

# **WAIKATO DISTRICT COUNCIL**

## **Hearings of Submissions on the Proposed Waikato District Plan**

### **Report and Decisions of the Independent Hearings Panel**

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#### **Decision Report 11: Hazardous Substances and Contaminated Land**

**17 January 2022**

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##### **Commissioners**

Dr Phil Mitchell (Chair)

Mr Paul Cooney (Deputy Chair)

Councillor Jan Sedgwick

Mr Weo Maag

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## **Glossary of terms**

Name	Abbreviation
Waikato District Council	Council
Federated Farmers of New Zealand	FFNZ
Horticulture New Zealand	HortNZ
Proposed Waikato District Plan	PDP
Hazardous Substances and New Organisms Act 1996	HSNO
Health and Safety at Work Act 2015	HSWA
Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011	NESCS
Resource Legislation Amendment Act 2017	RLAA2017
Resource Management Act 1991	RMA
Environmental Protection Agency	EPA

## **1 Introduction**

- 1.1 The subject matter of Hearing 8A related to the hazardous substances and contaminated land provisions contained in the Proposed Waikato District Plan (PDP).
- 1.2 The objectives and policies relating to hazardous substances are contained in Chapter 10.1 of the PDP. The rules relating to the management of hazardous substances are contained in the relevant zone chapters. Appendix 5 contains an Activity Status Table which sets out the permitted activity maximum quantity thresholds for identified hazardous substances in the various zones.
- 1.3 The objective and policy relating to contaminated land matters are set out in Chapter 10.2 of the PDP. There are no rules pertaining to contaminated land in the PDP, as the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011 (NESCS) apply.

## **2 Hearings Arrangement and Evidence Presented**

- 2.1 Waikato District Council (Council) received a total of 159 submissions and 184 further submissions on the topic of hazardous substances and contaminated land.<sup>1</sup>
- 2.2 Hearing 8A was held on 28 January 2020 at Council's offices at Ngaruawahia. All of the relevant information pertaining to this hearing (i.e., section 42A report, legal submissions and evidence) is contained on Council's website.
- 2.3 We heard from the following parties on hazardous substances and contaminated land provisions contained in the PDP:

Submitter	Representative
Council	Katherine Overwater (author of section 42A report) Norbert Schaffoener, hazardous substances specialist
Horticulture New Zealand	Lynette Wharfe, Planner
Ports of Auckland Limited	Mark Arbuthnot, Planner
Federated Farmers of New Zealand	Hilary Walker, Policy Advisor

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<sup>1</sup> Section 42A report, Paragraphs 85 and 89, dated 2 December 2019.

BP Oil NZ Limited, Mobil Oil NZ Ltd and Z Energy Limited (the Oil Companies)	Rob Enright, Legal Counsel Georgina McPherson, Planner
Fire and Emergency New Zealand	Craig Sharman, Planner
Tuakau Proteins Limited	Nicola Williams, Planner
Genesis Energy Limited	Richard Matthews, Planner
Transpower NZ Ltd	Pauline Whitney, Planner
Kāinga Ora	Matthew Lindenberg, Planner
Livestock Improvement Corporation	Graeme Mathieson
LPG Association of New Zealand	Peter Gilbert, Executive Director
WEL Networks Limited	Karleen Broughton, Legal Counsel
New Zealand Steel Holdings Limited	Sarah McCarter, Planner
Waikato Regional Council (WRC)	Lisette Balsom, Acting Manager
Fellrock Development Limited / TTT Products Limited	Leigh Shaw, Planner
Synlait Milk Limited	Ewan Chapman and Jamie Robinson, Legal Counsel

### **3 Overview of the Evidence Submitted to the Panel**

#### Hazardous substances

- 3.1 The section 42A report was prepared by Ms Katherine Overwater. Ms Overwater relied on the specialist advice of Mr Norbert Schaffoener, a technical expert on hazardous substances, to inform her recommendations to us. In section 2.3 of the section 42A report, Ms Overwater provided an overview of the statutory framework applying to hazardous substances. In addition to matters that fall to be considered under the Resource Management Act 1991 (RMA), which we refer to later, she stated that:<sup>2</sup>

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<sup>2</sup> Ibid Paragraph 2.3.1.

Hazardous substances are largely regulated by the Hazardous Substances and New Organisms Act 1996 (HSNO Act) and the Health and Safety at Work regulations.

