

22 November 2019

File Ref: 204622-799

Waikato District Council
Private Bag 544
NGARUAWAHIA 3742

For: Katherine Overwater

Dear Katherine

Proposed Waikato District Plan - Chapter 10 Hazardous Substances and Contaminated Land

1. Waikato District Council ("Council") notified Stage 1 of the Proposed District Plan on 18 July 2018 ("PDP"). The purpose of this letter is to assist with the preparation of your s42A planning report for Hearing Topic 8A Hazardous Substances.
2. By way of background, we are aware that some submitters to the PDP seek the deletion of the provisions which control hazardous substances, as they consider that they are already regulated by the Hazardous Substances and New Organisms Act 1996 and the Health and Safety at Work Act 2015 and regulations.
3. You seek advice on the following matters:
 - (a) Is there still a role for district plans to manage hazardous substances in light of the Resource Legislation Amendment Act 2017 ("RLAA")? Please address any case law on this issue.
 - (b) If the answer to (a) is yes, how are hazardous substances dealt with under the Resource Management Act 1991 ("RMA")?
 - (c) Whether the PDP is required to give effect to the Waikato Regional Policy Statement, Policy 4.2.9?
 - (d) Whether the National Planning Standards definition of hazardous substances can be amended?
 - (e) Do any other recent proposed district plans include hazardous substances provisions?
4. We respond as follows.

EXECUTIVE SUMMARY

5. While the explicit function of local authorities to control the storage, use, disposal, or transportation of hazardous substances was removed from sections 30 and 31 RMA in 2017, case law confirms it is still appropriate for district plans to include provisions to manage the land use effects relating to hazardous substances/hazardous facilities. HSNO, HSW legislation and the RMA all play a role in managing risk to human life and health from hazardous facilities. The regimes have similar yet distinct functions which can work together to minimise the risk to those within the hazardous facility and the wider environment.
6. The PDP is required to give effect to Policy 4.2.9 of the Waikato Regional Policy Statement.
7. Council is required to adopt the definition of hazardous substances as provided for in the Definitions Standard of the National Planning Standards if the term is used in the PDP in the same context.
8. Since RLAA, we are aware of three district councils who have included hazardous substances provisions in their proposed district plans.

INTRODUCTION

9. Hazardous substances are managed and regulated in New Zealand under three key Acts. We set out the purposes of those Acts for context:

- (a) Hazardous Substances and New Organisms Act 1996 (“HSNO”):

4 Purpose of Act

The purpose of this Act 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.

- (b) Health and Safety at Work Act 2015 which includes the Health and Safety at Work (Hazardous Substances) Regulations 2017 (“HSW”):

3 Purpose

- (1) The main purpose of this Act is to provide for a balanced framework to secure the health and safety of workers and workplaces by –

- a. Protecting workers and other persons against harm to their health, safety, and welfare by eliminating or minimising risks arising from work or from prescribed high-risk plant; and

...

- d. Promoting the provision of advice, information, education, and training in relation to work health and safety; and
- e. Securing compliance with this Act through effective and appropriate compliance and enforcement measures; and
- f. Ensuring appropriate scrutiny and review of actions taken by persons performing functions or exercising powers under this Act; and
- g. Providing a framework for continuous improvement and progressively higher standards of work health and safety.

- (2) In furthering subsection (1)(a), regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety, and welfare from hazards and risks arising from work or from specified types of plant as is reasonably practicable.

- (c) Resource Management Act 1991 (“RMA”):

5 Purpose

- (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
- (2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while –
 - a. Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
 - b. Safeguarding the life-supporting capacity of air, water, soil and ecosystems; and
 - c. Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

10. HSNO regulates the management, disposal, classification, packaging and transport of hazardous substances. The Environmental Protection Authority (“EPA”) is responsible for approving and classifying all hazardous substances for use in New Zealand under HSNO legislation. The controls imposed by the EPA manage the risks of hazardous substances and safeguard people and the environment. EPA is responsible for approving pesticides, household chemicals and other dangerous goods and substances under the HSNO legislation.
11. The HSW legislation aims to secure the health and safety of workers, workplaces and communities. From 1 December 2017 the rules around managing hazardous substances that affect human health and safety in the workplace have been transferred from HSNO to the Hazardous Substances Regulations under HSW. Worksafe New Zealand is responsible for establishing workplace controls for hazardous substances and is the principle enforcement and guidance agency in workplaces. The HSW legislative regime sets out specific requirements/obligations but does not generally prescribe how compliance must be achieved.
12. The RMA is focused on sustainable management which means controlling the use of “natural and physical resources in a way or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety...”. Decisions on the use of land, in particular the location of certain activities, falls for consideration under the RMA.

