

In the Environment Court of New Zealand
Christchurch Registry

I Te Koti Taiao o Aotearoa
Ōtautahi Rohe

ENV-2018-CHC-291

Under	the Resource Management Act 1991 (RMA)
In the matter of	an appeal under clause 14(1) of the First Schedule of the RMA in relation to the proposed Second Generation Dunedin City District Plan (2GP)
Between	BP Oil New Zealand Limited and Others
	Appellant
And	Dunedin City Council
	Respondent

Affidavit of Sarah Catherine Hickey

Affirmed **15** October 2019

Respondent's solicitors:

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**anderson
lloyd.**

I, **Sarah Catherine Hickey** of Dunedin, Policy Planner, hereby solemnly and sincerely affirm:

- 1 I am a policy planner at Dunedin City Council.
- 2 I have read the Code of Conduct for Expert Witnesses in the Environment Court Practice Note 2014. This evidence has been prepared in accordance with it and I agree to comply with it. I have not omitted to consider material facts known to me that might alter or detract from the opinions expressed.
- 3 I have been employed by Dunedin City Council (DCC) as a policy planner for four years. During this time I have primarily worked on drafting the 2GP, assessing submissions, preparing and presenting s42A reports and working on the appeals. Prior to this I was employed by the Otago Regional Council as a policy analyst working on the Otago Regional Policy Statement Review for two years, and prior to that as the Resource Planner – Liaison Officer for eight years making submissions on consent applications and local/central government proposals as well as assisting with plan changes.
- 4 I have a Bachelor of Science (Majoring in Geography) and a Post Graduate Diploma (Credit in Environmental Science) from the University of Otago.

Summary of appeal points

- 5 BP Oil New Zealand Limited and Others lodged appeal ENV-2018-CHC-291. Part of the relief sought included seeking to:

“Ensure appropriate references are included in the 2GP to draw the attention of plan users to the need to comply with the NESCS¹ when undertaking works on contaminated soil. Include a new objective and policy in Chapter 9 – Public Health & Safety as follows or to the same effect:

Objective:

There are no significant risks to human health posed by residual soil contaminant levels in land that has a history of land use which may have resulted in contamination.

Policies:

Ensure that before any development, redevelopment or change of land use on land that has a history of land use that may have resulted in contamination, associated health risks are appropriately identified and managed.

¹ Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011.

Any change of land use, development or redevelopment on contaminated land ensures that any proposed management controls, including remediation, pathway or receptor controls, will ensure the risks to human health are acceptable for the intended land use."

- 6 Aurora Energy Limited, Bindon Holdings Limited, Horticulture New Zealand, Kāti Huirapa Rūnaka Ki Puketeraki and Te Rūnanga o Ōtākou, Oceana Gold and Te Rūnanga o Ngāi Tahu are s274 parties to this part of the BP Oil New Zealand Limited and Others appeal. Liquigas Limited joined but then withdrew interest in this appeal.
- 7 Other aspects of the BP Oil New Zealand Limited and Others appeal are not addressed in my affidavit or the associated consent memorandum.

Issues of concern

Issues raised in appeals and s274 notices

- 8 The BP Oil New Zealand Limited and Others appeal states that "in the absence of a policy framework in the NESCS itself, it is important to provide policy guidance for the assessment of applications that require consent under the NESCS, particularly those that require a discretionary activity consent under the NESCS. This is not achieved by including an advice note in the Earthworks chapter. Nor will an advice note in this location necessarily draw the attention of plan users to the requirements of the NESCS in relation to change of land use or subdivision, where earthworks may not form part of the application."
- 9 The Aurora Energy Limited s274 notice opposes the relief sought, states that it is a network utility provider and seeks to ensure that the relief sought by the appellant does not give rise to unintended consequences for the management of its infrastructure.
- 10 The Bindon Holdings Limited s274 notice opposes the relief sought and states that the changes are unnecessary and will restrict the rights of landowners to utilise their land. It states that the appellants should ensure the effects of their activities are confined within their own properties and do not affect or harm other properties or the public. Further it states that the changes proposed are contrary to the objectives and purposes of the Act.
- 11 The Horticulture New Zealand s274 notice supports in part that relief sought. However, it seeks to ensure that it is made clear that not all rural land uses which disturb soil are managed under the NESCS. It considers the wording sought does not identify that disturbance of production land does not necessarily trigger the NESCS provisions, unless for purposes as set out in Clause 8 of the NESCS. It

seeks that any policy included in the Plan should be clear about the scope of the regulations.

- 12 The Oceana Gold s274 notice supports the relief sought and states that the advice note included in the Plan referring to the NESCS is insufficient to provide policy guidance for the assessment of applications that require consent under the NESCS and may be overlooked by plan users applying for a change of land use or subdivision that does not involve earthworks.
- 13 The Kāti Huirapa Rūnaka Ki Puketeraki and Te Rūnanga o Ōtākou, and Te Rūnanga o Ngāi Tahu s274 notices oppose the relief sought. The notices state that Kāti Tahu have interests in the protection of wāhi tūpuna areas and the wider district and are particularly interested in the protection of waterways, mahinga kai and access to the coast and freshwater. Threats to wāhi tūpuna include network utilities, sedimentation by earthworks and earthworks themselves.