- 3.2 The Health and Safety at Work Act 2015 (HSWA) reform came into effect on 1 December 2017, changing the enforcement regime for hazardous substances significantly. The changes meant that workplace-specific safety regulation relating to hazardous substances, including regulation of the storage, use and safety of hazardous substances in workplace, moved from HSNO Act into the HSWA.
- 3.3 Ms Overwater stated that prior to the Resource Legislation Amendment Act 2017 (RLAA2017), Council had an explicit function to control the adverse effects of the storage, use, transportation and disposal of hazardous substances pursuant to section 31 of the RMA. Ms Overwater referred to the legal opinion provided by Council's legal counsel, stating that the intent of this change was to remove the perception that local authorities must always place controls on hazardous substances under the RMA, and to ensure that local authorities only place additional controls on hazardous substances if they are necessary to control effects under the RMA that are not covered by the HSNO Act or HSWA.<sup>3</sup>
- 3.4 Having considered all the submissions and evidence, Ms Overwater recommended retention of the framework for managing hazardous substances as contained in the notified version of the PDP, with reliance on the Activity Status Table in Appendix 5 to establish the activity status of a hazardous facility for each zone.<sup>4</sup> Ms Overwater remained of the view that the framework proposed for the management of hazardous substances in the PDP does not duplicate other legislation or regulations because they are specifically focused on ensuring that the activities involving large quantities of hazardous substances trigger the need for resource consent and appropriate assessment.<sup>5</sup>
- 3.5 Ms Overwater also recommended that the policy framework for the management of contaminated land as contained in the notified version of the PDP be retained. In response to the submissions, she recommended a number of amendments to refine the provisions aligning with the notified framework.
- 3.6 Ms Georgina McPherson presented planning evidence on behalf of the Oil Companies. She stated that the Oil Companies' interests in the Waikato District relate to the operation and management of individual service station and truck stop networks, as well as supply of commercial and aviation refuelling facilities.<sup>6</sup> Ms McPherson agreed with Ms Overwater's conclusion that notwithstanding the RLAA2017, there remains an ability for Council to manage hazardous substances in the PDP. However, Ms McPherson disagreed that the level of control contained in the PDP is necessary and/or appropriate, including the proposed controls on the storage of hazardous substances at service stations. Ms McPherson stated that RLAA2017 removed the explicit function

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<sup>3</sup> Ibid Paragraphs 40 and 41.

<sup>4</sup> Ibid Paragraph 750.

<sup>5</sup> Hearing Introduction Statement of Ms Overwater, Paragraph 11, dated 28 January 2020.

<sup>6</sup> Highlights Package of Ms McPherson, Paragraph 1.2, dated 28 January 2020.

of local authorities to manage hazardous substances. She then stated that this sent a clear message that local authorities should re-evaluate their current hazardous substances provisions to determine if they are necessary to deal with any potential “gap” not covered by other legislation. Ms McPherson concluded that the section 32 analysis, nor the section 42A report, provided a convincing “gap” analysis.<sup>7</sup>

- 3.7 Ms McPherson stated that the definition of “hazardous facility”, as proposed, is too broad and that the PDP provisions should only address hazardous facilities that generate significant risk or adverse effects beyond the boundary of the site. Ms McPherson stated that an appropriate definition should be developed on the basis of further risk-based analysis to identify the types of facilities that warrant controls under the RMA.<sup>8</sup>
- 3.8 Ms Lynette Wharfe presented planning evidence on behalf of Horticulture New Zealand (HortNZ). Ms Wharfe stated that horticulture growers use fertilisers, agrichemicals and fuels, and are aware of regulations regarding the use of these substances, and therefore, seek provisions in the PDP that are practical and do not duplicate other regulatory requirements.<sup>9</sup> HortNZ opposed the hazardous substances framework in the PDP on the basis that it introduces a level of regulation that is unnecessary given the existing regulations under the HSNO Act and HSWA. Ms Wharfe stated that HortNZ supported the use of codes or practices and standards as a tool to ensure that hazardous substances are appropriately managed<sup>10</sup>. She supported the approach contained in the Hastings District Plan, which she stated contained objectives, policies and rules for hazardous substances with a focus on areas of specific concern.<sup>11</sup>
- 3.9 Ms Jean Walker presented evidence on behalf of Federated Farmers of NZ (FFNZ). She stated that FFNZ sought the deletion of the hazardous substances provisions in the PDP. Ms Walker stated that the proposed provisions result in unnecessary overlap with other legislation, noting that HSNO Act already provides for a comprehensive and far reaching regulatory framework for preventing or managing adverse effects of hazardous substances. Ms Walker stated that the proposed consent pathway relies on an activity status threshold table which is complex, uncertain and open to interpretation.<sup>12</sup>
- 3.10 Mr Mark Arbuthnot presented planning evidence on behalf of Ports of Auckland Limited (POAL). He stated that a distinction is required between facilities (such as warehouses) that handle and use hazardous substances and hazardous substances that are stored untouched in closed containers in transit depots, as they are subject to different management regimes. POAL sought to exclude hazardous substances that are stored as cargo in transit from the definition of “hazardous facility” as it is subject to a high level of regulation by the Health and Safety at Work (Hazardous Substances) Regulations 2017. This was not supported by Ms Overwater, as she did not consider

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<sup>7</sup> Ibid Paragraph 2.3.

