

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 IN RESPONSE TO
MINUTE AND DIRECTIONS OF 25 JUNE 2020
24 July 2020**

May it please the Hearing Commissioners:

1. I refer to the minute and directions issued by the Commissioners dated 25 June 2020 (“Minute”), which provides a draft set of provisions for the management of hazardous substances in the proposed Waikato District plan (proposed plan). The Minute provides both submitters and Council a final opportunity to comment on the drafting of the draft provisions.
2. Clauses 5(b) and 5(c) of the Minute provides:
 - b) Any party that filed evidence on the hazardous substances provisions of the proposed plan is to provide any recommended drafting amendments to those set out in paragraph 4 above, with reason, to the Hearing Administrator, Ms Sandra Kelly, no later than 5pm on Friday 17 July 2020.
 - c) Council staff are to provide any recommended drafting amendments to those provided by submitters, with reasons, to the Hearings Administrator, no later than 5pm on Friday 24 July 2020.
3. While this memorandum does not provide any recommended drafting amendments to those provided by submitters (as outlined in clause 5(c) of the Panel’s minute), it does highlight for the Commissioners’ consideration of some additional issues arising from the draft provisions which have not been addressed by the submitters.
4. I have reviewed the five responses to the Commissioners’ Minute provided from Fire and Emergency New Zealand, Ports of Auckland Limited, LPG Association of New Zealand, Genesis Energy Limited and the Oil Companies and have addressed below many of the points they raise as to whether or not I agree with their proposed amendments.
5. A low number of responses were received to the Minute, yet in my view a number of the original submitters could now be considered a Major Hazard Facility under the draft definition. The draft provisions are likely to expand the number and type of permitted activities that will result from the proposed definition.
6. I have highlighted the key issues with the provisions and provided some suggested amendments to the draft provisions as set out below.

Contaminated Land Provisions

7. Given that the Commissioners have not provided any indicative provisions for the Contaminated Land section of proposed Chapter 10, it is unclear whether the Commissioners wish to delete these provisions, or if they wish to retain them.
8. To ensure that they are not overlooked, I reiterate my support for the retention of high level direction in respect to contaminated land issues through an Objective and Policy Framework and consider this to be anticipated by the National Planning Standards, despite the provisions being included in the National Environmental Standard for Assessing and Managing Contaminants in Soils to Protect Human Health (NESCS).

Hazardous Substances Provisions

9. I wish to provide the following comments in respect to each section of the draft hazardous substances provisions:

10.1 HAZARDOUS SUBSTANCES

10.1.1 INTRODUCTION

Hazardous substances are used in a wide range of activities within the Waikato District. These activities can include industrial operations, petrol stations, emergency services facilities, workshops, agricultural and horticultural activities, and some occupations that are carried out from home. While the use, storage and disposal of hazardous substances allows people to provide for their social and economic wellbeing and their health and safety, such activities also create potential for adverse effects on human health and property and the wider environment.

The use of hazardous substances in New Zealand is primarily managed by the Hazardous Substances and New Organisms Act 1996 (HSNO), the Health and Safety at Work Act 2015 (HSW) and relevant regulations. The purpose of the HSNO and HSW legislation is to 'protect the environment, and the health and safety of people and communities by preventing or managing the adverse effects of hazardous substances and new organisms'. The HSNO Act is administered by the Ministry for the Environment and implemented by the Environmental Protection Authority. The HSNO Act provides the general framework for controlling hazardous substances during their entire life-cycle. Requirements apply from manufacturing or importing a substance, through its use, to disposal. The HSW Act is administered by WorkSafe New Zealand.

The district plan seeks to avoid duplication of other hazardous substances legislation and regulations. The provisions of this chapter are, therefore, designed to manage relevant effects of use, storage, or disposal of hazardous substances, where those effects are not appropriately controlled by existing legislation and regulations.

