

**IN THE MATTER**

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

**AND**

**IN THE MATTER**

of the decisions of the Northland Regional  
Council on the Proposed Northland  
Regional Plan

**BETWEEN**

**BP OIL NEW ZEALAND LIMITED, MOBIL OIL  
NEW ZEALAND LIMITED AND Z ENERGY  
LIMITED**  
Appellant

**AND**

**NORTHLAND REGIONAL COUNCIL**  
Respondent

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**NOTICE OF APPEAL BY BP OIL NEW ZEALAND LIMITED, MOBIL OIL NEW ZEALAND LIMITED AND  
Z ENERGY LIMITED  
DATED 17 JUNE 2019**

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**To:** The Environment Court Registrar  
Specialist Courts and Tribunals Centre  
Level 2  
41 Federal Street  
Auckland 1010

## **INTRODUCTION**

1. BP Oil New Zealand Limited, Mobil Oil New Zealand Limited and Z Energy Limited (***The Oil Companies***) appeal against parts of a decision of Northland Regional Council (***the Council***) on the Proposed Regional Plan for Northland (the Proposed Regional Plan).
2. The Oil Companies made submissions and further submissions on the Proposed Regional Plan.
3. The Oil Companies are not trade competitors for the purposes of section 308D of the Resource Management Act 1991 (***the RMA***).
4. The Oil Companies received notice of the Council's decisions on 3 May 2019.

## **BACKGROUND**

5. The Oil Companies receive, store and distribute refined petroleum products. Within Northland, the Oil Companies own, operate and/or supply service stations and truck stops and supply various commercial activities. These facilities provide an essential service to the residents and businesses of the Northland Region.
6. The Oil Companies also have a bulk storage fuel facility (Marsden Point Terminal) located adjacent to Refinery New Zealand and which is pipe fed from the Refinery New Zealand facility. It is operated on behalf of the Oil Companies by Wiri Oil Services Limited. The facility enables the distribution of fuels via road tanker for the Northland Region and into Auckland via the Refinery to Auckland pipeline.

## **THE PARTS OF THE DECISION BEING APPEALED**

7. The parts of the decision that the Oil Companies' appeal relates to are:
  - (a) Permitted Activity Rule C.6.8.2 Discharges from contaminated land and in particular the removal of the distinction between sensitive groundwater and non-sensitive groundwater.
  - (b) The definition of 'sensitive groundwater', which has been deleted.

## **REASONS FOR APPEAL**

8. The general reasons for the appeal are that the decision:

- (a) Is out of scope as no submissions provide scope for the amendments made by Council which are subject of this appeal.
- (b) Does not promote the sustainable management of natural and physical resources and is contrary to Part 2 and other provisions of the RMA.
- (c) Does not enable people and communities of Northland to provide for their social and economic wellbeing and their health and safety.
- (d) Is not consistent with the relevant objectives and policies of the Proposed Northland Regional Plan.
- (e) Does not adequately address the matters set out in the submissions, further submissions and evidence of the Oil Companies on the Proposed Regional Plan.
- (f) 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 RMA.
- (g) Will potentially impose unnecessary and unjustified costs.

9. Without limiting the generality of the above, the specific reasons for the Oil Companies' appeal are set out below.

**10. C.6.8.2 DISCHARGES FROM CONTAMINATED LAND**

***The Oil Companies' Submission***

10.1 The Oil Companies sought appropriate rules for discharges occurring from the breakdown or movement of residual contaminants in soil from legacy uses or historic spill events (passive discharges).

10.2 The Oil Companies sought a range of changes to the relevant permitted activity rule (C.6.8.2), including to clause 2, as tracked below.

*2) the site investigation report demonstrates that the passive discharge of:*

*a) contaminants of concern in sensitive groundwater, at the property boundary or within 50 horizontal metres of the contaminant source (whichever is less), does not exceed, as relevant to the contaminants of concern:*

*(i) ~~0.07 µg/L perfluorooctane sulfonate acid (PFOS) + perfluorohexane sulfonate (PFHxS), and~~*

*(ii) ~~0.56 µg/L of perfluorooctanoic acid (PFOA), and~~*

*(iii) the contaminant concentrations in Drinking Water Standards for New Zealand 2005 (revised 2008), and*

