

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of the Proposed Waikato District Plan

**STATEMENT OF EVIDENCE OF MARK NICHOLAS ARBUTHNOT FOR
PORTS OF AUCKLAND LIMITED IN RELATION TO HEARING 8A –
HAZARDOUS SUBSTANCES & CONTAMINATED LAND**

17 DECEMBER 2019

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EXECUTIVE SUMMARY

- A. This statement of evidence addresses the further submissions made by Ports of Auckland Limited ("**POAL**") in relation to 'Hearing 8A: Hazardous Substances & Contaminated Land' of the Proposed Waikato District Plan ("**Proposed Plan**").
- B. POAL has sought that mobile plant, motor vehicles, boats and small engines, and the temporary storage, handling and distribution of national or international cargo is excluded from the definition of 'hazardous facilities' for two main reasons:
- (a) hazardous substances are already highly regulated under Health and Safety at Work Act (Hazardous Substances) Regulations 2017; and
 - (b) significant inefficiencies would result if POAL were required to apply for resource consent every time a container containing hazardous substances arrives at the Waikato Inland Freight Hub for export or distribution that exceeds the permitted thresholds.
- C. In terms of section 32AA of the RMA imposing controls over hazardous substances passing through the Waikato Freight Hub as cargo will:
- (a) be unlikely to result in any benefit, given the high level of regulation under the Health and Safety at Work Act (Hazardous Substances) Regulations 2017 regime; and
 - (b) likely result in increased costs, due to the duplication of regulation for no environmental benefit.
- D. I therefore consider it appropriate to exclude fuel in mobile plant, motor vehicles, boats and small engines, and the temporary storage, handling and distribution of national or international cargo from the definition of a 'hazardous facility'.

- E. POAL also sought clarification to ensure that the rules pertaining to the use, storage or disposal of hazardous substances relate to a 'hazardous facility'. Without this clarification, the exemptions to the definition of 'hazardous facilities' (discussed above) would have no application and would result in an inefficient process with increased costs to applicants.
- F. Having regard to the Resource Legislation Amendment Act 2017 and the guidance prepared by the Ministry for the Environment in respect of hazardous substances, I am of the opinion that a discretionary activity status for rule infringements is unduly onerous, disproportionate to the scale and significance of an infringement to the rules, and is not justified.
- G. In my opinion, it is appropriate to provide for infringement to the hazardous substances rules as a discretionary activity, as opposed to a discretionary activity.

1. INTRODUCTION

1.2 My full name is Mark Nicholas Arbuthnot. I am a Director at Bentley & Co. Limited ("**Bentley & Co.**"), an independent planning consultancy practice based in Auckland.

Qualifications and experience

1.3 My qualifications and experience are set out within my statement of evidence dated 16 September 2019 (Hearing 1 – Chapter 1 Introduction).

Code of conduct

1.4 I confirm I have read the Code of Conduct for Expert Witnesses 2014 contained in the Environment Court Practice Note and I agree to comply with it. My qualifications as an expert are set out above. I confirm that the issues addressed in this brief of evidence are within my area of expertise, except where I state I am relying on what I have been told by another person. I have not omitted to consider material facts known to me that might alter or detract from the opinions expressed.

2. SCOPE OF EVIDENCE

2.1 Hearing 8A addresses the submissions and further submissions that have been made on the Hazardous Substances & Contaminated Land provisions of the Proposed Plan.

2.2 My evidence relates to POAL's primary submission points¹ that have been allocated to Hearing 8A of the Proposed Plan.

2.3 POAL's submissions are generally supportive of the provisions of the Proposed Plan as they relate to hazardous substances and sought:

(a) the retention of the objective and policies as notified;

¹ 578.3, 578.4, 578.48, 578.110, 578.111, 578.112, 578.113.

- (b) to ensure that hazardous substances in mobile plant, motor vehicles, and cargo are exempt from the provisions; and
- (c) that infringements to the rules are provided for as a restricted discretionary activity (as opposed to a discretionary activity).

3. STATUTORY FRAMEWORK

3.1 The provisions that are the subject of this hearing are district plan provisions. The purpose of a district plan is set out in section 72 of the RMA. It is to assist territorial authorities to carry out their functions in order to achieve the purpose of the RMA.

