

IN THE ENVIRONMENT COURT  
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA  
KI TAMAKI MAKAU

Decision No. [2024] NZEnvC 011

IN THE MATTER OF

an appeal under clause 14 of the First  
Schedule of the Resource Management  
Act 1991

BETWEEN

SWAP STOCKFOODS LIMITED

(ENV-2019-AKL-000065)

TIMBERLANDS LIMITED

(ENV-2019-AKL-000073)

Appellants

AND

BAY OF PLENTY REGIONAL  
COUNCIL

Respondent

Court: Judge MJL Dickey  
Commissioner JA Hodges  
Commissioner AP Gysberts

Hearing: On the papers  
Last case event: 20 December 2023

Date of Decision: 12 February 2024

Date of Issue: 12 February 2024

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THIRD INTERIM DECISION OF THE ENVIRONMENT COURT

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A: The Plan Change 13 provisions as set out in **Appendix A** are approved.

B: The s 293 process continues in accordance with the timeline previously  
approved.

Swap Stockfoods Limited v Bay of Plenty Regional Council



C: Costs are reserved.

## REASONS

### Introduction

[1] This matter concerns appeals against the Bay of Plenty Regional Council (**Regional Council**) on Proposed Plan Change 13 (Air Quality) to the Operative Bay of Plenty Regional Natural Resources Plan (**PC13**).

[2] The case is primarily about the management of dust in the Mount Maunganui Airshed (**MMA**) to protect the human health and mauri of the air. PC13 contains provisions to address the management of dust.

### The Court's Interim Decisions

[3] On 10 January 2023 this Court issued its First Interim Decision.<sup>1</sup> It sought submissions on a number of points. It also foreshadowed its intention to direct the Regional Council to prepare changes to PC13 in accordance with s 293 of the RMA. These changes included the controls of emissions of particulate matter less than 10 microns in diameter (PM<sub>10</sub>) from unsealed yards to contribute to integrated management of the MMA.

[4] On 20 October 2023 a Second Interim Decision was issued.<sup>2</sup> The parties were directed to provide final comments on the Plan Change. The Regional Council had provided draft plan provisions relating to the s 293 process for unsealed yards and its proposed timeline for the process. The Council was directed to commence a plan change and follow the timeline and process steps set out for the s 293 process.

### Memorandum of parties dated 16 November 2023

[5] By memorandum dated 16 November 2023, the parties advised they had some minor amendments to the Plan Change. The memorandum attached a consolidated version of the provisions.

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<sup>1</sup> *Swap Stockfoods Limited v Bay of Plenty Regional Council* [2023] NZEnvC 001.

<sup>2</sup> *Swap Stockfoods Limited v Bay of Plenty Regional Council* [2023] NZEnvC 221.

[6] At the time of finalising the memorandum feedback had not been received from Swap Stockfoods Limited (**SSL**), although it had previously filed a memorandum dated 2 November 2022 identifying a typographical error. The Court took this to be its remaining feedback on the plan change.<sup>3</sup>

***Reference to Rule AIR-R15(6) in the chapeau***

[7] The Regional Council noted that the wording of the chapeau in Rule AQ R22A and AQ R22B refers specifically to activities permitted by Rule AIR-R15(6) (composting), but not other activities within Rule AIR-R15 which may, as part of their operations, be handling bulk solid materials over the thresholds contained within Rule AQ R22A.

[8] Rule AIR-R15 is the discretionary activity rule that lists a number of industries, including asphalt manufacture, synthetic fertiliser manufacture etc. which may, as part of the wider operations, be handling bulk solid materials. It was not the Regional Council's intention that such activities would be required to obtain consent under both Rule AIR-R15 and Rule AQ R22A or B (either now or on reconsenting). Rather, all their discharge activities should be considered holistically under just Rule AIR-R15.

[9] The Regional Council considered that the chapeau should be amended to refer to "Rule AIR-R15".

[10] The Court accepted the amendment of the chapeau in Rules AQ R22A and AQ R22B to read Rule AIR-R15.<sup>4</sup>

***New Method AQ M1***

[11] The Regional Council noted that the Court had provided additional wording to new Method AQ M1 in its Second Interim Decision:<sup>5</sup>

New method AQ M1 is to be amended by adding the following at the end "...  
and may initiate reviews of existing consents where necessary to ensure

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<sup>3</sup> Minute of the Environment Court, dated 12 December 2023, at [2].