<sup>8</sup> Ibid Paragraph 3.2.

<sup>9</sup> Statement of Evidence of Ms Wharfe, Paragraph 3.2, dated 17 December 2019.

<sup>10</sup> Ibid Paragraph 3.3.

<sup>11</sup> Ibid Paragraph 13.7.

<sup>12</sup> Highlights Package of Ms Walker, Paragraphs 1 and 2, dated 21 January 2020.

it appropriate to single out specific operators as an exclusion from the definition.<sup>13</sup> Mr Arbuthnot further stated that the policies of the PDP relate to the manner in which “hazardous facilities” are to be managed, therefore, the rules that implement these policies must also be specific to “hazardous facilities”. Ms Overwater disagreed; she considered that the storage of hazardous substances is generally a “hazardous facility”, and that no change to the provisions was necessary in this regard.<sup>14</sup>

- 3.11 Mr Craig Sharman presented planning evidence on behalf of Fire and Emergency New Zealand (FENZ). Mr Sharman stated that FENZ opposed the hazardous substances rules across all the zones on the basis that whilst fire stations and associated firefighting activities involve the use and storage of hazardous substances at quantities that are considered minor, it is possible that the permitted provisions may not provide for FENZ to operate as required and therefore, could affect their ability to operate as effectively as needed. FENZ have therefore sought to exclude fire stations and associated fire service operations from the majority of the zone provisions.<sup>15</sup> FENZ also sought a number of clarifications regarding the hazardous substances provisions.
- 3.12 In respect to the proposed amendments to Policy 10.1.1 as recommended by Ms Overwater, Mr Sharman sought clarity around what a ‘sensitive environment’ includes and raised concerns about the potential of Policy 10.1.2 (location of new hazardous facilities) to restrict new fire stations seeking to locate within urban areas. Mr Sharman also requested clarity and amendments in relation to non-hazardous gas and Appendix 5 as well as to exclude fire stations and associated operations from the majority of the zone provisions.
- 3.13 Mr Peter Gilbert submitted information on behalf of LPG Association of New Zealand (LPG Association). Mr Gilbert stated that LPG Association objected to the use of the proposed activity table approach for the management of hazardous substances, as it is not only non-compliant with the requirements of the RMA, but more importantly: increases the cost for users of relatively small amounts of LPG (by requiring resource consent approval); duplicates requirements of existing legislation; and complicates the planning process for users of relatively small amounts of LPG.<sup>16</sup>
- 3.14 Ms Nicola Williams presented planning evidence on behalf of Tuakau Proteins Limited (TPL). Ms Williams stated TPL sought to delete the rules relating to hazardous substances in the PDP. Ms Williams stated that while it is important to include a specific chapter on hazardous substances that provides a policy framework to provide for and manage the use, storage, disposal and transportation of hazardous substances, while ensuring unacceptable risks are avoided, she did not consider it appropriate for the PDP to create unnecessary overlaps between itself and the HSNO Act. She stated that only significant hazardous facilities need to be managed through the rules in the PDP.<sup>17</sup>

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<sup>13</sup> Summary Statement of Mr Arbuthnot, Paragraphs 1.1 to 1.3, dated 22 January 2020.

<sup>14</sup> Ibid Paragraphs 2.3 and 2.3.

<sup>15</sup> Outline Summary Statement of Mr Sharman, Page 3 Paragraph 7, dated 28 January 2020.

<sup>16</sup> Supporting Information provided by Mr Gilbert.

<sup>17</sup> Statement of Evidence of Ms Williams, Paragraph 18, dated 17 December 2019.