- (iv) *contaminant concentrations in Table 3.4.1 Trigger Values for alternate levels of protection in the Australian and New Zealand Guidelines for Fresh and Marine Waters (ANZECC 2000) for fresh and marine water at the level of 80% protection of species and applied in accordance with those Guidelines, and*
- (v) *where there is a difference in contaminant concentrations in 2)a)iii) and iv), the most restrictive concentration applies, and*
- b) *contaminants of concern in non-sensitive groundwater, at the property boundary or within 50 horizontal metres of the contaminant source (whichever is less), does not exceed as relevant to the contaminant of concern:*
  - (i) ~~*2 µg/L of perfluorooctane sulfonate acid (PFOS) + perfluorohexane sulfonate (PFHxS), and*~~
  - (ii) ~~*632 µg/L of Perfluorooctanoic acid (PFOA), and*~~
  - (iii) *the concentrations for benzene listed in Table 3.4.1 Trigger Values for alternate levels of protection in the Australian and New Zealand Guidelines for Fresh and Marine Waters (ANZECC 2000) for fresh and marine water at the level 95% protection of species and applied in accordance with those Guidelines, and*
  - (iv) *for other contaminants, do not exceed the concentrations of contaminants listed in table 3.4.1 Trigger Values for alternate levels of protection in the Australian and New Zealand Guidelines for Fresh and Marine Waters (ANZECC 2000) for fresh and marine water at the level of 80% protection of species and applied in accordance with those Guidelines, and...*

10.3 The Oil Companies supported the distinction between sensitive and non-sensitive groundwater and sought retention of the notified definition of sensitive groundwater subject to the following amendment:

*Sensitive groundwater is groundwater is which is:*

- 1) *not artesian, and*
- 2) *less than 10 metres below the source or suspected source of contamination (or greater depth below ground surface where the geology suggests contamination may readily migrate to greater depth; for example, clean sands or gravels, fractured basalts), and*
- 3) *currently used or is of a quality appropriate for use and can yield water at a useful rate, or*
- 4) ~~*where the source of contamination is less than 100 metres from a sensitive surface water body (that is, a surface water body where limited dilution is available to mitigate the impact of contaminated groundwater discharging into the surface water body).*~~

10.4 The sensitive groundwater definition is from the Oil Industry Guidelines and is based on both potability and distance to surface water. Where proximity to surface water is the only criteria not met, the Oil Companies consider that applying the drinking water standards is unnecessary. The Oil Companies therefore sought clause 4 be deleted from the definition. As

an alternative to the deletion of clause 4, the following additional clause to the definition was sought by the Oil Companies:

*vi) for contaminants of concern in sensitive groundwater where proximity to surface water is the only criteria not met, then assessment against C.8.2.6 (2)(b) only is required.*

### **The Council's Decision**

- 10.5 The Council's decision has removed the distinction between sensitive and non-sensitive groundwater in C.6.8.2 and deleted the corresponding definition of sensitive groundwater. The decisions report references at para 168 changes to the rule but makes no specific comment to the rationale for this shift in approach. Footnotes in the tracked change version attached to the decision indicate that the relevant changes to the rule itself have been made consequentially in response to submissions by the Oil Companies. The deletion of the definition of sensitive groundwater is specifically referenced as a consequential amendment to address issues raised by the Oil Companies.
- 10.6 The consequence of the amendments is that clause 3 of C.6.8.2 now requires all contaminated sites to meet drinking water standards for groundwater at the property boundary or within 50 horizontal metres of the contaminant source, whichever is lesser.

#### **C.6.8.2 Discharges from contaminated land – permitted activity**

*The passive discharge of a contaminant from contaminated land into water, or onto or into land where it may enter water is a permitted activity, provided:*

- 1) a site investigation has been supervised and certified by a suitably qualified and experienced practitioner, and*
- 2) the site investigation report demonstrates that the passive discharge of the contaminants of concern is equal to or less than the relevant contaminant concentrations set out in clauses 3 to 9 below:*
- 3) in groundwater the concentration of a contaminant at the property boundary or within 50 horizontal metres of the contaminant source (whichever is less), does not exceed:*
  - a) the relevant contaminant concentrations in the Drinking Water Standards for New Zealand 2005 (revised 2008), and*
  - b) the relevant contaminant concentrations measured as dissolved concentrations in Table 3.4.1 in the Australian and New Zealand Guidelines for Fresh and Marine Water Quality, Volume 1 (ANZECC 2000) at the level of 80 percent protection of species, except for benzene which is to be applied at a level of 1 milligram per litre (95 percent protection of species), and*
- 4) in surface water, the concentration of a contaminant, at the property boundary or within 50 horizontal metres of the contaminant source (whichever is less), or immediately adjacent to any surface water or coastal water, does not exceed the relevant contaminant concentrations measured as dissolved concentrations in Table 3.4.1 in the Australian and New Zealand Guidelines for Fresh and Marine Water Quality, Volume 1 (ANZECC 2000) at the level of 95 percent protection of species, and*
- 5) concentrations of chlorinated solvents in soil gas do not exceed the land use specific Interim Health Investigation Levels for soil gas at one metre depth in Table 1A(2) of Schedule B1 (Guideline on Investigation Levels for Soil and Groundwater) of the National Environment Protection (Assessment of Site Contamination) Measure 1999*

