

**IN THE ENVIRONMENT COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**I TE KŌTI TAIAO O AOTEAROA
ŌTAUTAHI ROHE**

ENV-2020-CHC-128

UNDER the Resource Management Act 1991 (RMA)

IN THE MATTER of the Omnibus Plan Change - Plan Change 1, being part of a proposal of national significance directed by the Minister for the Environment to be referred to the Environment Court under section 142(2)(b) of the RMA

AND

IN THE MATTER of an application under section 149T of the RMA

OTAGO REGIONAL COUNCIL

Applicant

**MEMORANDUM OF COUNSEL ON BEHALF OF THE OTAGO REGIONAL
COUNCIL**

PC1 - CHAPTER 6 - DUST SUPPRESSANTS

20 September 2021

Applicant's Solicitor
PO Box 4341 CHRISTCHURCH 8140
DX WX11179
Tel +64 3 379 7622
Fax +64 379 2467

WYNNWILLIAMS

Solicitor: L F de Latour / M A Mehlhopt
(lucy.delatour@wynnwilliams.co.nz /
michelle.mehlhopt@wynnwilliams.co.nz)

MAY IT PLEASE THE COURT

- 1 This Memorandum of Counsel is filed on behalf of the Otago Regional Council (**Council**) in relation to Plan Change 1 to the Regional Plan: Waste for Otago (**PC1**).
- 2 The purpose of this memorandum is to update the Court and parties on the outcomes of mediation for the PC1 Dust Suppressants (**Chapter 6**) topic and to seek directions in relation to an evidence exchange timetable (as necessary).

Background

- 3 Environment Court facilitated mediation occurred in relation to Chapter 6 provisions of PC1 on Monday 6 September 2021.
- 4 As a result of the mediation, agreement has been reached between the parties in attendance at mediation in relation to all of the Chapter 6 topic and relevant provisions referred to mediation.¹ The provisions of Chapter 6 as agreed at mediation are included as **Appendix 1**. In summary,
 - (a) Further amendments to the notified provisions are proposed to:
 - (i) Amended Policy 6.4.10; and
 - (ii) Amended permitted activity Rule 6.6.2;
 - (b) The parties have agreed with all other changes to Chapter 6 proposed by PC1 should be the wording as notified.
- 5 Outlined below are further details in relation to the provisions of Chapter 6 that were referred to mediation including the changes agreed at mediation.

Explanation as to the position reached by parties*Changes agreed to Policy 6.4.10*

- 6 The Parties reached agreement on Policy 6.4.10. The only change from the notified version of Policy 6.4.10 (and its associated explanation) has been to change wording in the explanation to now state that waste oil

¹ Amended Policy 6.4.10, Amended Rule 6.6.2, Amended Rule 6.6.3, New Rule 6.6.4, New definition – waste oil and consequential amendments: Section 6.1.2.2, Issue 6.2.5, Objective 6.3.1, Methods 6.5.6 and 6.5.23, Principal reasons for hazardous substances and hazardous waste rules, Anticipated Environment Result 6.7.6.

must not be applied as a dust suppressant (rather than the notified wording “waste oil *should no longer* be applied as a dust suppressant”).

- 7 The change made is more supportive of the proposed rule framework of Chapter 6 prohibiting the use of waste oil as a dust suppressant.

Changes agreed to Rule 6.6.2.

- 8 The parties reached agreement on amended permitted activity Rule 6.6.2. This rule regulates the discharge of dust suppressants as a permitted activity onto or into land and has a number of conditions that must be met for the activity to be permitted.
- 9 Amendments to the conditions of the rule as notified were agreed to by the parties to control the discharge of dust suppressants in the proximity of “natural wetlands” rather than “Regionally Significant Wetlands”. This change has been made to the condition (c)(i), (c)(ii), d(i) and d(ii).

