

**IN THE ENVIRONMENT COURT
AT AUCKLAND**

ENV-2019-AKL-

**I MUA I TE KOOTI TAIAO
TĀMAKI MAKĀURAU ROHE**

IN THE MATTER of the Resource Management Act 1991 (“RMA”)

AND

IN THE MATTER of an appeal under clause 14(1) of Schedule 1 to the RMA

AND

IN THE MATTER of the Proposed Northland Regional Plan

BETWEEN **THE NEW ZEALAND REFINING COMPANY LIMITED**
Appellant

AND **NORTHLAND REGIONAL COUNCIL**
Respondent

**NOTICE OF APPEAL BY THE NEW ZEALAND REFINING COMPANY LIMITED
AGAINST DECISIONS ON THE PROPOSED NORTHLAND REGIONAL PLAN**

17 June 2019

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1 INTRODUCTION

- 1.1 The New Zealand Refining Company Limited, trading as Refining NZ, appeals against parts of the decision (“Decision”) by Northland Regional Council (“Council”) on the Proposed Northland Regional Plan (“Proposed Plan”).
- 1.2 Refining NZ made a submission and further submission on the Proposed Plan.
- 1.3 Refining NZ is not a trade competitor for the purposes of s308D of the Resource Management Act 1991 (“RMA”).
- 1.4 Refining NZ received notice of the Council’s Decision on the Proposed Plan on 4 May 2019.
- 1.5 Refining NZ is appealing those parts of the Decision identified in paragraphs 3.1 to 3.64 below.

2 GENERAL REASONS FOR THE APPEAL

- 2.1 The Decision appropriately provides for the vast majority of matters raised in Refining NZ’s submission and further submission on the Proposed Plan. However, to the extent the Decision does not provide for the relief sought in this notice of appeal, Refining NZ considers that the Decision:
 - (a) does not promote the sustainable management of resources, and does not achieve the purpose of the RMA;
 - (b) is contrary to Part 2 and other provisions of the RMA;
 - (c) does not represent the efficient use and development of natural and physical resources;
 - (d) does not manage natural and physical resources in a manner that enables the community to provide for its social and economic wellbeing;
 - (e) will not meet the reasonably foreseeable needs of future generations;
 - (f) does not give effect to relevant provisions of higher order planning documents (including the Northland Regional Policy Statement

(“RPS), the New Zealand Coastal Policy Statement (“NZCPS”), and the National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health);

- (g) does not appropriately avoid, remedy or mitigate adverse effects on the environment; and
- (h) does not represent the most appropriate means of exercising the Council’s functions and is therefore not appropriate under s32 and other provisions of the RMA.

2.2 Without derogating from the generality of the above, Refining NZ appeals the following specific parts of the Decision on the following grounds.¹

3 DETAILED REASONS AND RELIEF SOUGHT

Delete Mair Bank Significant Ecological Area

3.1 Refining NZ seeks the deletion of the Whangārei Harbour-Mair Bank Significant Ecological Area (“SEA”) from the Proposed Plan.

3.2 The relief sought by Refining NZ was supported at the Council hearing on the Proposed Plan by comprehensive independent expert evidence informed by extensive investigations carried out for Refining NZ’s Crude Shipping Project resource consent applications.² That expert evidence demonstrates Mair Bank’s ecological values do not justify the identification of the Mair Bank SEA in the Proposed Plan.³ The current ecological condition of Mair Bank, in a context where there has been a significant medium-term population decrease in pipi, means the site simply does not satisfy the criteria for identification as

¹ This notice of appeal refers to provision numbering as *per* the “clean” Decision Version of the Proposed Plan notified by the Council. Numbering of provisions in the “clean” version of the Decision version of the Proposed Plan is not entirely consistent with the “track change” version.

² The Crude Shipping Project is a proposal by Refining NZ to realign and deepen the Whangārei Harbour shipping channel and approaches. Resource consents for the Crude Shipping Project were confirmed by an Environment Court consent order dated 14 December 2018.

³ The evidence presented at the Council hearing on behalf of Refining NZ acknowledged that Mair Bank does have natural character and avifauna values that are separate considerations to the values associated with the identification of Mair Bank as a SEA.

a SEA. Refining NZ has recently sought and received separate independent ecological advice which confirms this position.

- 3.3 The Decision's retention of the Mair Bank SEA will unjustifiably and inappropriately restrict Refining NZ's activities. This is because the planning framework that results from the identification of an area as a SEA is extremely restrictive, including through the operation of NZCPS.⁴ Given Mair Bank's less than outstanding ecological values, Refining NZ considers that such a restriction on its activities will be unduly onerous, including in the context of Refining NZ's recognition as regionally (and nationally) significant infrastructure.
- 3.4 In addition, Refining NZ considers that the reasons provided in the Decision for retaining the Mair Bank SEA – centering on turning around Mair Bank's current degraded state – do not align with the Proposed Plan's framework for the identification of SEAs,⁵ and/or the criteria set out in Appendix 5 of the RPS.