*(updated 2013) at the property boundary or within 50 horizontal metres of the contaminant source (whichever is less), and*

- 6) concentrations of petroleum hydrocarbons in soil gas do not exceed the land use specific target soil air concentrations at one metre depth in Appendix 4J of the Guidelines for Assessing and Managing Petroleum Hydrocarbon Contaminated Sites in New Zealand (Ministry for the Environment, 2011) at the property boundary or within 50 horizontal metres of the contaminant source (whichever is less), and*
- 7) light non-aqueous phase liquids (LNAPLs)<sup>9</sup> must have a LNAPL transmissivity of less than 0.07 square metres per day, or a suitably qualified and experienced practitioner must certify that the LNAPL is unlikely to be mobile using a lines of evidence approach, and*
- 8) for dense non-aqueous phase liquids (DNAPL)<sup>10</sup> a suitably qualified and experienced practitioner must certify that the DNAPL is unlikely to be mobile and in free phase form using a lines of evidence approach, and*
- 9) non-aqueous phase liquids do not extend across the property boundary.*

### **Reason for Appeal**

- 10.7 The notified version of the passive discharge rule distinguished between sensitive and non-sensitive groundwater. The decisions version of the passive discharge rule has removed that distinction and applies drinking water standards (a very high water quality standard) at the property boundary or within 50 metres of the contaminant source, whichever is the lesser. This will apply in all locations, including where groundwater use is highly unlikely, for instance due to the nature of land use, low permeability, or low natural water quality.
- 10.8 The Oil Companies consider the passive discharge rule should take a risk-based approach and differentiate between sensitive and non-sensitive groundwater. This reflects that managing contaminated land is an activity which should be encouraged but that doing so is complex and costly and should be focused on discharges where potential effects may have unacceptable risk to human health or the environment. This is appropriately established by development of a conceptual site model, which identifies contaminants sources, routes of exposure (pathways), and what receptors are potentially affected<sup>1</sup>.
- 10.9 The Oil Companies consider that the decisions version of the rule and application of drinking water standards in non-sensitive groundwater will trigger resource consent requirements in circumstances where there is no potential for unacceptable adverse effects. For example, requiring a passive discharge consent on an operational terminal site where effects do not extend beyond the boundary (but may extend 50 horizontal metres from the contaminant source) on the grounds of an exceedance of drinking water standard. The changes will also potentially result in a number of discharges previously agreed with Council as acceptable in accordance with the relevant guidelines to again require resource consent.
- 10.10 The Oil Companies' position is supported by and consistent with the objectives and policies of the Proposed Regional Plan, particularly the key contaminated land policy, D.4.7 Discharges

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<sup>1</sup> Contaminated Land Management Guidelines No. 5, Site Investigation and Analysis of Soils (Ministry for the Environment, revised 2011).

from contaminated land. That policy requires that discharges from contaminated land are managed or remediated to a level that:

- allows contaminants to remain in the ground or in groundwater where it can be demonstrated that the level of residual contamination beyond the site boundary is not reasonably likely to result in an unacceptable risk to human health or the environment;
- mitigates adverse effects on potable water supplies; and
- avoids, remedies or mitigates adverse effects on aquatic ecosystem health, water quality, human health and amenity values while taking into account physical constraints, operational practicalities, financial implications, use of best practice, and adequacy of measures for the transport, disposal and tracking of contaminated material.

### **Relief Sought**

- 10.11 Reintroduce the differentiation of applicable limits in sensitive versus non-sensitive groundwater and include a definition of sensitive groundwater to ensure that C.6.8.2 is appropriate risk based. This could be achieved by amending Rule C.6.8.2 as set out below and reinstatement of the notified definition of sensitive groundwater, subject to the deletion of clause 4. The Oil Companies would be accepting of alternative relief to achieve the same outcome.

