<sup>3</sup> daily average contribution from the Higgins discharge at the site boundary), we conclude that the effects of discharge from a stack shorter than 28m are not acceptable beyond the immediate future and that the 28m stack should be installed as soon as possible. With this matter in mind, we have adjusted the time frames in proposed

Condition 14 to require consent for the stack extension to be sought with appropriate haste. We accept the submission of Mr. Jury<sup>18</sup> that it would be appropriate for some works involved in consenting, designing and construction of the stack extension to occur concurrently to minimise time delays.

- (63) The Applicant has expressed confidence that consent for the 28m high stack is likely to be able to be obtained. We determine that the stack extension should be completed within six months of commencement of consent and impose Condition 14A accordingly. Proposed Condition 41(b) allows the BOPRC to review the consent conditions in the unlikely event that consent to extend the stack is declined, and for production to cease in the interim until either a consent is obtained, or mitigation measures put into place. We accept that this could have economic implications for the Applicant; however, in the circumstances and based on the evidence before us on health effects, we find that the current adverse effects being generated are unacceptable without the stack being installed.

#### *Odour*

- (64) Several submitters expressed concern regarding the effects of odour from the existing asphalt plant discharge. These concerns are summarised in the s42A report prepared by Ms. Petricevich. Ms. Kelway stated that odour from the plant is noticeable in the residential area, particularly during autumn and winter mornings in south-westerly winds. She noted that odour is often experienced at the school. Mr. Goodhall lives in the affected residential area and noted odour effects experienced during light wind conditions. Ms. Jones stated that she has resided in Mount Manganui since 2016 and her children attend Omanu Primary School. She submitted that asphalt odour is common between 8am and 10am in the Primary School area and also submitted that odour is a particular issue at the College swimming pool area.
- (65) Detailed submissions were prepared by TMC and Mount Steelcraft Engineering that detailed odour and health effects experienced on properties neighbouring the Higgins site. Ms. Petricevich outlined the compliance and complaints history relating to the existing discharge<sup>19</sup>. She noted that 15 complaints were received between April 2018 and April 2020 (two years), and 22 complaints were received between 1 Jan 2022 and 27 Jan 2023 (one year). On 17 February 2022, the BOPRC issued an abatement notice for the discharge of offensive and objectionable odour causing an odour nuisance beyond the boundary of the site. This abatement notice is still in place. The BOPRC also issued infringement notices in November 2022 and May 2023.
- (66) The TMC and Mount Steelcraft sites are located in close proximity to the Higgins discharge. Mr. Jury, Mr. Cameron, Mr. McLeod and Mr. Huddleston provided comprehensive evidence outlining the odour and health effects they have experienced in relation to the existing discharge from the 16.6m high stack. Adverse health effects were also recorded in the diary of a BOPRC officer that attended the TMC site for monitoring purposes. We were not able to question the BOPRC officer as he was not in attendance; however, the Applicant did not challenge the production of the photocopy of the diary. In addition to odour, reported effects include lethargy, “brain fog”, stinging eyes/face,

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<sup>18</sup> Written comments by Mark Jury (Tauranga Motor Company Limited) on the Updated Draft Conditions of Consent dated 10 November 2023. Document dated 28 November 2023

<sup>19</sup> Section 42A report, sections 4 and 5.

nausea, metallic taste and reduced visibility. Mr. Jury stated that the symptoms are only experienced when the asphalt plant stack is discharging.

- (67) We accept the evidence of these submitters that the existing discharge is causing odour and associated health effects in the industrial area that are not acceptable. Their experience of impacts is well documented and is supported by the BOPRC complaint and compliance record, including effects directly experienced by monitoring officers. The updated dispersion modelling results<sup>20</sup> predict a peak off-site odour concentration of 15 OU/m<sup>3</sup> (1-hour average, 99.5<sup>th</sup> percentile) for the 16.6m stack, well above the evaluation criterion for an industrial area of 5-10 OU/m<sup>3</sup> (1-hour average, 99.5<sup>th</sup> percentile).
- (68) Both Dr Brady and Mx. Wickham noted that the odour modelling results do not appear to reflect lived experience, particularly in relation to the existing discharge where the stack is short and significantly affected by building downwash. The updated dispersion modelling predicts that the original proposal to raise the stack to only 19m would result in a peak off-site odour concentration of 13 OU/m<sup>3</sup> (1-hour average, 99.5<sup>th</sup> percentile). The experts agreed that the relative predicted reduction in odour concentration is small and that adverse odour effects would likely continue to be experienced based on discharge from the interim 19m high stack.
- (69) The revised modelling for a 28m high stack scenario shows a significant reduction to the predicted odour at close neighbours. At industrial sites the modelling predicts a peak off-site odour concentration of 2.7 OU/m<sup>3</sup> (1-hour average, 99.5<sup>th</sup> percentile), below the evaluation criterion of 5-10 OU/m<sup>3</sup> (1-hour average, 99.5<sup>th</sup> percentile). Mr. Bender stated that the predicted improvements include not only a reduction in odour concentration but also a reduction in the number of hours per year that odour would be detected.
- (70) We are mindful of the concerns expressed by the air quality experts regarding the reliability of odour modelling in this case, particularly for the 16.6m and 19m stack scenarios where building downwash is significant. However, the air quality experts did agree that modelling is a useful tool to indicate the extent of relative improvement likely to be achieved by raising the stack to 28m. As expected, the modelling indicates substantial improvement in odour concentrations at neighbouring industrial properties as a result of raising the stack height to 28m. Increasing the stack height is the key mitigation measure proposed by the Applicant. We do note Mr. Jury's concerns regarding ongoing odour effects if the stack increase is not undertaken promptly or is proven to be insufficiently effective. We have amended proposed Condition 41(b) to allow review of consent conditions to address these issues.
- (71) We further note that the modelling does not include odour emissions from the asphalt loadout process. Mr. Murray and Dr Brady noted that discharges from the loadout bins are not controlled and can intermittently contribute to odour impacts at neighbouring properties. We questioned Mr. Bender on this matter. In response, he noted that there are no known emission factors for odour from asphalt plants, including the loadout area. However, Mr. Bender stated that he was aware of an odour assessment for an asphalt plant in New Zealand that used measured emission rates from the loadout and stack. He added that it is not clear where the emission rates used in the assessment came from, as they referred to another assessment which could not be located. This information indicated that emissions of odour from loadout were around 0.6% of the stack emissions.