3.2 Section 75(1) of the RMA requires that a district plan must state:

- (a) the objectives for the district; and
- (b) the policies to implement the objectives; and
- (c) the rules (if any) to implement the policies.

3.3 Additionally, section 75(3) of the RMA requires that a district plan must give effect to:

- (a) any national policy statement; and
- (b) any New Zealand coastal policy statement; and
- (ba) a national planning standard;
- (c) any regional policy statement.

3.4 For the purposes of carrying out its functions under the RMA and achieving the objectives and policies of the plan, section 76(1) of the RMA enables a territorial authority to include rules in a district plan.

3.5 In preparing this evidence, I have had regard to:

- (a) POAL's primary and further submissions, and the primary and further submissions made by other parties;
- (b) the section 32 reports, dated July 2018; and

(c) the section 42A report prepared by Ms Overwater, dated November 2019.

3.6 I have had regard to section 32 of the RMA, which requires an evaluation of the objectives and policies and rules of the Proposed Plan that are relevant to POAL's further submissions. I have also had regard to section 32AA of the RMA, which requires a further evaluation for any changes that have been proposed since the original evaluation report under section 32 of the RMA was completed.

4. MATTERS THAT ARE ACCEPTED BY POAL

Primary submissions of POAL (578.110, 578.111, 587.112, 578.113)

4.1 I can confirm that POAL accepts the recommendations of the section 42A report in respect of its submission points on the following matters:

- (a) Objective 10.1.1 (hazardous substances).
- (b) Policy 10.1.2 (hazardous facilities).
- (c) Policy 10.1.3 (assessment of risks of hazardous substances).
- (d) Policy 10.1.4 (reverse sensitivity effects).

4.2 However, POAL does not wish to withdraw these submission points at this stage. This is to ensure POAL has scope should any changes be pursued by other submitters and/or recommended by the Panel which might adversely affect POAL's interests. Should any further changes be sought in the evidence of other submitters, POAL will address those changes in its rebuttal evidence, if necessary.

5. DEFINITION OF 'HAZARDOUS FACILITY'

Primary submission of POAL (578.48)

5.1 In its primary submission (578.48), POAL sought to exclude fuel in mobile plant, motor vehicles, boats and small engines, and the

temporary storage, handling and distribution of national or international cargo from the definition of a 'hazardous facility'.

5.2 The section 42A report recommends (at paragraph 304) that POAL's relief in respect of excluding fuel in mobile plant, motor vehicles, boats and small engines from the definition of a 'hazardous facility' is accepted.

5.3 However, POAL's relief in respect of excluding the temporary storage, handling and distribution of national or international cargo from the definition of a 'hazardous facility' is recommended by the section 42A report (at paragraph 305) to be declined for the following reasons:

[305.] In regard to the temporary storage, handling and distribution of national or international cargo, the submission does not provide any examples of the quantities of cargo that would contain hazardous substances and if so, what types of substances. Without such details I cannot determine whether the types of substances and respective quantities that would apply to the cargo are exempt or would require resource consent. However, irrespective of this information, I do not consider that the definition should focus on any particular industry or operation (e.g. Ports of Auckland).

5.4 POAL has sought that the temporary storage, handling and distribution of national or international cargo is excluded from the definition of 'hazardous facilities' for two main reasons:

- (a) hazardous substances are already highly regulated under the Health and Safety at Work Act (Hazardous Substances) Regulations 2017; and
- (b) significant inefficiencies would result if POAL were required to apply for resource consent every time a container containing hazardous substances arrives at the Waikato Inland Freight Hub for export or distribution that exceeds the permitted thresholds.

Regulation under HSWA (Hazardous Substances) Regulations

5.5 It is important to make the distinction between facilities (buildings such as warehouses) that handle and use hazardous substances and

dangerous goods/hazardous substances that are stored untouched in closed containers. There is a distinct difference between a transit depot (such as a Freight Hub container yard where goods remains in closed shipping containers/untouched) and a facility/building where hazardous substances are handled, stored, used etc.