10.1.2 Objective 10.1.1

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

10. I note that Fire and Emergency commented on “the adverse effects”, which implies that there will be adverse effects. I do not have a view either way if the word “the’ is removed from the Objective, as I consider that there will always be adverse effects, even if they are only potential effects. There are risks with hazardous substances and the test is whether those risks are acceptable or not, or can be appropriately mitigated.
11. I suggest the term “manufacture” be deleted from the objective as it is not the manufacture which presents risk in terms of hazardous substances. It is the subsequent use, storage and disposal of hazardous substances which present risk in the land use context. I also suggest the term “disposal” be inserted for consistency with the introduction above.
12. I note that the Oil Companies and Ports of Auckland responses to the Commissioners have requested the deletion of the term “transportation”. I do not agree that it should be removed, as there are circumstances where effects relating to the transport of hazardous substances to or from a specific facility may pose a risk to public health and safety, particularly in sensitive receiver locations (i.e. schools, retirement villages etc). Although the definition of “major hazard facility” explicitly excludes the transport of hazardous substances, consideration of a resource consent application would benefit from the inclusion of the transport aspect through the policy.

10.1.4 Policy 10.1.3

To 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).

13. The policy refers to existing activities moving closer to a hazardous facility. I think that perhaps the policy is intended to refer to “new sensitive activities establishing”. The term “reduced risks” should not be confused as an amenity effect, but is a health and safety issue, which is the key reason that reverse sensitivity effects must be appropriately managed. Sensitive activities also generally cannot know what the risks of another land use activity involving hazardous substances actually are, hence cannot ‘seek’ to reduce them.

10.1.6 Objective 10.1.5

To 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.

14. I note the reference to ‘unnecessary’ duplication implies that there may be ‘necessary’ duplication but there is no guidance as to what duplication is considered necessary.

10.1.7 Policy 10.1.6

To regulate the use, storage or transportation of hazardous substances, in the District Plan only where adequate levels of community and environmental protection is already provided by the Hazardous Substances and New Organisms Act 1996 or other legislation and regulation.

15. I agree with Fire and Emergency New Zealand, Genesis Energy and the Oil Companies who consider that the word ‘is’ should be replaced with the words “are not”.
16. I note also that the term “disposal” has been omitted from the policy. I suggest it be inserted to be consistent with the corresponding objective. I do not agree with the Oil Companies’ and Ports of Auckland’s responses to the Commissioners which have requested the deletion of the term “transportation”.

10.3 RULES FOR HAZARDOUS SUBSTANCES

Rule 10.3.1 Hazardous Substances in All Zones

RULE	LAND USE ACTIVITIES
P1	<i>The storage, handling or use of hazardous substances except where Rule 10.3.1 D1, or Rule 10.3.1 NC1, or 10.3.1 NC2 apply.</i>

17. I note that the term ‘handling’ has been introduced into the rule, yet is not referred to in the introduction, objectives or policies. I note that the terms “transportation” and ‘disposal’ have also been omitted, yet disposal has been referred to in the risk assessment criteria contained in Rule 10.3.1 D1.
18. In my opinion, inconsistent terminology results in a disconnect between this rule and the objectives and policies above.

D1	<i>The storage, handling or use of hazardous substances in a Major Hazard Facility.</i>
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	<p><i>Council's assessment under this rule may include, but is not limited to:</i></p> <p>) <i>A risk assessment, that addresses:</i></p> <p><i>The probability and potential consequences of an accident leading to the release or loss of control of hazardous substances. This assessment should focus on the ability of the design and management of the site to avoid accidents, such as spill containment measures, fire safety and fire water management, emergency management, site drainage and off-site infrastructure (e.g stormwater drainage system, sewer type and capacity) and the disposal of waste containing hazardous substances.</i></p> <p><i>Potential risks and effects on people and neighbouring activities, with an emphasis on sensitive activities such as residential activities, educational facilities and community facilities.</i></p> <p><i>Potential risks and effects on natural ecosystems and the life supporting capacity of land and water, waterbodies and sources of potable water.</i></p> <p>) <i>Potential risks and effects on sites of significance to tangata whenua, sites of historical or archaeological significance and Outstanding Natural Features and Landscapes.</i></p> <p><i>The potential for natural hazards to impact on the operation of the hazardous facility.</i></p> <p>) <i>The potential for cumulative adverse effects of hazardous substances.</i></p> <p>) <i>The extent to which alternative sites have been considered, and the reasons for selecting the site under consideration.</i></p>
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19. Similar to PI, note the inclusion of “handling” and the omission of “transportation” and “disposal”.

