BEFORE THE ENVIRONMENT COURT

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 Thames Coromandel District Council on the Proposed Thames Coromandel District Plan
BETWEEN	**BP OIL NEW ZEALAND LIMITED, MOBIL OIL NEW ZEALAND LIMITED AND Z ENERGY LIMITED (*The Oil Companies*)** Appellant
AND	**THAMES COROMANDEL DISTRICT COUNCIL** Respondent

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

To: The Registrar, Environment Court
Specialist Courts and Tribunals Centre
Level 2
41 Federal Street (Corner Wyndham Street)
Auckland 1010
New Zealand

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 Thames Coromandel District Council (*the Council*).

3. The Oil Companies' appeal against part of a decision of the Council on the Proposed Thames Coromandel District Plan (***the PDP***). The Oil Companies made submissions to the Council in relation to the PDP. The Oil Companies' core business in the Thames Coromandel District relates to the operation and management of their individual service station sites, including truck stops and airfield sites.

4. The Oil Companies are not a trade competitor for the purposes of section 308D of the Act.

5. The Council notified the PDP and made decisions on the submissions of the Oil Companies in relation to the PDP. The Oil Companies received notice of the decisions on 29 April 2016.

6. The parts of the decision being appealed

6.1 The part of the decision that the Oil Companies' appeal relates to is:

(a) Section 12 – Hazardous Substances: Policy 2a
(b) Section 12 – Hazardous Substances: Policy 2b
(c) Section 12 – Hazardous Substances: Policy 2f
(d) Section 12 – Hazardous Substances: Objective 3
(e) Section 12 – Hazardous Substances: Policy 3a
(f) Section 3 – Definitions: Residual Risk
(g) Section 36 – Hazardous Substances: Rule 3
(h) Section 36 – Hazardous Substances: Table 2, matter 2 (transport routes)
(i) Section 36 – Hazardous Substances: Table 2, matter 9 (hours of operation)
(j) Sections 40 to 59 – Zone Earthworks Rules

7. GENERAL REASONS

7.1 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 regulating earthworks or the storage, use and transport of hazardous substances and creates a potential for duplication of regulation.

(c) 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.

(d) Will potentially impose unnecessary and unjustified costs.

8. The specific reasons for the Oil Companies' appeal are set out below.

8.1 SECTION 12 – HAZARDOUS SUBSTANCES: POLICIES 2A AND 2B

The Oil Companies' Submission (826.1)

8.1.1 The Oil Companies' submission sought to amend both Policy 2a and 2b to refer to "remedy or mitigate" as well as avoid. This was sought so as to not set a zero tolerance threshold for adverse effects and to recognise that hazardous facilities, by their very nature, often generate some degree of adverse effects. The following specific relief was sought through the submission (additions in underline):

Policy 2a

Hazardous facilities shall be designed, constructed and managed to avoid, remedy or mitigate significant adverse effects on the environment.

Policy 2b

Appropriate facilities and systems shall be provided to avoid, remedy or mitigate the pollution of soil, groundwater, watercourses and air in the event of any accidents (including spills and gas escapes) involving hazardous substances.

The Council's Decision

8.1.2 The decisions version of the planning text shows that the Hearings Panel has rejected the Oil Companies' submission and retained Policies 2a and 2b as notified. The reason for this decision is deferred to that in the S42A staff report which states that the scope of both policies is qualified and that avoidance of significant adverse effects and pollution is therefore appropriate.

Reason for Appeal

8.1.3 Avoidance of a significant adverse effect (which includes potential effect) is not an appropriate resource management response for design and operation of hazardous facilities and can lead to an interpretation as a requirement to avoid effects, including potential effects of low probability but high potential impact. This would have the consequence of severely limiting such facilities. While it is accepted that design, construction and operation should not give rise to such effects this can be achieved through design of facilities,

appropriate mitigation measures (e.g. spill containment etc) and appropriate operational procedures. Policies 2a and 2b should focus on ensuring that any potential significant adverse effects (including risks) associated with hazardous facilities can be managed to an appropriate level. Risk can then addressed in terms of whether it is considered to be acceptable, tolerable or intolerable in relation to the nature of the activity proposed.