Transit Depots

- 5.6 Worksafe provide guidance² on transit depots, which include ports, airports, freight forwarders' yards and rail depots. The guidance acknowledges that such facilities can hold and handle large quantities of a wide range of substances that are in transit and awaiting delivery for their final destination. Such substances can be held in transit depots for up to three days, provided that they are in closed containers and that all containers stay shut. The substances cannot be sold or stored for supply.
- 5.7 This is likely to represent the bulk of the operations that will occur on the Freight Hub site. The Health and Safety at Work (Hazardous Substances) Regulations 2017 set out the requirements for managing hazardous substances including in transit depots. After that, the substances must be moved to another depot or to an approved storage facility. Both the POAL Waitemata seaport and the South Auckland Freight Hub at Wiri hold Location Compliance Certificates ('LCC's') authorising the storage of specific volumes of Hazardous Substances (Classes 2-5) within a designated area. Therefore, at the end of the 3 day period, the unopened dangerous goods containers are moved to the designated storage area and can remain indefinitely (as long as they remain untouched).
- 5.8 There are no constraints on the maximum volume of hazardous substances that can be held at a Transit Depot, but maximum volumes are set for the designated storage areas. POAL hold LCCs (with permitted max volumes) at the Waitemata seaport, while Connlinx (POAL's container transport service) holds them for the Wiri Freight

² <https://worksafe.govt.nz/topic-and-industry/hazardous-substances/guidance/industry-guidance/transit-depots/>

Hub. As a result, POAL does not need to know the maximum volumes in advance as they are part of the regulatory process for LCCs.

'Vanning' and 'Devanning' operations

- 5.9 If there are to be 'vanning' or 'devanning' operations that require the handling and storage of hazardous substances (i.e. where the containers are opened and do not benefit from the LCCs), this would be subject to the provisions of the Health and Safety at Work (Hazardous Substances) Regulations 2017 and the District Plan.

Inefficiencies

- 5.10 The cargo that will move through the Waikato Freight Hub will be transient in nature. In this regard, I understand that the makeup and mix of cargo that will be handled can vary considerably on a seasonal or day-to-day basis.
- 5.11 Without the exclusion that is proposed by POAL in relation to cargo, the Waikato Freight Hub would technically fall to be considered as a 'Hazardous Facility', which would result in significant consenting requirements on POAL's operations to the detriment of the efficient operation of the freight hub.
- 5.12 For example, if a shipment arrived at the Waikato Freight Hub that contained hazardous substances in excess of the permitted quantity (which in some cases is relatively low), a discretionary resource consent would technically be required to unload and store that cargo, despite it only being on the site for a relatively short period of time – when in fact it's 'in transit'. It is easy to see the unnecessary cost and inefficiency such a regime would generate.
- 5.13 In terms of section 32AA of the RMA imposing controls over hazardous substances passing through the Waikato Freight Hub as cargo will:
- (a) be unlikely to result in any benefit, given the high level of regulation under the HSWA (Hazardous Substances) Regulations; and

(b) likely result in increased costs, due to the duplication of regulation for no environmental benefit.

5.14 I therefore consider it appropriate to exclude the temporary storage, handling and distribution of national or international cargo from the definition of 'hazardous facilities' as follows:

Hazardous facility

Means activities involving hazardous substances and premises at which these substances are used, stored or disposed of. Storage includes vehicles for their transport located at a facility for more than short periods of time, and excludes:

- fuel in mobile plant, motor vehicles, boats and small engines; and
- the temporary storage, handling and distribution of national or international cargo.

6. RULE 20.2.6 HAZARDOUS SUBSTANCES

Primary submission of POAL (578.3)

- 6.1 The primary submission of POAL (578.3) 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.
- 6.2 The section 42A report (at paragraph 500) recommends that the relief of POAL be rejected on the basis that the storage of hazardous substances is generally a 'hazardous facility' and the change sought is not necessary.
- 6.3 I disagree with the conclusions of the section 42A report in respect of this matter. Section 75(1)(c) of the RMA requires that a district plan must state the rules (if any) to implement the policies. As the policies of the Proposed Plan relate to the manner in which 'hazardous facilities' are to be managed, the rules that implement these policies must also be specific to 'hazardous facilities'.

