

IN THE ENVIRONMENT COURT  
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA  
KI TĀMAKI MAKĀURAU

Decision No. [2021] NZEnvC 035

IN THE MATTER OF

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

BETWEEN

THE NEW ZEALAND REFINING  
COMPANY LIMITED

(ENV-2020-AKL-000126)

NEW ZEALAND TRANSPORT  
AGENCY

(ENV-2020-AKL-000132)

Appellants

AND

WHANGAREI DISTRICT COUNCIL

Respondent

Court: Environment Judge J A Smith sitting alone under section 279 of  
the Act

Hearing: On the papers  
Last case event: 8 March 2021

Date of Decision: **17 MAR 2021**

Date of Issue: **17 MAR 2021**

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DETERMINATION OF THE ENVIRONMENT COURT

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A: The Appeal point in relation to objective DG-O15 is confirmed as withdrawn.

B: Plan Change 148 to the Operative Whangarei District Plan is amended in  
accordance with **Annexure 1**. The appeal points in relation to these provisions are

The New Zealand Refining Company & New Zealand Transport Agency v Whangarei  
District Council



otherwise dismissed.

C: The appeal by The New Zealand Refining Company Limited is otherwise dismissed.

D: The appeal by the New Zealand Transport Agency remains extant.

E: The Strategic Policy – Regionally Significant Infrastructure topic is resolved.

F: Under section 285 of the Act there is no order as to costs.

## REASONS

### Introduction

[1] This determination results from a consent memoranda filed by the parties in relation to the appeals by The New Zealand Refining Company Limited (**Refining NZ**) and the New Zealand Transport Agency (**Waka Kotahi**).

[2] On 20 November 2020, a consent memorandum and draft consent documents were filed with the Court. On 26 November 2020, the Court directed the parties to explain in a memorandum and in a revised draft consent order how each change to the Plan provisions better or more appropriately achieves superior provisions including the Regional Policy Statement, with reference to Section 32AA. On 8 March 2021, a supplementary memorandum of the parties addressing section 32AA and a revised draft consent order were filed.

### Background

[3] The appeals by Refining NZ and Waka Kotahi are against the decision of the Whangarei District Council (**the Council**) on Plan Change 148 to the Operative Whangarei District Plan.

[4] Refining NZ and Waka Kotahi made submissions in relation to Plan Change 148, and subsequently appealed the Council decision.

[5] The section 274 parties to Refining NZ's appeal are Transpower New Zealand Limited, Northpower Ltd and Waka Kotahi.

[6] The section 274 parties to the appeal by Waka Kotahi are Refining NZ, Northland District Health Board, Transpower New Zealand Ltd, Southpark Corporation Ltd, Foodstuffs North Island Ltd, Northpower Ltd and KiwiRail Holdings Ltd.

[7] All the section 274 parties signed the consent memorandum and supplementary memorandum.

[8] The appeals deal with objectives and policies in the District Growth and Development (**DGD**) chapter of the Plan with respect to regionally significant infrastructure.

[9] These parts of the appeals are case managed as part of topic Strategic Policy – Regionally Significant Infrastructure (ENV-2020-349-000045).

[10] The Plan defines RSI as the infrastructure listed in Appendix 3 of the RPS, which includes Refining NZ's pipelines and storage facilities and state highways.

[11] Refining NZ's appeal seeks amendments to objective DGD-O15 and policy DGD-P15.

[12] The appeal by Waka Kotahi seeks amendments to policies DGD-P16 and DGD-P17 in order to provide consistency between the provisions and provide for an appropriate set of provisions for upgrades of RSI that may have greater effects than existing RSI.

[13] The appeals seek to give effect to the Northland Regional Policy Statement (**RPS**), to provide consistency between the provisions, and to clarify the policy position in relation to upgrades of existing RSI.

[14] Section 75(3) of the Act requires that a district plan must give effect to any regional policy statement. The RPS became operative in May 2016 and fully operative in June 2018. The RPS contains objectives and policies relevant to RSI.

### **Agreement reached**

[15] Following Court-assisted mediation, the parties reached agreement on a proposal to resolve the aspects of the appeals within the RSI topic.

[16] The parties agreed that:

- (a) Refining NZ will not pursue its relief on objective DGD-O15; and
- (b) Policies DGD-P15, DGD-P16 and DGD-P17 are to be amended to give effect to the RPS and to achieve greater consistency between the provisions and greater clarity in relation to upgrades of existing RSI.