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<sup>20</sup> Joint Witness Statement: Air Quality Experts – Appendix 3, Table 3

- (72) Given the lack of source reference, we have placed limited weight on the loadout emission information provided by Mr. Bender. On the balance of information provided by the Applicant and submitters, it is reasonable to conclude that the asphalt plant stack is likely to be the primary source of odour from the Higgins site. However, we are conscious that intermittent odour from the loadout area may become more prominent at TMC and other adjacent properties once the stack has been raised. Dr Brady noted that enclosure and control of loadout emissions is good practice for modern asphalt plants in sensitive locations. The Applicant indicated that enclosure of the loadout area could cost in the order of \$300,000, but Dr Brady regarded this cost as an “extreme upper limit”. Given the short term of consent, we find that this issue is adequately addressed by Condition 24 (odour scout monitoring) and Condition 41 (review of conditions).
- (73) The dispersion modelling for the 28m stack discharge<sup>21</sup> does indicate some reduction in predicted odour concentrations at the nearest residential areas and schools, particularly during stable meteorological conditions. The peak odour concentrations modelled for this area are within the odour assessment criteria recommended by the Ministry for the Environment. The experts agreed that the predicted reduction in odour concentrations in the residential area is relatively small.
- (74) The dispersion modelling did not account for potential cumulative effects of odour of similar character from different sources, notably in relation to the Allied asphalt plant discharge. Allied has lodged a consent application for a new asphalt plant, which has been directly referred to the Environment Court, expected to result in reduced odour emissions relative to the existing discharge. We accept that the two asphalt plants may have some cumulative impact on the residential area under different wind conditions. However, given the improvements planned at both plants and noting that the 28m tall stack is predicted to result in some reduction in the frequency of detection of odour from the Higgins discharge in the residential area, we find that odour effects at the residential area are acceptable in the short term (not more than three years).
- (75) Based on the evidence, we conclude that the effects of odour at neighbouring industrial properties are not currently acceptable. We determine that we would not grant consent for discharge from the existing stack or the short interim extension to 19m without further mitigation being implemented immediately (within six months at the latest). The odour scout monitoring proposed is appropriate to determine the effectiveness of the 28m stack in mitigating odour impacts at TMC.
- (76) Overall, we find that the proposed 28m stack height is likely to result in odour effects that are acceptable over the three year term of consent until a new plant is installed. It is critical that the 28m stack is installed as soon as possible to address adverse effects currently occurring at TMC and other neighbouring industrial properties. The tall stack is the only effective mitigation proposed. We note the degree of uncertainty regarding odour predictions and the effectiveness of the proposed mitigation and we impose amended conditions to address this issue.

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<sup>21</sup> Joint Witness Statement: Air Quality Experts – Appendix 3, Table 3



### *Other contaminants*

- (77) The asphalt plant discharge includes trace amounts of polycyclic aromatic hydrocarbons (PAHs), benzene and dioxins. Mx. Wickham expressed concern that the background concentrations of these contaminants in the local area may be elevated and this should be taken into account in the assessment.
- (78) This matter was addressed in the JWS<sup>22</sup> issued by the air quality experts. All experts agreed that the background levels of these contaminants are likely to be elevated relative to health-based guidelines. They noted that a new plant (or bag filter) would reduce the contribution this plant would make to these levels downwind. There was agreement that while the contribution from the discharge on its own may be relatively small, there is a lack of good information regarding background concentrations.
- (79) Mr. Bender and Dr Brady considered that predicted concentrations of PAHs and benzene caused by the asphalt plant discharge are small compared to relevant guidelines and the relative contribution is low.
- (80) Mr. Bender predicted peak ground level concentrations of various trace contaminants based on modelling of the 19m stack discharge in his evidence<sup>23</sup>. The results indicated that the contribution from the plant would be less than 5% of the relevant air quality criteria. Mr. Bender did not provide updated modelling results for these contaminants based on the 28m stack now proposed. However, it is clear from the results of modelling for PM and odour that the proposal will result in a substantial reduction in off-site concentrations relative to the predictions provided in his evidence.
- (81) Based on discharge from the 28m stack now proposed for a period of up to three years, we find that any effects of trace contaminants discharged from the asphalt plant are likely to be minor. We accept that the contribution to existing background concentrations in the neighbouring area is likely to be small.
- (82) The asphalt plant discharge includes nitrogen dioxide (NO<sub>2</sub>). Mx. Wickham and Mr. Shoemack noted that the 2021 World Health Organisation (WHO) guidelines are more stringent than the NES-AQ, substantially so in the case of NO<sub>2</sub>. Mr Bender addressed this matter in evidence<sup>24</sup>.
- (83) Mr. Bender noted that the WHO guidelines have not been formally adopted in New Zealand. He observed that most urban areas in New Zealand would currently be unable to comply with the WHO 2021 guideline for NO<sub>2</sub> as 24-hour and annual averages, largely due to emissions of NO<sub>2</sub> from motor vehicles in urban areas. Mr. Bender noted that, based on discharge from a 19m high stack, the incremental increase in NO<sub>2</sub> concentrations from the Higgins discharges to cumulative NO<sub>2</sub> is less than 10% of the background concentrations, representing a minor contribution to overall NO<sub>2</sub>. He added that the incremental increase in NO<sub>2</sub> is also limited to areas near the site boundary and will be much lower in sensitive areas, where the contribution of Higgins discharges to overall NO<sub>2</sub> will be less than 1% of the 24-hour WHO criterion and less than 1% of the annual criterion.

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<sup>22</sup> Joint Witness Statement: Air Quality Experts – Section 2

<sup>23</sup> Evidence in Chief of Chris Bender, 24 October 2023 – Table 8, page 24

<sup>24</sup> Evidence in Chief of Chris Bender, 24 October 2023 – para 55-58

- (84) Based on the updated modelling in the JWS, we observe that the 28m stack discharge will result in a substantial reduction in the predicted NO<sub>2</sub> concentrations off-site. We accept the evidence of Mr. Bender that the contribution of NO<sub>2</sub> discharge to background concentrations will be relatively small, particularly at residential areas. Given the 28m tall stack now proposed and the short term of consent, we find that any adverse effects of NO<sub>2</sub> discharged from the plant are likely to be minor.
- (85) Fugitive discharges of larger PM (dust) occur from the site, particularly in relation to the storage and handling of aggregate materials used in the asphalt manufacturing process. The effects of these discharges were assessed qualitatively, and good practice dust controls have been proposed by the Applicant, including water suppression and limiting vehicle speeds.
- (86) The air quality experts for the parties were in agreement that effects of fugitive dust discharges from the site are likely to be minor. Submitters did not raise dust emissions from the existing plant as a matter of particular concern. Proposed Conditions 18 and 19 appropriately address the dust controls required. These measures will be included in the Air Quality Management Plan (AQMP) required to be prepared for certification under proposed Condition 20. Taking into account these controls, we find that effects of dust emissions from the site are likely to be minor.

