

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)

**MEMORANDUM BY COUNCIL TO HEARING COMMISSIONERS RELATING TO
HEARING 8A HAZARDOUS SUBSTANCES AND CONTAMINATED LAND
24 April 2020**

May it please the Hearing Commissioners:

1. The Hearings Panel issued directions on 22nd April 2020 setting out a process for addressing hazardous substances provisions in the Proposed District Plan. Of particular note are the requirements in paragraph 6 as follows:
 - b) As a priority, Council staff are to liaise with the parties that filed evidence on the Hazardous Substances provisions for the hearing on 28 January 2020, to ascertain if there is a consensus position on what matters relating to the management of Hazardous Substances should and should not be included in the district plan.
 - c) Council staff are to advise the Hearings Administrator, Ms Sandra Kelly, of the extent to which there is, or is not, any consensus position, no later than 5pm on Friday 24 April 2020.
2. In accordance with paragraph 6(c) of those directions, Council wish to advise the Panel that it has contacted all of the parties who filed evidence to the Hazardous Substances hearing.
3. Council contacted those submitters, outlining eight matters which Council consider to be the key resource management matters to be addressed in the District Plan as they relate to hazardous substances.
4. These matters are based on the preliminary technical analysis of gaps in the Health and Safety at Work (Hazardous Substances) Regulations 2017 and Hazardous Substances (Hazardous Property Controls) Notice 2017.
5. The eight matters circulated by Council to the submitters are 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 (different to the specific case of calculating some separation distances for mega-storage facilities (>500 tonnes) of highly hazardous Class 3.2, 4 and 6.1 substances).
 - 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.
6. Out of the 16 submitters Council emailed, 8 submitters responded. These parties are as follows:
- a. The Oil Companies
 - b. Kainga Ora
 - c. Fire and Emergency New Zealand
 - d. Horticulture New Zealand
 - e. Ports of Auckland
 - f. LPG Association
 - g. Federated Farmers of New Zealand
 - h. Genesis Energy
7. Of the 8 parties who provided a response to Council, Council can advise that no consensus has been reached by the parties on what matters relating to the management of Hazardous Substances should and should not be included in the district plan. However it is noted that Fire and Emergency New Zealand accepted four of Council's matters and partially agreed with one other. Kainga Ora had no comment to make on Councils listed matters.
8. A summary of the responses of the parties are attached to this memorandum.

Summary

9. Given that no consensus has been reached by the parties, Council now refers to paragraph 6(e)(i) and (ii) of the Panel's directions, and shall prepare proposed plan provisions and reasons for the provisions by 5pm on the 29th May 2020 in accordance with paragraph 6(e)(ii).

Dated at Ngaruawahia this 24th day of April 2020



Carolyn Wratt
Principal Policy Planner

Attachment I – Summary of Responses

Oil Companies

The Oil Companies have stated:

“There is no consensus. Council has not provided a gap analysis and has not provided any detail as to planning controls (issues, objectives, policies, methods) that would follow from the 8 generic points made. Absent gap analysis, the type of interventions proposed by Council are not efficient and effective, because they duplicate existing controls imposed outside the RMA. Such controls are not part of Council’s statutory function.”

Further the Oil Companies state:

“Our starting point, reflected in the operative plan regime, is that compliance with HSNO & HSWA is the appropriate and orthodox approach. This avoids duplication. The Oil Companies cannot agree to generic statements of principle in the abstract. A gap analysis is required. Meaningful consensus must be conditional on Council disclosing the nature and effect of the provisions drafted purportedly to implement the stated intent.”

Kainga Ora

Kainga Ora state that they have no comment to make on the Council’s memorandum, however request to be copied in on correspondence related to this exercise going forward.

Fire and Emergency New Zealand

Fire and Emergency New Zealand sought comments from Dr Trudy Geoghegan, the National Hazardous Substances Advisor who has agreed with four of the eight points in Council’s email, which includes a, b, d and e. They have disagreed with points f and g; partially agreed with point c; and indicated that although point h is a Council matter, there should not be a double up of rules between HSW and HSNO and RMA legislation.