Relief sought

- 3.5 The deletion of the Mair Bank Significant Ecological Area.

Delete the Significant Marine Mammal and Seabed Area from the Whangārei Harbour/Bream Bay

- 3.6 The notified version of the Proposed Plan identified the entire Northland Region coastal marine area as a Significant Marine Mammal and Seabird Area ("SMMSA"). At the Council hearing on the Proposed Plan, independent expert evidence was presented on behalf of Refining NZ on this matter, again informed by extensive investigations carried out for Refining NZ's Crude Shipping Project. That expert evidence demonstrated that: the SMMSA overlay in the area of the Whangārei Harbour/Bream Bay is not justified on the basis of ecological values; and the SMMSA overlay's grouping together of both marine mammals and seabirds was inappropriate, given that values

⁴ See for example Policy 11(a) (Biodiversity), which requires the *avoidance* of adverse effects on such areas.

⁵ The Decision Report refers to evidence from a range of parties, including Refining NZ, regarding the current ecologically degraded state of Mair Bank.

relating to marine mammals and birds are quite distinct (and the Proposed Plan contains a separate Significant Bird Area overlay).⁶

- 3.7 For the same reasons identified above in paragraph 3.3, Refining NZ also submitted at the Council hearing that the identification of the entire Northland coastal marine area as a SMMSA would unjustifiably and inappropriately restrict Refining NZ's (and others') activities through imposing an unduly restrictive and onerous planning framework.
- 3.8 The Hearing Commissioners reinforced Refining NZ's concerns, stating in their Decision that the Proposed Plan as notified could have the unintended consequence of imposing an effective veto on any use and development in the entire Northland coastal marine area.⁷ The Decision therefore made certain amendments to the Proposed Plan.⁸
- 3.9 However, the Hearing Commissioners stated in the Decision that they were "*satisfied that the SMMSA overlay could remain in the Proposed Plan's maps to serve as an information source for future resource consent decision-makers*".⁹ This statement is inconsistent with the fact that the Proposed Plan still refers to the SMMSA in several places.¹⁰
- 3.10 Refining NZ maintains that the identification of the Whangārei Harbour and Bream Bay as a SMMSA is inappropriate for the reasons outlined above. In addition, the retention of the SMMSA overlay in the Proposed Plan (including the maps) is confusing. The mechanisms for how the SMMSA overlay will be applied and what it will mean for activities in Northland waters is unclear. Notwithstanding the comments of the Hearing Commissioners in the Decision, the Proposed Plan does not identify that the SMMSA overlay is for "*information purposes only*". There is a real risk that resource consent decision-makers will consider that the SMMSA – covering the entire Northland coastal marine area – is an area of significant habitat of indigenous fauna for the purposes of s6(c) of the RMA, warranting "*protection*" (not

⁶ Refining NZ submitted that a more appropriate approach would be to individually map marine mammal areas and seabird areas.

⁷ Decision, paragraph [147].

⁸ The Decision deleted reference to the SMMSA from Policy D.2.7(1) relating to the maintenance, repair and upgrading of regionally significant infrastructure.

⁹ Decision, paragraph [147].

¹⁰ See for example: Policy D.2.16 Managing adverse effects on indigenous biodiversity; Policy D.2.18 Precautionary approach to managing effects on significant indigenous biodiversity; and Section I: Maps.

“protection from inappropriate subdivision, use, and development” as is required under sections 6(a), (b) and (f) of the RMA). For the reasons outlined above Refining NZ considers such an outcome is inappropriate.

Relief sought

- 3.11 The deletion of the SMMSA overlay, at least as it applies to Whangārei Harbour and Bream Bay.

Managing adverse effects on indigenous biodiversity (amend policy D.2.16)

- 3.12 As outlined above, Policy D.2.16(3)(c) of the Proposed Plan refers to the SMMSA. For the reasons identified in paragraphs 3.6 to 3.11 above Refining NZ considers that the reference to the SMMSA in Policy D.2.16(3)(c) should be deleted.

Relief sought

- 3.13 The amendment of Policy D.2.16 to delete the reference to the SMMSA, as shown below:

D.2.16 Managing adverse effects on indigenous biodiversity

Manage the adverse effects of activities on indigenous biodiversity by:

...

3) *recognising areas of significant indigenous vegetation and significant habitats of indigenous fauna include:*

a) Significant Ecological Areas, and

b) Significant Bird Areas,

c) ~~Significant Marine Mammal and Seabird Areas, and~~

...