20. DI provides the inclusion of details pertaining to a risk assessment, which provides useful guidance which would assist Council's resource consent planners. The matters listed in DI provide a good indication of the scope of a risk assessment.

21. I suggest that it could be helpful to list these as criteria (i.e. (a), (b)...).

NC2	<i>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.</i>
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22. NC2 in my opinion appears reasonable and clear and is the same as the provision proposed by Council, which was supported by submitters.

DEFINITIONS

Definitions – relating to hazardous substances

<i>Major hazard facility</i>	<p><i>Major Hazard Facility:</i></p> <p><i>Means any facility which involves one or more following activities:</i></p> <ul style="list-style-type: none"> • <i>Manufacturing and associated storage of hazardous substances (including industries manufacturing agrochemicals, fertilisers, acids/alkalis or paints)</i> • <i>Oil and gas exploration and extraction facilities</i> • <i>Purpose built bulk storage facilities for the storage of hazardous</i>
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substances (other than petrol, diesel or LPG) for wholesale or restricted commercial supply

- *The storage/use of more than 100,000L of petrol*
- *The storage/use of more than 50,000L of diesel*
- *The storage/use of more than 6 tonnes of LPG*
- *Galvanising plants*
- *Electroplating and metal treatment facilities*
- *Tanneries*
- *Timber treatment*
- *Freezing works and rendering plants*
- *Wastewater treatment plants*
- *Metal smelting and refining (including battery refining or recycling)*
- *Milk treatment plants*
- *Fibreglass manufacturing*
- *Polymer foam manufacturing*
- *Asphalt/bitumen manufacture or*

storage

- Landfills

For the avoidance of doubt, the following activities are not considered to be major hazardous facilities:

- *The incidental use and storage of hazardous substances in minimal domestic scale quantities*
- *Retail outlets for hazardous substances intended for domestic usage (e.g supermarkets, hardware stores and pharmacies)*
- *The incidental storage and use of agrichemicals, fertilisers and fuel for land based primary production activities.*
- *Pipelines used for the transfer of hazardous substances such gas, oil, trade waste and sewage*
- *Fuel in motor vehicles, boats, airplanes and small engines*
- *Military training activities*
- *The transport of hazardous substances (e.g in*

23. Having given extensive consideration to the draft definition of Major Hazardous Facility, I consider the definition could be improved.
24. Most of the submitters who responded have also raised concerns with the proposed definition. I agree with the comments from Fire and Emergency New Zealand that the definition could have several consequences, including potentially permitting what is defined in the HSW Regulations as a 'Major Hazard Facility'.
25. The fact that facilities involving large quantities of hazardous substances could be inappropriately permitted, as correctly identified by Fire and Emergency NZ, should be addressed by linking the appropriate consent status to the level of risk. The best approximation of that is, as in the HSW Regulations themselves, a quantity threshold list.
26. The LPG Association has provided feedback in respect to the storage of LPG and highlighted one of the issues between the definition in the HSW (Major Hazard Facilities) Regulations 2016 and the definition proposed. While the definition in the HSW (MHF) legislation refers to discrepancies in the 6 tonnes to 50 tonnes range, the HSW (MHF) legislation definition is silent on the implications for large scale storage up to 6 tonnes in sensitive zones as permitted activities. This volume of LPG storage as a permitted activity may pose significant risk to sensitive receiver environments.
27. The Oil Companies and Ports of Auckland wish to change the terminology to 'Significant Hazardous Facility' to avoid potential confusion with the definition of major hazard facility used in the Health and Safety at Work (Major Hazard Facilities) Regulations 2016.
28. I agree and consider the term 'Major Hazard Facility' should be reconsidered as it is used in other legislation in a different context and with a different definition. It is noted that the terms 'major hazard facility' and 'major hazardous facility' are used interchangeably which adds to the confusion. However, simply replacing it with another term would not address the remaining problems with the scope of the definition, as highlighted below.