Relief Sought

8.1.4 Ensure Policies 2a and 2b recognise that hazardous facilities should be designed, constructed and operated to appropriately manage and mitigate significant adverse effects and to ensure residual risk is acceptable. This could be achieved by amending Policies 2a and 2b as follows (additions in underline, deletions in strikethrough):

Policy 2a

Hazardous facilities shall be designed, constructed and managed to avoid, or adequately mitigate significant adverse effects, including risks, to ~~on~~ the environment.

Policy 2b

Appropriate facilities and systems shall be provided to avoid, or minimise the risk of pollution of soil, groundwater, watercourses and air in the event of any accidents (including spills and gas escapes) involving hazardous substances.

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

8.1.6 Such other relief as the Court sees fit.

8.2 SECTION 12 – HAZARDOUS SUBSTANCES: POLICY 2F

The Oil Companies' Submission (826.1)

8.2.2 The Oil Companies' submission sought to amend Policy 2f to apply only to new hazardous facilities to recognise that it is inappropriate to require the consideration of alternative locations where consent is required for upgrading works at existing sites. For example, the removal and replacement of underground storage tanks is part of maintenance works at a service station and it is inappropriate to require the consideration of an alternative location of the tanks (and therefore another site) when a service station already exists on the site. The following specific relief was sought through the submission (additions in underline):

Policy 2f

Alternative locations for new hazardous facilities shall be considered to ensure the most appropriate site has been identified given the potential effects of a proposal to develop, use or subdivide land to store, use, dispose or transport hazardous substances.

The Council's Decision

8.2.3 The decisions version of the planning text shows no change to the provision and therefore the Hearings Panel has rejected the Oil Companies' submissions and retained Policy 2f as notified. The reason for decision is deferred to that in the s42A staff report on the Contaminated Land and Hazardous Substances. It states that the intent of the provision is to apply to new and upgraded facilities and not to replacement and maintenance of existing facilities, and that this is achieved by the current wording of the policy. Inclusion of *new* hazardous facilities would exclude expansion of existing facilities from the policy consideration.

Reason for Appeal

8.2.4 Policy 2f requires applicants to demonstrate that the most appropriate site has been chosen for the activity. This goes well beyond the normal test under the Act of considering alternative locations or methods (Schedule 4, clause 6(1) of the Act) and sets a very high threshold to achieve.

8.2.5 It remains uncertain as to whether maintenance activities (such as tank replacement) will be captured by the provision, particularly when the modern equivalent may include a larger tank, which may in turn reduce number of fills required. Further clarification is required on this matter. Furthermore the policy fails to recognise the existing investment in such facilities and the controls in place under the Hazardous Substances and New Organisms Act 1996 (***HSNO***).

8.2.6 A key issue with regard to hazardous facilities is that risk is acceptable at the chosen location. It will in many cases be neither practicable nor necessary to demonstrate that the most appropriate site has been chosen, even when an expansion of existing facilities is proposed, including any increases in volumes of hazardous substances stored. It would be appropriate to require that residual risk post development remains acceptable or no worse than existing. Consideration of the appropriateness of a site should only be a factor to consider for new sites.

Relief Sought

8.2.7 Ensure that the policy does not apply to existing activities or their maintenance or upgrading. Rely on other provisions relating to residual risk to address such concerns. Ensure assessment of alternative locations is only considered for new sites where a proposal may lead to significant effects. This could be achieved through amending Policy 2f as follows (additions in underline):

Policy 2f

Alternative locations <u>for new hazardous facilities</u> shall be considered to ensure the most appropriate site has been identified given the potential <u>significant</u> effects of a proposal to develop, use or subdivide land to store, use, dispose or transport hazardous substances.