Extend the Marsden Point Port Zone

- 3.14 Refining NZ generally supports the inclusion of the Marsden Point Port Zone (“MPPZ”) in the Proposed Plan. However, Refining NZ considers that a small extension to the spatial extent of the MPPZ is necessary to appropriately provide for Refining NZ and its operations.

- 3.15 The MPPZ does not currently cover the full extent of the tanker berth pocket (and associated activities) next to Refining NZ’s jetty, which is an important

oversight. Refining NZ therefore considers that the MPPZ should be extended a small distance to the east.

Relief sought

3.16 Refining NZ seeks:

- (a) a small extension to the spatial extent of the MPPZ to include the berth pocket (and associated activities) next to Refining NZ's jetty, as indicatively shown in red outline on the map attached as **Annexure A**; and
- (b) consequential minor adjustments of the boundaries of all mapped areas of elevated values, including: the Whangārei Harbour Significant Bird Area; Te Poupuwhenua Site/Area of Significance to Tangata Whenua; and the Marsden and Mair Banks High Natural Character Area (and the Marsden Bank SEA and/or the SMMSA, if the relief sought above in paragraphs 3.5 and/or 3.11 is not granted) so that they do not overlap with the extended MPPZ.

Capital dredging in the MPPZ and the Whangārei Harbour commercial shipping channel as a restricted discretionary activity (new rule C.1.5.11A)

3.17 The Decision provides that dredging outside of certain mapped areas possessing elevated values (e.g. high and outstanding natural character areas) is a discretionary activity.¹¹ While Refining NZ agrees that capital dredging should *generally* be a discretionary activity throughout the region, Refining NZ considers that dredging within the MPPZ and the Whangārei Harbour commercial shipping channel should be provided for as a restricted discretionary activity. This is because of the well-understood nature of effects in these areas (including as a result of the recent Crude Shipping Project), their confined and defined spatial extent, and their already modified nature.

3.18 Restricted discretionary activity status will mean that all relevant matters can be taken into account by consent authorities and the Environment Court when considering resource consent applications. Applications can be declined or

¹¹ Proposed Plan Rule C.1.5.12.

approved with appropriate conditions. In addition, appropriate recognition for areas with high/outstanding values within or in the vicinity of the MPPZ and the commercial shipping channel is provided through the Proposed Plan's mapping of such areas, with associated restrictions. Restricted discretionary activity status for dredging within the MPPZ and the commercial shipping channel would also appropriately recognise and provide for Refining NZ and Northport's regional and national significance and would be consistent with several other regional coastal plans in New Zealand.

- 3.19 Overall, Refining NZ considers that a restricted discretionary activity status for dredging within the MPPZ and the commercial shipping channel would appropriately give effect to the RPS¹² and the NZCPS.¹³

Relief sought

- 3.20 The addition of a new Rule C.1.5.11A which provides for dredging, deposition and disturbance activities as restricted discretionary activities where such activities occur within the MPPZ and/or the Whangārei Harbour commercial shipping channel, as follows:

C.1.5.12A Dredging, deposition and disturbance activities associated with the Marsden Point Port Zone and/or the Whangārei Harbour commercial shipping channel – restricted discretionary activity

Dredging activities associated with the Marsden Point Port Zone and/or the Whangārei Harbour commercial shipping channel that are not within

a:

- 1) Nationally Significant Surfbreak; or
- 2) Regionally Significant Anchorage; or
- 3) Outstanding Natural Feature in the coastal marine area; or
- 4) Area of Outstanding Natural Character in the coastal marine area; or
- 5) Historic Heritage Area or Site; or
- 6) Site or area of Significance to Tangata Whenua
is a restricted discretionary activity.

Matters of discretion:

- 1) The method used to carry out the activity;

¹² See for example Objectives 3.7 (Regionally Significant Infrastructure) and 3.8 (Efficient and Effective Infrastructure) and Policies 5.3.2 (Benefits of Regionally Significant Infrastructure) and 5.3.3 (Managing Adverse Effects Arising from Regionally Significant Infrastructure).

¹³ See for example Objective 6 and Policies 6, 9, and 23.

- 2) The timing of the activity;
- 3) Effects on natural processes including effects on the stability of the seabed and nearby shorelines.
- 4) Effects of disturbance, deposition and discharge associated with the activity;
- 5) Effects on indigenous biodiversity and ecosystems; and
- 6) Navigation and safety (including notification to the regional council's Harbourmaster and Maritime New Zealand).

For the avoidance of doubt this rule covers the following RMA activities:

- Destruction, damage or disturbance of any foreshore or seabed or the deposition of material in, on or under the foreshore or seabed (s12(1)).
- Discharge of water or sediment into water incidental to the activity (s15(1)).

