

**IN THE ENVIRONMENT COURT
AT CHRISTCHURCH
I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI**

Decision No. [2021] NZEnvC 185

IN THE MATTER

of the Resource Management Act 1991

AND

of a notice of motion under section 149T(2) to decide proposed Plan Change 1 to the Regional Plan: Waste for Otago (referred to the Environment Court by the Minister for the Environment under s142(2)(b) of the Act)

BETWEEN

OTAGO REGIONAL COUNCIL

(ENV-2020-CHC-128)

Applicant

Court: Environment Judge P A Steven
Environment Commissioner K A Edmonds

Hearing: In Chambers on the papers

Last case event: 5 November 2021

Date of Decision: 30 November 2021

Date of Issue: 30 November 2021

DECISION OF THE ENVIRONMENT COURT

A: Amend Plan Change 1 as set out in ‘Annexure 1: Plan Change 1 (Dust Suppressants) Provisions’ attached to and forming part of this decision.



ORC PC1 – DECISION

REASONS

Introduction

[1] The Regional Plan: Waste for Otago ('the Waste Plan') was made operative in 1997 and has not been amended or reviewed under s79 of the Resource Management Act 1991 ('the Act') since that time. It is now out of date with current expectations for environmental management. The entirety of the Waste Plan is intended to be reviewed alongside the operative Regional Plan: Water for Otago in the preparation of a new Land and Water Regional Plan ('new regional plan').

[2] Plan Change 1 ('PC1') addresses two pressing issues with the existing Waste Plan provisions to improve environmental outcomes in the interim. This decision only deals with the topic of the use of dust suppressants, and particularly, waste oil in Chapter 6 (and not the topic of landfills).

[3] The Minister for the Environment directed that PC1 be referred to the Environment Court under s142(2)(b) of the Act to give a decision on the provisions and matters raised in submissions.

[4] Along with the Regional Council, five of the nine parties who gave notice of their intention to become a party to the PC1 proceedings under s274 of the Act relating to Chapter 6 participated in mediation and signed the mediation agreement resolving all submission points.¹ Two s274 parties did not attend the mediation, but specifically advised that they would abide the outcome of the mediation.² Two further s274 parties advised they would not be attending the mediation, but did

¹Director-General of Conservation; Federated Farmers New Zealand - Otago and North Otago provinces; Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga (Kāi Tahu ki Otago); Royal Forest and Bird Protection Society of New Zealand Inc; and Ngāi Tahu Ki Murihiku (Te Ao Marama).

² Otago Fish and Game Council and the Central South Island Fish and Game Council; Matthew Sole.

not specifically advise they would abide the outcome of mediation.³ Parties participated in court-assisted mediation on the provisions of Chapter 6 of PC1 on 6 September 2021.

[5] On 5 October 2021 the court convened a telephone conference to discuss the dust suppressants (Chapter 6) topic and whether the matter was to proceed to hearing or could be dealt with on the papers. The parties at the conference agreed that the matter could be dealt with on the papers, however, for the avoidance of doubt, the other parties were given an opportunity to lodge any objection by Friday 22 October 2021. No objections were received, with the court issuing a Minute on 5 November 2021 advising the topic will be dealt with on the papers and will not proceed to a formal hearing, but reserving leave for any party to apply for further (or other) directions.

[6] A joint memorandum dated 5 November 2021 was signed by each of the s274 parties who attended mediation and signed the mediation agreement. The joint memorandum was filed with the court and sent to all other s274 parties who have an interest in Chapter 6 of PC1. That memorandum contains the mediation agreement, the Environment Court's obligations in relation to call-in, an explanation of the mediation agreement, and seeks a decision of the court. Appendix 1 helpfully sets out the general legal requirements under the Act applicable to Chapter 6 of PC1.

[7] An affidavit of Dolina Lily Lee, a senior analyst freshwater and land at Otago Regional Council, in support of the provisions agreed at mediation to Chapter 6 of PC1, was prepared in her capacity as an expert. In that affidavit Ms Lee acknowledges that she has read, understands and complies with the Code of Conduct for Expert Witnesses contained in the Environment Court Practice Note

³ James Miles advised in writing that he could not attend mediation but wished to know the outcome; Te Rūnanga o Ngāi Tahu advised in writing that it would not attend mediation and that its interests are aligned with those of Ngāi Tahu Ki Murihiku (Te Ao Marama). Both responses are tantamount to agreeing to abide the court's decision.

dated 1 December 2014.