<sup>4</sup> Minute of the Environment Court, dated 12 December 2023, at [4(a)].

<sup>5</sup> *Swap Stockfoods Limited v Bay of Plenty Regional Council* [2023] NZEnvC 221, at [86(f)].

compliance as soon as reasonably practicable and that the annual guideline value in the Health-based Guideline Values of the Ambient Air Quality Guidelines 2002 (or its amendment or replacement) is met”.

[12] The Court had previously provided a strong recommendation to the Council in relation to the review of existing resource consents in its First Interim Decision:<sup>6</sup>

We strongly recommend that the Regional Council:

- 1 Implements other non-statutory methods and undertakes a review of existing resource consents relating to the discharge of PM<sub>10</sub> to air to ensure the Mount Maunganui Airshed is managed on a fully integrated basis as soon as reasonably practicable;
- 2 ...

[13] The Regional Council had concerns about the Court’s wording added in its Second Interim Decision, and asked that it be deleted for the following reasons:

- (a) the Court had already provided a strong direction to the Regional Council in relation to existing discharge consents within the MMA in the First Interim Decision;
- (b) the Regional Council is constrained by both the wording of s 128 RMA and any review consent conditions on a particular consent, when exercising its discretion to determine whether a review of consent conditions is required; and
- (c) the Regional Council was concerned that the additional wording to the Method, which relates more specifically to assessments of MMA monitoring results, suggests that existing consent holders are currently non-compliant (by virtue of the wording “where necessary to ensure compliance as soon as reasonably practicable”), is potentially confusing, and may go beyond the ambit of s 128 RMA and the consent conditions.

[14] The Court accepts that the additional wording to new Method AQ M1 referred to in the Second Interim Decision should not be included in the plan change.<sup>7</sup>

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<sup>6</sup> *Swap Stockfoods Limited v Bay of Plenty Regional Council* [2023] NZEnvC 001, at Direction C1.

<sup>7</sup> Minute of the Environment Court, dated 12 December 2023, at [4(c)].

***When Rules AQ R22A, R22B and R22C are deemed operative***

[15] The parties sought clarification from the Court on when Rules AQ R22A, R22B and R22C are deemed operative. The parties assumed that, given the Court's s 293 directions, the intention is that the Court will issue a third interim decision following the receipt of any comments by the parties; but that the 'interim decision' will be treated as the 'final findings' in relation to Rules AQ R22A, R22B and R22C; at which time they will be deemed operative. The parties understanding was that the 'Final Decision' on these appeals will not be issued until after the s 293 process on unsealed yards is completed; so as to ensure that the Court does not become functus officio in relation to the appeals.

[16] By Minute dated 12 December 2023, the Court advised:<sup>8</sup>

The parties are correct in their assumption that the Court will issue a final decision on PC1[3] following completion of the s 293 process. The reference to "final decision" in paragraph [20] of the second interim decision, related to the substantive appeals only, not a further decision related to the s 293 process, but accept this was not clear. As to the date on which Rule AQ R22A, Rule AQ R22B, and Rule AQ R22C become operative, we note that the rules and Policy AQ P11 relating to the handling of bulk solid materials and logs for an interim period will not be affected by the s 293 process. This means they can be deemed operative in accordance with version of the plan change attached to the memorandum, amended in accordance with paragraph [3] above.

Policy AQ P12 will apply to the handling of bulk solid materials and logs on expiry of the Interim Permitted Activity Rule, but its finalisation as part of the s 293 process does not need to delay Rule AQ R22A, Rule AQ R22B, and Rule AQ R22C becoming operative.

***Section 293 process***

[17] The Regional Council advised it had commenced circulation of the draft plan change in relation to unsealed yards, as directed under s 293 RMA. It did however note that, given the truncated timeline between issuing a draft of the plan change and receiving feedback, it was unlikely to be in a position to meaningfully consider any feedback and publicly notify the proposed plan change by the end of November 2023. It considered the preferable course of action would be to provide further time for

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<sup>8</sup> Minute of the Environment Court, dated 12 December 2023, at [5] – [6].

consideration of responses to the draft provisions and make any necessary amendments, before publicly notifying the changes in early January 2024. This would still align with the Court’s timeframes set out in Appendix C to the Second Interim Decision.