Other capital dredging as a discretionary activity (amend rule C.1.5.14)

3.21 The Decision provides that dredging that does not come within the discretionary activity rule (i.e. dredging within certain mapped areas possessing elevated values) is a non-complying activity. Refining NZ considers that such dredging should be provided for as a discretionary activity.

3.22 Discretionary activity status will mean that the full range of relevant matters can be taken into account by consent authorities and the Environment Court when considering resource consent applications. This includes any effects on the identified values of any mapped areas possessing elevated values (e.g. high and outstanding natural character areas). Non-complying activity status for such dredging is unnecessary, unjustified and unnecessarily restrictive.

3.23 Overall, Refining NZ considers that a discretionary activity status for dredging within the MPPZ and the commercial shipping channel would appropriately give effect to the RPS and the NZCPS.

Relief sought

3.24 The amendment of Rule C.1.5.14 to provide for “other” dredging, deposition and disturbance activities as a discretionary activity, as follows:

**C.1.5.14 Other dredging, deposition and disturbance activities –
discretionary activity non-complying**

The damage, destruction or disturbance of the foreshore or seabed, or deposition of material in, on or under the foreshore or seabed, that is not a:

- 1) *discretionary activity under Rule C.1.5.12 Dredging, deposition and disturbance activities – discretionary activity, or*
- 2) *restricted discretionary activity under Rule C.1.5.12A Dredging, deposition and disturbance activities associated with the Marsden Point Port Zone and/or the Whangārei Harbour commercial shipping channel – restricted discretionary activity*
- 23) *discretionary activity under Rule C.1.5.13 Dumping (deliberate disposal) of certain waste in coastal marine area – discretionary activity,*

Are discretionary activities ~~non-complying activities~~....

Existing and new industrial/trade wastewater discharges from the refinery as controlled and restricted discretionary activities respectively (new Rules C.6.6.3A and C.6.6.3B)

- 3.25 The Decision provides for all industrial or trade discharges to water or land as a discretionary activity (where they are not subject to any other rule).¹⁴
- 3.26 At the refinery, combined treated wastewater, stormwater and groundwater flows are discharged to the lower Whangārei Harbour via a submarine diffuser attached to the refinery jetty. As regionally significant infrastructure with existing authorised discharges, Refining NZ considers it is appropriate for the Proposed Plan to provide for: re-consenting of existing wastewater discharges to water or land from the refinery as a controlled activity; and new wastewater discharges to water or land from the refinery as a restricted discretionary activity.
- 3.27 Refining NZ holds several resource consents authorising discharges from its Marsden Point site, and over many years has built up a considerable body information, including monitoring data, regarding the effects of such discharges. At the Council hearing on the Proposed Plan, comprehensive

¹⁴ Proposed Plan Rule C.6.6.4.

water quality expert evidence presented on behalf of Refining NZ concluded that stormwater quality parameters at the Marsden Point site are almost always below consented limits, and water quality parameters in the receiving environment were consistently within their consent condition limits. In addition, the expert evidence was that there are no measurable water quality impacts in the receiving environment of the existing refinery operation. Refining NZ has also demonstrated an ability to appropriately manage the effects from existing discharges. Therefore, a rule framework that provides for the re-consenting of Refining NZ's wastewater discharges to water or land as a controlled activity is appropriate.

- 3.28 Refining NZ acknowledges that any application for a new industrial/trade discharge from the refinery would carry greater uncertainty and that the consent authority/Environment Court should have the ability to assess and decline such an application, where appropriate. It is therefore appropriate that new discharges should be considered as restricted discretionary activities. Restricted discretionary activity status will mean that all relevant matters can be taken into account for resource consent applications. In addition, appropriate recognition for areas with high/outstanding values is provided through the Proposed Plan's mapping of such areas, with associated restrictions.
- 3.29 The above approach would appropriately balance the importance of the refinery with the need to appropriately control adverse effects from industrial/trade discharges. It would appropriately give effect to the RPS¹⁵ and NZCPS.¹⁶

Relief sought

- 3.30 The addition of new rules as follows:

C.6.6.3A Re-consenting of existing discharges from the Marsden Point Refinery Site – controlled activity

Except as provided for by Rules C.6.6.1, C.6.6.2, or C.6.6.3:

¹⁵ See for example Objectives 3.7 (Regionally Significant Infrastructure) and 3.8 (Efficient and Effective Infrastructure) and Policies 5.3.2 (Benefits of Regionally Significant Infrastructure) and 5.3.3 (Managing Adverse Effects Arising from Regionally Significant Infrastructure).