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

8.2.9 Such other relief as the Court sees fit.

8.3 SECTION 12 – HAZARDOUS SUBSTANCES: OBJECTIVE 3 AND POLICY 3A

The Oil Companies' Submission (826.1)

8.3.1 The Oil Companies' submission sought amendments to Objective 3 and Policy 3a to ensure that the risk associated with hazardous facilities is managed to acceptable levels, having regard to the surrounding environment, and recognising that there is always a degree of risk associated with hazardous facilities but that this risk can be managed appropriately. The following wording was sought (additions in underline, deletions in strike through):

Objective 3

~~People, property and the environment are protected from residual risks posed by new hazardous facilities.~~

<u>Residual risks posed by new hazardous facilities on people, property and the environment are managed to acceptable levels.</u>

Policy 3a

The identification, assessment and management of the effects of hazardous facilities shall ensure that residual risks to people, property and the natural environment are ~~minimised~~ <u>at acceptable levels.</u>

The Council's Decision

8.3.2 The decisions version of the planning text shows that the Hearings Panel has rejected the Oil Companies' submissions, and retained Objective 3 and Policy 3a as notified. The reasons for this decision is deferred to the S42A report on Contaminated Land and Hazardous Substances. The report states that protection and minimisation are the appropriate thresholds to be referred to in the policy framework given that there are usually options open for locating a new facility, and that flexibility in design, processes, and procedures enable adverse effects to be internalised.

Reason for Appeal

8.3.3 Protection from residual risk is a very high threshold and is not an appropriate policy approach in relation to either new or existing hazardous facilities. Residual risk cannot be avoided (being the level of risk after mitigation measures) but rather it should be at a level that is acceptable to the receiving environment. That level may well change depending upon the sensitivity of the receiving environment – however not all risk can be eliminated.

8.3.4 In terms of existing facilities, which Policy 3a would capture, it is necessary to recognise that minimisation needs to be practicable or similarly may lead to circumstances whereby hazardous facilities cannot operate in the District in accordance with policy. A minimisation requirement for residual risk is uncertain. A further complication arises in relation to the definition of residual risk in the decisions version (which is now limited to natural hazard risk) and therefore creates uncertainty of application for the policy. The definition issue is addressed in section 8.4.

Relief Sought

8.3.5 Ensure Objective 3 and Policy 3a recognise that it is not appropriate to protect the environment from residual risk or minimise it but rather ensure that any residual risks are appropriate for the relevant receiving environment. This could be achieved through amending Objective 3 and Policy 3a as follows (additions in underline, deletions in strikethrough):

Objective 3

~~*People, property and the environment are protected from residual risks posed by new hazardous facilities.*~~

Residual risks posed by new hazardous facilities on people, property and the environment are managed to acceptable levels.

Policy 3a

The identification, assessment and management of the effects of hazardous facilities shall ensure that residual risks to people, property and the natural environment are ~~minimised~~ at acceptable levels.

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

8.3.7 Such other relief as the Court sees fit.

8.4 SECTION 3 – DEFINITIONS: RESIDUAL RISK

The Oil Companies' Submission (826.26)

8.4.1 The Oil Companies' submission sought retention of the notified definition of residual risk without modification.

Residual Risk
Means the level of risk that remains after risk avoidance or mitigation measures have been implemented. For flooding, also refer to 'Natural Hazard Terms'.

The Council's Decision

8.4.2 The decisions version of the planning text shows that the Hearings Panel has rejected the Oil Companies' submissions and deleted the general definition of residual risk. The definition now states:

Residual Risk has the same meaning as in the Waikato Regional Policy Statement.

"Residual risk—the risk associated with existing natural hazard structural defences such as stopbanks and seawalls, including the risk of failure of a defence or of a greater than design event occurring."

8.4.3 There is no discussion on the rationale for deletion of this general definition in either Decision Report 7 re Natural Hazards or Decision Report 9 relating to Contaminated Land and Hazardous Substances.

Reason for Appeal

8.4.4 It is appropriate that a general definition of residual risk be retained, in conjunction with the objective and policy amendments above, to recognise that an element of risk will remain at hazardous facilities following adoption of risk avoidance and mitigation measures. Furthermore, Council appears to have no scope to delete the general definition of residual risk as the Council's summary of submissions establishes that the Oil Companies were the only submitter and sought retention of the definition.

