

**BEFORE THE ENVIRONMENT COURT
AUCKLAND REGISTRY**

ENV-2009-AKL-

IN THE MATTER of clause 14 of the First
Schedule of the Resource
Management Act 1991 and
Proposed Plan Change 3 to the
Auckland Regional Plan:
Coastal

BETWEEN **MARSTEL TERMINALS
LIMITED**

Appellant

AND **AUCKLAND REGIONAL
COUNCIL**

Respondent

**NOTICE OF APPEAL TO ENVIRONMENT COURT AGAINST DECISION ON
PROPOSED PLAN CHANGE 3 TO AUCKLAND REGIONAL PLAN:
COASTAL**

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TO: The Registrar
Environment Court
Auckland

1 **MARSTEL TERMINALS LIMITED (“Marstel”)** appeals against a decision of Auckland Regional Council on the following:

Proposed Plan Change 3 to Auckland Regional Plan: Coastal (Wynyard Quarter)

2. It made a submission on that proposed plan change as submitter number 16

3. It received notice of the decision on 3 December 2008.

4. Auckland Regional Council made the decision.

5. The decision that Marstel is appealing is:

(a) The whole plan change insofar as it relates to the Respondent's failure to adequately provide for:

(i) The continued safe and efficient operation of the bulk liquids industry and downstream industry reliant upon bulk liquids;

(ii) The relocation of the bulk liquid industry to another site in the Auckland region.

(iii) Reverse sensitivity and protection of the bulk liquid industry from sensitive activities. The decision weakens the plan change provisions to put a higher onus on Marstel and other bulk liquid operators to continue operating at Wynyard Wharf. This is contrary to the principle of reverse sensitivity

6. The reasons for the appeal are as follows:

(a) **General points:**

(1) Marstel supported the proposed plan change in principle but sought 3 specific outcomes in its submission to ensure it could remain operational

and could in due course be relocated to another site in a commercially viable way. The Respondent has accepted only that part of the submission supporting the proposed plan change and has rejected the outcomes sought. Marstel considers the outcomes to be fundamental to its ongoing operational requirements and its long-term commercial viability

- (2) The decision states that there is an intention to transition the proposed development around the bulk liquid industry while that industry remains present at Wynyard Wharf:
 - (a) The decision is incorrectly premised on the bulk liquid industry ceasing its operations at Wynyard Wharf once existing leases expire. A company associated with the Respondent, through Auckland Regional Holdings, presently holds these leases. The Respondent's refusal to extend the leases is highly prejudicial to Marstel and the bulk liquid industry.
 - (b) The Respondent is premature in assuming that the bulk liquid industry can or will relocate. The plan change should not be implemented based upon an assumption of relocation prior to any certainty that this can in fact occur. Relocation is a complex issue and may in fact not be achievable for all the industry leading to the sort of adverse economic effects highlighted by the bulk liquid industry and Marstel. There is currently no commercially viable alternate location for bulk liquid industry in the Auckland Region. The marine and fishing industries have been recognised and provision made under the plan change

for their long term protection and viability in Auckland. There is no reason why the regionally significant bulk liquid industry and industry reliant on bulk liquids should be treated differently from other industries dependant on a land sea interface.

- (c) The decision fails to provide a long-term relocation strategy or solution for the bulk liquid industry, to enable the transition to occur seamlessly.
 - (d) The plan change fails to provide appropriate management of risk around the industry's regionally important facilities at Wynyard Wharf.
- (3) The Respondent has not taken into account that Wynyard Quarter will continue to be used for the storage of hazardous bulk liquids, and Wynyard Wharf will need to remain operating as a dangerous goods wharf, until at least 2025 (or possibly beyond if relocation is not achievable),
- (4) While the importance of the bulk liquid industry to the Auckland regional economy has been recognised by the Respondent in the early part of the decision, this has not been reflected in the detail of the decision, in particular the objectives, policies, methods and rules.
- (5) The intended adoption of the precautionary principle has not been carried through to the methods, policies and rules.
- (6) The Respondent has erred in failing to include the bulk liquid industry in its assessment of port activities, and the priority to be accorded to those activities in the Wynyard Quarter area. The bulk

liquid industry is a port activity dependent on deep-water access for its operations.