[8] Ms Lee’s affidavit addresses the background to Chapter 6 of PC1, an explanation of the changes introduced by PC1, a summary of the submissions received, and the amendments agreed through mediation and supporting reasons. She also considers the outcomes to be achieved under Chapter 6 and the relationship of Chapter 6 with other planning instruments, including those introduced since the notification of PC1. In Annexure 2 Ms Lee provides the changes to Chapter 6 provisions in the notified plan change (in red text) and further amendments agreed at mediation (in green text) along with footnotes indicating the scope for those. In Annexure 4 Ms Lee considers and makes recommended decisions on the relief sought in all the submissions with reasons, including on submissions from submitters who were not s274 parties, on Chapter 6 provisions in the notified plan change.

The Law

[9] A plan change must be prepared in accordance with the Regional Council’s functions under s30 (in this case s30(1)(f) “the control of discharges of contaminants into or onto land, air or water ...”) and the provisions of Part 2 of the Act. Chapter 6 must give effect to the New Zealand Coastal Policy Statement, any applicable national policy statements, including of particular relevance, the National Policy Statement for Freshwater Management 2020 (‘NPS-FM 2020’) (to the extent that there is scope to do so) and any regional policy statement.

[10] There are two relevant regional policy statements: the partly operative Regional Policy Statement (all provisions made operative on 15 March 2021 except provisions relating to the Port Otago High Court decision) and the proposed Otago Regional Policy Statement notified in June 2021. The court is to have regard

to the proposed policy statement.⁴

[11] Chapter 6 must also not be inconsistent with either of the two water conservation orders in Otago, or any other regional plan for the region. The court is also to have regard to the consistency with any proposed or operative regional policy statements and plans of the adjacent regional councils – Southland Regional Council, Canterbury Regional Council and West Coast Regional Council.

[12] There is also a requirement to have regard to other matters including any relevant management plans under other Acts,⁵ and to take into account⁶ any relevant planning document recognised by an iwi authority.⁷

[13] The proposed policies and rules must be examined in accordance with s32 of the Act as to whether they are the most appropriate way to achieve the objectives by identifying other reasonably practicable options for achieving the objective and assessing their efficiency and effectiveness. That requires identifying benefits and costs and assessing the risk of acting or not acting if there is insufficient information. In the context of Chapter 6 of PC1, an amending proposal, the examination must relate to the provisions and objectives of Chapter 6 and the objectives of the Waste Plan to the extent that those objectives are relevant to the objectives of the plan change and would remain if PC1 were to take effect.⁸

[14] Section 70(1)(b) specifies requirements to be satisfied before including a

⁴ “Have regard to” requires the decision-maker to give genuine attention and thought to the matter. *Unison Networks Ltd v Hastings District Council* [2011] NZRMA 394 (HC) at [70].

⁵ Section 66(2)(c) of the Act. The Otago Sports Fish and Game Management Plan 2015-2025 was had regard to.

⁶ “Take into account” requires that the decision-maker must address the matter and record it has been addressed in the decision; but the weight of the matter is for the decision-makers’ judgment in light of the evidence. *Unison Networks Ltd v Hastings District Council* [2011] NZRMA 394 (HC) at [70].

⁷ The following iwi management plans are relevant to Chapter 6 – Kāi Tahu ki Otago Natural Resource Management Plan 2005; Te Tangi a Taurira: Ngāi Tahu ki Murihiku Natural Resource and Environmental Iwi Management Plan 2008; and Waitaki Iwi Management Plan 2019.

⁸ Section 32(3) of the Act.

rule in a regional plan that allows as a permitted activity a discharge of a contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water. Those requirements are to be satisfied that no specified effects, as described in s70(1)(c) to (g), are likely to arise in the receiving water after reasonable mixing.

The Plan Change

[15] The Section 32 Evaluation Report ('the s32 report') accompanying the notified plan change describes the current issues or the problem the plan change is dealing with as follows:⁹

There is a large network of unsealed roads in Otago, including approximately 1,800 kilometres in the Central Otago and Clutha districts alone. Dust from gravel roads can pollute the air, reduce visibility and road safety and generally be a nuisance for rural residences. Some residents apply dust suppressants to the roads close to their properties, including waste oil (primarily waste engine oil) or apply to their local territorial authority to have it applied on their behalf.

Some territorial authorities within the Otago region have already begun phasing out the use of waste oil as a dust suppressant. ...