- 3.15 Mr Richard Matthews presented planning evidence on behalf of Genesis Energy Limited (Genesis). He stated that Genesis sought amendments to the hazardous substances and contaminated land provisions in the PDP to ensure that overlaps between the PDP provisions and the requirements under other legislation do not occur, and if related requirements are proposed, they are only necessary for resource management purposes.
- 3.16 Mr Matthew Lindenberg presented planning evidence on behalf of Kāinga Ora. Kāinga Ora sought the deletion of the definition for the term “hazard” from the PDP, which was supported by Ms Overwater. Mr Lindberg considered that the term can apply to a range of matters that are not included in the proposed definition and there are definitions already provided for such as “hazardous facility”, “hazardous substance” and “hazardous waste”. Kāinga Ora also sought to amend the definition of the term “use” to “hazardous use”, as the definition is clear that it is specific to the use of hazardous substances. Ms Overwater did not support the amendment to the term “use” as she considered the definition to be clear that it relates to the “use” of hazardous substances.
- 3.17 Mr Graeme Mathieson presented a letter on behalf Livestock Improvement Corporation (LIC). LIC sought that the PDP continue with the same approach as the Operative District Plan with regards to permitted thresholds for hazardous substances within an “Agriculture Research Centre Campus”. Ms Overwater recommended that LIC’s submission be accepted.

#### Contaminated Land

- 3.18 Ms Karleen Broughton provided evidence on behalf of WEL Networks Limited and expressed support for Ms Overwater’s recommended amendments to Objective 10.2.1 and Policy 10.2.2.
- 3.19 On behalf of the Oil Companies, Ms McPherson supported reliance on the NESCS and expressed support for Objective 10.2.1 subject to amendments to clarify the intent of the term ‘sustainably managed’ and remove the reference to ‘safety’. She expressed support for the intent of Policy 10.2 subject to amendments to focus on the consideration of risk associated with contaminated land rather than compliance with specific thresholds, consistent with the approach taken in the NESCS, which relies on risk-based guidelines and suitably qualified and experienced practitioners.
- 3.20 Ms Balsom provided evidence on behalf of the Waikato Regional Council (WRC) and supported Ms Overwater’s recommendations with regards to:
- (a) The inclusion of “sustainably” before “managed” in Objective 10.2.1(a);
  - (b) Retention of Policy 10.2.2(b); and
  - (c) Rewording of Policy 10.2.2(d).
- 3.21 On behalf of FFNZ, Ms Walker supported Ms Overwater’s recommended amendments to Policy 10.2.2 but considered that the policy should more appropriately relate to the risk from contaminants; not whether or not contaminants are at acceptable levels. Ms McPherson on behalf of the Oil Companies and Ms Wharfe on behalf of Horticulture New Zealand shared this view.

## 4 Panel's Decision and Reasons

### Hazardous Substances

- 4.1 During the course of the hearing, it became apparent to us that there was a fundamental difference in approach, analysis and opinions between Council's specialists (being Ms Overwater and Mr Schaffoener) and the submitters as to how to manage hazardous substances in the PDP. While all parties generally agreed that the relevant legislation for consideration for this hearing is the HSNO Act, HSWA and RMA, the first matter of contention was whether (and to what extent) Council has a role in the management of hazardous substances under the RMA in light of the amendments to section 31 of the RMA (pursuant to RLAA2017). The second matter of contention was what "additional" provisions are required in the PDP, noting the role of other legislation in managing this particular resource management issue.
- 4.2 We considered the legal opinion provided by Tompkins Wake, Council's legal counsel, on the matter of the role of the PDP in managing hazardous substances in light of the RLAA2017. We also considered the legal submissions of Mr Enright (on behalf of the Oil Companies), and Mr Chapman and Ms Robinson (on behalf of Synlait Milk Limited) on this matter.
- 4.3 We accept the conclusion of Council's legal opinion that:
- "While the explicit function of local authorities to control the storage, use, disposal, or transportation of hazardous substances was removed from sections 30 and 31 RMA in 2017, case law confirms it is still appropriate for district plans to include provisions to manage land use effects relating to hazardous substances/hazardous facilities. HSNO, HSW legislation and the RMA all play a role in managing risk to human life and health from hazardous facilities. The regimes have similar yet distinct functions which can work together to minimise the risk to those within the hazardous facility and wider environment."*<sup>18</sup>
- 4.4 The legal opinion also referred to the Ministry for the Environment Resource Legislation Amendments 2017 Fact Sheet 2 (the Fact Sheet). The Fact Sheet states that the intent of the legislative changes is to remove the perception that local authorities must always place controls on hazardous substances under the RMA, and to ensure that local authorities only place additional controls on hazardous substances if they are necessary to control effects under the RMA that are not covered by the HSNO Act or HSWA. The Fact Sheet provides that in most cases HSNO and HSWA controls will be adequate to avoid, remedy or mitigate adverse environmental effects (including potential effects) of hazardous substances.<sup>19</sup>
- 4.5 In light of the above policy directives, we agree with Mr Enright, that the starting point for the PDP, should be less, not more, regulation of hazardous substances. We also

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<sup>18</sup> Legal opinion of Tompkins Wake, Paragraph 5, dated 22 November 2019.