- 6.4 Without this clarification, the exemptions to the definition of 'hazardous facilities' (discussed above) would have no application and would result in an inefficient process with increased costs to applicants.

Primary submission of POAL (578.4)

- 6.5 In its primary submission (578.4), POAL sought that the use, storage or disposal of any hazardous substances that does not comply with the permitted standards is provided for as a restricted discretionary activity, as opposed to a discretionary activity, as follows:

RD1 The use, storage or disposal of any hazardous substances that does not comply with Rule 20.2.6 P1, P2 or C1.

Council's discretion shall be restricted to the following matters:

- (i) the proposed operation and site layout;
- (ii) the separation distances from the receiving environment and other land uses;
- (iii) the degree and acceptability of residual risk;
- (iv) consideration of potential health and environmental hazards and exposure pathways arising from the proposed facility;
- (v) minimising potential cumulative risks including in conjunction with other nearby hazardous facilities;
- (vi) proposed emergency management planning;
- (vii) transport routes times and frequencies for the transport of hazardous substances on and off-site;
- (viii) waste management;
- (ix) compliance with relevant codes of practice and standards for specific materials/substances;
- (x) measures to minimise or mitigate potential adverse effects that may result from natural hazards; and
- (xi) the social and economic benefits of hazardous facilities.

- 6.6 The section 42A report (at paragraphs 501 to 507) recommends that the relief sought by POAL is rejected for the following reasons:
- (a) It would make more sense to for the activity status to reflect full discretion, given that resource consent has been triggered anyway.
 - (b) Rule 20.2.6 applies to all properties with industrial zoning and could include a wide range of industrial activities where a variety of considerations need to be taken into account with respect to the storage, use and transportation of hazardous

substances within sites and the matters of discretion may not address all matters for industrial sites.

- (c) A discretionary activity status is the best activity status to ensure that all adverse effects associated with hazardous substances are appropriately addressed.
- (d) Rule 20.2.6 is the most appropriate option to ensure that there are rules covering the effects of hazardous substances in the Horotiu Industrial Park.

6.7 I disagree with the conclusions of the section 42A report in respect of this matter. The Resource Legislation Amendment Act 2017 ('**RLAA**') removed the explicit function of territorial authorities under section 31 of the RMA to control the adverse effects of the storage, use, disposal and transportation of hazardous substances to ensure that duplication between the RMA, HSNO Act and HSW Act is avoided.

6.8 The RLAA also introduced a procedural principle (section 18A) to ensure that district plans include only matters relevant to the purpose of the RMA. While a broad power to manage hazardous substances through district plans has been retained to achieve the purpose of the RMA and to carry out the function of integrated management of natural and physical resources in the district, this should only be exercised where the potential environmental effects are not adequately addressed by other legislation (and in particular the HSNO Act and the HSW Act).

6.9 The Ministry for the Environment updated the RMA Quality Planning resource on hazardous substances to provide detailed guidance on where RMA controls may be necessary in district plans:³

- (a) To manage the effects of activities that use, store, manufacture and/or dispose of hazardous substances in relation to surrounding land uses:

- (i) managing the establishment of hazardous substances/facilities adjacent to and within sensitive environments to ensure acceptable levels of risk of off-site adverse effects; and
 - (ii) preventing sensitive or incompatible activities establishing in areas where hazardous facilities/activities are located where these activities have the potential to constrain or curtail the operation of a lawfully established hazardous facility.
- (b) For sites or operations that store or use particularly large volumes of hazardous substances (including Major Hazard Facilities⁴), controls that extend beyond HSWA (Hazardous Substances) Regulations and require a wider assessment of the surrounding land uses and environment may be appropriate. Any assessment matters or restriction of discretion in relation to these types of activities (e.g. bulk fuel storage, large scale chemical or explosive storage and manufacture etc), need to consider what the risks are and what information council will need to assess these risks.
- (c) For sites within or adjacent to particularly sensitive receiving environments, additional controls under the RMA may be justified to appropriately manage the adverse effects and risks associated with hazardous substances. For example, a rule might be imposed in a plan imposing permitted activity conditions or requiring resource consent for hazardous facilities within a certain setback distance from sensitive areas, such as wetlands or sources of reticulated potable water to allow site-specific requirements to be imposed to ensure the potential adverse effects on these receiving environments are appropriately managed.

