

IN THE MATTER

of an appeal under Clause 14 of the First Schedule to the Resource Management Act 1991 (*the Act*)

AND

IN THE MATTER

of the decisions of the Otago Regional Council on the Proposed Otago Regional Policy Statement (*the Proposed RPS*)

BETWEEN

BP OIL NEW ZEALAND LIMITED, MOBIL OIL NEW ZEALAND LIMITED AND Z ENERGY LIMITED (*The Oil Companies*)

Appellant

AND

OTAGO REGIONAL COUNCIL

Respondent

NOTICE OF APPEAL UNDER CLAUSE 14 OF THE FIRST SCHEDULE TO THE RESOURCE MANAGEMENT ACT 1991

**To: The Registrar, Environment Court
Enterprise Business Park
4-6 O'Briens Road
Unit 7
Stockburn
Christchurch**

1. **The Appellants are BP Oil New Zealand Limited, Mobil Oil New Zealand Limited, Z Energy Limited (*The Oil Companies*)**
2. **The Respondent is the Otago Regional Council (*the Council*).**
3. The Oil Companies appeal against part of a decision of the Council on the Proposed Otago Regional Policy Statement (*the Proposed RPS*). The Oil Companies made submissions and further submissions to the Council in relation to the Proposed RPS.
4. The Oil Companies core activities in the Otago Region relate to the operation and management of bulk storage facilities, aviation facilities and the operation and supply of retail outlets.
5. The Oil Companies are not a trade competitor for the purposes of section 308D of the Act.
6. The Council notified the Proposed RPS and made decisions on the submissions and further submissions of the Oil Companies in relation to the Proposed RPS. The Oil Companies received notice of the decisions on 4 October 2016.
7. **The parts of the decision being appealed**
 - 7.1 The part of the decision that the Oil Companies appeal relates to is:
 - (a) Chapter 4 - Policy 4.1.5 Natural hazard risk
 - (b) Chapter 4 - Policy 4.1.6 Avoiding increased natural hazard risk
 - (c) Chapter 4 - Policy 4.6.2 Use, storage and disposal of hazardous substances
 - (d) Chapter 4 - Policy 4.6.5 Managing contaminated land
 - (e) Chapter 4 - Policy 4.6.9 Contaminated land
 - (f) Chapter 4 – Policy 4.4.6 Energy efficient transport
8. **GENERAL REASONS**
 - 8.1 The general reasons for the appeal are that the decision:
 - (a) Does not promote the sustainable management of natural and physical resources and is contrary to Part 2 and other provisions of the Act.
 - (b) Is not the most efficient or effective way of managing natural hazard risks, contaminated land or hazardous substances and regionally significant infrastructure.
 - (c) Does not recognise and provide appropriate protection for the regionally significant motor fuel infrastructure to the region.

- (d) Does not represent the most appropriate means of exercising the Council’s statutory functions, having regard to the efficiency and effectiveness of other available options under section 32 of the Act.

9. **The specific reasons for the Oil Companies’ appeal are set out below.**

10. **CHAPTER 4 – POLICY 4.1.5 NATURAL HAZARD RISK (3.2.4 NOTIFIED)**

The Oil Companies’ Submission (128/80)

- 10.1 The Oil Companies sought a range of changes to simplify the suite of policies addressing natural hazards. Relief sought included amending policy 3.2.4 as notified to avoid duplication with risk identification policies and to focus on management of risk and acceptable levels of risk.

The Council’s Decision

- 10.2 The Council has made ‘minor language improvements’ but has otherwise retained the policy as notified.

Reason for Appeal

- 10.3 The requirements to assess the implications of residual risk and future tolerance to risk are ambiguous and will promote uncertainty. The policy should address the acceptability of residual risk, not the implications of residual risk or tolerance to risk.
- 10.4 The use of the phrase ‘including residual risk’ at 4.1.5b) implies residual risk is broader than the definition in the glossary¹. Greater clarity would be provided if reliance was placed on the definition of residual risk in the Proposed RPS.