HAZARDOUS SUBSTANCES UNDER THE RMA

Sections 30 and 31 RMA

13. The RMA is one of three key pieces of legislation that direct how hazardous substances are managed in New Zealand. In 2017 the RLAA removed the control of hazardous substances as an explicit function of regional and territorial councils under sections 30 and 31 RMA respectively. Prior to the RLAA, section 30(1)(c)(v) provided:

30 Functions of regional councils under this Act

- (1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:
 - ...
 - (c) The control of the use of land for the purpose of –

...

(v) the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances:

14. Furthermore, prior to the RLAA, section 31(1)(b)(ii) provided:

31 Functions of territorial authorities under this Act

(1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:

...

(b) the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of –

...

(ii) The prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances.

15. The Ministry for the Environment Resource Legislation Amendments 2017 Fact Sheet 2 states that the intent of the above changes is to remove the perception that councils must always place controls on hazardous substances under the RMA, and to ensure councils only place **additional controls** on hazardous substances if they are necessary to control effects under the RMA that are not covered by the HSNO or HSW Acts. The Fact Sheet provides that in most cases HSNO and HSW controls will be adequate to avoid, remedy or mitigate adverse environmental effects (including potential effects) of hazardous substances.
16. The Fact Sheet states that Councils still have a broad function of achieving integrated management, and may use this function to place **extra controls** on hazardous substance use under the RMA, if existing HSNO or HSW controls are not adequate to address the environmental effects of hazardous substances in any particular case (including managing the risk of potential effects on the local environment).
17. Although the RLAA removed the explicit functions of regional and district councils in regard to hazardous substances, the Environment Court has recently concluded that the RMA and WorkSafe legislation and regulations¹ all play a role in managing risk to human life and health from hazardous facilities. The Court found that the RMA regime and the WorkSafe legislation and regulation regimes have similar, yet distinct functions which work together to minimise risk to those within the hazardous facility and the wider environment both now and in the future.² We discuss this case in further detail below.

INTERFACE BETWEEN THE RMA AND HSNO/HSW LEGISLATION

18. The starting point in terms of the role and scope of the RMA can be found in the judgment of Whata J in *Meridian Energy Ltd v Southland District Council* [2014] NZHC 3178:

[23] The RMA provides a comprehensive framework for the regulation of the use of land, water and air. It signalled a major change from the direct and control emphasis of the

¹ *Taranaki Energy Watch v South Taranaki District Council* [2018] NZEnvC 227 footnote 39, states that when “WorkSafe legislation and regulations” is referred to in this decision, this mean Health and Safety at Work Act 2015 and its regulations and Hazardous Substances and New Organisms Act 1996. Although not relevant to the decision, we record that from 1 December 2017 the rules around managing hazardous substances that affect human health and safety in the workplace have been transferred from HSNO to the Hazardous Substances Regulations under HSWA.

² *Taranaki Energy Watch v South Taranaki District Council* [2018] NZEnvC 227.

previous planning regime to the sustainable management of resources, with its composite objective of enabling people and communities to provide for their wellbeing, while, among other things, mitigating, avoiding or remedying adverse effects on the environment. The Act is carefully framed to provide for the control of the effects of resource use, including regulatory oversight given to functionaries at national, regional and district levels. **In general terms, all resource use is amenable to its framework, unless expressly exempted from consideration.**

19. Therefore, unless expressly exempted, it follows that hazardous substances (a resource use) are amenable to the RMA framework. In that regard, we agree with the approach outlined in the paper *The Resource Management Act 1991 – Its Interface and Interplay with other legislation*³ which summarised the principles to apply to determine whether two (or more) statutes can apply to the same subject matter. The paper provides that the approach should:
- (a) Consider the stated purpose of the RMA, HSNO and the HSW;
 - (b) Discern with precision what each statute was intended to address, and, having regard to the purpose and nature of controls in each, whether there is scope for both to operate. If it is reasonably possible to construe the provisions so as to give effect to both, that must be done. Only if one is so inconsistent with, or repugnant to, the other that the two are incapable of standing together, is it necessary to determine which is to prevail. As a general rule, express language will be required before the RMA is excluded.
 - (c) Consider whether HSNO and HWA contain express language that was intended to expressly exclude the operation of the RMA or other legislation of general application; and
 - (d) Consider whether the scheme of HSNO and HWA is such that different functionaries making decisions under separate statutes is tenable, particularly if it would negate or derogate from any existing right of licence.
20. Neither HSNO or HSW expressly refers to their relationship with the RMA in relation to the control of hazardous substances.⁴ Considering the above approach, we refer to the recent Environment Court decision *Taranaki Energy Watch v South Taranaki District Council* which provides useful commentary regarding the interface between the RMA and HSW and regulations.⁵