<sup>19</sup> Ibid Paragraph 15.

- agree with Mr Enright (and the submitters) that duplication of provisions in the PDP should be avoided, and consent triggers should be reserved for regulatory gaps.
- 4.6 Council's legal opinion stated that PDP must give effect to Policy 4.2.9 (hazardous substances) of the Waikato Regional Policy Statement (RPS). In this regard, we accept Mr Enright's submission that the RPS became operative prior to the RLAA2017 and may require amendment to reflect the functions which were repealed from sections 30 and 31 of the RMA. We also accept Mr Enright's submission that Policy 4.2.9 is not directive as to the content for the PDP; it simply states that local authorities "shall be responsible" for developing provisions to control hazardous substances for "all other land".<sup>20</sup>
- 4.7 We acknowledge the concerns raised by the submitters that the section 42A report and Mr Schaffoener's report does not provide sufficient information on regulatory gaps to support the recommended framework for the management of hazardous substances in the PDP. At the hearing we expressed the preliminary view that the PDP should not duplicate matters regulated under other legislation unless it was clearly necessary for resource management purposes. We formed this preliminary view based on the comprehensive evidence and information provided by the submitters. During the hearing, we expressly asked all submitters and Council staff for their opinions on our preliminary view. Our preliminary view was accepted by all present in the hearing.
- 4.8 We invited the submitters that had filed evidence on the hazardous substances provisions to liaise with Council staff to ascertain if there was a consensus position on what matters relating to the management of hazardous substances should be included in the PDP, following the completion of further work on the "gap" analysis.
- 4.9 Having considered the information provided by the parties, which we record was not of material assistance to us, we issued a minute and directions on 25 June 2020 setting out the following:
- a. The provisions proposed by Council staff, as set out in their memorandum of 15 May 2020, are unduly onerous, in that they unnecessarily duplicate matters already regulated under other statutes, and in particular the HSNO Act;
  - b. The provisions proposed by the Oil Companies, as set out in the memorandum of 29 May 2020, are generally more appropriate than those proposed by Council staff, in that they limit duplication with HSNO and other statutes, but are not sufficiently rigorous in a number of respects; and
  - c. That the hazardous substances provisions of the Operative Hastings District Plan are an appropriate starting point, in that they seek to avoid duplication between district plan provisions and the HSNO Act and do so in a way that the Panel considers is sufficiently robust.
- 4.10 Our minute on 25 June 2020 included an initial draft set of provisions to manage hazardous substances, based largely on the Hastings District Plan and which we invited the parties to comment on. The provisions focused on "Major Hazard Facilities" which were defined as particular activities (e.g., timber treatment plants) or volumes

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<sup>20</sup> Legal Submissions of Rob Enright, Paragraph 24, dated 22 January 2020.

for the storage of fuel. The storage, handling or use of hazardous substances meeting the definition of a Major Hazard Facility were classified as:

- a. Non-complying activity in the Residential, Country Living, Village or Rangitahi Peninsula Zones; and
  - b. Discretionary activity in all other zones;
- 4.11 Any new storage or use of hazardous substances with explosive or flammable intrinsic properties within 12 metres of the centre line of a National Grid Transmission Line was a non-complying activity. The storage, handling or use of hazardous substances that do not meet the definition of Major Hazard Facility is a permitted activity.
- 4.12 A number of the parties provided feedback on our revised draft provisions, including the following:
- a. Fire and Emergency New Zealand;
  - b. Genesis Energy;
  - c. The Oil Companies;
  - d. Ports of Auckland;
  - e. LPG Association; and
  - f. Ms Overwater.
- 4.13 Having considered the detailed evidence from submitters and the feedback on our draft revised set of provisions for managing hazardous substances, we consider that our draft is the more appropriate approach (with minor amendments as we discuss below). We consider that the revised provisions effectively manage hazardous substances in a clear and concise manner without unduly constraining normal activities such as farming.
- 4.14 We agree with the Oil Companies and POAL that the term “Significant Hazardous Facility” will avoid potential confusion with the definition of major hazard facility used in the Health and Safety at Work (Major Hazard Facilities) Regulations 2016. We do not agree with Ms Overwater that the term “manufacture” should be deleted from Objective 10.1.1 as is it not just the subsequent use, storage and disposal of hazardous substances that presents risk. We agree with the Oil Companies and POAL who requested the deletion of the term “transportation”. We note that the definition of “major hazard facility” explicitly excludes the transport of hazardous substances and consider that the PDP has limited ability to control the transport of hazardous substances in any event.
- 4.15 We have amended the volumes of petrol and diesel in response to the comments from the Oil Companies and POAL and focused only on above ground storage to avoid duplication with other documents / processes. We agree with Mr Lindenberg that the defined term “use” should instead be “use of hazardous substances” to provide additional clarity.