#### *Cultural values*

- (87) The AEE includes an assessment on cultural effects<sup>25</sup>. It identifies Waitaha, Ngāti Pūkenga, Ngāi Te Rangī, Ngāi Tukairangi Hapū and Ngāti Kuku as potentially having an interest in the application. It also highlights that the RPS has strong direction for consideration of cultural effects. The AEE outlines the outcome of consultation undertaken with the identified iwi and hapū authorities on an earlier proposal for a new plant as well as consenting the existing plant, and a review of relevant iwi management plans. The AEE advises that Waitaha deferred to Ngāi Te Rangī and Ngāti Pūkenga did not raise any specific cultural effects regarding the existing plant and that they were continuing to engage with Ngāi Tukairangi Hapū and Ngāti Kuku, including the provision of an air quality report. The AEE concludes that no feedback was obtained that indicated the existing plant has been a concern, has created or is likely to create cultural effects, and any effects are less than minor. We assume here that the AEE author is referring to adverse cultural effects in particular.
- (88) Ngāti Kuku submitted in opposition to the application. Ngāti Kuku was represented by Awhina Ngātuere, chairperson of Ngāti Kuku Hapū. The submission outlines that Ngāti Kuku is a hapū of Ngāi Te Rangī Iwi, who hold ahi kaa in Whareroa and the wider Mount Maunganui area in Tauranga, including the application site. In summary, Ngāti Kuku consider the proposal is highly offensive to them and their tikanga, and inconsistent with their long term plan for their region<sup>26</sup>. They also consider it fails to meet the requirements of sections 5 to 8 of the RMA; avoid, remedy or mitigate the range of adverse effects on their values; recognise the NZCPS as a relevant consideration; recognise the iwi provisions and other relevant planning instruments; and adequately factor in the traditional associations of Ngāti Kuku with their ancestral lands and other taonga. The submission outlines the history and context of the Whareroa lands, block and Marae, in particular the

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<sup>25</sup> Section 6.2 of the AEE

<sup>26</sup> Kuku Ki Taiatea Strategy.

encroachment of the industrial area, and expresses concern that consent authorities have failed to deal with cumulative effects from individual resource consents. The submission expresses the point that the application puts in danger the wellbeing of their taonga, exacerbating already significant cultural impacts due to the desecration of natural water eco-systems, flows, and so on, from the industrial area.

- (89) The Applicant commissioned the Ecocific Report in response to concerns raised by Ngāi Tukairangi Hapū and Ngāti Kuku in consultation. A summary of the Report and its recommendations are set out in Table 4 of Mr Greening's statement of evidence. In response to that report, the Applicant offered measures including a short-term 10 year consent, ongoing engagement, ambient air quality monitoring and daily odour observations.
- (90) Ms. Petricevich addresses cultural effects in section 11.3 of her s42A report. She notes the direction to the consideration of cultural effects given in Policy AIR-P1 and Air-P4, identifying that these require effects on cultural values to be avoided, remedied or mitigated, with values identified in iwi and hapū management plans, the effects on cultural values and cumulative effects being relevant considerations. She also identifies the strong direction provided in the RPS. In Ms. Petricevich's view, the individual adverse effects of the discharge are unlikely to result in an adverse effect on the human health of Ngāti Kuku and the Whareroa Marae. However, on a cumulative basis, she concludes that the proposal will continue to contribute to the cumulative adverse effects within the Airshed, with no new measures to meaningfully reduce the activity's contribution, which are contributing to cumulative adverse cultural effects. On that basis, she concludes that the cumulative adverse cultural effects are unacceptable.
- (91) Mr Naylor addressed engagement with Ngāti Kuku in his statement of evidence. In this, he outlines that Higgins is only beginning its relationship with iwi and local hapū and discusses a draft set of conditions which are intended to be worked through with Ngāti Kuku and Ngai Tukairangi. Mr Greening's evidence included the draft conditions of consent, which includes six conditions under the heading of cultural effects. In summary, these conditions would require the Applicant to invite Ngāti Kuku to join a Kaitiaki Forum, which would meet at least every six months or as otherwise determined, for the purpose of recognising the importance of air quality in the Airshed and the authority and obligations of Whareroa Marae as kaitiaki, facilitate ongoing engagement regarding the consent, including monitoring activities. The Applicant would also fund the costs of the Forum, the preparation and delivery of a cultural values assessment and mauri monitoring and management plan, specific to this particular application.
- (92) On questioning, Mr Naylor was unable to advise of Ngāti Kuku and Ngai Tukairangi's position on the draft conditions. Mr Greening was also not able to advise in this regard.
- (93) We heard from Awhina and Joel Ngātuere, on behalf of Ngāti Kuku. The key points they raised were the cumulative effects arising from consents being dealt with in isolation, the prioritisation of economic development above community health, and the current system not being adequate to address discharges. They advised they do smell asphalt at the marae but acknowledge that there are three cement and asphalt plants in the vicinity.
- (94) In respect to the conditions offered by the Applicant, they questioned who the Applicant and other consent holders expect to be engaging with so many of them, and who they expect to be putting aside the time to prepare cultural values assessment and

management plans, and to be at the other end of a call saying that there will be discharges occurring. They consider the conditions to be inadequate, noting that there are over 200 industries wanting to continue to operate, and dealing with them each individually was a significant burden. What they seek is commonsense, with applicants listening to the community, the ability to breathe in clean air, and the elimination of pollution. They are concerned about the cumulative discharges, along with what they cannot smell, but what they can see in the whenua. They would like the Applicant to find a fit for purpose location to be in.