Taranaki Energy Watch v South Taranaki District Council [2018] NZEnvC 227

21. This decision involved an appeal against a decision of South Taranaki District Council in relation to submissions on the proposed South Taranaki District Plan. The proposed District Plan as notified, included separation distances in the rules to address the risks associated

³ *The Resource Management Act 1991 – Its Interface and Interplay with other legislation*, Simon Berry, Maree Baker-Galloway, presented at NZLS CE LTD Environmental Law Intensive November 2019.

⁴ However section 230 HWA provides that nothing prescribed in regulations made under this Act for the safe use, handling, manufacture, or storage of hazardous substances applies in relation to any resource consent to which this subsection applies that is – (a) a land use consent relating to the use, handling, manufacture, or storage of any hazardous substances; or (b) a coastal permit to do something that would otherwise contravene s 15 of the RMA; or (c) a discharge permit; Section 142 of HSNO provides that nothing in this Act shall apply to any resource consent, being – (a) a land use consent relating to the storage, use, disposal, or transportation of any hazardous substance; or (b) a coastal permit to do something that would otherwise contravene section 15 of the Resource Management Act 1991; or (c) a discharge permit, -

⁵ Which largely subsumed reporting, certification, and enforcement in relation to Petroleum exploration and production facilities previously under HSNO.

with hazardous facilities (in particular petroleum exploration and production facilities). The Hearings Panel in its decision removed the separation distances from the rules in the proposed plan, holding that compliance with the WorkSafe legislation and regulations (HWA and regulations) internalised risk to within the subject site. The appeal subsequently required consideration of the separate legislative regimes to determine whether the Court had jurisdiction to consider and address human risk and safety issues through a district plan.

22. The Court provided useful commentary regarding the interface between the RMA and WorkSafe legislation and regulations. We set that out in full (footnotes omitted):

[42] With that said, we accept Ms Hanson-White's characterisation of the Health and Safety at Work Act 2015 ("HSWA") as being "**performance-based legislation**" insofar as the legislation does not generally prescribe how compliance must be achieved. In principle, "workers and other persons should be given the highest level of protection against harm to their health, safety, and welfare from hazards and risks arising from work or from specified types of plant as is reasonably practicable" (s 3(2)). Section 36 of HSWA establishes the primary duty of care on all persons conducting a business or undertaking, which is to ensure, so far as reasonably practicable, the health and safety of workers and other persons who may be exposed to risks that arise from work activity (ss 36(1) and (2)). "Other persons" include persons who are not in the workplace; their identity is determined, inter alia, by the nature of the risks.

[43] Section 30 of the HSWA imposes a duty:

- (a) to eliminate risks to health and safety, so far as is reasonably practicable; and
- (b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.

[44] The point being, where a risk is minimised, because it cannot be eliminated, there is "no absolute guarantee that incidents or accidents will be prevented or that harm will be prevented". Instead, **measures are to be implemented to minimise those risks so far as is reasonably practicable. Thus, it cannot be imputed that compliance with WorkSafe legislation and regulations means risk is eliminated.**

(Emphasis added)

23. Significantly, the Court further noted that the WorkSafe legislation and regulations do not control decisions made on the use of land near a workplace and do not require an assessment of risk carried out at the time of site selection:

[45] The second key point is this: WorkSafe legislation and regulations do not control decisions made on the use of land near a workplace.

[46] The final key point is that WorkSafe legislation and regulations do not require an assessment of risk carried out at the time of site selection. Mr Cobden and Ms Hanson-White's view, together with the planning and risk experts, **is that decisions on the use of land – in particular, the location of petroleum exploration and petroleum production activities and the location of sensitive receptors – are to be addressed under the District Plan.**

24. The Court concluded that there is a distinction between the scope and functions of the WorkSafe legislation and regulations and the RMA. This being, that there is scope for them both to operate.⁶ In that regard, we take from the Court's commentary in *Taranaki Energy*

⁶ *Taranaki Energy Watch v South Taranaki District Council* [2018] NZEnvC 227 at [32] and [62].

Watch Inc v South Taranaki District Council, which was post RLAA, that while the WorkSafe legislation and regulations provide 'performance based' controls in relation to hazardous substances, it does not necessarily follow that compliance with the WorkSafe legislation and regulations will mean that risk is eliminated.

25. As such, additional controls to address any risk relating to hazardous substances will necessarily be appropriate under a district plan.