- (7) The Respondent has misunderstood and misapplied risk parameters in assessing the effect of the proposed plan change on the bulk liquid industry and has failed to apply the appropriate risk provisions recommended by its internal and external expert advisers and as suggested by submitters.
- (8) The Respondent has failed to apply advice on risk given by URS, and accepted by the Respondent, at the hearing.
- (9) The Respondent has promoted public access to Wynyard Quarter and Wynyard Wharf while the bulk liquid industry remains operational, resulting in unnecessary risk to the public due to the incompatibility of the two activities (for example and without limitation, Te Wero Bridge, Wynyard Wharf and temporary activities).

(b) Analysis of Risk

- (1) The existing plan already adequately provides for appropriate use of Port Management Area 4A. There should be no need to alter the plan as it relates to Wynyard Wharf because it will continue to be used for the transfer of hazardous substances until at least 2025.
- (2) In proposing this plan change the Respondent has relied upon on risk analysis and advice in conjunction with the Auckland City Council. Risk issues are common to this plan change and that proposed by the Auckland City Council. The reliance upon the Auckland City Council's risk analysis and attempt to make both plan changes consistent in respect of risk has lead to a

misapplication of risk issues within this plan change.

- (3) The Respondent's and the Auckland City Council's ("the Councils") approach to risk will result in undue risk to the public and unacceptable risk to Marstel's operations.
- (4) The Councils have not sought to conduct any appropriate risk analysis for the Wynyard Quarter in advance of implementing the plan changes. The Councils are proposing comprehensive changes to a primarily industrial area containing large amounts of hazardous substances through the introduction of high-density development and people intensive activities. Accepted risk practice dictates that proposals for such fundamental changes in land use should have been preceded by reference to an appropriate risk assessment taking into account the proposed changes to land use.
- (5) The Councils are relying upon risk advice commissioned by Ports of Auckland (POAL) which requires the decommissioning of the bulk liquid terminals. The POAL advice contains a fundamental error on the properties of Ammonia leading incorrectly to the dismissal of New South Wales Department of Urban Affairs and Planning (DUAP) recommendations to the Auckland City Council on injury risk. The Respondent's and the Auckland City Council's own risk adviser at the hearings presented incorrect evidence to the Commissioners based on fundamentally incorrect assumptions on the nature of the products stored in the terminals (URS).
- (6) The Councils have failed to properly consider risk in the context of the proposed introduction of high-density development and people intensive

activities to Wynyard Quarter when the terminals are expected to continue to store large volumes of hazardous product until at least 2025. Instead the Councils seem to simply assume that the risk from hazardous substances in the area is less than it is in fact likely to be. The current storage of hazardous substances, and the potential to store greater levels of hazardous substances in the Wynyard Quarter, may well be higher than that assumed by the Councils. The risk should be measured by assessing the probability of an incident occurring and the consequences of that incident occurring, as required by section 3 of the Act. Both plan changes should have been preceded by and based upon knowledge of the hazard sources and appropriate risk analysis.

- (7) The Councils have failed to take into account and apply appropriate risk practice and provisions as recommended by its internal and external expert advisers and as suggested by submitters.
- (8) The Auckland City Council has failed to take into account advice outlined in reports it has received and relied upon over a number of years from DUAP relating to the Wynyard Quarter and also in advance of previous proposed changes in the area. The Respondent has also failed to take those reports into account. The approach to risk and recommendations contained within those reports remain fundamentally valid and should form the Councils primary source of information on risk for Wynyard Wharf and Wynyard Quarter.
- (9) The plan change only refers to individual fatality risk in section 25.5 13, and has followed the same approach to risk taken by Auckland City Council plan change. Risk analysis is more complex than fatality risk alone. Other types of risk analysis such

as injury and societal risk analysis as well as damage to property are equally appropriate and relevant given the type and scale of activities and redevelopment proposed