Relief Sought

- 10.5 Amend Policy 4.1.5 to reduce repetition, improve clarity, and ensure a focus on management of residual risk to acceptable levels. This could be achieved as follows (additions in underline, deletions in strikethrough):

Policy 4.1.5 Natural hazard risk

Manage natural hazard risk to people and communities, with particular regard to all of the following:

- a) The risk posed, considering the likelihood and consequences of natural hazard events;*
b) The acceptability ~~implications~~ of residual risk, ~~including the risk remaining after implementing or undertaking risk reduction and hazard mitigation measures;~~

¹ Residual risk - The risk remaining after the implementation or undertaking of risk management measures.

~~c) The community's tolerance of that risk, now and in the future, including the community's ability and willingness to prepare for and adapt to that risk, and respond to an event;~~
~~cd) The changing nature of tolerance to risk;~~
de) Sensitivity of activities to risk.

10.6 Make any consequential amendments as a result of the above amendments.

10.7 Such other relief as the Court sees fit.

11. CHAPTER 4 –POLICY 4.1.6 AVOIDING INCREASED NATURAL HAZARD RISK (3.2.6 NOTIFIED)

The Oil Companies' Submission (128/86)

11.1 The Oil Companies' submission sought to amend Policy 3.2.6 to recognise that it is not necessary or possible to avoid all natural hazard risk or increases in risk, especially where there is no control over the frequency and intensity of events, and to ensure the policy focus is on the adverse effects arising from an exposure to a hazard and not about controlling the hazard per se.

The Council's Decision

11.2 The Council's decision was to amend the policy to reflect Policy 25 of the (NZCPS) and to reduce complexity and duplication. The Council considers that it is appropriate to avoid activities that significantly increase natural hazard risk. The following is the wording in the Council's decision:

Reason for Appeal

11.3 Policy 25 of the NZCPS requires, among other things, the avoidance of increased risk of social, environmental and economic harm and avoidance of redevelopment, or change in land use, that would increase the risk of adverse effects from coastal hazards. Policy 25 of the NZCPS also addresses a range of other matters in areas potentially affected by coastal hazards, including encouraging the encouragement of infrastructure away from areas of hazard risk, where practicable. These other matters provide a balance to the policy and recognise that there may be instances when activities are necessary in areas potentially affected by coastal hazards.

11.4 In contrast, Policy 4.1.6 of the Proposed RPS only partially reflects the intent of Policy 25 and in particular only requires the avoidance of increase in risk of adverse effects from coastal hazards during redevelopment or changes of use, or where there is an increase in risk of social, environmental and economic harm, it does not apply to all activities. The structure of the policy allows an assessment to be balanced against all of the relevant provisions. Importantly in relation to infrastructure it recognises this will not be practicable in all circumstances. In contrast, even the temporary increase of risk associated with a maintenance activity in a coastal hazard area could be considered contrary to 4.1.6b). This could have significant

implications for port related activities that have to functionally operate within and adjacent to the coastal environment.

Relief Sought

- 11.5 Delete the requirement for avoidance of all activities which will increase risk of coastal hazards and instead focus on managing risk to acceptable levels. Introduce a pathway for infrastructure activities and acknowledge that it is not possible to avoid infrastructure within hazard zones, as is recognised through Policy 25 of the NZCPS. This could be achieved as follows (additions in underline, deletions in strikethrough):

Policy 4.1.6 – Avoiding increased natural hazard risk

Manage natural hazard risk to people and communities by ~~both~~:

- a) Avoiding activities that significantly increase risk including displacement of risk off-site; ~~and~~*
- b) Avoiding redevelopment, or change in land use, activities that would increase the risk of adverse effects from in areas potentially affected by coastal hazards over at least the next 100 years ~~and~~*
- c) Encouraging the location of infrastructure away from areas of hazard risk, where practicable.*

- 11.6 Make any consequential amendments as a result of the above amendments.

