IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Hearing Submissions and Further Submissions on the Proposed Waikato District Plan (Stage 1)

AND

IN THE MATTER of Hearing 8A Topic: Hazardous Substances and Contaminated Land (Chapter 10)

MEMORANDUM BY COUNCIL TO HEARING COMMISSIONERS IN RESPONSE TO DIRECTIONS OF 22 APRIL 2020 – COUNCIL'S RECOMMENDED PLAN PROVISIONS FOR CHAPTER 10

29 May 2020

May it please the Hearing Commissioners:

1. The Hearings Panel issued directions on 22nd April 2020 outlining a process for addressing hazardous substances provisions in the Proposed District Plan ("the Directions"). In paragraph 6(e)(ii) of the Directions, the Panel directed the section 42A author for Hearing Topic 8A to prepare a memorandum setting out the details of the proposed plan provisions considered to be appropriate, including reasons in support. The deadline for this response is Friday 29 May 2020.

Overview

2. My full name is Katherine Elizabeth Overwater. I am employed by Waikato District Council as a Senior Policy Planner and am the writer of the original s42A report for Hearing 8A Hazardous Substances and Contaminated Land. My qualifications and experience are set out in the introduction of the s42A report together with my statement to comply with the Code of Conduct for Expert Witnesses in the Environment Court Practice Note 2014.

3. My response is explained in this memorandum and amended track change plan provisions for the Hazardous Substances and Contaminated Land chapter (Chapter 10) are included in **Attachment 1.** A clean version is included in **Attachment 2**.

4. As the Panel will be aware from previous memoranda filed since the hearing was adjourned, additional technical analysis has been undertaken by Council's technical expert, Mr Schaffoener, to identify the existence of any gaps between controls covered by the Health and Safety at Work (Hazardous Substances) Regulations 2017 and Hazardous Substances (Hazardous Property Controls) Notice 2017 on the one hand and, the Resource Management Act 1991 (RMA) on the other hand. The full technical gap analysis report (which constitutes in part my reasons for the approach I am recommending) has been provided as **Attachment 3**, with a summary table included as **Attachment 4.** A brief summary of the analysis is provided below.

5. By way of background to the gap analysis it is my understanding that Waikato District Council is one of the first Councils in New Zealand to have completed such a detailed analysis to identify any gaps, inconsistencies and duplication between the hazardous substances regulations and the RMA (although I am aware that Dunedin City Council is currently undertaking a similar task). Before engaging Mr Schaffoener to undertake this task, I requested information from the Ministry for the Environment (MFE) to understand if they could assist Council with this task and outlined the benefit this information would have in informing other Council's undertaking plan reviews. The short response from MFE was that an analysis of this level of detail was not undertaken in 2017 at the time the explicit section 30 and 31 functions of territorial and regional authorities were removed from the RMA.

6. The gap analysis undertaken by Mr Schaffoener has identified gaps between the Hazardous Substances and New Organisms Act 1996 (HSNO), the Health and Safety at Work Act 2015 (HSW) and subsequent regulations and notices. Having reviewed the technical gap analysis report, it is my view that the notified proposed plan provisions do not duplicate the requirements of the relevant HSNO and HSW legislation. However, despite gaps having been identified in the technical analysis, this did not necessarily mean that provisions were needed for a resource management purpose in respect of all of the gaps identified. Based on this approach, I have now reviewed the plan

provisions presented at the hearing from a clean slate and have considered these in light of the technical gap analysis which now underpins my reasoning for the revised provisions.

7. In regards to the proposed rules which aim to address the identified gaps, I have taken a broad approach rather than specifically addressing each individual gap found in each part, section or clause of the regulations. In some of the rules I have referred to specific activities (i.e. the storage of fuel for retail sale, radioactive materials), however as a general approach I have still provided for activities to be triggered by the quantity or volume of substances being used, stored, transported or disposed of through the use of the Activity Status Table (AST). This is because the gaps could refer to a wide range of hazardous facilities, depending on the hazardous substance and the specific quantities or volumes involved. I have also used matters of control or discretion to ensure the gaps which have been identified in the technical analysis are covered.