- (95) We also had the benefit of the media clippings provided by Ms. Kelway, which included material from interviews with Mr. Ngatuere and other members of the community, which has helped us to understand the concerns of Ngāti Kuku and the wider community regarding the cumulative impacts on Whareroa Marae and the wider Mount Maunganui area.
- (96) After hearing from the submitters, Ms. Petricevich advised that her conclusions expressed in her s42A report had not changed. She also noted the heavy burden the conditions would place on Ngāti Kuku to be involved in all the planning processes, alongside other pre-application engagement, notified resource consents, plan changes and other processes such as Marine and Coastal Areas (Takutai Moana) Act and Treaty Settlements, on top of other roles, responsibilities and jobs. She considered a condition of this sort may be appropriate, where cultural effects are well known, able to be managed appropriately and tangata whenua have indicated that an ongoing forum may be a way to ensure this continues to be the case. We note that is not the situation in this case.
- (97) The Applicant's final position<sup>27</sup> was to continue to propose and support the same draft conditions of consent as set out in Mr Greening's evidence, whether or not the conditions are included in the consent. This was for the reason that Higgins wish to build a relationship with Ngāti Kuku and the forum provides a means for this to occur, with flexibility built in to limit the burden on Ngāti Kuku of participating.
- (98) We acknowledge the concerns expressed by Ngāti Kuku about the cumulative impacts arising from the industrial activities in the Mount Maunganui area, both on them in particular, but also on the community as a whole. Of particular note in respect to this application is that the Applicant is not proposing any measures that would reduce the discharge of contaminants from the site, and thereby their contribution to reducing discharges to the over-allocated catchment.
- (99) It was encouraging to hear from Mr Naylor that they are seeking to build a relationship with Ngāti Kuku, particularly considering the length of time that Higgins has been operating its plant, knowing that it needed to renew its discharge consent and the time that has passed since the application was lodged. The evidence presented to us discussed how the offered conditions would be a means of developing that relationship and understanding what the effects on cultural values are and how to address them.
- (100) We can understand why Higgins seek the inclusion of the conditions and we also see the merit in what would be delivered through the conditions if Ngāti Kuku were to engage in working with Higgins to deliver what is set out in them. However, we also heard and understand the burden that such conditions, however voluntary, can impose on iwi and

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<sup>27</sup> Appendix A – Proposed Conditions – to Closing Legal Submissions

hapū. We note here that the conditions relating to the establishment of the Community Liaison Group also include Ngāti Kuku, which would impose an additional burden, and some likely cross-over. We also understand that the conditions will not address the fundamental concerns that Ngāti Kuku have in respect to pollution in the Mount Maunganui airshed as a whole, both on Whareroa and the wider community. We heard and understood Ngāti Kuku's frustrations on having to deal with consents on a singular basis, rather than dealing with the effects of them in an integrated and cumulative basis.

- (101) We accept Ms. Petricevich's conclusion that the cumulative adverse effects on cultural values are unacceptable; but on a singular basis, the adverse effects of a short term consent are acceptable. That is one of the primary reasons we have imposed a three-year consent duration, rather than the five and a half year term sought by the Applicant. We consider that the three-year term provides an incentive to the Applicant to address its contribution to the cumulative adverse effects, including effects on cultural values, arising from discharges in seeking consent for discharges from a new plant.
- (102) Rather than the suite of conditions offered by the Applicant, we have imposed a simplified condition requiring the consent holder to provide evidence to the Council within two months of consent being granted that they have engaged with Ngāti Kuku with a purpose of establishing a working relationship and agreeing on what the relationship will look like and involve for the purpose of this consent. We find that approach is more consistent with tikanga and will allow the parties to develop a more meaningful relationship. We have also imposed an additional clause on the review condition, enabling the BOPRC to initiate a review if there is evidence arising of any more than minor adverse effects on cultural values that were not identified at the time the consent was granted.

#### **Section 104(1)(a) Effects on the Environment Conclusion**

- (103) Overall, we find that, subject to the conditions of consent which include the requirement for the stack height to be increased within six months of consent being granted, and the more limited consent term which we address later, the effects arising from the proposal will be acceptable in the short term.

#### **Section 104(1)(ab) Ensuring Positive Effects Through Offsets and Compensation Assessment and Conclusion**

- (104) The Applicant did not propose any offsets or compensation measures as part of the Application.

#### **Section 104(1)(b) Relevant Planning Documents Assessment**

- (105) In accordance with section 104(1)(b)(i)-(iv) of the RMA, we have had regard to the relevant standards, policy statements and plan provisions of the following documents:
- NES-AQ
  - Bay of Plenty Regional Policy Statement 2014 (RPS)
  - Bay of Plenty Regional Natural Resources Plan 2008 (RNRP)

#### *Other instruments*

- (106) There was initially contention whether the National Policy Statement on Greenhouse Gas Emissions from Industrial Processes 2023 was a relevant consideration for the application.

We accepted Ms. Campbell's submission that it was not relevant, for the reasons she presented to us. We note that Ms. Petricevich agreed with Ms. Campbell's reasons that it was not applicable.

- (107) Ms. Petricevich also addressed the First Interim Decision of the Environment Court on Plan Change 13<sup>28</sup> dated 10 January 2023. The Panel was initially confused as to its relevance to this particular application, given that we had been made aware that the bulk of Plan Change 13 on Air Quality to the RNRP was now operative and the outstanding appeal related to AQ-R22. Ms Campbell subsequently provided us with the Second Interim Decision of the Environment Court<sup>29</sup>.
- (108) We were subsequently advised by Ms. Petricevich and Ms. Campbell that in the First Interim Decision, the Environment Court expressed its concern that the provisions in Plan Change 13 did not adequately address the control of emissions of particulate matter less than PM<sub>10</sub> from unsealed yards, and that it recommended that the Council take actions to ensure that the Airshed is managed on a fully integrated basis. The Second Interim Decision contains appellant feedback on a draft plan change directed under s293 RMA and a further iteration of the draft plan change, with directions that the Council notify it by the end of November 2023. This draft plan change includes a new Policy AirP12 on iterative management of air quality within the Airshed, which addresses activities which discharge PM<sub>10</sub> and other particulates to air. This management includes improvements to air quality so the Airshed is no longer polluted, management of cumulative effects, safeguarding the life-supporting capacity of the air and protecting human health and avoid, remedy or mitigate adverse effects on cultural values, amenity values and the environment. We were advised by both Ms. Petricevich and Ms. Campbell that this draft plan change has no statutory weight at the time of the hearing; however, should it be publicly notified, then it would be a relevant consideration.
- (109) As at the date of the hearing, the s293 RMA plan change had not been publicly notified. However, we checked the Council website in finalising this decision, which confirmed that the plan change was publicly notified on the 15<sup>th</sup> January 2024<sup>30</sup>. Accordingly, we are legally obliged to have particular regard to it. Given we had already closed the hearing, our options were to reconvene the hearing and request the parties to provide further evidence and comment on it or to consider it without the benefit of evidence and proceed with making a decision. We carefully considered matters of natural justice and fair process and the extent to which the Plan Change addressed matters that had not already been traversed in our consideration of this application.
- (110) After reviewing the Plan Change, we determined that we could proceed with making the decision without calling for further evidence, and we have considered Proposed Policy 12. This is because the concerns expressed by the Environment Court in their First Interim Decision are about the lack of clear direction in the RNRP to improve air quality in an integrated way within the Airshed and to give effect to the RPS. As we also address below, Mr. Greening identified that the RNRP does not address cumulative effects on air quality and cumulative effects were a concern expressed by most submitters, which we have addressed those in our s104(1)(a) assessment.