- (10) Quantitative risk analysis (QRA) is costly to undertake and requires detailed inputs from industry. It is a risk analysis tool for large projects or for land planning by local authorities. Such analysis will be inaccessible to most plan change proponents or developers seeking to demonstrate compliance. Currently the information does not exist. Irrespective, there may be pressure from developers to keep updating fatality risk analysis to capture periods of lower risk if they have the resources to do so. This may prevent the terminals returning to storing more hazardous products at a later stage, even if to do so would have ordinarily been a normal part of their operations, because the provisions of the plan change make it untenable to do so.
- (11) Basing this plan change and the Auckland City Council's plan change upon appropriate and accepted risk analysis using the actual and potential future storage of hazardous products would enable the Councils to plan for appropriate development and activities that would protect the existing hazardous industry from reverse sensitivities, protect the public from unnecessary risk from industrial hazards and remove the need for risk analysis to be undertaken by individuals on a case by case basis.
- (12) The plan changes treat fatality risk contours as absolutes. The variability of the inputs and uncertainty associated with the process of risk quantification means that they should be used as a planning tool identifying risk, not lines on the

ground which represent safety on one side and unacceptable risk on the other. The type and volume of products stored at the Marstel terminal have not changed since the initial 1989 risk report commissioned by the Councils. It is also possible that such risk criteria may become more conservative over time as more experience and knowledge is gained. (An example can be found within the recommendations and experience gained from the Buncefield fuel terminal explosion and fire.)

- (13) The Respondent has failed to assess the risk of injury from the bulk storage terminals accidentally releasing vapour, toxic fumes and fire. It has ignored the information provided by Marstel regarding the content of the bulk storage terminals and the risk resulting from the storage of those products when new activities are introduced to the area.
- (14) The Respondent is promoting public access to the Wynyard Quarter while the bulk liquid industry remains operational, without consideration of risk to the public due to the incompatibility of the two activities (for example and without limitation, Te Wero Bridge, Wynyard Wharf and temporary activities).

(c) Relocation

- (1) The decision is incorrectly premised on the bulk liquid industry ceasing its operating at Wynyard Wharf once existing leases expire. The plan change should not be implemented based upon an assumption that the bulk liquid industry can, or will relocate upon the expiry of leases prior to any certainty that this can in fact occur. Relocation is a complex issue and may in fact not be achievable for all the industry leading to the sort of adverse

economic effects highlighted by the bulk liquid industry and Marstel. There is currently no commercially viable alternate location for bulk liquid industry in the Auckland Region. The marine and fishing industries have been recognised and provision made under the plan change for their long term protection and viability in Auckland. There is no reason why the regionally significant bulk liquid industry and industry reliant on bulk liquids should be treated differently from other industries dependant on a land sea interface.

- (2) The Respondent has failed to provide a long-term relocation strategy or solution for the bulk liquid industry, to enable the seamless transition of that industry to other sites. The Respondent is in fact implementing a plan change in conjunction with the Auckland City Council that is dependant upon the decommissioning the terminals without any certainty that relocation can be achieved.
- (3) The plan changes should not have been introduced until appropriate strategies had been developed to relocate the bulk liquid industry to other commercially viable sites, so that new activities incompatible with bulk liquid terminalling could establish at Wynyard Quarter once the bulk liquid industry had relocated.
- (4) The Respondent has not taken into account that Wynyard Quarter will continue to be used for the storage of hazardous bulk liquids, and Wynyard Wharf will need to remain operating as a dangerous goods wharf, until at least 2025 (or possibly beyond if relocation is not achievable), The Respondent is premature in proposing changes in relating to Wynyard Wharf given the long term continuing use of Wynyard Wharf for Port related activities. The existing plan already

adequately provides for the ongoing regionally significant port activities in Port Management Area 4A and manages competing activities

- (5) The Respondent has not taken the risk arising from the ongoing hazardous activity into account in its decision. Because of the ongoing risk, it is unlikely that the area directly adjacent to the terminals could be redeveloped for any other than industrial use. The non-alignment of bulk liquid leases is also a major practical and logistical constraint on any ability to achieve a seamless relocation for the bulk liquid industry. These issues in conjunction with the potential of significant adverse economic effects make it difficult to comprehend any requirement for the removal of the regionally significant bulk liquid infrastructure prior to 2025.