[18] The Court accepted the need to revise the timetable for the s 293 process and that public notification in January, rather than early January, is appropriate.<sup>9</sup>

### ***Standard 1(f)***

[19] In a Minute dated 12 December 2023, the Court stated:

We note that parties consider that the words “Except for” should be reinstated in Standard 1(f). Our concern is that the exception can be read as meaning standards (g) to (x) do not have to meet the less effective requirement. We consider clearer wording to be “In addition to mitigation measures required by standards (g) to (x), all other **PM10** mitigation measures in place on the **subject site** must be no less effective...”. This wording is to be included in the plan change.

[20] With regard to the other matters raised in the 16 November 2023 memorandum, the Court accepted the amended version of the plan change attached to the memorandum.<sup>10</sup>

### **Minute dated 12 December 2023**

[21] By Minute dated 12 December 2023, the Court directed the parties to file a clean version of the plan change. The Court advised it would then issue a third interim decision, after which Rule AQ R22A, Rule AQ R22B, and Rule AQ R22C can be deemed operative.

### **Memorandum of counsel for the Regional Council dated 20 December 2023**

[22] The memorandum attached a clean version of the provisions.

[23] The Regional Council raised a matter which had arisen on final review of the provisions, and relates to the timing for submission of Dust Management Plans (**DMP**).

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<sup>9</sup> Minute of the Environment Court, dated 12 December 2023, at [7].

<sup>10</sup> Minute of the Environment Court, dated 12 December 2023, at [4(b)].

[24] The current wording set out in 3(c)(iii) is:

The dust management plan required by 3(a) or 3(b) must be:

- (i) peer reviewed by another **SQEP** prior to submission to the Regional Council; and
- (ii) revised to address the peer review comments prior to submission to Regional Council, or where the comments are not addressed to the satisfaction of the peer reviewer, the reasons must be stated; and
- (iii) provided to the Regional Council within three months of this rule becoming operative, together with the peer review required by (3)(c)(i); or for the **Port Industry Area**, provided to the Regional Council and Ngāi Te Rangi within six months of this rule becoming operative, together with the peer review required by (3)(c)(i); and
- (iv) reviewed by **SQEP** at least once every calendar year and any updated version of the dust management plan provided to the Regional Council and to Ngāi te Rangi for the **Port Industry Area**, within one month of its review.

[25] The Regional Council's concern is whether all parties subject to the Interim Permitted Activity Rule (IPAR) will be in a position to submit their DMP within three months of the Court's final findings. The Council's concern is that given the Christmas/January period where a number of industries shut down, this may affect the availability of both staff and/or more particularly the required Suitably Qualified and Experienced Air Quality Persons (**SQEP**) (and peer review by a **SQEP**) to meet the required timeframe. Although the Regional Council appreciates that parties to the current process are probably already well underway with their DMP preparation, there are other sites/businesses who have not formed part of the Court process.

[26] The Council requested that the Court amend 3(c)(iii) as follows:

The dust management plan required by 3(a) or 3(b) must be:

- (i) peer reviewed by another **SQEP** prior to submission to the Regional Council; and
- (ii) revised to address the peer review comments prior to submission to Regional Council, or where the comments are not addressed to the satisfaction of the peer reviewer, the reasons must be stated; and
- (iii) provided to the Regional Council within ~~three~~ six months of this rule becoming operative, together with the peer review required by (3)(c)(i); or for the **Port Industry Area**, provided to the Regional Council and Ngāi

Te Rangi within six months of this rule becoming operative, together with the peer review required by (3)(c)(i); and

- (iv) reviewed by **SQEP** at least once every calendar year and any updated version of the dust management plan provided to the Regional Council and to Ngāi te Rangi for the **Port Industry Area**, within one month of its review.

[27] Counsel raised this issue with the other parties to the proceeding and received the following responses:

- (a) SSL, Timberlands Limited and ADM agree with the amendment;
- (b) Port of Tauranga Limited are 'not opposed' to the amendment. Toi Te Ora and Ngāi Te Rangi are neutral;
- (c) at the time of filing the memorandum, it was the Regional Council's understanding that counsel for Viterra and Agrifeeds did not have instructions.

[28] The Court agrees that further time should be given for submission of DMP, for the reasons set out by the Regional Council.

### Outcome

[29] The Plan Change 13 provisions as set out in **Appendix A** are approved.

[30] The s 293 process continues in accordance with the timeline previously approved.

[31] Costs are reserved.

For the Court:



**MJL Dickey**  
Environment Judge