⁴ As defined under regulation 19 and 20 of the Health and Safety at Work (Major Hazard Facility) Regulations 2016.

- (d) Councils need to be fully aware of the significance and potential risk from a Major Hazard Facility, when considering sensitive land uses or intensification. Depending on the risk, it may be appropriate to consider land use restrictions on land in the vicinity of a Major Hazard Facility, to enable the Major Hazard Facility to carry out its operations, including maintenance and upgrades, without being unreasonably constrained by sensitive activities subsequently locating near a Major Hazard Facility.
- (e) Cumulative risks may result from similar types of risks presented by neighbouring facilities, or from potential multiple adverse events through time. For most small to medium hazardous facilities, cumulative risks are generally not a significant issue that warrant controls in RMA plans, but they may be for larger facilities to ensure risks are acceptable.
- (f) Councils may find that the requirements within their RMA plans relating to buildings and development in areas identified as being subject to natural hazards, combined with the HSWA (Hazardous Substances) Regulations and requirements under other legislation such as the Building (Earthquake-prone Buildings) Amendment Act 2016, are sufficient to protect the building or site in which a hazardous substance is used or stored from the natural hazard risk. Where the risk of a natural hazard is greater, councils may place additional controls on the location of certain activities (such as industrial activities) or hazardous substances within the specified natural hazard risk area. It is not warranted to impose blanket controls on all hazardous substances on land considered hazard prone as this would likely result in significant consenting requirements without adding significant benefits.
- (g) RMA plans and policy statements may control substances which, due to particular properties, can have adverse effects on ecosystems and wildlife but are not considered eco-toxic

under the HSWA (Hazardous Substances) Regulations. Such properties include the potential to cause high bio-chemical oxygen demand in natural waters when the substance enters such waters, leading to rapid oxygen depletion, for example some agrichemicals. Other environmentally damaging properties include the potential for smothering effects, for example those caused by certain oils.

- 6.10 It is my opinion that the effects associated with hazardous facilities that store, use or dispose of hazardous substances in excess of the permitted standards can be readily determined in this context. The matters of discretion that are sought by POAL are comprehensive and “cover the field” (if not go beyond that which is required by the Ministry for the Environment guidance), noting that:
- (a) they are the same which apply ‘Auckland-wide’ (regardless of the underlying zoning) under the provisions of Chapter E31 of the Auckland Unitary Plan; and
 - (b) the advice provided by the Ministry for the Environment (set out at (b) above) suggests that restricted discretionary activity status is appropriate.
- 6.11 A discretionary activity will require an applicant to undertake a full assessment of effects when considering an infringement to the hazardous substances rules, and will require matters that are unrelated to the storage, use or disposal of hazardous substances to be assessed (such as traffic generation, parking, landscaping and building design). Such an approach is unduly onerous, disproportionate to the scale and significance of an infringement to the rules, and is not justified in the context of the RLAA and the guidance that has been prepared by the Ministry for the Environment.
- 6.12 For these reasons, I am of the opinion that it is appropriate to provide for infringement to the hazardous substances rules as a discretionary activity, as opposed to a discretionary activity. Having regard to the

guidance provided by the Ministry for the Environment (outlined above),
I would support the following matters of discretion:

RD1 The use, storage or disposal of any hazardous substances that does not comply with Rule 20.2.6 P1, P2 or C1.

Council's discretion shall be restricted to the following matters:

- (i) the proposed operation and site layout;
- (ii) the separation distances from the receiving environment and other land uses;
- (iii) the degree and acceptability of residual risk;
- (iv) consideration of potential health and environmental hazards and exposure pathways arising from the proposed facility;
- (v) minimising potential cumulative risks including in conjunction with other nearby hazardous facilities; and
- (vi) measures to minimise or mitigate potential adverse effects that may result from natural hazards.

Mark Nicholas Arbuthnot

17 December 2019