No changes to notified provisions

- 10 In relation to most of the amendments to Chapter 6 proposed by PC1 the parties have agreed that the notified version of these provisions did not require any additional amendment. In particular, the parties have agreed that the following provisions should be amended as notified (subject to consideration by the Court):
- (a) *Section 6.1.2.2*: The notified changes to Section 6.1.2.2, which is an introduction section to Chapter 6, are consequential amendments as a result of the new definition of waste oil which is detailed below. This is to ensure consistency in terminology used throughout Chapter 6.
 - (b) *Issue 6.2.5*: The notified change to Issue 6.2.5 is a consequential amendment to ensure consistency of terminology used in Chapter 6 as a result of the new definition of waste oil.
 - (c) *Objective 6.3.1*: The notified change to Objective 6.3.1 is a minor change to the rules referred to as relevant to this objective.
 - (d) *Methods 6.5.6 and 6.5.23*: The notified changes to these methods are consequential changes to ensure consistency in the terminology and intent of the substantive changes Chapter 6 prohibiting the use of waste oil as a dust suppressant and controlling dust suppressants generally.

- (e) *Amended discretionary activity Rule 6.6.3*: This rule regulates the discharge of dust suppressants as a discretionary activity if a condition of permitted activity Rule 6.6.2 is not met. The notified changes to this rule includes the addition of a condition that the dust suppressant cannot be waste oil in order to be a discretionary activity.
- (f) *6.6.3.1 Assessment Matters*: 6.6.3.1 Assessment Matters set out matters to assess if resource consent is required under Rule 6.6.3. The notified changes to 6.6.3.1 Assessment Matters removes reference to the locality of oil as a matter for assessment. This change supports the proposed changes to Chapter 6 prohibiting the use of waste oil as the locality of oil is no longer a relevant matter for assessment. There were no specific submissions on these Assessment Matters.
- (g) *New prohibited activity Rule 6.6.4*: This new rule as notified prohibits the discharge of waste oil onto or into land or into water (except as provided for by other rules in the Regional Plan: Waste for Otago).
- (h) *Principal Reasons for hazardous substances and hazardous waste rules*: The notified changes to these Principal Reasons are consequential changes to reflect that waste oil is a prohibited activity under the proposed changes to Chapter 6. Therefore, providing reasons for controlling the discharge of oil is no longer required. There were no submissions on the Principal Reasons.
- (i) *Anticipated Environmental Result 6.7.6*: The notified changes to the Anticipated Environmental Result 6.7.6 are consequential amendments to ensure consistency with the proposed framework under Chapter 6 to prohibit the discharge of waste oil. The changes clarify that the use of waste oil is to be avoided while the adverse effects of the use of other dust suppressants are to be avoided, remedied or mitigated.
- (j) *New definition of "waste oil"*: This new definition as notified has been proposed to clarify what oil is classified as "waste oil" and is therefore prohibited from being discharged under new Rule 6.6.4.

- 11 The Parties also discussed the submissions and further submissions which had been classified as “general submissions” on Chapter 6. Those that relate to Chapter 6 are submissions made by:
- (a) Director General of Conservation;
 - (b) Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou and Hokonui Rūnanga (Kāi Tahu ki Otago); and
 - (c) Otago Fish and Game Council and the Central South Island Fish and Game Council.
- 12 No further changes to Chapter 6 were required as a result of these general submission points.

Directions sought

- 13 The Council anticipates that evidence will be required in order for the Court to consider the provisions of PC1 Chapter 6 - Dust Suppressants as agreed at mediation. However, at this stage it is unclear whether or not the Court considers that hearing time will be required, or whether it might be sufficient for affidavit evidence to be filed, alongside any necessary consent documentation (including a more fulsome than usual consent memorandum). It is anticipated that the affidavit evidence would comprise of planning evidence, a s32AA analysis of the further changes agreed at mediation, and a table of officer recommendations on the Chapter 6, PC1 provisions.
- 14 Counsel is conscious that the Court may wish to convene a hearing, given that this matter, as a call-in, is a first instance decision and the Court will need to make decision on the submissions. However, given the relatively narrow nature of the amendments to Chapter 6 proposed by PC1 it seems that it may be appropriate to proceed directly with consent documentation (and accompanying affidavit evidence).
- 15 Depending on the Court’s preferences it is respectfully suggested that a teleconference to discuss the next steps may be an efficient way to proceed.
- 16 For completeness, it is noted that the other parties to the mediation agreement have not been specifically canvassed regarding the contents of this memorandum.

17 In light of the above explanation, the Council respectfully seeks the following direction:

- (a) A teleconference to be convened to discuss evidence preparation and whether a hearing is needed in relation to Chapter 6 of PC1.

Dated this 20th day of September 2021



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L F de Latour / M A Mehlhopt

Counsel for Otago Regional Council