#### **C.6.8.2 Discharges from contaminated land – permitted activity**

*The passive discharge of a contaminant from contaminated land into water, or onto or into land where it may enter water is a permitted activity, provided:*

- 1) *a site investigation has been supervised and certified by a suitably qualified and experienced practitioner, and*
- 2) *the site investigation report demonstrates that the passive discharge of the contaminants of concern is equal to or less than the relevant contaminant concentrations set out in clauses 3 to 9 below:*
- 3) *in sensitive groundwater the concentration of a contaminant at the property boundary or within 50 horizontal metres of the contaminant source (whichever is less), does not exceed:*
  - a) *the relevant contaminant concentrations in the Drinking Water Standards for New Zealand 2005 (revised 2008), and*
  - b) *the relevant contaminant concentrations measured as dissolved concentrations in Table 3.4.1 in the Australian and New Zealand Guidelines for Fresh and Marine Water Quality, Volume 1 (ANZECC 2000) at the level of 80 percent protection of species, except for benzene which is to be applied at a level of 1 milligram per litre (95 percent protection of species), and*
  - c) *for contaminants of concern in sensitive groundwater where proximity to surface water is the only criteria not met, then assessment against (3)(b) only is required.*
- X) *in non-sensitive groundwater the concentration of a contaminant at the property boundary or within 50 horizontal metres of the contaminant source (whichever is less), does not exceed:*
  - a) *the relevant contaminant concentrations measured as dissolved concentrations in Table 3.4.1 in the Australian and New Zealand Guidelines for*

Fresh and Marine Water Quality, Volume 1 (ANZECC 2000) at the level of 80 percent protection of species, except for benzene which is to be applied at a level of 1 milligram per litre (95 percent protection of species), and

- 4) in surface water, the concentration of a contaminant, at the property boundary or within 50 horizontal metres of the contaminant source (whichever is less), or immediately adjacent to any surface water or coastal water, does not exceed the relevant contaminant concentrations measured as dissolved concentrations in Table 3.4.1 in the Australian and New Zealand Guidelines for Fresh and Marine Water Quality, Volume 1 (ANZECC 2000) at the level of 95 percent protection of species, and
- 5) concentrations of chlorinated solvents in soil gas do not exceed the land use specific Interim Health Investigation Levels for soil gas at one metre depth in Table 1A(2) of Schedule B1 (Guideline on Investigation Levels for Soil and Groundwater) of the National Environment Protection (Assessment of Site Contamination) Measure 1999 (updated 2013) at the property boundary or within 50 horizontal metres of the contaminant source (whichever is less), and
- 6) concentrations of petroleum hydrocarbons in soil gas do not exceed the land use specific target soil air concentrations at one metre depth in Appendix 4J of the Guidelines for Assessing and Managing Petroleum Hydrocarbon Contaminated Sites in New Zealand (Ministry for the Environment, 2011) at the property boundary or within 50 horizontal metres of the contaminant source (whichever is less), and
- 7) light non-aqueous phase liquids (LNAPLs)<sup>9</sup> must have a LNAPL transmissivity of less than 0.07 square metres per day, or a suitably qualified and experienced practitioner must certify that the LNAPL is unlikely to be mobile using a lines of evidence approach, and
- 8) for dense non-aqueous phase liquids (DNAPL)<sup>10</sup> a suitably qualified and experienced practitioner must certify that the DNAPL is unlikely to be mobile and in free phase form using a lines of evidence approach, and
- 9) non-aqueous phase liquids do not extend across the property boundary.

10.12 Reinstate the definition of sensitive groundwater subject to deletion of clause 4.

*Sensitive groundwater is groundwater is which is:*

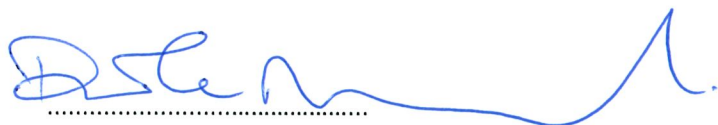
- 1) not artesian, and
- 2) less than 10 metres below the source or suspected source of contamination (or greater depth below ground surface where the geology suggests contamination may readily migrate to greater depth; for example, clean sands or gravels, fractured basalts), and
- 3) currently used or is of a quality appropriate for use and can yield water at a useful rate, ~~or~~
- 4) ~~where the source of contamination is less than 100 metres from a sensitive surface water body (that is, a surface water body where limited dilution is available to mitigate the impact of contaminated groundwater discharging into the surface water body).~~

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

10.14 Such other relief as the Court sees fit.



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



David le Marquand  
Principal Planning and Policy Consultant

Dated this 17<sup>th</sup> day of June 2019

**Address for Service:**

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Ph: 021 122 3429

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**Annexures:**

- A. A copy of the Oil Companies' submissions
- 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 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 or the part of 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.