8. To assist the Panel with the reasons for my revised amendments, I have provided reasons for the proposed provisions which relied on 4 options to ensure that my approach was still the best way of achieving the relevant objectives of the Proposed District Plan. While reviewing these options I have considered the approach taken to hazardous substances in the Hastings, Christchurch, Dunedin and New Plymouth District Plans. I have provided some brief comments on those approaches as a comparison to the recommended amendments I have proposed.

RMA Matters to be addressed through District Plan Provisions

9. As identified in my memorandum dated 24 April 2020, there are eight matters that are considered to be important in terms of the management of hazardous substances in the landuse planning context, which are not duplicated in other legislation, set out as follows:

   a. Sensitivity of land use activities within the area of risk of a hazardous facility.

   b. Sensitivity of a natural environment/eco-system within the area of risk of a hazardous facility.

   c. Carrying out a facility and location-specific risk assessment.

   d. Any potential natural hazards relevant to the location of the hazardous facility.

   e. Cumulative effects of hazardous facilities within the area of influence of each other (for example in relation to the above ground storage of fuel).

   f. Control of the use and storage of hazardous substances outside the scope of HSNO, such as radioactive substances or environmentally harmful substances other than in relation to defined eco-toxicity (such as high biochemical oxygen demand).

   g. Additional secondary containment, additional separation distances (or other appropriate risk management measures), site-specific emergency management, communication and information sharing issues where site-specific characteristics in the land use planning context (including surrounding land uses and natural environments) are not taken into account under other statutes. An example of this would be the storage of fuel for retail sale both above and below ground.

h. Consideration of the enforcement penalties if a rule in the District Plan is breached (i.e. failure to apply for a resource consent where required to), given the maximum penalties which apply under HSW compared with the RMA. This is a matter for Council to consider with regard to effectiveness of controls.

10. My recommended proposed plan provisions seek to address land use controls in relation to these matters only. My reasons provided below explain the connection between the technical gap analysis and these matters.

11. I also note that the revised provisions included as **Attachment 1 and 2** address changes suggested at the hearing by the Panel in respect to the objectives and policies for contaminated land.

Identification of the gaps in regulations - Highlights of the technical gap analysis

12. At the hearing, the Hearings Panel directed Council to undertake a technical gap analysis of the applicable legislation to determine any gaps between this legislation and the RMA. Council engaged Mr Schaffoener from Resources Consulting to undertake this task and instructed him to focus specifically on the Health and Safety at Work (Hazardous Substances) Regulations 2017 and Hazardous Substances (Hazardous Property Controls) Notice 2017. As instructed, the analysis was robust, but not a "line-by-line" analysis.

13. I acknowledge the Hearing's Panel's directions of 22 April did not specifically refer to or seek a copy of the gap analysis report, however it has been included for two key reasons. First, it has assisted me to identify what provisions need to be included in the Proposed District Plan. Secondly, many submitters still oppose regulation of hazardous substances in the Proposed District Plan on the basis that such provisions duplicate existing controls imposed outside the RMA and that the HSNO, HSW and other relevant regulations provide a comprehensive framework for managing risks from the use of hazardous substances. However, the submitters have not provided a gap analysis of their own to demonstrate the duplication. The full technical review has been included as **Attachment 3** to this memorandum, with a summary table included as **Attachment 4**. A brief summary of the technical analysis is as follows:

Health and Safety at Work (Hazardous Substances) Regulations 2017

Part, section, clause	Gaps identified in technical review
Definitions	Gaps have been identified in terms of scope and applicability or relevant defined terms, particularly in respect of the terms: • area of high intensity land use • area of low intensity land use • hazardous substance location • protected place • vulnerable facility
Part 3 – General duties relating to risk management	A gap has been identified in respect to this part of the regulation which focuses on 'internal' risk and the risk to workers (refer to s3.2(1) and s3.2(2)), which may need to be covered by District Plan provisions, particularly in respect to cumulative risk outside the workplace and risk of exposure to the public.
Part 5 – Emergency Management	Part 5 includes gaps in relation to the control of off-site effects, particularly in proximity to sensitive environments and cumulative operations.
Part 9 – Class 1 Substances (explosives)	Class 1 substances may require specific provisions in the District Plan in respect to off-site effects and risk management depending on the hazardous facility and quantity being used. Different quantities of Class 1 substances appear to require different provisions. It is also noted that consenting conditions may need to be varied depending on the circumstances of the activity using or storing Class 1 substances.
Part 10 – Class 2, 3 and 4 substances	Class 2, 3 and 4 substances may need District Plan provisions, particularly if secondary containment is less than specified in the regulations. Further the regulations may not be sufficient to address landuse matters, such as location and as such requirements may need to be different from what is included in the regulations to address landuse matters.
Part 11 – Controls relating to adverse effects of unintended ignition of Class 2 and 3.1 substances	There appears to be a big difference between what the regulations require in terms of appropriate separation distances to adjoining or adjacent sensitive land uses.
Part 12 – Class 5 substances	Gaps have been identified in respect to matters such as assessing location-specific risks, controlled adverse effects on sensitive land uses and environments (including by separation), additional secondary containment and cumulative effects with other facilities.
Part 13 – Class 6 and 8 substances	There are gaps in regards to Class 6 and 8 substances which may require landuse provisions in the District Plan in respect to the matters such as assessing location-specific risks, controlling adverse effects on sensitive land uses and environments (including separation), additional secondary containment and cumulative effects with other facilities.
Part 17 – Stationary container systems	The gaps in regards to stationary container systems may require landuse provisions in the District Plan in respect to matters such as assessing location-specific risks, controlling adverse effects on sensitive land uses and environments (including by separation), additional secondary containment and cumulative effects with other facilities.

Schedule 5	Schedule 5 refers to Part 5 (Emergency Management) and may require landuse provisions in response to matters such as emergency response or emergency management.
Schedule 9	Schedule 9 includes minimum separation distances for Classes 3.2 and Class 4 substances and threshold quantities for secondary containment. The gaps identified in Parts 10 and 17 apply as above.
Schedule 10	Schedule 10 includes threshold quantities for secondary containment, which relate largely to Part 12 (Class 5 substances) with some applying to Part 17 (stationary containers). There are gaps in respect to separation distances for Class 5.1 substances required. Further the analysis in regards to Parts 12 and 17 apply, which includes those gaps identified above.
Schedule 11	Schedule 11 includes minimum separation distances for Class 5.2 substances and threshold quantities for secondary containment, which relate largely to Part 12 (Class 5 substances) with some applying to Part 17 (stationary containers).
Schedule 12	Schedule 12 contains 10 tables, 8 of which specify minimum separation distances for Classes 2.1.1 and 3.1. In reference to Part 11 and 17, District Plan provisions may be required to cover gaps relating to minimum separation distances for Classes 2.1.1 and 3.1. Examples of these gaps are included in the technical analysis in relation to Parts 11 and 17.
Schedule 16	Schedule 16 refers to section 13.30 in Part 13 (Class 6 and 8 substances) and section 17.99 in Part 17 (stationary containers). Gaps that have been identified in Part 13 and 17 may be required to be covered in District Plan provisions in respect to secondary containment.
Schedule 17	Schedule 17 contains 4 tables which specify minimum separation distances between hazardous substance locations or above ground stationary tanks and protected or public places. The gaps referred to in Part 13 and 17 may require District Plan provisions in respect to separation distances.

Hazardous Substances (Hazardous Property Controls) Notice 2017

Part, section, clause	Gaps identified in technical review
Part 3 Requirements for hazardous substances in a place other than a workplace to which the HSW Act applies	There are gaps in Subpart A of Part 3 which may need to be addressed in the District Plan where planning requirements can and ought to be applied for hazardous substances below the thresholds in Schedule 3 of the Notice, such as assessing location-specific risks, cumulative effects with other substances – particularly if the storage of such large quantities is proposed within a sensitive zone (such as residential, being likely as it is not a workplace matter).
Part 4: Class 9 substances	There are gaps in Subpart A of Part 4 which may need to be addressed in the District Plan where planning requirements can and ought to be applied for Class 9 hazardous substances, such as assessing location-specific risks, providing additional secondary containment and other emergency management measures.
Schedule 2, 3, 6, 7	District Plan provisions may be required to cover gaps relating to the identified gaps as identified in the corresponding parts of the Hazardous Substances notice.

14. In my opinion, the technical analysis shows that there are a number of gaps that exist between the HSNO and HSW regulations and therefore may be required to be covered by District Plan provisions in a landuse context.