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<sup>28</sup> Decision [2023] NZEnvC001

<sup>29</sup> Decision [2023] NZEnvC221

<sup>30</sup> <https://www.boprc.govt.nz/your-council/plans-and-policies/plans/regional-plans/regional-air-plan/air-quality-plan-change-13>

- (111) We address the NES-AQ, RPS and RNRP in turn. We note that both Mr. Greening and Ms. Petricevich provided detailed assessments of the application against both the RPS and the RNRP<sup>31</sup>. Mr. Coles also provided an assessment in respect to the RNRP. We have focussed on the areas of disagreement between the planners and have accepted their advice where they have agreed.

#### *NES-AQ*

Ms. Petricevich was of the view that the proposal meets the requirements of Regulations 17, 20 and 21 of the NES-AQ. We accept that, because the application is for a PM<sub>10</sub> discharge that is already authorised in the airshed, the 2.5µg/m<sup>3</sup> (24-hour average) ground level concentration limit in Regulation 17 does not apply. We find on the evidence that Regulations 17, 20 and 21 do not prevent us from granting consent.

#### *RPS*

- (112) Mr. Greening focussed on the RPS provisions in respect to Kaitiakitanga and cumulative effects, and otherwise addressed the RNRP. He explained in his evidence that this was because the RNRP Air Quality Chapter takes primacy over the RPS Air Quality Chapter, the RNRP does not comprehensively deal with cumulative effects, and that the RNRP Kaitiakitanga chapter provisions refer largely to land, water and geothermal resources. We asked Mr. Greening about the stated concept of primacy, which he acknowledged was a poor choice of words and his intent rather was to say the Air Chapter in the RNRP was now operative and therefore a more relevant document to refer to than the RPS. In contrast, Ms. Petricevich had assessed all relevant RPS objectives and policies in her s42A report.
- (113) In rebuttal evidence, Mr. Greening reflected in response to the Environment Court's Interim Decision that there is incomplete coverage in the RNRP Air Quality Chapter and as such, the commissioners may wish to refer back to Part 2. Ms. Petricevich's position was that she did not think reference back to Part 2 is required, as the primary concern that the Environment Court raised was in giving effect to the RPS. Rather, she thought it may just be necessary to go up the statutory framework to the RPS to ensure full coverage.
- (114) Our view is that it is relevant to consider the RPS Air Quality Chapter given the Environment Court's position in their First Interim Decision that the Plan Change 13 provisions were inadequate. Given Mr. Greening's comments about gaps in the RNRP, we have also considered all other relevant objectives and policies in the RPS. Regarding Mr. Greening's position that the lack of coverage meant we should revert to Part 2, we prefer Ms. Petricevich's advice that it is rather reference to all the relevant provisions in the RPS that is required in the first instance. We address Part 2 later in this decision.
- (115) There was clear disagreement between Mr. Greening and Ms. Petricevich as to whether the application is consistent with the RPS provisions. Mr. Greening's view as expressed in his statement of evidence was that it was consistent in respect to cultural values for the reasons that:
- There is no policy direction that requires outright avoidance of effects on cultural values,

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<sup>31</sup> S42A report and statement of evidence of Mr Greening

- Effects would be reduced through the raising of the stack and continued engagement between Higgins and mana whenua, along with other conditions,
  - Suitable conditions are expected to be developed in collaboration with Ngāti Kuku to recognise and provide for their role as kaitiaki and identify the exact form and nature of measures to avoid, remedy or mitigate cultural effects
  - Engagement has been consistent with the principles of the Treaty of Waitangi
  - the Higgins approach has been consistent with provisions in relevant IMPs
- (116) We note that Mr. Greening set out other RPS provisions in his Appendix 2, but there was no explicit assessment of the provisions. In respect to cumulative effects, he states<sup>32</sup> that he does not agree with Ms. Petricevich that the discharge is unacceptable for human health when considered on a cumulative basis, as the discharge occurs within guidelines designed to ensure human health is protected. He also notes that this appears to be inconsistent with the notification decision that the effects on air quality and human health are considered to be no more than minor.
- (117) Ms. Petricevich’s opinion was that the application:
- (a) Is inconsistent with the Air Quality objective and policy because she could not conclude that the discharge results in the protection of human health and amenity
  - (b) Is inconsistent with Policy IW 2B as it does not recognise and provide for the values and matters in the policy. Her view is that it is clear from the Ngāti Kuku submission that the measures proposed by the Applicant will not address their concerns in a meaningful way. It is also unknown whether tangata whenua have adopted the recommended measures in the Ecocific Report.
- (118) Ms. Petricevich also addressed Objective 10 and Policy IR 5B in respect to cumulative effects. This objective and policy focus on ensuring the cumulative effects of existing and new activities are appropriately managed. While she did not provide an assessment as to whether the Application is consistent with this objective and policy, she did set out her view in respect to the relevant components of the policy that:
- (a) The discharge is to an Airshed breaching air quality limits, which is a result of cumulative effects from discharges in the Airshed.
  - (b) There has been cumulative and incremental degradation of the cultural values of Ngāti Kuku.
  - (c) The cumulative effects of the discharge are contributing to the degradation of amenity and recreational values, the use and enjoyment of the public, and the social wellbeing of the general public.
  - (d) While the Applicant is not solely responsible for the cumulative effects of air discharges, they are also not contributing to any cumulative improvement. In her view, given these cumulative effects exist, all dischargers have some responsibility to reduce cumulative effects occurring as a result of their discharge.
- (119) We have addressed the effects of the Application earlier in this decision where we have concluded that the effects arising from the Application are acceptable in the short-term, subject to the 28m stack being installed. We have concluded that the discharge is not acceptable in the medium or long term. In addition, we accept the advice of Ms. Petricevich, Mr. Wickham and Dr Shoemack that when considering the proposal from a cumulative effects basis, the proposal is contributing to adverse effects in the Airshed,

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<sup>32</sup> Para 151 of the statement of evidence of Simon Greening



and the Applicant in our view has not demonstrated that they are taking affirmative action to achieve what is sought through the relevant objectives and policies of the RPS; that is the reduction in those adverse cumulative effects on cultural values, people's health and wellbeing and the environment. We cannot conclude that the Application is consistent with these objectives and policies on the basis of the evidence and information in front of us. However, as we discuss elsewhere in this decision, we find that a short-term consent with the installation of the 28m stack, and the Applicant's stated intent to construct a new plant which will lead to significant reductions, enables us to find that the proposal is not so inconsistent that would warrant us to decline consent.