Waste engine oil contains a large number of hazardous contaminants, including a number of carcinogens (Ward, 2016). These substances are known to be hazardous to both human health and the environment. Contaminants can be transferred to the environment when the oil is applied to roads or once the surface of the oiled road breaks down. When the surface breaks down and the road becomes dusty again, contaminants can bind to the dust and be blown into the air or shifted by traffic or water. There are safer alternatives to waste oil for human and environmental health

Used oil is classified as a hazardous substance under the Hazardous Substances

⁹ Section 32 Evaluation Report 9 April 2020 at [4.4.1.3].

and New Organisms Act 1996 (HSNO)

Approvals under HSNO set controls for hazardous substances throughout their lifecycle, such as requirements for storage, identification, emergency management and disposal. The Environmental Protection Authority's code of practice for *Managing and handling used oil* specifically states inappropriate methods of disposal for waste oil, which include disposal on the ground and any practices in which the used oil may cause contamination of the ground and ground water, migrate to watercourses, contaminate air or have negative impacts on humans, plants, animals or other organisms. Applying waste oil to roads is likely to be considered an inappropriate disposal method under HSNO.

[16] The s32 report states:¹⁰

... The most relevant objectives in the Waste Plan are:

- **6.3.1:** To avoid, remedy and mitigate the risk to the environment and human health from hazardous substances and hazardous wastes.
- **6.3.2:** To avoid, remedy and mitigate the harmful effects of hazardous substances and hazardous wastes on traditional water, land and mahika kai values of importance to Kāi Tahu.

The objective of this proposal is to manage the adverse effects arising from the use of dust suppressants.

[17] As notified, PC1 proposed amendments to Chapter 6 to one existing policy and two existing rules, and the inclusion of one new rule to incentivise the use of appropriate dust suppressants and prohibit the use of waste oil. A new definition of “waste oil” is:

Any oil that has been refined from crude oil, or any synthetic hydrocarbon oil, that has been used, and as a result of such use, has become unsuitable for its original purpose due to the presence of impurities or contaminants or the loss of original properties.

¹⁰ Section 32 Evaluation Report 9 April 2020 at [4.4.1.2].

[18] Policy 6.4.10 is amended to read:

To ~~discourage~~ prevent waste oil being used as a dust suppressant and provide for the use of safer alternatives.

[19] Amendments to two existing rules for a permitted activity and discretionary activity replace references to “oil or substances containing oil” with “dust suppressants”.

[20] The permitted activity Rule 6.6.2 has requirements for the discharge of dust suppressants onto or into land not to be a hazardous substance or to be approved under HSNO with its use and discharge undertaken in accordance with all conditions of that approval. The discharge must also not produce an objectionable odour, or a conspicuous oil or grease film, scum or foam in any lake, river, natural wetland (as amended at the mediation from “Regionally Significant Wetland” and covered below) or the coastal marine area, or drain or water race flowing to the foregoing or bore or soak hole in certain circumstances. Neither must a discharge be undertaken in a manner that results in ponding or overland flow entering those specific water bodies or the coastal marine area or a drain or water race going to those locations.

[21] The discretionary activity Rule 6.6.3 for a discharge that is not a permitted activity states that the dust suppressant must not be waste oil.

[22] A new Rule 6.6.4 provides that the discharge of waste oil onto or into land or into water is a prohibited activity.¹¹

[23] Anticipated Environmental Result 6.7.6 is amended to read:

The use of waste oil as a dust suppressant is avoided, and the adverse effects

¹¹ Except as provided for by Rules 6.6.1 (Operation of facilities for the treatment or disposal of hazardous wastes), 7.6.1 or 7.6.2.

of the use of ~~other waste lubricating oil~~ as a dust suppressants are avoided, remedied or mitigated.

Amendments agreed at mediation and supporting reasons

[24] Two changes were agreed at mediation. One was the amendment of the last sentence of the explanation to Policy 6.4.10 from “waste oil should no longer be applied as a dust suppressant” to “waste oil must not be applied as a dust suppressant” as more consistent with the prohibition on the use of waste oil in the plan change.

[25] A second amendment was that ‘natural wetland’ should replace ‘Regionally Significant Wetland’ because the latter are not identified in the Waste Plan (as they are in the Regional Plan: Water). This was considered to better give effect to the direction in the NPS-FM 2020 in relation to Policy 6 to protect the values of natural inland wetlands. It was also agreed that the reference in the rule should be “natural wetlands” so that artificial wetlands are not captured.