- 4.16 Having made these amendments, we consider that the following two objectives are the most appropriate way to achieve the purpose of the RMA:

10.1.1 Objective

To protect the community and natural environment from the adverse effects associated with the manufacture, use and storage of hazardous substances.

10.1.2 Objective

To enable activities to utilise hazardous substances where necessary for their operations, in appropriate locations.

- 4.17 We consider that these objectives will protect the health and safety of people and the community. The objectives strike a balance between protecting the natural and physical resources, while providing for the economic and social well-being that comes from using hazardous substances. The objectives will assist in achieving Section 5(2)(c) of the RMA, particularly as Objective 10.1.1 seeks to protect the community and natural environment from the adverse effects arising from hazardous substances.
- 4.18 We consider that the policies and rules are the most appropriate way to achieve the two new objectives, having considered all the options open to us. We are satisfied that the revised provisions avoid duplication of other hazardous substances legislation and regulation, and appropriately manages the effects of the use, storage or disposal of hazardous substances, where those effects are not appropriately controlled by existing legislation and regulations. We consider this approach to be the most efficient and effective way to achieve the objectives.

Contaminated land

- 4.19 Turning to contaminated land, we have inserted introductory text at the start of the chapter to explain the relationship with the NESCS. We agree with FFNZ's suggestion to include "from unacceptable risk" at the end of Objective 10.2.1 as this makes it clear what human health and the environment is being protected from. We do not see the need to include the word "sustainably" as sought by WRC, and instead have amended the objective to focus on preventing the risks to human health and safety and the environment in the first instance, and in any event reduce the risk to acceptable levels. We agree with the Waikato District Health Board who sought to include the words "and safety" in Objective 10.2.1. We agree that this addition better reflects the purpose of the RMA. With regards to the proposal by Waikato Tainui to require a bond to cover liability and ensure that contaminated land is remediated following use, we do not consider it necessary to include that in the objectives or policies for contaminated land.
- 4.20 However, we are concerned with any wording that requires risk to be prevented, because that is not always achievable in practice. Instead, we have reworded the objective to read as follows:

### 10.2.1 Objective – Contaminated land

- (a) The subdivision, use and development of contaminated land is managed to prevent, as far as possible, and, in any event reduce to acceptable levels, the risks to human health and safety and the environment.

4.21 We have made a number of amendments to Policy 10.2.2 in response to submissions as follows:

- a. Recognising that remediation is a form of management of contaminated land in clause (a);
- b. Given the NESCS covers preliminary site investigations, we agree with the amendments sought by WRC to refer to “actually or potentially” contaminated land. For similar reasons we have recognised preliminary site investigations as a management approach;
- c. Recognition of the potential adverse effects on human health “and safety” to better reflect section 5 of the RMA;
- d. We agree with WRC that the policy would benefit from an additional clause requiring plans to be prepared in accordance with the Ministry for the Environment’s Contaminated Land Management Guidelines; and
- e. Refined the wording in places to improve clarity.

4.22 We agree with Ms Overwater that the recommended amendments to Policy 10.2.2 are more aligned with the NESCS and provide an effective and efficient policy framework that supports the provisions contained within the NES. We consider that the amendments will result in Policy 10.2.2 achieving Objective 10.1.1 in a more appropriate way.

## 5 Conclusion

5.1 Having considered the submissions, section 42A reports and evidence presented to us, we are satisfied that the amended provisions for Chapter 10 relating to hazardous substances and contaminated land (as included in **Attachment 1** to this Decision) will provide a more suitable framework than the notified provisions, and more appropriately achieve the purpose of the RMA and give effect to the RPS.

**For the Hearings Panel**



**Dr Phil Mitchell, Chair**

**Dated: 17 January 2022**

# Attachment I: Amendments to Chapter 10: Hazardous Substances and Contaminated Land

## 10.1 Hazardous Substances

The use of hazardous substances in New Zealand is primarily managed by the Hazardous Substances and New Organisms Act 1996 (HSNO Act), the Health and Safety at Work Act 2015 (HSW Act) and relevant regulations.

Because the district plan seeks to avoid duplication of requirements and obligations that arise under other legislation and regulations, the provisions of this chapter are designed to manage the effects of use, storage, or disposal of hazardous substances, only to the extent that those effects are not within the ambit of existing legislation and regulations.

### **10.1.1 Objective**

To protect the community and natural environment from the adverse effects associated with the manufacture, use and storage of hazardous substances.