¹⁶ See for example Objective 6 and Policy 6.

the re-consenting of a discharge of a contaminant (except for a contaminant entrained in stormwater) into water, or onto or into land, from the Marsden Point Refinery Site is a controlled activity, provided:

- 1) the discharge is authorised by an existing resource consent at the time of the re-consent application, and
- 2) there is no increase in the timing, rate and volume of the discharge as authorised by the current resource consent.

Matters of Control:

- 1) the timing, rate, volume and composition of the discharge, and
 - 2) the location and velocity of the discharge, and
 - 3) consideration of the treatment of the discharge prior to disposal.
- ...

C.6.6.3B New discharges from the Marsden Point Refinery Site – restricted discretionary activity

A new discharge of a contaminant (except for a contaminant entrained in stormwater) into water, or onto or into land, from the Marsden Point Refinery Site is a restricted discretionary, provided:

- 1) the discharge complies with the water quality limit, and
- 2) the discharge does not cause any of the following effects in receiving water after reasonable mixing:
 - a) the production of conspicuous oil or grease films, scums or foams, or floatable or suspended materials, and
 - b) any conspicuous change in the colour or visual clarity, and
 - c) any emission of objectionable odour, and
 - d) the rendering of fresh water unsuitable for consumption by farm animals, and
 - e) any significant adverse effect on aquatic life, and
- 3) a discharge to land does not cause any ponding or surface water runoff, and
- 4) the discharge does not scour or erode the bed of any water body or the coastal marine area.

Matters of discretion:

- 1) the timing, rate, volume and composition of the discharge, and
 - 2) the location and velocity of the discharge, and
 - 3) consideration of the treatment of the discharge prior to disposal, and
 - 4) the effects on indigenous biodiversity and ecosystems.
- ...

3.31 Insertion into the Proposed Plan of a new definition of “Marsden Point Refinery Site” as follows:

<p><u>Marsden Point Refinery Site</u></p>	<p><u>Means the land at Marsden Point owned by The New Zealand Refining Company Ltd. including the land having the following legal descriptions: Part Section 10; Part Lot 1 DP 54730; Lot 2 DP 199563; Part Allot 83 Parish of Ruakaka; Lot 1 DP 56387; Lot 1 DP 199563 (all being in Block VIII Ruakaka SD)</u></p>
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Stormwater discharges from the refinery site as a controlled activity (amend Rule C.6.4.4)

3.32 On the basis that the refinery site is considered to fall within the definition of a “high-risk industrial or trade premises”, stormwater discharges from the refinery are discretionary activities in the Proposed Plan.¹⁷ As regionally significant infrastructure with existing stormwater discharges, Refining NZ considers it is appropriate for the Proposed Plan to provide for stormwater discharges from the refinery site as a controlled activity.

3.33 Including for the reasons outlined in paragraph 3.27 above, such an approach would appropriately balance the importance of the refinery (as opposed to other industrial/trade premises) with the need to appropriately control adverse effects from stormwater discharges. For the refinery, controlled activity status for re-consenting existing stormwater discharges and for new stormwater discharges is appropriate given the generally reduced potential for adverse effects compared with industrial/trade discharges. It would appropriately give effect to the RPS and NZCPS.

Relief sought

3.34 Amend Rule C.6.4.4 to provide for stormwater discharges from the refinery site as a controlled activity, as follows:

C.6.4.4 Stormwater discharges onto or into contaminated land or from high-risk industrial or trade premises – discretionary activity

¹⁷ Proposed Plan rule C.6.4.4.

The diversion and discharge of stormwater:

- 1) into water or onto land where it may enter water from a high-risk industrial or trade premises, or*
- 2) into contaminated land, or*
- 3) onto contaminated land that is not covered by an impervious area*

is a discretionary activity (unless the diversion and/or discharge is associated with the Marsden Point Refinery Site, in which case it is a controlled activity under Rule C.6.4.3).

...

Reposition the “Mixing Zone for Major Discharges” (amend maps)

- 3.35 The Proposed Plan Maps identify a “Mixing Zone for Major Discharges” relating to Refining NZ’s discharge of treated stormwater / wastewater / groundwater to the lower Whangārei Harbour.
- 3.36 The zone identified on the maps as “Mixing Zone for Major Discharges” is incorrectly positioned. It does not align with the position of the submarine diffuser attached to Refining NZ’s jetty.

Relief sought

- 3.37 Reposition the mapped extent of the “*Mixing Zone for Major Discharges*” so that it is correctly positioned in relation to the submarine diffuser attached to Refining NZ’s jetty, as shown in red outline on the map attached as **Annexure B**.

Existing authorised burning at the refinery as a controlled activity (new Rule C.7.1.8A)

- 3.38 The Proposed Plan provides for burning associated with energy generation activities a separate consenting pathway. Refining NZ considers that this is appropriate given the importance of such activities. However, Refining NZ considers that a similar stand-alone rule framework should also apply to the burning activities undertaken by Refining NZ; and seeks a controlled activity rule for re-consenting existing authorised burning at its Marsden Point site.¹⁸

¹⁸ Burning activities are distinct from the refinery’s non-combustive discharges, which are governed by separate rules in the Proposed Plan.