15. Based on these identified gaps, I have re-visited the objectives and policies which are discussed further at paragraph 24. I am still of the view that the objectives and policies are needed to support the proposed rules with respect to managing the use, storage, transport and disposal of hazardous substances. This is because the objectives and policies seek to manage the control of hazardous substances in a landuse context, which are not addressed in HSNO or HSW legislation and without them, there would be no linkages between any rules required to cover these gaps, with the higher level issues that are presented by the gaps in these other legislative requirements.

16. In order to ensure that the objective and policy framework is being achieved, I have looked at 4 options which have assisted me as I have considered the best approach to cover the gaps identified in the technical gap analysis.

Broad Approach

17. It is my view that the Proposed District Plan needs to manage and control hazardous substances within the Waikato District. My reasons are that there are gaps between the HSNO and HSW legislation that need to be addressed from a landuse planning context. I consider that a hybrid approach is the most appropriate where large hazardous facilities are assessed by using quantity thresholds according to zone and the provisions are more restrictive in proximity to sensitive environments (based on zone) and sensitive landuse activities.

18. Using a hybrid approach to manage hazardous substances in my opinion achieves the proposed objective and policies. Further, it provides the least financial and environmental risks to local communities, eco-systems and the Council; has been subject to public scrutiny in the Waikato District and is defensible; would not represent an ad-hoc change; provides the most effects-based approach, rather than an activities-based approach, representing the most appropriate option in relation to the purpose of the RMA; provides flexibility to regulate not only large hazardous facilities, but also hazardous facilities that require specific management, particularly in relation to reverse sensitivity effects on sensitive environments or sensitive landuse activities.

19. Using a hybrid approach, the plan provisions can focus on the off-site effects of hazardous facilities and any cumulative impacts that may result from multiple hazardous facilities in one location. These aspects are not addressed by HSNO or HSW. Plan provisions can also ensure protection of regionally and nationally significant infrastructure that may be adversely affected if a hazardous facility were to establish within proximity to the infrastructure (i.e. National Grid Transmission Lines).

20. The proposed provisions are tested, defensible and compatible with neighbouring local authorities and would give effect to the National Planning Standards, which requires a "hazards and risks" chapter, which is to include provisions for hazardous substances. District Plan provisions will allow off-site effects of hazardous facilities on sensitive activities and receiver environments to be managed.

21. In coming to this view, I considered 3 other options but do not prefer them for the following reasons:

A. No regulation controlling hazardous substances

a. While having no regulation to control hazardous substances is favoured by some submitters who consider the RMA no longer has a role to play in District Plans, in light of the technical gap analysis, this option does not address the gaps in respect to landuse activities, which can only be controlled through District Plan provisions.

b. The disadvantages of having no regulations at all in the District Plan, including the exposure of: local communities to potential public health and safety risks; the local environment and eco-systems to potential adverse environmental effects; and Council to potential liability risk where incompatible land uses are located close to each other or where sensitive landuse activities or environments are impacted.

c. Other agencies such as Worksafe NZ and the Waikato Regional Council may not consider this option to be appropriate given that Council's role under the RMA is to manage landuse matters. These agencies are not resourced to provide enforcement beyond the regulations they are administering.

B. Only regulating Major Hazardous Facilities (MHF)

a. While the regulation of only Major Hazardous Facilities (MHF) is the option being sought by some of the submitters, the definition of MHF presents issues in terms of which activities constitute a Major Hazard Facility given that the regulations do not provide clear direction to plan makers as to which activities are considered "major". By narrowly defining only MHF activities this may not include activities (including future activities) where the use, storage and disposal of hazardous substances involve types and quantities that may pose a risk to both the public and the environment.

b. There are examples of plans in New Zealand (i.e. Hastings District Plan) that define 'major' or 'significant' hazardous facilities in other ways. However, these definitions present challenges to these industry operators, as often the types and/or quantities of hazardous substances being used, stored or disposed of do not necessarily warrant a robust risk assessment to be undertaken (i.e. tanneries, milk processing), yet would still require a discretionary activity resource consent. Additionally, the objective and policies are not narrowly focused on MHF, but the use, storage, transport and disposal of hazardous substances irrespective of the landuse activity.

c. Part 4 of the HSW (MHF) Regulations 2016 refers to "a facility that WorkSafe has designated as a lower tier major hazard facility or an upper major hazard facility under regulation 19 or 20". This definition poses difficulties as to what activities should be included in District Plan provisions.

d. HSNO and HSW regulation is not focused on MHF activities specifically, but rather the control and management of all hazardous substances classes.