#### *RNRP*

- (120) The three planners focussed on the Air Chapter of the RNRP, which they have both set out in their evidence. As with their assessments against the RPS, Mr. Greening and Ms. Petricevich disagreed as to consistency with the RNRP for largely the same reasons as for their evaluations in respect to the RPS. Mr. Coles' assessment focused on the odour effects being experienced by his client, which he considered to be inconsistent with AIR-O1, AIR-O3, AIR-P2 to AIR-P4.
- (121) The main contention arose in respect to the applicability of the best practicable option (BPO) to the consideration of this application under AIR-P3. The chapeau for AIR-P3 reads:  
*Activities that discharge contaminants to air must be managed, including by use of the best practicable option to...*
- (122) It was Ms. Petricevich's view that the evaluation of alternatives provided in the AEE lacked the depth necessary to inform whether the Application is BPO, and of the alternatives provided, that there were no compelling reasons why certain options were not feasible. She noted that there are alternatives available that could significantly reduce the amount of contaminants discharged that were not being proposed through this application. She stated she was unable to conclude that the option chosen by the Applicant is BPO. Her position was that the policy seeks that BPO is implemented and directs that air discharges are managed inclusive of BPO. However, she also accepted the Applicant's position that implementing BPO would be technically difficult, expensive and require significant downtime, and would not make sense if the plant was then to be upgraded in the near future. However, she also disagreed that the measures being proposed are BPO in a 10 year term.
- (123) Mr. Coles' view was that the BPO is a relevant consideration when air discharge effects cannot be avoided. His view was that the Applicant has not sufficiently assessed BPO in the Application, particularly in respect of considering a higher stack and enclosing and ventilating the loadout area.
- (124) In contrast, Ms. Campbell submitted that the BPO is just one method of managing the discharge, with other methods being available to avoid, remedy or mitigate effects. This was on the basis of use of the word "including", implying that BPO is one of other options and the placement of the phrase referencing BPO as a sub-clause. Mr. Greening was of the same view and considered the BPO to be just one tool. His view was that it would not be the most efficient and effective means of preventing or minimising adverse effects on the environment, as the Higgins proposal would achieve compliance with relevant human health guidelines, avoid offensive and objectionable discharges and mitigate cultural effects.

- (125) In respect to the relevant objectives AIR-O1, AIR-O2 and AIR-O3, and in considering AIR-P4, Mr. Greening was of the view that these were met based on Mr. Bender's evidence that at the Higgins location, the NES-AQ and the MfE AAQGs are met without Higgins likely contributing to an exceedance at the BOPRC monitoring stations.
- (126) We have reviewed the planners' assessments and advice, having taken into our account our findings on the effects of the application. In regard to the BPO, we accept that "true" BPO would require substantive works which would be unrealistic for re-consenting an existing and outdated plant, and we have noted the Applicant's undertaking to commission a new plant as soon as possible that would include BPO. However, this is something that is beyond our ability to require or impose conditions on, as it is out of scope of this application. In respect to this application, as we have set out earlier, we do not consider a 19m high stack and the other measures proposed to be sufficient and is not the BPO. That is why we have imposed conditions that require the stack to be increased to a 28m height within six months of consent being granted, and the review conditions that would require additional measures to be put in place should these be required to mitigate adverse effects arising.
- (127) Our findings in respect to the RNRP are the same as our findings in respect to the RPS.

*Proposed Policy 12 of Plan Change 13*

- (128) As outlined earlier, we consider it is appropriate to have particular regard to this plan change. This proposed Policy 12 addresses shortfalls in the RNRP in giving effect to the RPS and addressing cumulative effects in the over-allocated Airshed. By the time that this Plan Change was notified we had already completed the substance of the decision and found that consent was only acceptable in the short term, given the adverse effects arising from the operation of the plant. We had found that it was important for a new plant to be commissioned without delay to ensure that the discharges from the site are reduced and contribute to a reduction in the cumulative discharges. To that extent, we find that our decision is consistent with Plan Change 13. Granting consent to a longer term than three years in our view, would not be.

**Section 104(1)(b) Relevant Provisions Conclusion**

- (129) Overall, we find that the proposal, in the short-term, is not inconsistent with the relevant provisions of the policy statements and plans to the extent that consent should be declined. Our determination is subject to the stack being increased to a 28m height within a six-month timeframe, and the other conditions of consent we have imposed. We would not reach this same conclusion for a consent with any longer duration than three years.

**Section 104(1)(c) Other Matters**

- (130) The other matters we considered relevant to this application are the Iwi and Hapū Management Plans (IMPs) formally lodged with the BOPRC, the Health Risk Assessments and Legal Matters raised by the Applicant. We address these in turn.

### *Iwi and Hapū Management Plans*

- (131) Both Mr. Greening and Ms. Petricevich evaluated the IMPs. Ms. Petricevich noted that Ngāti Kuku had submitted that the application does not align with the Kuku Ki Taiatea Strategy, but she had not been able to obtain a copy of the document. We were also not provided with a copy of the document, so are unable to consider it further.
- (132) We received evidence on the following Iwi Management Plans:
- (a) Tauranga Moana IMP (TM-IMP)
  - (b) Waitaha IMP
  - (c) Ngāti Pūkenga IMP
  - (d) Ngai Tukairangi, Ngāti Hapū: Hapū Management Plan 2014 (NTNH-HMP)
- (133) Of these, Ms. Petricevich noted that Waitaha supported the response from Ngāi Te Rangi, and that Ngāti Pūkenga had been consulted by the Applicant and had raised no concerns. Mr. Greening was of a similar view, also noting that the engagement the Applicant had undertaken was consistent with the IMPs. In respect of the NTNH-HMP, Ms. Petricevich identifies that it also includes a policy about engagement, and that engagement culminated in the Ecocific report being commissioned. We find that there is nothing inconsistent with these three IMPs.
- (134) Ms. Petricevich’s advice in respect to the Tauranga Moana IMP was that the Applicant had consulted with iwi and hapu, which we find is consistent with that aspect of the TM-IMP. Her view was that the proposal does not contribute to the protection or enhancement of air quality, and does therefore not protect or enhance mauri, while noting that the Ngāti Kuku submission does not specifically mention impacts on mauri. Mr. Greening in contrast did not identify any issues with the TM-IMP. We find from hearing from Ngāti Kuku and their concern about the impact of the discharges on the air and whenua to imply also concerns about the impact on mauri.