- 3.39 The expert evidence presented on behalf of Refining NZ at the Council hearing on the Proposed Plan addressed in detail the technical and planning rationale for the relief being sought by Refining NZ. There is a comprehensive evidentiary basis for the relief being sought; including relating to the significant body of data on Refining NZ's discharges to air in the context of the wider airshed (evidencing consistent compliance with consent requirements and other guidelines/standards), and the evidence to date indicates the low air quality impacts of the refinery emissions.
- 3.40 Overall, Refining NZ considers that controlled activity status for re-consenting existing authorised burning at its Marsden Point site will appropriately recognise the benefits of Refining NZ as regionally and nationally significant infrastructure (as reinforced in the RPS) and provide suitable certainty for Refining NZ, while also providing the consent authority/Environment Court with appropriate control over adverse effects.

Relief sought

- 3.41 Insert a new controlled activity rule as follows:

**C.7.1.8A Existing authorised burning at the Marsden Point refinery
- controlled activity**

An application for a new resource consent to replace an existing resource consent for burning associated with the Marsden Point refinery is a controlled activity provided:

- 1) the existing air discharge is authorised by an existing resource consent at the time of the resource consent application, and
- 2) there is no increase in the scale of the discharge as authorised by the existing resource consent.

Notification:

Resource consent applications under this rule are precluded from notification (limited or public).

Matters of control:

- 1) Measures to avoid, remedy or mitigate the adverse effects on neighbouring dwelling places or properties, and
- 2) The method of discharge, including stack design and exit velocity, and
- 3) Emission control equipment, its operation and maintenance, and
- 4) Combustion equipment operation and maintenance, and

- 5) Fuel use, quality (including sulphur content), storage and handling, and
- 6) Requirement for a management plan, and
- 7) Emission limits (concentrations and/or rates) on the discharge, and
- 8) Monitoring and requirements for sampling points, and
- 9) Local air quality and compliance with the standards prescribed in Schedule 1 of the National Environmental Standards for Air Quality 2004, and ambient air quality effects relative to appropriate air quality criteria referenced in order of priority and set out in the Ministry for the Environment 'Good Practice Guide for Assessing Discharges to Air from Industry'.

...

Investigating potentially contaminated land – permitted activity (amend Rule C.6.8.1)

3.42 Rule C.6.8.1 of the Proposed Plan requires that any disturbance of land for a site investigation to assess the concentration of hazardous substances is a permitted activity if (among other things) it is supervised by a suitability qualified and experienced practitioner as defined in the Plan (“SQEP”). Refining NZ considers that this requirement is unduly onerous on Refining NZ because it will put the company to significant time and cost in undertaking its day-to-day activities (the rule applies to any disturbance of land for a site investigation, which is extremely broad).¹⁹ For example, Refining NZ regularly takes routine soil samples, an activity carrying very low environmental risk. On its face, Rule C.6.8.1 would require a SQEP to supervise and certify each and every sample. This is likely an inadvertent implication of the wording of the rule and is not appropriate, particularly in the case of regionally significant infrastructure such as Refining NZ which possesses extensive in-house experience and expertise.

3.43 In addition, such a restrictive requirement does not align with the National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health (“NES”). The NES provides for, among other things, sampling soil and disturbing soil as permitted activities without the requirement for supervision by a SQEP or similar.

¹⁹ It is not clear whether the rule is referring to any site investigation (on the ordinary meaning of those words), or “*site investigation*” as defined in the NES.

Relief sought

3.44 Amend Rule C.6.8.1 as follows:

C.6.8.1 Investigating potentially contaminated land – permitted activity

The disturbance of land for a site investigation to assess the concentration of hazardous substances in soil, water or air is a permitted activity, provided:

1. *except where the site investigation is being undertaken at the Marsden Point Refinery Site, the site investigation is supervised and certified by a suitability qualified and experienced practitioner, and*

...

Re-consenting passive discharges from contaminated land – controlled activity (amend Rule C.6.8.4)

3.45 Refining NZ generally supports Rule C.6.8.4 of the Proposed Plan, which provides for re-consenting passive discharges from contaminated land as a controlled activity. However, Refining NZ considers that in the context of re-consenting a passive discharge (where effects will likely be relatively well known and informed by a history of monitoring data), the inclusion of “*the need for a financial bond*” as a matter of control is unnecessary and inappropriate.