### **Section 32AA analysis**

[17] Section 32AA of the Act requires a further evaluation for any changes to a proposal since the initial section 32 evaluation report. In this instance the changes are the agreed amendments to the Decisions Version policies DGD-P15, P16 and P17 in response to appeals.

[18] The relevant Decision Version objectives which the policies must achieve are:

Objective DGD0-O14 – Recognised Benefits

The benefits of Regionally Significant Infrastructure are recognised and provided for.

Objective DGD-O15 – Adverse Effects

Avoid, remedy, mitigate or offset adverse effects arising from the development, operation, maintenance, and upgrading of Regionally Significant Infrastructure.

### ***Policy DGD-P15***

[19] The agreed amendment is:

Policy DGD-P15 – Benefits of Regionally Significant Infrastructure

To recognise and provide for the social, economic and cultural benefits of Regionally Significant Infrastructure by enabling its ongoing operation, maintenance, development, and upgrading where adverse effects ~~can be avoided, remedied, mitigated or off-set (when offered or agreed to)~~ are managed.

[20] The parties consider that the “effects hierarchy” phase “*can be avoided, remedied, mitigated, or off-set (when offered or agreed to)*” is equivalent to the term “*managed*” and that “*managed*” is a more efficient expression of the same concept.

[21] The proposed amendment is consistent with a number of RPS provisions relating to RSI which use the term “*manage*”:

- (a) RPS objective 3.8 (“*Manage resource use to ...*”);
- (b) The title of RPS policy 5.5.3 (“*Managing adverse effects arising from RSI*”); and
- (c) RPS policy 5.5.3(3) (“*When managing the adverse effects of RSI...*”).

[22] The “*manage*” amendment is also consistent with the Decisions Version of policy DGD-P17 and with the amended version of policy DGD-P16. The three policies now all consistently refer to *management* of effects.

[23] The parties therefore consider that the “*manage*” amendment gives effects to the RPS and is the most efficient, effective and appropriate way to achieve objective DGD-O14.

### ***Policy DGD-P16 and P17***

[24] The agreed amendments are:

Policy DGD-16 – New Regionally Significant Infrastructure

~~Allowing~~ Manage adverse effects ~~from created by~~ new network utilities and Regionally Significant Infrastructure ~~that have been avoided, remedied, mitigated or offset by~~ avoiding, remedying, mitigating, or offsetting (where offered or agreed to), while taking into account the following matters:

1. Benefits of the activity...

DGD-P17 – Managing Adverse Effects of Existing Regionally Significant Infrastructure

To ~~manage~~ manage adverse effects ~~from created by~~ the operation, maintenance and upgrading

of existing network utilities and Regionally Significant Infrastructure by:

1. Allowing adverse effects that are not significant while the maintenance or upgrading is being undertaken.
2. ~~Requiring~~ Allowing that any ~~permanent~~ adverse effects that, after the conclusion of the maintenance or upgrading, are the same or similar to the adverse effects that existed before the maintenance or upgrading was undertaken.
3. Avoiding, remedying, mitigating, or offsetting (where offered or agreed to) adverse effects, if DGD-P17.1 or DGD-P17.2 do not apply.
4. Taking into account the following matters:
  - a. Benefits of the activity...

Policy architecture

[25] RPS policy 5.3.3 is divided into three parts:

- (a) 5.3.3(1) deals with new RSI;
- (b) 5.3.3(2) deals with maintenance and upgrading of RSI; and
- (c) 5.3.3(3) relates to both, and sets out matters which decision makers will give weight to.

[26] In policies DGD-P16 and P17:

- (a) DGD-P16 deals with new RSI;
- (b) DGD-P17 deals with maintenance and upgrading of RSI; but
- (c) The hearings commissioners determined that the RPS should be given effect to by incorporating the RPS policy 5.3.3(3) matters into both DGD-P16 and P17.

[27] In agreeing amendments to DGD-P16 and P17 the parties have retained the policy architecture that the hearing commissioner considered gave effect to the RPS.

“Allowing”

[28] RPS policy 5.3.3(1) refers to “allowing” adverse effects from the establishment and operation of new RSI when listed circumstances (such as consistency with higher order “avoid” policies) apply. The criteria listed in RPS policy 5.3.3(1) are not repeated in policy DGD-P16, noting that any consent application will have reference to RPS policy 5.3.3(1) and to the relevant policies within the RPS and the district plan overlays.

[29] RPS policy 5.3.3(2) similarly refers to “allowing” adverse effects from the maintenance and upgrading of RSI when certain listed circumstances apply. The criteria listed in RPS policy 5.3.3(2) are repeated in policy DGD-P17.