### *Health Risk Assessment*

- (135) Submitters brought the Air Pollution: Health Risk Assessment Mount Maunganui and the Mount Maunganui Air Quality Monitoring Review for Mount Maunganui<sup>33</sup>, released by the Institute of Environmental Sciences and Research Ltd (ESR) in July 2023 (HRA report and AQM Report), to our attention. The Applicant also provided us with a copy of the “Review of ESR Air Pollution Health Risk Assessment for Mount Maunganui Airshed”, prepared by Tonkin & Taylor in September 2023 (HRA Review Report) to our attention. The former two reports were commissioned by Toi Te Ora from Emission Impossible on behalf of the ESR and the latter by the Port of Tauranga.
- (136) Ms. Petricevich raised the HRA and AQM Reports as being relevant new information following the notification of the application. Her conclusion on the HRA report is that it substantiates the views of many submitters that there is an unacceptable cumulative adverse effect on the environment, particularly on human health, associated with air discharges in the Airshed. She notes that the AQM Report indicates that there was an improvement in ambient air quality in the Airshed over 2019-2023.

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<sup>33</sup> Both reports are available at: <https://toiteora.govt.nz/public/air-quality/>

- (137) Mr. Bender expressed concern with the validity of the HRA and AQM reports and identified that there had been a review commissioned of the Reports. Mx. Wickham was of the view that the Reports were robust, noting that Toi Te Ora had commissioned the work for the purpose of working cooperatively with industry and regulatory authorities to reduce air pollution. Dr Shoemack<sup>34</sup> submitted that the HRA Report provides clear evidence that the air in Mount Maunganui is polluted and harming human health, which he considers to be unacceptable.
- (138) We find that these three reports are relevant to the consideration of this Application, in particular in respect to the cumulative adverse effects of discharges within the Airshed.

#### *Legal Matters*

- (139) Ms. Campbell raised the priority of consents and the importance of consistency of decision-making in her opening submissions. Her view was that the relative priority of application for the purpose of assessing cumulative effects is incredibly important given that lack of an allocation framework in the Airshed. In her view, given the timing of the Applications, the Higgins application has priority over the Allied and HR Cement applications.
- (140) We were advised that the Allied Application had been directly referred to the Environment Court and our decision would therefore be ahead of that decision. There are no issues of priority there. We were provided documentation that the HR Cement application was granted on a non-notified basis on 11 September 2023. We queried Ms. Campbell about the impact of this on our decision. She advised that it is not possible for the Council to undo what has been done, but rather the Council can strive to ensure that its decision making is consistent, particularly in the approach to PM<sub>10</sub> discharge. We agree with Ms. Campbell that the Council cannot undo what has been done. In the same regard, neither can we, and we simply have to proceed on the basis that the HR Cement decision has been made.
- (141) Mx. Wickham addressed this point. They highlighted that the cases cited by Ms. Campbell relate to case law for water take permits, and there are fundamental differences between air and water. Their advice was that this application is not a contest between different applicants for the same resource, in that:
- Applicants do not get to 'use up' the air or 'pollute up to' a limit or cap on PM<sub>10</sub>. This is because the existing airshed is already polluted and the air quality in the neighbouring residential area is likely elevated in comparison with other residential areas. Further, there is no 'safe' level for PM<sub>10</sub>. It is a known carcinogen.*
- (142) Their view was that everybody in the airshed needs to reduce their emissions. Ms. Petricevich agreed with Mx. Wickham that the case law examples do not apply here. She considered that the consents are not competing and do not trigger any priority.
- (143) Ms. Campbell raised priority again in closing legal submissions. She submitted that Higgins had not modeled the combined odour effects of both plants because of priority, with Higgins having been ready for notification before Allied. Given that both asphalt plants have potential to affect the residential area, including schools, during different wind directions, we consider that modelling of cumulative odour effects may have been useful.

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<sup>34</sup> Medical Officer of Health for Toi Te Ora Public Health

It would certainly have better informed the assessment of existing impacts. However, bearing in mind the short term of consent and the imminent upgrades planned for both the Higgins and Allied asphalt plants, we find that such modelling is not critical to our determination.

- (144) We preferred Mx. Wickham and Ms. Petricevich's advice and we find that there are no issues of priority of consents that impact on our decision-making.
- (145) In respect of consistency, Ms. Campbell highlighted that the s87F Report for the Allied application recommends approval to the discharge permits for the existing plant (two years) and the proposed plant (35 years). She submitted that the s87F Report shows a plant that emits PM<sub>10</sub> at a greater hourly and annual rate than Higgins to be acceptable over a two-year period. She then addressed the HR Cement application, noting it was granted without notification, and involves an increase in the total volume of PM<sub>10</sub> discharged and it would contribute more to particulate matter in the airshed than Higgins.
- (146) Ms. Petricevich advised that she considered the process undertaken to assess and decide on the applications is consistent. In her view, the three consents are only comparable to the extent that they are discharges of the same or similar substances to the same Airshed. Otherwise, the key difference between the Allied and HR Cement applications to this one is that both those applications proposed and committed to implementing best practice technology and management methods to manage their contaminant discharges at source. Higgins rather proposes a raised stack and no further emissions control, whereby the rate of contaminants being discharged is not being reduced and therefore there would be only limited improvement in the effects of odour and other contaminants at affected properties. She considered that these distinguishing differences mean it is fair to treat the applications differently and come to a different recommendation/decision.
- (147) We received no evidence that there was any difference in the way that the Council had assessed the Higgins application compared to the Allied and HR Cement that would cause concern. We rather accept Ms. Petricevich's position that the key differences in what was being sought in the Applications is sufficient justification for the different recommendations following that assessment.
- (148) Accordingly, we find that there are no issues of inconsistency.

#### **Section 104(2A) Value of the Investment**

- (149) Ms. Petricevich did not expressly address s104(2A) of the RMA. We accept Mr. Greening's advice<sup>35</sup> in respect to the value of the investment and its contribution to meeting asphalt demand within the Region.