Relief sought

3.46 Delete “*the need for a financial bond*” as a matter of control in Rule C.6.8.4.

Site investigations associated with the refinery as a restricted discretionary activity (new Rule C.6.8.5A)

3.47 The Decision wording of C.6.8.5 does not align with the NES and creates an overly onerous consenting requirement.

3.48 Refining NZ accepts the inclusion of a discretionary rule for the investigations of contaminated land generally, however, due to the regional (and indeed national) significance of its operations, Refining NZ considers it is appropriate to include a restricted discretionary rule in relation to its site.

3.49 Given the policy framework of the Proposed Plan provides for the recognition of regionally significant infrastructure, Refining NZ considers the inclusion of a restricted discretionary rule is appropriate.

Relief sought

3.50 Insert a new Rule C.6.8.5A as follows:

C.6.8.5A Contaminated Land: Marsden Point Refinery Site – restricted discretionary activity

Site investigations associated with the Marsden Point Refinery Site to assess the concentration of hazardous substances that may be present in soil, or discharges from contaminated land, that is not a:

1. permitted activity under Rule C.6.8.1, or
2. permitted activity under Rule C.6.8.2

is a restricted discretionary activity.

Matters of discretion:

1. the area and volume of material to be disturbed, and
2. the erosions and sediment controls associated with the works, and
3. the adequacy of the detail site investigations, including
 - a. site sampling
 - b. laboratory analysis
 - c. risk assessment
4. the suitability of the land of rate proposed activity, given the amount and kind of soil contamination
5. volume and composition of the discharge, and
6. the location and velocity of the discharge, and
7. consideration of the treatment of the discharge prior to disposal.

...

Precautionary approach to managing effects on significant indigenous biodiversity (amend Policy D.2.18)

3.51 Policy D.2.18 of the Proposed Plan requires a precautionary approach to be taken “where there is scientific uncertainty”, by giving the most weight to “the greatest extent of adverse effects reasonably predicted by science”. Refining NZ considers Policy D.2.18 is overly simplistic, unduly directive, uncertain, and on its face will inappropriately apply to the vast majority of consent

applications (as some level of scientific uncertainty applies in almost any context involving the environment). In addition, in almost every case involving more than one expert on a subject, there will likely be some disagreement between experts. It is clearly not appropriate in every such case for the decision-maker to be required to favour the evidence of the expert predicting the “*greatest extent of adverse effects*” as would be required by Policy D.2.18. The Policy also provides little guidance to decision-makers, applicants, and the community regarding its application.

3.52 While the precautionary approach is an established RMA concept (although the term is not used within the Act itself), Refining NZ considers that Policy D.2.18 should recognise that decision-makers need to exercise their discretion regarding whether or not – and how – to apply the precautionary approach in weighing and balancing evidence in each application. Other amendments are needed to bring the Policy better into line with case law regarding the precautionary²⁰ approach, and the RPS²¹ and NZCPS.²²

3.53 In addition, for the reasons outlined in paragraph 3.12 above, Refining NZ considers that reference to the SMMSA should be deleted from Policy D.2.18.

Relief sought

3.54 Amend Policy D.2.18 as follows:

D.2.18 Precautionary approach to managing effects on significant indigenous biodiversity

Where there is scientific uncertainty about the adverse effects of activities on:

- 1) *species listed as Threatened or At Risk in the New Zealand Threat Classification System including those identified by reference to the Significant Bird Area ~~and Significant Marine Mammal and Seabird Area maps~~ (refer Maps), or*
- 2) *any values ranked high by the Significant Ecological Areas maps (Refer Maps),*

a precautionary approach may be appropriate, where the effects have the potential to be significantly adverse. Consideration should be given

²⁰ *Sustain Our Sounds Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 40.

²¹ See RPS Policy 6.1.2.

²² See NZCS Policy 3.

to the imposition of conditions that provide mechanisms such as adaptive management to enable the monitoring of effects and collection of data as a means to decrease knowledge gaps and allow for the adjustment of the activity based on actual effects. The Council's ability to review conditions under s128 of the RMA should also be considered.

~~then the greatest extent of adverse effects reasonably predicted by science, must be given the most weight.~~

Activities in the Marsden Point airshed (amend Policy D.3.5)

- 3.55 The words “within the Marsden Point Port Zone” at the end of this policy should be deleted. The MPPZ applies only within the coastal marine area and does not extend landward. Therefore, linking regionally significant infrastructure to that located within the coastal marine area means that the policy wording as drafted excludes much of the regionally significant infrastructure within the Marsden Point airshed. This appears to be an unintended/inadvertent consequence and one that should be corrected.