e. There is a risk to Council, communities and the environment if operators that are not considered MHF activities do not need to comply with District Plan requirements.

f. A plan change may need to be undertaken each time a MHF establishes to ensure that the risk assessment is reflected on the planning maps and that appropriate provisions are included in the plan to manage any off-site effects. Currently there are no listed MHF activities that meet the regulation definition within the Waikato District and hence need to be regulated; therefore the plan would only be in anticipation of new MHF establishing. Additionally, District plan provisions cannot consider sensitive environments associated with a MHF which rely on a risk assessment and the approach would introduce a new concept of 'Risk Management Areas' without any public consultation.

C. Regulating only identified sensitive environments

a. If regulation focused only on identifying sensitive environments, further work would need to be undertaken to identify these areas in order to provide provisions in the District Plan. It therefore may be difficult to define sensitive environments on planning maps (i.e. areas of cultural significance).

b. The plan would also need to provide clear guidance as to whether an operator requires resource consent or not and this is best managed through specifying quantity thresholds relative to the zones where the hazardous substances are being used, stored, transported or disposed of.

c. New sensitive land use activities that establish within the District may not be provided for by District Plan provisions. The plan would still need to apply clear provisions for plan users to determine whether a resource consent is required or not (i.e. quantity thresholds). There is a risk that sensitive land uses or areas of cultural or natural significance are not individually identified and hence not included. Further, any additions/amendments may require a costly plan change.

Reasons for revised provisions

22. For the Panel's ease, I have provided both a track change copy of the revised changes and a clean version (refer to **Attachment 1 and 2**). Without detailing every amendment, below I provide a summary of the key changes and the reasons for these.

10.1.1 Introduction

23. Taking on board the changes proposed by submitters, I have made several amendments to the introduction to Chapter 10 to make it clear what the role of the District Plan provisions are in relation to other legislation. I have also made it clear what resource management effects the provisions are focused on. These matters are reflective of the gaps identified in the technical gap analysis between the HSNO and HSW regulations and the RMA.

Objectives and Policies

24. I have revised the Objective and Policy framework for both Hazardous Substances and Contaminated Land based on the Panel's comments and questions received at the hearing. As I mentioned previously in this memorandum, in light of the technical analysis I do not consider that the Objective and Policy framework needs to be changed significantly for the reasons set out in paragraph 15 above. Therefore I have attempted to streamline and focus the wording of the objectives and policies to better align with the key issues identified in the technical gap analysis which reflect the revised methods.

Rule 10.3.1 P1

25. P1 reflects the general approach to the management of hazardous substances and relies on the Activity Status Table (AST) in Appendix 5 to determine the quantity thresholds for hazardous substances within a particular zone. If I were to shift away from using the AST to determine whether a resource consent is triggered or not, the replacement rule would need to be clear, defensible and able to be practically implemented. As I have previously expressed in the hearing, I have concerns about an approach that relies solely on compliance with the HSNO and HSW Acts and regulations and consider that this approach may be ultra vires. In my opinion, neither P1 nor the AST used to determine compliance with P1 is a duplication of the HSNO or HSW regulations and continues to provide an effective way for a Council officer to determine compliance.

26. I note that I have re-worded clause (a) to refer to "a hazardous facility", which relies on the definition. Further I have introduced clause (b) to make it clear which substances are permitted (previously hidden at the end of Appendix 5).

Rule 10.3.1 P2

27. P2 provides a rule for the management of radioactive material, which is also considered a gap in reference to an exempt activity or article in the Radiation Safety Act Regulations 2016.

Rule 10.3.1 P3

28. P3 provides a permitted activity rule for the underground storage of fuel or diesel and single vessel storage of LPG within zones which are less sensitive (i.e. Rural, Industrial, Heavy Industrial, Hampton Downs Motorsport and Recreation or Te Kowhai Airpark). This is a shift in position from the rules originally notified, which had a controlled activity starting point, and I now consider the regulations appropriately cover the storage of fuel for underground tanks up to the quantity thresholds set out in the proposed rule.

Rule 10.3.1 C1

29. C1 provides for the storage of fuel within the less sensitive zones that do not meet P3 (i.e. if the proposal has more than the maximum quantity thresholds, is above ground, or if the site adjoins a sensitive zone) or where the storage of fuel is within a sensitive zone up to the maximum thresholds, to be a Controlled Activity.