#### **Section 105**

- (150) Section 105 states that if an application is for a discharge permit to do something that would contravene section 15, the consent authority must, in addition to the matters in s104(1), have regard to:
- (a) *The nature of the discharge and the sensitivity of the receiving environment to adverse effects; and*

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<sup>35</sup> Paragraph 139 of his Statement of Evidence

- (b) *The applicant's reasons for the proposed choice; and*
- (c) *Any possible alternative methods of discharge, including discharge into any other receiving environment.*

(151) These matters were generally traversed through the s104 assessment, so we do not repeat them. In his evidence, Mr. Greening outlined that the Applicant considers this consent is necessary to enable asphalt production while a new plant is consented, and outlines the disruption that would occur if production ceased. We have taken this into consideration.

**Subject to Part 2:**

(152) Ms. Campbell submitted that we may choose to revert to Part 2 as a result of the Environment Court's finding that the Air Chapter provisions in Plan Change 13 did not adequately give effect to the RPS. Ms. Petricevich's position was that we could revert to the RPS instead of Part 2, as the RPS traversed the relevant matters in Part 2. Mr. Greening provided an evaluation of the proposal in respect to Part 2, concluding that the proposal accords with it.

(153) We agree with Ms. Petricevich that there is no cause to revert to Part 2, given the sufficiency of coverage of the RPS provisions. We have therefore not addressed it.

**Section 108 Conditions**

(154) We carefully considered the conditions finally offered by the Applicant. We have addressed many of these conditions through the body of the decision. We have amended the condition suite to ensure that they are effective and enforceable and provide clear direction to the consent holder and Council, and certainty to submitters of what is required.

**Duration of consent**

(155) The Applicant requested a five and a half (5.5)<sup>36</sup> year term for the consent. This duration was based on the timeline it considered required to approve expenditure, design, commission, consent and install a new plant. Closing submissions provide a summary of the estimated timeline for these steps. Ms. Campbell was of the view that the term sought was consistent with *PVL Proteins vs Auckland Regional Council*, a matter which she addressed primarily in her opening legal submissions. We found her submission helpful in setting out the matters the Court considered relevant to making a decision on term.

(156) We have carefully considered the Applicant's estimated timeline and reasons for that timeline, alongside feedback from the Council and submitters. Dr Shoemack recommends a short-term consent for a maximum of one to two years if the stack height is not increased; or a five-year term if it is. Ms. Petricevich's opinion was that a two-year consent term would be sufficient, on the basis of the PVL Proteins case law, the Applicant's use of a worst-case consenting scenario which could be sped up through requesting public notification and direct referral, and the likely ability to rely on s124 RMA to continue operating while a new consent was obtained. In her view, having a longer consent term and operating with s124 rights would provide the public being affected less certainty than

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<sup>36</sup> Sixty-six months

a shorter two-year consent term. Ms. Petricevich advised us that the following matters would generally support a longer term of consent:

- (a) An applicant's need for certainty, particularly to protect investment
- (b) An activity that generates known and minor effects on the environment on a constant basis.

(157) In her view, the application does not satisfy either matter, given the age of the plant, the lack of investment to date, and the effects that are being generated. She also comments on the Court direction where a short term may be preferable; noting that in this instance a shorter term consent is preferable to reliance on a review condition, given reviews cannot be initiated by affected persons and require a burden of proof on the Council. In this instance, she notes that the most likely need for a review would be because of odour, and the evidence produced through this hearing of the difficulties in proving offensive and objectionable odours.

(158) We prefer Ms. Petricevich's advice and agree with her reasons why a shorter consent term is appropriate. In addition, as we have set out in this decision, we have found that the mitigation works, if implemented, will result in substantial reductions in the localised impacts of key contaminants in the short term and allow NES-AQ requirements to be achieved to the extent practicable. However, as we have set out through this decision, we have found that the effects are not acceptable in the medium or long term, particularly when considering cumulative effects alongside other air discharges in the Airshed.

(159) We have imposed a three-year term which provides the Applicant what we consider is sufficient time to prepare, obtain and implement a consent for a new plant, while recognising the ability of the Applicant to use s124 RMA if necessary. We prefer the use of a short term consent to fully relying on review conditions given the Applicant is not proposing to implement the BPO through this consent and our findings on the degree of adverse effects. Further, we consider that the Applicant has already had considerable opportunity to progress the development of a new plant and a shorter term consent would incentivise its timely advancement.

## **7 Final Discussion**

(160) The length of this decision reflects the complexity of this consent and our decision-making on it. We were mindful of the benefits that the existing plant provides to the regional economy and that refusing consent would have a significant impact on the economy, businesses, infrastructure and the community, through the loss of asphalt production. As we have set out, our decision to grant consent rests on the stack height being increased to 28m, within a short six-month time period of consent being granted.

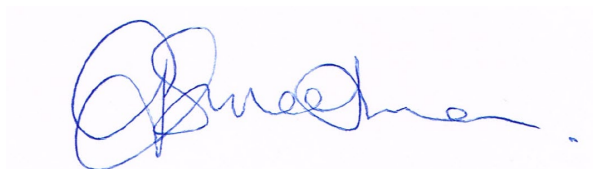
(161) If the Applicant had not offered the increased stack height of 28m, we would have refused consent on the basis of the adverse effects being experienced by those adjacent to the site, Ngāti Kuku and the wider community, and the inconsistency with the relevant planning documents. With the offer of the 28m stack, we have granted consent, subject to a short term of consent to reflect that the proposal is not acceptable over the medium to long term. We trust that this will incentivise the Applicant to expediently obtain consent for a new plant that utilises BPO and reduces odour impacts and the rate of contaminants discharged into the Airshed, improving the health and wellbeing of Ngāti Kuku and the community.

## 8 Decision

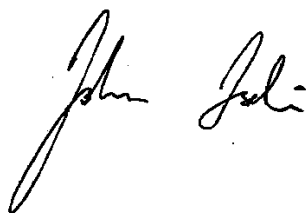
(162) Pursuant to the powers delegated to us by the Bay of Plenty Regional Council under section 34A(1) of the Resource Management Act 1991, we record that having read the Higgins Group Holdings Limited application documents and evidence; the BOPRC Section 42A Report; the submissions and submitter evidence, and having considered the various requirements of the RMA, we find for the reasons set out in this decision, and summarised below, that:

- (a) The actual and potential adverse effects of the application in the short term are acceptable, subject to the stack height being raised to 28m within a six-month time period;
- (b) The conditions of consent provide sufficiently robust means to ensure that the adverse effects arising from the application can be avoided, remedied or mitigated, or the conditions reviewed and additional mitigation implemented, where additional adverse effects arise; and
- (c) The application, in the short term, is not so inconsistent with the provisions of the relevant statutory documents to decline consent.

**Commissioner Gina Sweetman**



**Commissioner John Iseli**



**Date: 23 January 2024**