### **10.1.2 Objective**

To enable activities to utilise hazardous substances where necessary for their operations, in appropriate locations.

### **10.1.3 Policy**

Ensure that activities are able to utilise hazardous substances in compliance with relevant regulation as necessary to their operation, without being compromised by 'reverse sensitivity' (that is, by residential or other sensitive activities moving closer and seeking higher amenity levels, including reduced risks from hazardous substances).

### **10.1.4 Policy**

Ensure that significant hazardous facilities are appropriately sited and managed in order to reduce risks to the environment and community to acceptable levels.

### **10.1.5 Policy**

Avoid any unnecessary duplication of regulation between the Hazardous Substances and New Organisms Act 1996, the Health and Safety at Work Act 2015 and relevant regulations, and the District Plan.

### **~~10.1.1 Objective – Effects of hazardous substances~~**

~~(a) Residual risk associated with the storage, use, or disposal of hazardous substances is managed to ensure that the effects on people, property and the environment are acceptable, while recognising the benefits of facilities using hazardous substances.~~

### **~~10.1.2 Policy – Location of new hazardous facilities~~**

~~(a) New hazardous facilities minimise the risk to the environment (including people and property) to acceptable levels by:~~

- ~~(i) Siting new hazardous facilities in appropriate locations that are separated from incompatible activities and environment;~~
- ~~(ii) Avoid locating near to sensitive land use activities and infrastructure~~
- ~~(iii) Designing, constructing and operating hazardous facilities in a manner that ensures the adverse effects of the operation or an accidental event involving hazardous substances can be contained within the site; and~~
- ~~(iv) Disposing hazardous wastes to authorised disposal or treatment facilities that have appropriate management systems in place.~~

### **~~10.1.3 Policy – Residual risks of hazardous substances~~**

- ~~(a) Facilities for the use, storage or disposal of hazardous substances shall identify and assess potential adverse effects (including cumulative risks and potential effects of identified natural hazards) to prevent unacceptable levels of risk to human health, safety, property and the natural environment.~~

### **~~10.1.4 Policy – Reverse sensitivity effects~~**

- ~~(a) Separate sensitive land use activities from lawfully established hazardous facilities;~~  
~~(b) Separate new hazardous facilities from existing sensitive land use activities; and~~  
~~(c) Avoid the storage, processing or disposal of hazardous waste in sensitive environments.~~

## **10.2 Contaminated Land**

Land can become contaminated when hazardous substances are used, stored or disposed of inappropriately.

This plan identifies potentially contaminating activities and industries by reference to the Ministry for the Environment's Hazardous Activities and Industries List (HAIL) and does not identify specific sites within the district.

### **10.2.1 Objective – Contaminated land**

- (a) The subdivision, use and development of contaminated land is managed to protect prevent, as far as possible, and, in any event reduce to acceptable levels, the risks to human health and safety and the environment.

### **10.2.2 Policy – Managing the use of contaminated land**

- (a) Contaminated land is managed (which may include remediation) ~~or remediated~~ to ensure that contaminants are at a level acceptable for the proposed land use.
- (b) Disposal of contaminated soil ~~must be~~ is carried out in a manner that avoids further adverse effects on human health and safety or on the environment.
- (c) Use or development of contaminated land ~~must~~ does not damage or destroy any contaminant containment works, unless comparable or better containment is provided, or monitoring demonstrates that the containment is no longer required.
- (d) Ensure that contaminated land management approaches associated with the use, subdivision and development of actual or potentially contaminated land management approaches includes, to the extent necessary where appropriate:
- (i) ~~undertaking a site investigations being undertaken of any land identified as actually or potentially contaminated, prior to any new subdivision or change of use of land~~ use that could result in an increase in any adverse effects of land contamination;
  - (ii) remedial action plans;
  - (iii) site validation reports;
  - and
  - (iv) site management plans as appropriate for identifying, monitoring and managing contaminated land.
- (e) All site investigation reports, remedial action plans, site validation reports and ongoing site management plans are prepared in accordance with the Ministry for the Environment's Contaminated Land Management Guidelines #1 and #5, and are provided to both Waikato District Council and Waikato Regional Council for their records.

## 10.3 Rules for Hazardous Substances

### Rule 10.3.1 – Hazardous Substances in All Zones

<u>RULE</u>	<u>LAND USE ACTIVITIES</u>
<u>PI</u>	The storage, handling or use of hazardous substances except where Rule 10.3.1 DI, or Rule 10.3.1 NC1, or 10.3.1 NC2 apply.
<u>DI</u>	The storage, handling or use of hazardous substances in a Significant Hazard Facility.
<u>NC1</u>	Significant hazard facility in the General Residential, Medium Density Residential, Large Lot Residential, Rural Lifestyle, Settlement or Rangitahi Peninsula Zones.
<u>NC2</u>	Any new storage or use of hazardous substances with explosive or flammable intrinsic properties within 12m of the centre line of a National Grid Transmission Line.