30. Again this is a large shift from the notified version, which provided for these activities as a Non-Complying activity. This shift is a balanced approach providing certainty to the applicant that consent will be granted while also ensuring control is reserved only to the location of the fuel tank or LPG storage vessel in the first matter of control and the management of off-site effects in the second matter of control, specifically matters A - D which are gaps that need to be addressed as part of a wider emergency response plan, the basics of which are required by the regulations. This rule essentially covers the gap between regulations which are "internally" focused and ensures that consideration is given to off-site effects and potential impacts on sensitive landuse activities or environments.

Rule 10.3.1 RD1

31. RD1 is a shift from a default discretionary activity status where rules P1, P2, P3 and C1 cannot be compiled. The technical gap analysis has enabled me to focus on the key matters where gaps exist between the HSNO and HSW regulations and the RMA regime. The matters set out in RD1(a)(i) – (vi) provide matters of discretion for a wide range of hazardous facilities, from those that are marginally non-compliant with the quantity threshold amounts or for an above ground storage tank for the retail sale of fuel. These types of applications may only require a minimal assessment compared to those hazardous facilities which are considered significant or major hazardous facilities and will involve large quantities of hazardous substances that require a more rigorous risk assessment to ensure the adverse effects are appropriate for the location.

32. Although the matters of discretion include a relatively long list, this is because the matters need to provide for a wide variety of activities where the nature and scale of the hazardous facility will vary. On this basis I would anticipate a consent planner assessing the proposal to tailor resource consent conditions to these matters (if applicable). I have carefully reviewed each of these matters and are satisfied that none of them duplicate the functions of the other legislation and are more specifically targeted at the gaps identified in the technical gap analysis.

33. It is important to highlight that RD1 is primarily focused on the off-site effects of hazardous substances and in developing this rule I have considered the role and function of Worksafe in terms of managing the workplace effects of a proposal. However as the technical report demonstrates, the cross-overs between the regulations and resource management issues in the landuse context are not always clear cut and there is potential for some overlap, specifically in terms of individual consent conditions. However a planner interpreting the plan provisions should be clear that the RMA role is to look outwards from the site of the proposed hazardous facility, as opposed to internally, which is largely where Worksafe's role and function lies.

Comments in respect to other Territorial Authority Plan Provisions

34. Towards the end of the hearing, the Panel referred to District Plan provisions in the Hastings and Christchurch District Plans as being examples of provisions introduced since the removal of Council's explicit functions under section 30 and 31 of the RMA.

35. Since the hearing I have turned my mind to these District Plan provisions and reviewed some of the s32 reports associated with each of these Council's District Plan provisions which I will make some brief comments on as follows:

<u>Hastings District Plan</u>

36. The Hastings District Plan section 32 report provides 3 options:

- Option 1 - status quo using the Hazardous Facilities Screening Process (HFSP),
- Option 2 - no regulation (relying on other legislation)
- Option 3 - a median approach regulating large hazardous facilities and sensitive environments.

37. The report writer makes it clear under preferred option 2, for no regulation at all and having sole reliance on HSNO regulations leaves the potential for aspects of hazardous facilities management to 'fall through the gaps'.

Additionally they make the point that the interface between hazardous facilities and sensitive environments may not be adequately managed and there is potential for not adequately fulfilling RMA requirements. Further under option 3 the writer comments that it is difficult to define 'large hazardous facilities' and 'sensitive environments' and to identify appropriate regulation for the interface between these and hazardous substances. Upon my review of potential options, I also found this to be the case.

38. In respect to the comments about defining 'large hazardous facilities', this approach identified costs in terms of listing individual activities under the definition and further that some facilities may not in fact be extremely hazardous due to the scale or nature of the activity. I also agree with this issue.

39. In respect to sensitive environments and reverse sensitivity, the author determined that the most effective and efficient option was to rely on individual zone rules, hazardous substances policy and legislation (primarily HSNO). There would be no specific rules addressing sensitive environments or reverse sensitivity. I disagree with this approach.

40. My overall view on the Hastings District Plan provisions is that the s32 report lacks the required level of detail as no technical gap analysis was undertaken. As I mentioned previously, the technical gap analysis is the level of detail that is required by all Council's in order to evaluate the reasonably practicable options required by s32 and to be certain that district plan provisions are not duplicating controls in the regulations.