[30] Neither RPS policy 5.3.3 nor its explanation clarify what is meant by “allow”, stating in the explanation that it is appropriate “to provide for these proposals in a straightforward manner...”. “Allow” could be following an assessment by a decision maker or through a permitted or controlled activity status.

[31] As the hearing commissioners have inserted the RPS policy 5.3.3(3) list of decision-making factors into both policies DGD-P16 and P17, the parties consider that amending DGD-P16 so that each policy opens with “Manage adverse effects” better reflects both the “allow” aspects and the “weigh” aspects.

[32] Using “manage” in DGD-P16 is also consistent with the amendments to policy DGD-P15 described above, so that the three policies are all internally consistent.

[33] The parties therefore consider that the “manage” amendment to DGD-P16 gives effect to the RPS and is the most efficient, effective and appropriate way to achieve objective DGD-O15.

Upgrades

[34] The appeal by Waka Kotahi sought that policy DGD-P17 be amended in order to provide policy guidance for upgrades to existing RSI that had effects that were

greater than before the upgrade was undertaken.

[35] The parties agreed that the Decisions Version of DGD-P17(2) (*“requiring”*) could be interpreted in a way that:

- (a) upgrades of existing RSI could not be consented unless the effects were the same or similar (which would be inconsistent with RPS policy 5.3.3(3), the decision of the hearing commissioners to incorporate 5.3.3(3) into policy DGD-P17, and objective DGD-O15); and
- (b) it would be easier to obtain approval for entirely new RSI than an upgrading of existing RSI (which would be inconsistent with RPS objective 3.8(a) to optimise the use of existing infrastructure, and the explanation to that objective which acknowledges that infrastructure is costly and resources are limited so it is important to get the best out of existing infrastructure).

[36] To address this concern the parties have agreed to:

- (a) Amend *“requiring”* to *“allowing”* in DGD-P17(2) to give effect to RPS policy 5.3.3(2)(b); and
- (b) include a new clause (3) in DGD-P17 to clarify that, outside the *“allow”* criteria in clauses (1) and (2), the effects of upgrades are avoided, remedied, mitigated or offset while taking into account the decision making factors in clause (4).

[37] The parties therefore consider that the amended policy DGD-P17 gives effect to RPS objective 3.8 and RPS policy 5.3.3 and is the most efficient, effective and appropriate way to achieve objective DGD-O15.

[38] In summary:

- (a) The changes to policies DGD-P15 and DGD-P16 involve relatively minor wording changes; while
- (b) The basis for the more substantive amendments to policy DGD-P17 is to ensure that upgrades of existing RSI, where the effects are greater than before the upgrades, have clear policy direction.

***Overall conclusion under section 32 and section 32AA***

[39] Under section 32AA of the Act, the Court is required to undertake an evaluation to the extent that is necessary having regard to the changes made.

[40] I have examined the changes in wording. I am unable to see anything that would offend against the provisions of the Act. Greater clarity is to be welcomed. It is my view that the greater clarity of the provisions and consistency between provisions is likely to have a beneficial effect in terms of overall impact. I am satisfied that the wording achieves a better outcome than the existing provisions. The re-wording better implements the RPS and is an appropriate way to achieve the DGD chapter objectives in this Plan. I am satisfied that the agreement reached is one that represents the various interests of the parties.

[41] Overall, I am satisfied that the approach of the parties is consistent with the Act and sections 32 and 32AA in particular and that the approach is as a result of a cohesive and integrated approach to amendments.

**Outcome**

[42] I have concluded that in terms of my duty under the Act, that the Court has a discretion to make a Determination granting these provisions. The provisions of the Act and the RPS have been largely met.

[43] I am satisfied that the provisions attached in **Annexure 1** are the most

appropriate provisions in all the circumstances. Plan Change 148 to the Operative Whangarei District Plan is amended in accordance with **Annexure 1**. The appeal points in relation to these provisions are otherwise dismissed.

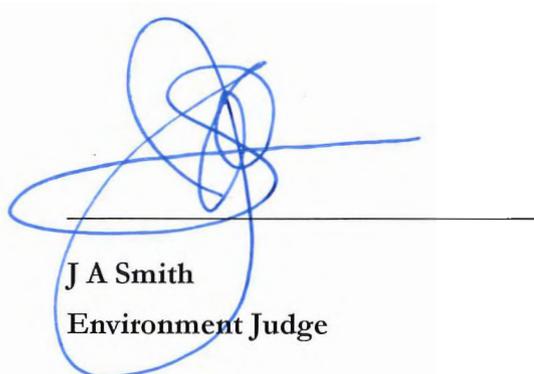
[44] The appeal point in relation to objective DG-O15 is confirmed as withdrawn.