In addition to the eight matters, Dr Geoghegan notes that:

“Council may also want to consider how it will provide for the assessment and enforcement of the rules they set. We are finding the many Council’s, even largish Council’s sometimes lack the technical expertise to evaluate consents and enforce their rules.”

Horticulture New Zealand

Horticulture New Zealand states that it does not support the eight matters listed. Further they state:

“At the hearing on 28 January 2020 Lynette Wharfe, for HortNZ, tabled a set of alternative provisions for Hearing 8A that are considered to provide an appropriate framework for the district plan for hazardous substances. The focus of the alternative provisions is on:

- Hazardous substances, as opposed to hazardous facilities
- HSNO and HSW regulations as the basis of permitted activity rules
- Major hazardous facilities requiring resource consent to assess risk”

Ports of Auckland

Ports of Auckland state that:

“The matters identified by Council do not appear to address Ports of Auckland Limited’s issues in relation to this topic. As set out within its evidence, and for the reasons discussed within my email dated 5th March 2020, it is appropriate to exclude hazardous substances that are stored as cargo in transit from the definition of a ‘hazardous facility’ as it is subject to a high level of regulation outside of the RMA. It is unclear how this matter is to be addressed within Council’s position.

Ports of Auckland Limited also disagrees with the manner in which rules are intended to be applied, and has sought clarification that the rules pertaining to the use, storage or disposal of hazardous substances relate to a ‘hazardous facility’, thereby ensuring that the corresponding objectives and policies of the Proposed Plan are implemented. Furthermore, the use, storage or disposal of any hazardous substances that does not comply with the permitted standards to be provided for as a restricted discretionary activity, as opposed to a discretionary activity.”

LPG Association

The LPG Association states that it:

“does not believe the 8 points distributed by Council represent what matters relating to the management of Hazardous Substances should and should not be included in the district plan.

Council has not provided a gap analysis and has not provided any detail as to planning controls (issues, objectives, policies, methods) that would follow from the 8 generic points made. The points made are so vague and wide ranging, that almost any level of Council intervention could be encompassed.”

Despite these above statements, they do offer some small concession to Council’s list by saying:

“Whilst some matters are worthy of further clarification, others are so vague and introduce new concepts, making them unacceptable without much more explanation and justification.”

Federated Farmers of New Zealand

Federated Farmers of New Zealand states that it does not support the eight matters listed in the Council memo dated 23 April.

They state that:

“Federated Farmers understands all parties at the hearing accepted that HSNO provides the general framework and is the primary mechanism for controlling and managing the use and storage of hazardous substances but that some matters may fall within the scope of the Resource Management Act 1991 and included within district plan provisions, once the appropriate evaluation analysis has been done.

Potential resource management related matters were broadly discussed at the hearing using examples from other district council, namely Hastings and the Proposed New Plymouth District plans, as relating to public risk, major hazardous facilities and to address reverse sensitivity issues, if needed.”

In their view, the eight matters listed have the potential to extend well beyond the 'gaps' broadly accepted at the hearing, the recent planning approaches adopted by other district councils and have introduced as many questions as answers with regards to the potential planning response Council may propose.

They also state that it is difficult to accept some of those matters in principle when it is still unclear as to what context those matters may be applied in. Key terms, such as the definition of hazardous facilities, remain contentious.

Ms Walker from Federated Farmers provides some commentary in respect to determining the planning provisions as being a planning matter where caucusing may be useful to address the matter. She also refers to the tabled set of alternative provisions from Lynnette Wharf of Horticulture New Zealand, which in Federated Farmers view could be used to meet the purposes of directions clause 6(d), should all parties agree with the focus of the alternative provisions being on hazardous substances, as opposed to hazardous facilities; HSNO and HSW regulations as the basis of permitted activity rules; and accepting that major hazardous facilities would require resource consent to assess risk.

Genesis Energy

Genesis Energy contacted Council requesting an update on whether consensus has been reached between Council staff and other parties on the provisions that should or should not be included in the District Plan, but did not express a position.