Christchurch District Plan

41. The Christchurch Replacement Plan in my view is not necessarily a helpful example of how to approach the management of hazardous substances in a district plan. The plan only has provisions for permitted activities allowing the use, storage or disposal of any hazardous substance (not already specified in the plan) or non-complying activities in respect to the National Grid transmission line and the Woolston Risk Management Area.

42. As the Waikato District does not currently have any Risk Management Areas, my opinion is that the Christchurch Replacement Plan provisions would not effectively manage hazardous substances and do not adequately address the gaps that exist between the regulations and the management of landuse effects which need to be managed through a resource consent to assess the risks involved in each activity. Further, I do not believe that this is an approach that would best serve the communities of the Waikato District and would not be acceptable from a Council perspective if there were ever a serious event resulting from the misuse of hazardous substances causing, for example, loss of life due to landuse effects not being managed.

43. While the Christchurch Replacement Plan had input from some experts in the area of hazardous substances, it is my understanding from Mr Schaffoener who was involved in the Christchurch Replacement Plan and gave evidence, that the amended provisions were devised ad-hoc on the premise of the unsuitability of the Hastings provisions. The RMA section 32 report highlighted the unsuitability of the Hastings provisions and the subsequent evaluation did not address the technical gaps that exist between HSNO, HSW regulations and the RMA. If this work had been undertaken, it could have been a good example to follow; however, I consider that a more thorough analysis may have resulted in different provisions.

Dunedin District Plan

44. The Dunedin District Plan uses zone rules to manage hazardous substances. My understanding from speaking to one of the Policy Planners at Dunedin City Council is that the hazardous substances provisions are being appealed and that they are undertaking a similar exercise to what Waikato District Council has done in respect to the technical gap analysis.

45. It is important to note that the Dunedin District Plan was notified prior to removal of the section 30 function for territorial authorities.

46. Similar to my recommended approach, this plan also uses quantity limits and provides a rule framework based on zones. In my opinion, the format of Appendix A6.4 of the Dunedin District Plan is more difficult to follow than proposed Appendix 5 in my recommended amendments.

New Plymouth District Plan

47. The New Plymouth District Plan was recently notified (23 September 2019) and takes a very different approach to both Christchurch and Hastings. Of note, the plan reflects the Ministry for the Environment's National Planning Standards and provides for a section on "Hazards and Risk", which includes the provisions for Hazardous Substances.

48. The inclusion of a separate chapter for "Hazards and Risk" in the National Planning Template strongly suggests, in my view, that the Ministry for the Environment does intend Council's to have at least some level of control on hazardous substances in district plans rather than simply rely on the HSNO and HSW regulations.

49. The New Plymouth proposed District Plan defines "significant hazardous facilities", which includes a list similar to the Hastings District Plan. Further the permitted activity rule references Risk Management Contours mapped in the District Plan which applies to certain zones provided the activity does not result in the 1×10^{-6} individual fatality risk contour extending beyond the Significant Hazardous Facility Risk Management Contour identified and mapped for the subject site. Non-compliance with this rule results in a Discretionary Activity resource consent. Further, where there is no Significant Hazardous Facility Risk Management Contour mapped in the District Plan, then provided the activity does not result in the 1×10^{-6} individual fatality risk contour containing any sensitive activity for these zones, a Restricted Discretionary Activity resource consent is triggered. In all other zones, there is a long list of non-complying activities relating to significant hazardous facilities either within a sensitive environment or within close proximity to a sensitive area (i.e. waterbodies, site and area of significance to Maori, archaeological site).

50. I have not reviewed the s32 report for the New Plymouth District Plan Hazardous substances provisions, but understand that there was no technical gap analysis undertaken. However in my opinion these rules are far more onerous than my recommended approach, as firstly my proposed rules do not require a risk assessment to determine compliance as a permitted activity or require a plan change to be assessed as permitted activity in the first instance. Secondly, in my opinion the requirement for non-complying activity resource consents for activities (defined as significant hazardous facilities) that may only hold very small quantities of hazardous substances is

excessive regulation. This would mean that operators will be faced with unnecessary costs irrespective of the quantities of hazardous substances being used or stored on site. Given that the New Plymouth District Plan is yet to be tested by submissions through a hearing process, I suggest little weight be placed on its approach to the management of hazardous substances.