- 11.7 Such other relief as the Court sees fit.

12. CHAPTER 4 – POLICY 4.6.2 USE, STORAGE AND DISPOSAL OF HAZARDOUS SUBSTANCES (NOTIFIED 3.9.2)

The Oil Companies' Submission (128/131)

- 12.1 The Oil Companies' submission pointed to the difficulties of combining policies relating to hazardous substances and waste and sought separate policies be provided.

The Council's Decision

- 12.2 The Council's decision is to amend the policy to apply to hazardous substances only and to add 'and avoiding, remedying and mitigation adverse effects on the environment' at matter c). The Council has also incorporated matter g) to encourage the use of best management practices. Other changes sought to this policy have not been taken forward.

Reason for Appeal

- 12.3 The decision retains a requirement to avoid accidental spillage or release of hazardous substances. This is inappropriate and does not recognise that accidents will happen from time to time, despite best management. Rather than requiring the avoidance of such spillages, the

policy should require risk minimisation approach through appropriate management and design to be in place for the use, storage, treatment and disposal of hazardous substances.

- 12.4 It is also not appropriate to require secure containment of hazardous substances in all instances. Take for instance the disposal of hazardous substances, which this policy would also apply. The policy should not require a landfill to provide secure containment as might be expected of a fuel storage tank.
- 12.5 Matter c) has been amended but requires avoidance of adverse effects on 'the health and safety of people'. Health and safety is subject to separate legislation and is a matter for Worksafe New Zealand. This matter should be specific to human health, in line with overarching objective 4.6 and the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011 (NESCS).
- 12.6 Matter f) addresses reverse sensitivity but is only applied to treatment or disposal. It is considered equally important to protect sites that store hazardous substances from reverse sensitivity effects. It is important that the RPS requires consideration of such matters.
- 12.7 In line with the definition of reverse sensitivity which specifically references intensification, the Oil Companies maintain it is appropriate that matter f) should address not just the location of activities but also intensification, which can similarly cause reverse sensitivity effects.

Relief Sought

Amend the policy so as to not to require avoidance of spillage or containment in all instances and to ensure the policy does not unnecessarily address matters appropriately provided for outside the Act. Broaden the application of the reverse sensitivity considerations, including to bulk storage of hazardous substances. This could be achieved by making changes as follows (additions in italics and underline, deletions in strikethrough):

Policy 4.6.2 Use, storage and disposal of hazardous substances

Manage the use, storage and disposal of hazardous substances ~~to avoid accidental spillage or release of those substances~~, by all of the following:

- a) Providing secure containment for the storage of hazardous substances in accordance with the Hazardous Substance and New Organisms Act ~~of those substances in case of accidental spillage~~;*
- b) Minimising risk associated with natural hazard events;*
- c) Avoiding adverse effects of those substances on the human health ~~and safety of people~~, and avoiding, remedying or mitigating adverse effects on the environment and other values;*
- d) Providing for the development of facilities to safely store, transfer, process, handle and dispose of hazardous substances;*
- e) Ensuring hazardous substances are treated or disposed at authorised facilities, in accordance with the relevant disposal instructions;*

f) Restricting the location and intensification of activities that may result in reverse sensitivity effects near authorised facilities for hazardous substance bulk storage, treatment or disposal;
g) Encouraging the use of best management practices.

12.8 Make any consequential amendments as a result of the above amendments.

12.9 Such other relief as the Court sees fit.

13. CHAPTER 4 – POLICY 4.6.5 MANAGING CONTAMINATED LAND (NOTIFIED 3.9.4)

The Oil Companies' Submission (128/133)

13.1 The Oil Companies' submission sought a range of changes to this policy to recognise that contaminated land is the result of an historic discharge(s) and that there are a range of measures to manage such discharges appropriately.