Relief Sought

8.4.5 Reinstate a general definition of residual risk to recognise that an element of residual risk will remain following adoption of risk avoidance and mitigation measures, for instance at hazardous facilities. This could be achieved through the following wording (additions in underline):

Residual Risk (excluding residual risk relating to natural hazards which is separately defined)

means the level of risk that remains after risk avoidance or mitigation measures have been implemented.

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

8.4.7 Such other relief as the Court sees fit.

8.5 SECTION 36 – CONTAMINATED LAND AND HAZARDOUS SUBSTANCES: RULE 3

The Oil Companies' Submission (826.2)

8.5.1 The Oil Companies' submission sought amendments to Rule 7 of the notified provisions to adequately provide for the storage of LPG in multiple vessels as is common practice at service stations. The following amendments were sought:

RULE 7 Retail sale of LPG, petrol or diesel

1. *The retail sale of LPG, petrol and/or diesel is a controlled activity provided:*

    a) *The site has no more than:*
        i) *An aggregate six tonnes of LPG stored; and*
        ~~*ii) One LPG storage tank; and*~~
        iii) *An aggregate 100,000 litres of petrol stored; and*
        iv) *An aggregate 50,000 litres of diesel stored; and*
    b) *No storage tanks for petrol or diesel are above ground; and*
    c) *It meets the standards in Table 2 at the end of Section 36.*

2. *The Council reserves control over all matters relating to Hazardous Substances in Table 4 at the end of Section 36*

3. *An activity that is not a controlled activity under Rule 7.1 is a discretionary activity.*

The Council's Decision

8.5.2 The decisions version of the planning text shows that this rule has been renumbered Rule 3 and that matter a)ii) has been retained. Retention of matter a)ii) is contrary to the Reporting Planner's recommendation in the S42A report on the Contaminated Land and Hazardous Substances provisions which supported deletion. No further discussion of this matter is provided in the relevant Hearings Panel Decision Report (Report 9).

Reason for Appeal

8.5.3 The retention of matter a)ii) only acts to complicate this rule. Retail sales of LPG are predominantly via 'swappa' bottles and not refills. There are no effects relevant to the storage of LPG in multiple tanks to warrant such a restriction.

Relief Sought

8.5.4 Provide for the storage of up to 6 tonnes of LPG in multiple tanks. This could be achieved by deleting matter a)ii) and relying on the controls provided by matter a)i) and Table 3.

8.6 SECTION 36 – ASSESSMENT MATTERS AND CRITERIA: TABLE 2 MATTER 2 (TRANSPORT) AND MATTER 9 (HOURS OF OPERATION)

The Oil Companies' Submission (826.2)

8.6.1 The Oil Companies' submission sought the deletion from Table 2 Controlled Activity Matters for Hazardous Substances matter 2 (*The location of selected 'least risk' routes to be used for the transport of hazardous substances on and offsite*) to recognise that such technical assessments are not justified on the basis of potential effects and are potentially ultra vires.

8.6.2 The Oil Companies also sought the deletion from Table 2 of matter 9 (*Hours of operation*) to recognise that hours of operation have little effect on risks associated with the storage of hazardous substances and that the issue is better addressed through zone provisions relating to amenity.

The Council's Decision

8.6.3 The decisions version of the planning text shows that the Hearings Panel has rejected the Oil Companies' submissions. The basis for this decision is provided in the S42A report on the Contaminated Land and Hazardous Substances provisions.

8.6.4 The report accepts that the identification of 'least risk' routes, and hours of operation, are not particularly relevant to service stations and truck stops. However, the report goes onto state that these provisions will apply to all hazardous facilities that exceed the permitted aggregate quantities and which may be located where assessment of 'least risk' routes is appropriate. The report also states that hours of operation will also be a valid concern in some locations, for instance where a hazardous facility establishes near a sensitive activity that has peak occupancy times. The report also states that there is no obligation for Council to require assessment of all the matters listed but rather that Council can select the appropriate controls on a case by case basis.