Summary of approaches adopted by other territorial authorities

51. Overall, based on the approaches adopted by other territorial authorities to manage the use, storage or disposal of hazardous substances in district plans, I maintain my view that my recommended approach is the most appropriate. If anything, I consider it more important that the provisions are evaluated to be in compliance with s74(2) of the Act with regard to plans of adjacent territorial authorities, which are more aligned with my recommended approach. Details of the provisions of adjacent territorial authorities are addressed in both Mr Schaffoener's issues and options paper supporting the original section 32 report and briefly in his background report supporting my S42A report at section 3.7. Introducing other plan provisions would provide ad-hoc provisions that could be inconsistent with neighbouring Council's provisions.

Observations from submitter responses

52. Upon review of the consolidated set of provisions put forward to the Panel on 19 May 2020 by the Oil Companies, Horticulture New Zealand, Federated Farmers and the LPG Association, which was supported by Ports of Auckland Limited, there are some aspects of their joint proposal that I agree with and have incorporated into my draft set of provisions. I welcome that references to codes and standards under other statues is avoided. However, fundamentally I am not in agreement with the changes proposed and do not consider these provisions to be the most appropriate option under the RMA or able to be practically implemented. I have set out my reasons below why I have not adopted their position.

(i) Proposed Rule 10.3.1 P, NC and D only applies to a Major Hazard Facility (of which there are currently none within the Waikato District) and relies on a definition included in the Health and Safety at Work (Major Hazard Facilities) Regulations 2016. The definition in this regulation refers to a "facility that Worksafe has designated as a lower tier major hazard facility or an upper tier major hazard facility under regulation 19 or 20". In my mind, Worksafe are not required to notify or consult territorial authorities when a Major Hazard Facility establishes, therefore there is a risk of duplication. Further, the definition of a Major Hazard Facility poses practical issues from a Council officer perspective in terms of determining whether an activity is permitted or not.

(ii) Rule 10.3.1 NC which refers to a "Risk Management Area identified on the Planning maps" would provide confusion to plan users, as there are no risk management areas identified on Council's planning maps. Further I question the "risk acceptability criteria" that this rule refers to. This rule introduces new concepts that have not been discussed or raised through submissions and on the basis of identifying new risk management areas, a plan change would need to be undertaken each time a major hazardous facility is proposed within the District. This approach would represent a significant ad-hoc change without public involvement.

53. The response from Ports of Auckland still maintains that the District Plan needs to provide for "transit depots" in the definition of hazardous facility. I am still of the view that the provisions as revised would continue to provide for the Ports activities generally as a permitted activity. However if there is a concern that at any one time there would be large volumes of hazardous substances stored on site for any lengthy period of time, perhaps this ought to have been a consideration as part of the original landuse consent for the operation.

54. I do wish to highlight to the Panel that the 5 responses received are only a small representation of the number of submitters involved in the hearing, and particularly with regard to the farming and horticulture sector do not represent Major Hazardous Facility operators, as defined by the regulations.

Conclusion

55. The revised provisions I have provided in **Attachment 1 and 2** are more focused and directed to address the gaps that exist between the HSNO and HSW regulations and to ensure the management of hazardous substances is appropriate in a landuse context. While Worksafe NZ are responsible for the "internal" effects of a hazardous facility in respect to Health and Safety, the RMA does have a vital role to play in managing the off-site effects of hazardous substances. Without any planning provisions in the District Plan, sole reliance on other legislation will leave gaps which in turn may have serious consequences for the communities within the Waikato District, and the Waikato District Council itself.

56. I have looked at options in formulating my recommended plan provisions. In my opinion, using a hybrid approach, that uses the Activity Status Table to determine whether a hazardous facility triggers the need for resource consent, and adopts provisions appropriate to the location of activities in proximity to sensitive receiver environments, is the most effective and efficient method to achieve the objective in Chapter 10. In my opinion this will effectively manage the potential adverse effects on sensitive landuse activities, cumulative effects of other hazardous facilities, sensitive environments and will ensure an appropriate risk assessment is carried out that is relative to the scale and nature of the proposed activity, where necessary.

Dated at Ngaruawahia this 29th day of May 2020

K. E. Overwater

Katherine Overwater
Senior Policy Planner