The Council's Decision

13.2 Minor amendments are proposed to the wording of the policy.

Reason for Appeal

13.3 The changes do not address the Oil Companies' concerns as set out in submissions. In particular the revised policy requires remediation in all instances where there is contamination. This will potentially cause issues for all contaminated land, including landfills. This approach fails to recognise that remediation is but one option and that there are a range of measures that may need to be employed to ensure risks from contamination are appropriately managed to acceptable levels, including mitigation and monitoring.

13.4 The provisions do not sufficiently encourage investment in contaminated land. It is important to actively encourage such investment, in conjunction with identification and appropriate management, to ensure good outcomes for human health and the environment.

13.5 The policy fails to adequately ensure that contaminated land is fit for purpose and that any discharges do not pose unacceptable risks to people or the environment.

13.6 The wording relating to site investigations gives rise to uncertainty, particularly as this can be interpreted as requiring a detailed site investigation in all instances. This is not necessary. There are a number of means for establishing the nature and extent of contamination and it should not be necessary to provide a detailed site investigation for an underground fuel tank replacement prior to the work. Rather, it is appropriate to provide a report characterising any residual contamination post removal (as required by the NESCS).

13.7 The policy fails to recognise that ongoing monitoring can vary significantly in nature and intensity and the extent of any monitoring needs to be in response to nature, type and level

of contaminants and potential pathways and receptors arising from any proposed land use and site management practices in place. Ongoing monitoring should not be required of sites which do not pose a risk to human health and the environment.

Relief Sought

- 13.8 Amend the policy to give effect to the Oil Companies' submissions and encourage management of contaminated land via a range of measures to ensure that contaminated land does not pose an unacceptable level of risk to people and the environment. This could be achieved as follows (deletions in strikethrough; additions in underline):

Policy 4.6.5 Managing contaminated land

Encourage investment in, and ~~manage~~ the use of, contaminated land, to ~~protect people and the environment from adverse effects~~ ensure it is fit for purpose and that it does not pose an unacceptable level of risk to people and the environment, by all of the following:

~~a) Prior to subdivision or development of potentially contaminated land, requiring that a site investigation be undertaken to determine the nature and extent of any contaminants~~ are characterised where subdivision or land use change is proposed on potentially contaminated land;

b) Where there is contamination;

~~i. Requiring an assessment of associated environmental and human health risks, having regard to the intended use of the site; and~~

~~ii. Remediating contaminated land;~~

c) Considering the nature and need for ongoing monitoring of contaminant levels and associated risks where the discharge of contaminants is likely to be a risk to human health and the environment.

- 13.9 Make any consequential amendments as a result of the above amendments.

- 13.10 Such other relief as the Court sees fit.

14. CHAPTER 4 – POLICY 4.6.9 CONTAMINATED LAND (NOTIFIED 3.9.5)

The Oil Companies' Submission (128/134)

- 14.1 In its submission, the Oil Companies note this policy sets out a zero tolerance threshold for contamination, which typically occurs through accidental loss of contaminants, and may be construed as prohibiting the establishment of activities involving hazardous substances. The Oil Companies sought that the policy be deleted.

The Council's Decision

- 14.2 Amendments are proposed to the title of this policy and to remove the word 'new' in the policy itself. The Council has rejected the Oil Companies' submission and determined that it should be retained as follows:

Reason for Appeal

- 14.3 It is not practicable to avoid the creation of contaminated land. While such an approach may be acceptable in an aspirational objective, at a policy level in a Proposed RPS document there is a risk that it will preclude future activities involving hazardous substances. A new or extended landfill in the region for instance would create contaminated land.
- 14.4 The methods listed give no further guidance on how this policy is to be applied. Methods 3.1 and 4.1 both refer to regional/district/city plans setting objectives, policies and methods to implement policies in the RPS as they relate to Regional/District/City Council areas of responsibility. No specific direction with regard to this particular policy is provided.
- 14.5 The use and storage of hazardous substances can, however, be managed to minimise the risk of spills or incidents that may result in land contamination. This is provided for in the suite of policies addressing hazardous substances.