(d) Economic effects

- (1) The importance of the bulk liquid industry to the Auckland regional economy and the significance of the industry to national economic and infrastructural interests have not been recognised and protected by the provisions of the plan change
- (2) While it has accorded special protection to the marine and fishing industries and their ongoing operations at the Wynyard Quarter as a working waterfront, the Respondent has given insufficient consideration to the economic effect of the plan change on the bulk liquid industry or the ongoing economic viability of that industry within the Auckland region
- (3) The expert analysis of economic effects provided by the bulk liquid industry, and accepted by the Respondent in 2004, demonstrated that the

economic benefits to the Auckland region of the bulk liquid industry are significant and that the removal of the terminals without replacement in Auckland could significantly affect the economic wellbeing of the wider Auckland region and beyond. The study was implemented by undertaking a survey of terminal operators and their direct customers who were dependant on import or exports via Wynyard Wharf.

- (4) The Respondent must evaluate the benefits and costs of the plan change. The Respondent must take the economic importance of Wynyard Wharf to the region into account and consider the costs that may arise from the closure of Wynyard Wharf.

(e) Statutory and other relevant tests and documents

- (1) The Respondent's decision is inconsistent with and contrary to various provisions of the Act, including (without limitation) Part 2, section 32, section 76, and the First Schedule.
- (2) The Respondent's decision is inconsistent with and contrary to the provisions of the New Zealand Coastal Policy Statement, including (without limitation) policy 3.5.1(c) and (e).
- (3) The Respondent's decision is inconsistent with and contrary to the Auckland Regional Policy Statement, including (without limitation) Policies 2.6.7, 2.6.8(l), 7.4.13(iii) and (vi) and 7.4.19.
- (4) The Respondent's decision does not represent sound resource management practice.

7. Marstel Terminals Limited seeks the following relief:

- (1) That the plan change be declined in its entirety until such time as it provides for the following outcomes:

- (a) In consultation with the Appellant, the Respondent completes a comprehensive risk analysis that takes proper account of international best practice, and the scale and type of activities and development proposed. The report should provide recommendations on the appropriateness of such proposed redevelopment and be structured such that the Respondent is able to protect the existing bulk liquid industry from reverse sensitivity and the public from unnecessary harm from industrial hazards. The provisions of any plan change for Wynyard Quarter should be conservatively based upon the outcomes of that risk assessment.
- (b) In consultation with the Appellant, the Respondent completes a thorough assessment of the economic effect of the plan change on the bulk liquid industry, including the economic effects of the plan change on the industry's customers, and takes steps to protect those economic interests in the long term through the plan change provisions.
- (c) In consultation with the Appellant, the Respondent meaningfully investigates bulk liquid relocation issues and works to secure a commercially viable and unconditional alternative site for the bulk liquid industry. This outcome will require alternative sites to be properly investigated and the possibility of further plan changes being notified to enable a seamless transition of the bulk liquid industry, along with the completion of all consenting requirements for alternative sites.

(d) No development of the Western Reclamation, in particular Wynyard Wharf, until an alternative site is secured and consented on terms acceptable to Marstel and relocation has occurred. Alternatively the plan change could be based upon appropriate risk analysis that assumes that the regionally significant bulk liquid industry will remain at Wynyard Quarter beyond 2025

- (2) Such further or other relief as is considered necessary or appropriate in the circumstances
- (3) Costs arising from and incidental to this appeal

8 Marstel attaches the following documents to this notice:

- (a) copies of its submission and further submission;
- (b) copies of submissions of other parties relevant to the further submissions from Appellant;
- (c) a copy of the relevant decision;
- (d) a list of names and addresses of persons to be served with a copy of this notice.


Jan Caunter
Solicitor and authorised agent for the Appellant

16/2/09
Date

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Advice to Recipients of Copy of Notice of Appeal

1. How to become party to proceedings

You may be a party to the appeal if you made a 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 30 working dates after this notice was lodged with the Environment Court. You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing requirements (see form 38).

2. 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, the submissions of other parties and (or) the decision (or part of the decision) appealed. These documents may be obtained, on request, from the Appellant.

3. Advice

If you have any questions about this notice, contact the Environment Court Unit of the Department for Courts in Auckland.

Contact Details of Environment Court for Lodging Documents:

Documents may be lodged with the Environment Court by lodging them with the Registrar

The Auckland address of the Environment Court is:

8th floor District Court Building
3 Kingston Street
Auckland

Its postal address is:

P O Box 7147, Wellesley Street, Auckland

And its telephone and fax numbers are:

Telephone: (09) 916 9091

Fax: (09) 916 9090