Reason for Appeal

8.6.5 The transport of hazardous substances, including the safe design and operation of vehicles, is tightly controlled by HSNO and the Land Transport Act, which are administered by the Environmental Protection Agency and the New Zealand Transport Agency, respectively. Further regulation through the PDP is unnecessary and the need for such additional regulation has not been demonstrated.

8.6.6 The Oil Companies are not aware of such controls being applied in the district and do not anticipate circumstances in the district where it would be appropriate to implement such controls, over and above the controls in place under HSNO.

Relief Sought

8.6.7 Ensure there is no duplication of matters of control which are appropriately regulated under HSNO and the Land Transport Act. This could be achieved by:
Either;
A) Deleting matters 2 and 9 from Table 2, or,
B) Specifically excluding these criteria where an application relates to a service stations, truck stops or airfields (additions in underline):

NOTE
1. Matters 2 and 9 shall not apply to Service Stations, Truck Stops and Airfields.

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

8.6.9 Such other relief as the Court sees fit.

8.7 SECTIONS 40-59 – ZONE RULES: EARTHWORKS

The Oil Companies' Submission (826.22)

8.7.1 The Oil Companies' submission sought the inclusion of a permitted activity rule in each of sections 40-59 exempting the replacement and/or removal of a fuel storage system, as defined and regulated by the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011 (***NES***), from the earthworks provisions of the PDP. The following was proposed in the earthworks rules for each zone (additions in underline):

Earthworks are a permitted activity provided:
….
They are for the removal of an underground petroleum storage system in accordance with the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011; or

8.7.2 In addition, the following statement was sought at the beginning of the earthworks rules for all zones:

Earthworks activities on Potentially contaminated land will be determined by the requirements of the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011 and are not subject to the following rules:

The Council's Decision

8.7.3 The decisions version of the planning text shows that the Hearings Panel has rejected the Oil Companies' submissions as no such relief is provided in the respective zone provisions.

8.7.4 Submission point 826.22 is specifically summarised in Appendix 1 to the Recommending Planner's S42A report on residual submission points. Clear acceptance of this submission point is provided in the table at paragraph 113 of the S42A Report on Contaminated Land and Hazardous Substances which accepts the submission point subject to consequential changes.

8.7.5 No such amendments were however proposed by the Reporting Planner in track changes to the corresponding provisions. This was raised in the hearing statement tabled by the Oil Companies on 20 May 2015 but relief has not been provided in the decisions version of the decision text and the matter is not discussed further in the Hearings Panel reports.

Reason for Appeal

8.7.6 The earthworks rules in Sections 40-59 have the potential to unnecessarily constrain tank removal and replacement activities that are permitted by way of the NES. An exemption from the earthworks provisions for tank removals and replacements will avoid conflict with the NES and the need to unnecessarily obtain resource consents for an earthworks activity that is already well regulated.

Relief Sought

8.7.7 Ensure there is no duplication of controls for earthworks with the NES. Provide an exemption from the earthworks provisions for activities associated with the removal or replacement of a fuel storage systems, as defined and regulated by the NES. This could be achieved generally across all zones or at least in the zones within in which service stations, truck stops and airfields are known to currently operate. It is understood that these include the following zones:

- Industrial
- Commercial
- Airfield

- Gateway
- Pedestrian Core
- Rural
- Coastal Living
- Extra Density Residential

8.7.8 This could be achieved by the addition of the following note in each of the relevant zones (additions in underline):

Earthworks associated with the replacement and/or removal of a fuel storage system as defined in the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011 are permitted, and are not subject to any other earthworks standards in the District Plan.

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

8.7.10 Such other relief as the Court sees fit.

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

.....
Mark Laurenson
Burton Planning Consultants Limited

Dated at Takapuna this 13 June 2016

Address for Service:

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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) A copy of the relevant S42A reports and appendices

(d) 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.

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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

A copy of the S42A Reports and Appendices most relevant to this appeal

ANNEXURE D

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

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