Relief Sought

- 14.6 Policy 4.6.9 should be deleted with reliance placed instead on policies addressing the use, storage, transfer and disposal of hazardous substances. Alternatively, if the policy is to be retained, it should be amended to focus on minimising the creation of contaminated land. This could be achieved as follows (additions in underline, deletions in strikethrough):

Policy 4.6.9 Contaminated land

~~Minimise~~Avoid the risk of creating contaminated land through appropriate hazardous substance management.

- 14.7 Make any consequential amendments as a result of the above amendments.

- 14.8 Such other relief as the Court sees fit.

15. CHAPTER 4 – POLICY 4.4.6 ENERGY EFFICIENT TRANSPORT (NOTIFIED 3.6.6)

The Oil Companies' Submission (128/114)

- 15.1 The Oil Companies supported policy 3.6.6 relating to the reduction in long term demand for fossil fuels but sought recognition of the importance of maintaining the integrity of the existing fossil fuel supply chain until a shift to more sustainable fuels can be achieved.

The Council's Decision

- 15.2 The policy has been amended to remove its emphasis on reducing demand for fossil fuels in the medium to long term and to focus on energy efficient transport.

Reason for Appeal

- 15.3 Overarching Objective 4.4 seeks to ensure energy supplies to Otago's communities are secure and sustainable. The corresponding issue recognises that Otago is an importer of fossil fuels and that any constraints on fuel supply could significantly impact on the region. While corresponding policies address renewable electricity, electricity transmission and distribution, and energy efficient transport, no policy support is provided for the existing fossil fuel supply chain. Such a policy is necessary to ensure these critical supplies are securely maintained as an interim measure.

Relief Sought

- 15.4 Recognise the importance of the fossil fuel supply chain. This could be achieved by including a new policy as follows (additions in underline):

Policy 4.4.7 Fossil Fuels

Recognise the importance of the fossil fuel supply chain to the region by ensuring supply chain infrastructure can be maintained and enhanced to meet community fuel demands, including facilities for the transition to a lower carbon future.

- 15.5 Make any consequential amendments as a result of the above amendments.
- 15.6 Such other relief as the Court sees fit.

Signature of person authorised to sign on behalf of the Oil Companies



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Mark Laurensen
Burton Planning Consultants Limited

Dated at Takapuna this 8th day of December 2016

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Annexures:

- (a) A copy of The Oil Companies' submissions on the relevant points subject to this appeal
- (b) A copy of the decision on the relevant points subject to this appeal
- (c) Names and addresses of the persons to be served with a copy of this notice

Advice to Recipients of This Copy of Notice of Appeal

How to become party to proceedings

You may be a party to the appeal if you made a submission or a further submission on the matter of this appeal and you lodge a notice of your wish to be a party to the proceedings (in form 33) with the Environment Court within 15 working days after the period for lodging a notice of appeal ends.

Your right to be a party to the proceedings in the court may be limited by the trade competition provisions in section 274(1) and Part 11A of the Resource Management Act 1991.

You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing or service requirements (*see* form 38).

How to obtain copies of documents relating to appeal

The copy of this notice served on you does not attach a copy of the appellant's submission or the decision appealed. These documents may be obtained, on request, from the appellant.

Advice

If you have any questions about this notice, contact the Environment Court in Auckland, Wellington, or Christchurch.

Contact Details of Environment Court for lodging documents

Documents may be lodged with the Environment Court by lodging them with the Registrar.

Auckland:

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ANNEXURE A

A copy of the Oil Companies' submissions on the relevant points subject to this appeal

ANNEXURE B

A copy of the decision on the relevant points subject to this appeal

ANNEXURE C

**Names and addresses of persons to be served
with a copy of this notice**