[45] The appeal by The New Zealand Refining Company Limited is otherwise dismissed.

[46] The appeal by the New Zealand Transport Agency remains extant.

[47] The Strategic Policy -- Regionally Significant Infrastructure topic is resolved.

[48] Under section 285 of the Act there is no order as to costs.

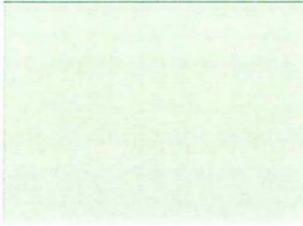


**J A Smith**  
**Environment Judge**

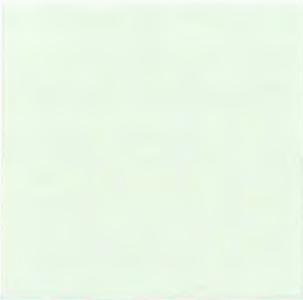


## Annexure 1

Policies – Regionally Significant Infrastructure	
DGD-P15 – Benefits of Regionally Significant Infrastructure	To recognise and provide for the social, economic and cultural benefits of Regionally Significant Infrastructure by enabling its ongoing operation, maintenance, development, and upgrading where adverse effects <del>can be avoided, remedied, mitigated or off-set (when offered or agreed to)</del> <u>are managed.</u>
DGD-P16 – New Regionally Significant Infrastructure	<p><del>Allowing Manage</del> adverse effects <del>from created by</del> new network utilities and Regionally Significant Infrastructure <del>that have been avoided, remedied, mitigated or offset by avoiding, remedying, mitigating, or offsetting</del> (where offered or agreed to), while taking into account the following matters:</p> <ol style="list-style-type: none"> <li>1. Benefits of the activity.</li> <li>2. Any recognition within a national policy statement.</li> <li>3. Constraints that limit the design and location of the activity.</li> <li>4. Whether the proposal is a regionally significant infrastructure lifeline utility which meets the foreseeable needs of Northland.</li> <li>5. The extent to which the adverse effects of the activity can be practicably reduced including any positive effects on the subject site or elsewhere (provided that the positive effects accrue to the community of interest and/or resource affected).</li> <li>6. Any monitoring programme for identified significant adverse effects with uncertain outcomes which can be addressed by an adaptive management regime where the infrastructure assists in achieving efficient land use.</li> <li>7. Whether the infrastructure proposal helps to achieve consolidated development and efficient use of land.</li> <li>8. Ensuring damage to or loss of the relationship of iwi with ancestral sites, sites of significance, wāhi tapu, customary activities and/or taonga is avoided or otherwise agreed to by the affected iwi or hapū.</li> </ol>
DGD-P17 – Managing Adverse Effects of Existing Regionally Significant Infrastructure	<p>To manage adverse effects <del>from created by</del> the operation, maintenance and upgrading of existing network utilities and Regionally Significant Infrastructure by:</p> <ol style="list-style-type: none"> <li>1. Allowing adverse effects that are not significant while the maintenance or upgrading is being undertaken.</li> <li>2. <del>Requiring</del> <u>Allowing that any permanent</u> adverse effects <u>that, after the conclusion of the maintenance or upgrading,</u> are the same or similar to the adverse effects that existed before the maintenance or upgrading was undertaken.</li> <li>3. <u>Avoiding, remedying, mitigating, or offsetting (where offered or agreed to)</u> adverse effects, if DGD-P17.1 or DGD-P17.2 do not apply.</li> <li>4. Taking into account the following matters: <ol style="list-style-type: none"> <li>a. Benefits of the activity.</li> </ol> </li> </ol>



- b. Any recognition within a national policy statement.
- c. Constraints that limit the design and location of the activity.
- d. Whether the proposal is a regionally significant infrastructure lifeline utility which meets the foreseeable needs of Northland.
- e. The extent to which the adverse effects of the activity can be practicably reduced including any positive effects on the subject site *or elsewhere (provided that the positive effects accrue to the community of interest and/or resource affected)*.



- f. Any monitoring programme for identified significant adverse effects with uncertain outcomes which can be addressed by an adaptive management regime where the infrastructure assists in achieving efficient land use.
- g. Whether the infrastructure proposal helps to achieve consolidated development and efficient use of land.