[26] Ms Lee also prepared an analysis under s32AA of the Act for the version of the Plan Change agreed at mediation against that for Chapter 6 as notified.¹² She concluded that the mediated version is the most efficient and effective to achieve the objective of PC1 of improving environmental outcomes for targeting a specific activity known to be contributing to water quality issues, until the review of the Waste Plan is completed as part of an integrated new regional plan.

The Evidence

[27] Ms Lee addressed those planning instruments that were not directly addressed in the s32 report in relation to the plan change as a whole with the mediated amendments.¹³ That included, her opinion, that the outcomes sought in

¹² Annexure 3 – s32AA evaluation for Chapter 6.

¹³ At [47]-[48].

the Plan Change are consistent with the Waitaki Iwi Management Plan 2019, not inconsistent with the Water Conservation (Mataura River) Order 1997 and not inconsistent with the regional policy statements and plans of the adjacent regional councils of Canterbury, Southland and West Coast.

[28] Of particular note is the NPS-FM 2020 that came into force on 3 September 2020 and the proposed Otago Regional Policy Statement notified in June 2021, both dating from well after the notification of PC1. We note that the NPS-FM 2020 has as its fundamental concept, Te Mana o te Wai.¹⁴

[29] Following on from NPS-FM 2020, the proposed Otago Regional Policy Statement is a significant change from the partly operative Regional Policy Statement 2019 in its structure and content.¹⁵ Ms Lee gave evidence that Chapter 6 does not give full effect to either superior document and is not required to do so at this time.

[30] Ms Lee gave evidence that as an interim measure the plan change seeks to strengthen Otago's planning framework by targeting specific activities known to contribute to water quality issues. The use of waste oil as a dust suppressant has been identified as an activity with the potential to have a negative impact on water quality and to have effects on human health. The changes proposed to Chapter 6 strengthen the objective addressed by the plan change, requiring that waste oil must not be used as a dust suppressant and that there are stringent requirements for alternative dust suppressants as a permitted activity. Ms Lee considered that the plan change provisions are a step in the right direction under both superior documents.

¹⁴ See *Re Otago Regional Council* [2021] NZEnvC 164.

¹⁵ See *Re Otago Regional Council* [2021] NZEnvC 164.

Consideration

[31] We concur with the evidence of Ms Lee.

[32] We accept that the use of waste oil as a dust suppressant is no longer considered acceptable practice and there are safer alternatives. Prohibiting the use of waste oil as a dust suppressant and encouraging the use of other safer alternatives will contribute towards improving water quality.

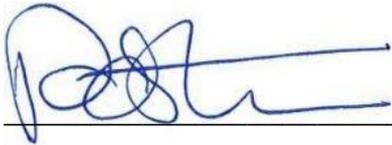
[33] Evaluating the changes to the provisions against Chapter 6, Objective 6.3.1, we conclude that the direction in Policy 6.4.10 '[t]o prevent waste oil being used as a dust suppressant' and a new rule prohibiting the discharge of waste oil to "avoid" the risk to the environment and human health, are the most appropriate ways to achieve the objective. The direction in Policy 6.4.10 '[to] provide for the use of safer alternatives' is implemented through the stronger controls in the requirements that are to be met for a dust suppressant to be a permitted activity, along with a full discretionary activity otherwise, is also the most appropriate approach.

[34] In making our decision we also accept that the plan change provisions are a step in the right direction under both the NPS-FM 2020 and the proposed Regional Policy Statement.

Outcome

[35] Pursuant to s149U(6) and cl10(1) to (3) of Schedule 1 of the Resource Management Act 1991, the court's decision on Plan Change 1 is to amend it as set out in 'Annexure 1: Plan Change 1 (Dust Suppressants) Provisions' attached to and forming part of this decision.

For the court



P A Steven
Environment Judge



Annexure 1:

Plan Change 1 (Dust Suppressants) Provisions

Section 6.1.2.2 Waste oil

Waste oil accounts for possibly the largest quantity of low toxicity waste generated. All motor vehicle users generate waste oil and it is also produced wherever machinery is used. Oil has adverse environmental effects on any receiving waters or land. The toxicity of oil derives from heavy metal additives or combustion products.

The Waste Lubricating Oil Survey of Otago (Otago Regional Council 1991) estimated that 700,000 litres of waste oil are generated in Otago annually. Of this, 250,000 litres are re-refined for fuel, and a further 200,000 litres are re-refined for lube use. Due to the availability of cheaper overseas oil the volume re-refined for lube use in Otago has significantly decreased over recent years. There are also problems in the refining process, as disposal of acid tar is required.