Mediation

- 14 Mediation for Group 1 – Non-Strategic (Earthworks Rules) took place on the 15th of August 2019. All parties relevant to the above-mentioned BP Oil New Zealand Limited and Others appeal point were in attendance, except for Bindon Holdings Limited.
- 15 It was agreed at mediation that the appeal could be resolved by a new strategic direction policy and a new section 9 policy and that Council staff would draft wording.
- 16 The following amendments to the 2GP have since been agreed to by parties in response to the appeal point by BP Oil New Zealand Limited and Others:

- (a) Include the following strategic direction policy under Objective 2.2.6 Public health and safety:

Policy 2.2.6.3

Give effect to the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011 by including a policy to support the implementation of regulations provided by that national environmental standard.

- (b) Include the following policy in section 9 (Public Health and Safety) under Objective 9.2.2:

Policy 9.2.2.16

Activities on land that has a history of land use that may have resulted in contamination are managed in accordance with the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011, including by:

- a. at the time of subdivision, land use or when land development activities involving soil disturbance take place, identifying and assessing risk to human health from contaminants in soil, where practicable; and
 - b. if necessary based on the intended use of the land, remediating or managing the contaminants to make it safe for human use.
- 17 No consequential changes to the 2GP are necessary as a result of these amendments, in my assessment.
- 18 As these are new provisions, there is no potential overlap with different appeals on the same provisions in the plan.

Assessment

Consistency with higher order documents

- 19 The National Environmental Statement for Assessing and Managing Contaminants in Soil to Protect Human Health (NESCSCS) contains regulations for land actually or potentially contaminated by an activity or industry on the Hazardous Activities or Industries List. These regulations range from permitted activities to discretionary activities.
- 20 The Users' Guide to the National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health (MfE, April 2012) does however state that the policy objective of the National Environmental Standard is to *"ensure land affected by contaminants in soil is appropriately identified and assessed when soil disturbance and/or land development activities take place and, if necessary, remediated or the contaminants contained to make the land safe for human use."*
- 21 Proposed Policy 9.2.2.16 reflects the NESCSCS regulations and the "policy objective" in the above-mentioned User's Guide.

Section 32AA Assessment

- 22 Based on the information provided by BP Oil New Zealand Limited and Others I have assessed the proposed new policies and considered them using s32 of the RMA as a guide.

23 I agree with the appellant that in the absence of a policy framework in the NESCS itself, it is useful to provide policy guidance for the assessment of applications that require consent under the NESCS. Policy 9.2.2.16 is proposed to provide this guidance and reflects the NESCS and "policy objective" explained in the associated User's Guide. It is not drafted in accordance with the 2GP drafting protocol, which might have included different policies for different activity statuses, but was considered a better option overall by all parties for its simplicity. Because the rules sit outside the 2GP (in the NES) I do not consider that consistency with the drafting protocol is necessary.

24 Policy 9.2.2 would sit under an existing Plan objective in Section 9 (Public Health and Safety).

Objective 9.2.2

Land use, development and subdivision activities maintain or enhance people's health and safety.

25 I note there is no appeal on Objective 9.2.2.

26 As this is essentially a new 'method' (policy direction) included in the Plan, a policy is proposed to be included in the Strategic Directions (Policy 2.2.6.3) to explain the approach (method) to be taken in the Plan. It is included under an existing relevant strategic direction objective (Objective 2.2.6). It has been drafted to be in keeping with the 2GP drafting protocol for strategic directions.

27 Based on the opinions I have heard from planning professionals and lawyers who attended the mediation commenting generally on good drafting principles as well as feedback from the DCC consents team, I believe that the proposed policy would improve the consistency and efficiency of assessing consent applications.

28 My conclusion is that the proposed amendment is appropriate in terms of the NESCS and objectives of the Plan, would contribute to the achievement of Objective 2.2.6, and is appropriate to give effect to Part 2 of the Act.

29 I support the amendment agreed by the parties recorded in the associated consent memorandum.

Relationship to relevant objectives and policies, and appeals on those objectives and policies

30 For thoroughness, I have also assessed the appeals on the related objective and strategic direction to ensure no appeals could change the Plan framework in a way that would change the above assessment.

31 As noted above there is no appeal on the related objective in Section 9: Objective 9.2.2.

32 The most relevant strategic direction objective is Objective 2.2.6 as follows:

Objective 2.2.6

The risk to people's health and safety from contaminated sites, hazardous substances, and high levels of noise or emissions is minimised.

33 Objective 2.2.6 is under appeal by BP Oil New Zealand Limited and Others (ENV-2018-CHC-291) as it is linked to their appeal point seeking to amend Policy 2.2.6.2 to improve clarity and to focus on managing risk of hazardous substance to acceptable levels. Further it seeks the deletion of the requirement to include rules that limit the quantity of hazardous substances that may be used in different environments, and instead focus on managing risk to acceptable levels. The appellant considers this could be achieved by making changes along the following lines:

Policy 2.2.6.2

Manage the risk posed by the storage and use of hazardous substances to an acceptable level so that it is no more than low, including ~~by through rules that:~~

a. Managing the storage and use of hazardous substances in close proximity to sensitive activities and in areas subject to natural hazards limit the quantity of different hazardous substances that may be used in different environments (zones); and

b. restrict sensitive activities from locating within a hazard facility mapped area.

34 This appeal is located in the Hazardous Substances appeal management topic. The relief sought would not change the overall focus of Objective 2.2.6, which is the minimisation of risk to peoples' health and safety.

Affirmed at Dunedin)
By Sarah Catherine Hickey)
this 15 day of October 2019)
before me:)



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Ashleigh Nicole Mitchell-Craig
Solicitor
Dunedin

A Solicitor of the High Court of New Zealand