Manufacturing

29. The term 'manufacturing' is not defined and open to wide interpretation. It is unclear whether this includes or excludes mining/extraction (as per the HSNO Act definition of the term), mixing or diluting of hazardous substances, or numerous other activities which could be interpreted as 'generating something'. It also has no reference to scale with the result that activities generating small quantities, such as produced in a laboratory, are included by default. My concerns in regards to using the term are that it could create uncertainty and could be unduly onerous. In

addition, storage is explicitly linked to manufacturing, therefore storage not associated with manufacturing could be deemed permitted. This generates potential inconsistencies between activities with similar adverse effects.

Oil and gas exploration and extraction facilities

30. The likelihood of 'oil and gas exploration and extraction facilities' occurring in the Waikato District is unlikely so these activities could be deleted from the definition. I suggest that other activities such as extraction/mining involving explosives, the commercial scale storage of solvents, paints, corrosives etc., any activity involving radioactive substances be added to the definition.

Purpose built bulk storage facilities

31. The scope of 'purpose built bulk storage facilities...' is unclear as many bulk warehousing activities are not necessarily 'purpose built'. Without the necessary quantification it is unclear at what point 'bulk' storage starts. It is unclear what 'restricted' commercial supply means. Restricted by what? This term relies on numerous variables and is confusing and open to wide interpretation.

Storage/use of petrol and diesel

32. I disagree with the response provided by the Oil Companies and Ports of Auckland in respect to the definition recognising only above ground storage of petrol and diesel, as this would mean that all other fuel storage (i.e. below ground) can have unlimited quantities as permitted activities. The requested arbitrary switching of quantity limits between different plans highlights the lack of consistency. While petrol is more flammable, it is not mentioned in the Oil Companies response that diesel is as eco-toxic (but less volatile and thus more likely to enter ground and water). The specific reference to selected hydrocarbons also fails to address the equivalent storage of, for example, aviation fuels. Otherwise the reference to petrol and diesel should be to the storage for retail purposes only, which is not the case with the proposed change.

Landfills or waste metal refining

33. It is unclear why landfills or waste metal refining is included in the list but not, for example, solvent recycling or waste oil processing. I suggest these activities are included.

Tanneries

34. Tanneries are included as a generic activity thus potentially applying the status of 'Major Hazard Facilities' to the small-scale processing of possum pelts with food acids. This is an example of where not identifying the scale of the activity or quantities of hazardous substances involved in the operation unintentionally captures small-scales activities.

Wastewater treatment plants

35. Wastewater treatment plants are apparently listed due to the large scale storage of high BOD substances. However, other activities involving bulk storage of high BOD substances are not included, apart from milk 'treatment plants'. It is unclear what treatment is included, and may unintentionally capture activities such as an artisan cheese maker (processing milk).

Transportation

36. I note the exclusion of transport of hazardous substances but also note that "transportation" is included in Objective 10.1.1 and Policy 10.1.6.

Other activities listed

37. It appears that a number of traditionally defined 'noxious' activities or industries are included in the listed activities for the definition which have that status largely due to gas or odour emissions. However, this should not be confused with hazardous facilities in the land use planning context and should be based on the risks associated with the activity in respect to the quantities of hazardous substances being used, stored, transported or disposed of as part of the hazardous facility operation.

Overall comments regarding the definition

38. Overall the term 'Major Hazard Facility' is problematic. Some activities have been included that are unlikely to establish in the District, while other activities that are, or could be, relevant are not included such as the storage and use of aviation fuels (i.e. Te Kowhai Airfield). There is no clear link of listed activities to adverse effects generated by hazardous substances. There is no scale or degree in the listed activities that could correspond to a scale of effects and there is the risk that benign activities (such as the cheese maker) may inadvertently be included as a major hazardous facility.
39. Other terms such as the type of activities being addressed (such as use, storage – while avoiding terms such as handling or manufacture altogether) are not defined but should be.

Summary

40. Overall, having reviewed the draft provisions, whether intended or not, they provide a more lenient rule framework in terms of the management of hazardous facilities within the Waikato District for some activities but are considerably more onerous for others.

Dated at Ngaruawahia this 24th day of July 2020



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