Over 200,000 litres of waste oil per year is disposed of by inappropriate or unknown methods, or is being stored prior to treatment or disposal. Waste oil has been disposed of into the ground, burnt, or spread over roads as a dust suppressant.

Re-refining waste oil for use as a fuel for industrial use can potentially use much of the waste oil produced in the South Island.

Issue 6.2.5

Hazardous substances and hazardous wastes have an adverse effect on the environment

Explanation

Adverse environmental effects, such as the contamination of water or soils, can result from spills, unsuitable storage, inappropriate usage and disposal. This includes agricultural chemicals and the spreading of waste oil on roads.

...

Objective 6.3.1

To avoid, remedy and mitigate the risk to the environment and human health from hazardous substances and hazardous wastes

Explanation

Otago's environment, including its communities, must be protected from the adverse effects of hazardous substances and hazardous wastes, associated with legitimate activities, or which arise by way of accidents.

Policies 6.4.1 – 6.4.12

Methods 6.5.1 – 6.5.25

Rules 6.6.1 – 6.6.4

Policy 6.4.10

To prevent waste oil being used as a dust suppressant and provide for the use of safer alternatives

Explanation

In parts of Otago, waste oil has historically been used as a dust suppressant on roads. This practice can give rise to environmental contamination as a consequence of heavy metals and other noxious elements within the oil entering the ground in the areas treated, and water bodies where runoff occurs. Wind or traffic derived dust can spread the contamination and, depending on the nature of the substances, these can be a hazard to public health. Present technologies identify lead concentrations to be of greatest concern. With safer alternatives now more readily available, waste oil must not be applied as a dust suppressant.

Methods 6.5.3, 6.5.22, 6.5.25

Method 6.5.6

Advocate to central government to promote the recycling and reuse of waste oil by the removal of positive disincentives (duty and tax) and the adoption of policies to promote reuse, on the basis of environmental damage resulting from dumping of this hazardous waste

Method 6.5.23

Include a rule in this Plan which controls the discharge of dust suppressants.

Rule 6.6.2

Discharge of dust suppressants (permitted activity)

The discharge of a dust suppressant onto or into land is a permitted activity, provided that:

- (a) The dust suppressant is not a hazardous substance; or
- (b) The dust suppressant is approved under the Hazardous Substances and New Organisms Act 1996 and the use and discharge of dust suppressant is undertaken in accordance with all conditions of the approval; and
- (c) The discharge does not produce an objectionable odour, or a conspicuous oil or grease film, scum or foam in any:
 - (i) Lake, river or natural wetland; or
 - (ii) Drain or water race that flows to a lake, river, natural wetland or coastal marine area; or
 - (iii) Bore or soak hole; and
- (d) The discharge is not undertaken in a manner that results in ponding or overland flow that enters any:
 - (i) Lake, river, natural wetland or coastal marine area; or
 - (ii) Drain or water race that goes to any lake, river, natural wetland or coastal marine area.

Rule 6.6.3

Discharge of dust suppressants (discretionary activity)

The discharge of a dust suppressant onto or into land is a discretionary activity where:

- (a) The discharge is not permitted by Rule 6.6.2; and
- (b) The dust suppressant is not waste oil.

6.6.3.1 Assessment Matters

In considering any application under this rule, in addition to the matters listed in Section 104 of the Resource Management Act, the Otago Regional Council will have regard to, but not be restricted by, the following matters:

- (a) to (d) unchanged
- (e) Means by which the above matters will be monitored, including land adjoining areas being sprayed, any water body, including the frequency and locations of monitoring.

Rule 6.6.4

Discharge of waste oil

Except as provided for by Rules 6.6.1, 7.6.1 or 7.6.2, the discharge of waste oil onto or into land or into water is a prohibited activity.

Principal Reasons for adopting hazardous substances and hazardous waste rules

The discharge of hazardous wastes into or onto land, and into water and air, can have a significant adverse effect on Otago's natural and physical resources. Because of the potential for significant adverse effects to occur, the discharge of such hazardous wastes requires control.

Anticipated Environmental Result 6.7.6

The use of waste oil as a dust suppressant is avoided, and the adverse effects of the use of other dust suppressants are avoided, remedied or mitigated.

Definition of 'waste oil'

Waste oil: Any oil that has been refined from crude oil, or any synthetic hydrocarbon oil, that has been used, and as a result of such use, has become unsuitable for its original purpose due to the presence of impurities or contaminants or the loss of original properties