Relief sought

- 3.56 Amend Policy D.3.5 as follows:

D.3.5 Activities in the Marsden Point airshed

The Marsden Point Air Quality Strategy must be taken into account when considering resource consent applications for discharges to air in the Marsden Point airshed as shown in I Maps |Ngā mahere matawhenua. In particular, resource consent applications involving the discharge of sulphur dioxide (SO₂) to air must avoid adverse effects on the operation of regionally significant infrastructure ~~within the Marsden Point Port Zone.~~

Freshwater quantity (amend Objective F.1.1)

- 3.57 To manage historical contamination at the refinery site, a groundwater management programme was implemented in the 1980s, involving groundwater extraction to recover product which had been discharged to ground. Refining NZ abstracts groundwater to create a localised groundwater depression within the refinery site to contain any discharges from the site. This mitigates the risk of fugitive product flowing off-site by creating a flow gradient towards the recovery wells, and therefore has important benefits.

While this activity may result in some degree of saline intrusion, it ultimately results in a positive environmental outcome.

- 3.58 Objective F.1.1(6) of the Proposed Plan provides for the management of taking, using, damming and diverting fresh water so that “*adverse effects associated with saline intrusion and land subsidence above are **avoided***” (emphasis added).
- 3.59 Refining NZ considers that the use of “*avoid*” in the objective is inappropriate and does not allow for any consideration of positive effects associated with activities resulting in saline intrusion. In certain circumstances, taking groundwater for water table depression purposes is an appropriate method to manage passive discharges, as evidenced by Refining NZ’s extraction programme. Such activities can result in positive environmental effects and should be provided for within Objective F.1.1.

Relief sought

- 3.60 Amend the wording of objective F.1.1(6) as follows:

F.1.1 Freshwater quantity

Manage the taking, use, damming and diversion of fresh water so that:

...

6. *adverse effects associated with saline intrusion and land subsidence above are avoided, except where the benefits outweigh the adverse effects.*

Reasonable and efficient use of water – other uses (amend Policy D.4.15)

- 3.61 Policy D.4.15 of the Proposed Plan seeks to ensure that resource consent applications for water takes promote the efficient use of water. Certain uses of water are explicitly exempted from the policy.²³
- 3.62 As outlined in paragraphs 3.57 to 3.59 above, Refining NZ holds resource consents for abstraction and non-consumptive use of water, in order to

²³ Being irrigation and community/group water supplies.

manage other environmental effects. Overall, this use of water by Refining NZ has important environmental benefits.

- 3.63 Refining NZ considers that Policy D.4.15 should recognise and provide for the non-consumptive use of water for the management of passive discharges at the refinery site. It is not necessary or appropriate for such an activity to include an assessment of “efficient” use. There is capacity within the existing Ruakaka aquifer to enable the take to occur, and the quality of water within the aquifer is unsuitable for many other uses.

Relief sought

- 3.64 Amend Policy D.4.15 as follows:

D.4.15 Reasonable and efficient use of water – other uses

An application for resource consent to take water for any use of water other than that addressed under D.4.13 or D.4.14 must include an assessment of reasonable and efficient use by, taking into account the nature of the activity, and identifying if water will potentially be wasted, and opportunities for re-use or conservation (this requirement does not apply to water takes for the management of passive discharges from the Marsden Point Refinery Site).

4 RELIEF SOUGHT

- 4.1 Refining NZ seeks:

- (a) the relief sought above; and
- (b) such consequential and/or related relief as may be necessary or appropriate to give effect to its concerns.

5 ATTACHMENTS

- 5.1 The following documents are attached to this notice:

- (a) **Attachment One:** Refining NZ’s submission.
- (b) **Attachment Two:** Refining NZ’s further submission.
- (c) **Attachment Three:** the Decision.
- (d) **Attachment Four:** a list of names and addresses of persons to be

served with a copy of this notice.

THE NEW ZEALAND REFINING COMPANY LTD

by its solicitors, ChanceryGreen:



Chris Simmons

17 June 2019

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To: The Registrar at the Environment Court in Auckland

And to: Northland Regional Council

benl@nrc.govt.nz

And to: Minister of Conservation

jwilliams@doc.govt.nz

sreed@doc.govt.nz

And to: Submitters on the Proposed Plan (see **Attachment Four**)

Advice to recipients of 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.

To become a party to the appeal, you must -

- within 15 working days after the period for lodging a notice of appeal ends, lodge a notice of your wish to be a party to the proceedings (in form 33) with the Environment Court and serve copies of your notice on the relevant local authority and the appellant; and
- within 20 working days after the period for lodging a notice of appeal ends, serve copies of your notice on all other parties.

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/further 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.

ANNEXURE A: MAP SHOWING EXTENSION SOUGHT TO MPPZ (EXTENSION SHOWN IN RED OUTLINE)



ANNEXURE B: MAP SHOWING LOCATION OF REPOSITIONED “MIXING ZONE FOR MAJOR DISCHARGES” SOUGHT