### 10.3.2 Assessment criteria for discretionary activities

For discretionary activities, the following criteria identify those matters which Council may assess the activity against. However, for discretionary activities Council's assessment is not restricted to these matters:

#### 1. Risk assessment comprising:

- (a) The probability and potential consequences of an accident leading to the release or loss of control of hazardous substances.
- (b) Potential risks and effects on people and neighbouring activities, with an emphasis on sensitive activities such as residential activities, educational facilities and community facilities.
- (c) Potential risks and effects on natural ecosystems and the life supporting capacity of land and water, waterbodies and sources of potable water.
- (d) Potential risks and effects on sites of significance to tangata whenua, sites of historical or archaeological significance and Outstanding Natural Features and Landscapes.
- (e) The potential for natural hazards to impact on the operation of the hazardous facility.
- (f) The potential for cumulative adverse effects of hazardous substances.

#### 2. Alternative locations:

An assessment of alternative locations, having particular regard to locations both within the site and outside the site.

#### 3. Records for existing activity:

The record of compliance and acceptable risk management of any existing activity where expansion of an existing activity is proposed.

## Appendix 5: Hazardous Substances

## Amendments to Chapter 13: Definitions

### Definitions – relating to hazardous substances

<u>Hazardous substance</u>	Has the same meaning as in section 2 of the RMA.
<u>Significant hazard facility</u>	<p><u>Significant Hazard Facility:</u></p> <p><u>Means any facility which involves one or more of the following activities:</u></p> <ul style="list-style-type: none"> <li>• <u>Manufacturing and associated storage of hazardous substances (including industries manufacturing agrochemicals, fertilisers, acids/alkalis or paints)</u></li> <li>• <u>Oil and gas exploration and extraction facilities</u></li> <li>• <u>Purpose built bulk storage facilities for the storage of hazardous substances (other than petrol, diesel or LPG) for wholesale or restricted commercial supply</u></li> <li>• <u>The aboveground storage/use of more than 50,000L of petrol</u></li> <li>• <u>The aboveground storage/use of more than 100,000L of diesel</u></li> <li>• <u>The storage/use of more than 6 tonnes of LPG</u></li> <li>• <u>Galvanising plants</u></li> <li>• <u>Electroplating and metal treatment facilities</u></li> <li>• <u>Tanneries</u></li> <li>• <u>Timber treatment</u></li> <li>• <u>Freezing works and rendering plants</u></li> <li>• <u>Wastewater treatment plants</u></li> <li>• <u>Metal smelting and refining (including battery refining or recycling)</u></li> <li>• <u>Milk treatment plants</u></li> <li>• <u>Fibreglass manufacturing</u></li> <li>• <u>Polymer foam manufacturing</u></li> <li>• <u>Asphalt/bitumen manufacture or storage</u></li> <li>• <u>Landfills</u></li> </ul> <p><u>For the avoidance of doubt, the following activities are not significant hazard facilities:</u></p> <ul style="list-style-type: none"> <li>• <u>The incidental use and storage of hazardous substances in minimal domestic-scale quantities</u></li> <li>• <u>Retail outlets for hazardous substances intended for domestic usage (e.g., supermarkets, hardware stores and pharmacies)</u></li> <li>• <u>The incidental storage and use of agrichemicals, fertilisers and fuel for land based primary production activities.</u></li> <li>• <u>Pipelines used for the transfer of hazardous substances such gas, oil, trade waste and sewage</u></li> <li>• <u>Fuel in motor vehicles, boats, airplanes and small engines</u></li> </ul>

	<ul style="list-style-type: none"> <li>• <u>Military training activities</u></li> <li>• <u>The transport of hazardous substances (e.g., in trucks or trains)</u></li> </ul>
<u>Use of hazardous substances</u>	<p>Means <del>with respect to a hazardous substance</del>, the manufacturing, processing or handling of a hazardous substance for a particular activity without necessarily changing the physical state or chemical structure of the hazardous substance involved. <del>This</del> <u>It</u> includes mixing, blending and packaging operations, or the use of a hazardous substance as a cooling or heating medium. It <del>does not include</del> <u>excludes</u> the filling or drawing of a hazardous substance from bulk storage tanks unless the processing is permanently connected to the bulk storage, and <del>does not include</del> <u>excludes</u> loading out and dispensing of petroleum products.</p>