Implications

26. Considering the approach outlined at paragraph 19, and the above decision, we consider that there is still a role for district councils to regulate hazardous substances/hazardous facilities in their district plans. Neither HSNO or HWA and regulations contain express provisions excluding the operation of the RMA, and as determined by the Court in *Taranaki Energy Watch*, the two legislative regimes have distinct functions which work together to minimise risk to workers and to the wider environment.
27. Several district councils have included hazardous substances/hazardous facilities provisions in their district plans following the RLAA amendments. Summaries of these plans are included with this letter as **Attachment 1**.

HAZARDOUS SUBSTANCES UNDER THE PDP

28. As demonstrated above, we have determined that there is still a role for Council to regulate hazardous substances/hazardous facilities in the PDP. We have identified the following areas where RMA controls may be necessary:
- (a) Where local circumstances generate a need for additional management of hazardous substances/hazardous facilities than is already provided for under HSNO and HSW:
 - (i) Effects of hazardous facilities on the environment;
 - (ii) Incompatible land uses;
 - (iii) Sensitive receiving environments;
 - (iv) Reverse sensitivity issues;
 - (v) Cumulative effects risk;
 - (vi) Discharges;
 - (vii) Substances not listed in HSNO.

29. Of note, section 360D RMA⁷ provides that the Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations to prohibit or remove specified rules or types of rules that would *duplicate, overlap with, or deal with the same subject matter that is included in other legislation*.⁸ No regulations have been issued under section 360D in relation to HSNO or HSW since it came into force and we note that the Resource Management Amendment Act 2019 proposes the removal of section 360D.
30. We are aware that Council's hazardous substances' expert is providing Council with a background report providing an explanation in relation to the submissions received as well as the function of relevant legislation, specifically HSNO and HSW. The report will also address Council's role in managing land use, outlining circumstances where RMA controls are necessary.
31. In the following section, we address whether the PDP is required to give effect to the Waikato Regional Policy Statement, Policy 4.2.9, and the definition of "hazardous substances" in the PDP.

Waikato Regional Policy Statement – Policy 4.2.9

32. Policy 4.2.9 in the Waikato Regional Policy Statement ("RPS") was made operative before RLAA removed the express function in section 31(1)(b)(ii) to manage hazardous substances. In the circumstances, you ask what relevance Policy 4.2.9 has to the decision-making on the PDP. Policy 4.2.9 provides:

4.2.9 Hazardous substances

Regional and district plans shall recognise and provide for the following division of responsibilities when developing provisions for the control of the use of land for the prevention or mitigation of any adverse effects of the storage, use disposal or transportation of **hazardous substances**:

- (a) Waikato Regional Council shall be responsible for developing objectives, policies, rules and other methods for land in the coastal marine area and the beds of lakes and rivers; and
- (b) Territorial authorities shall be responsible for developing objectives, policies, rules and other methods for all other land.
33. Section 75(3)(c) RMA provides that a district plan must give effect to any regional policy statement. Case law has determined that "give effect" means to implement.⁹
34. In general, sections 73-75 RMA require the PDP to give effect to the RPS if there is a provision in the statement to which the PDP does not give effect. Section 73(5) requires this compliance either within a time specified in the statement, or as soon as reasonably practicable, in any other case.
35. In that regard, as Policy 4.2.9 of the RPS is operative, the PDP must necessarily give effect to it. This means, in effect, that the PDP must contain objectives, policies, rules and other methods for all land (other than the coastal marine area and the beds of lakes and rivers) to

⁷ Section 360D was introduced into the RMA in 2017.

⁸ Section 360D(1) does not apply to rules or types of rules that regulate the growing of crops that are genetically modified organisms.

⁹ *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited & Ors* [2014] NZSC 38.

control the use of land for the prevention or mitigation of any adverse effects of the storage, use disposal or transportation. Therefore Policy 4.2.9 in the RPS should apply in regards to the storage, use, disposal or transportation of hazardous substances where control is required to manage a landuse effect (i.e. effects on sensitive environments, reverse sensitivity effects etc.).

Definition of “hazardous substances” in the PDP

36. The Ministry for the Environment has recently released the first set of National Planning Standards in April 2019 (“NPS”). You have asked us to comment on the NPS definition for hazardous substances and in particular, whether it can be amended. The NPS definition for hazardous substances simply reads “has the meaning as in section 2 of the RMA.”

37. The RMA, section 2 provides the following definition for hazardous substances:

Hazardous substance “includes, but is not limited to, any substance defined in section 2 of the Hazardous Substances and New Organisms Act 1996 as a hazardous substance”.

38. Section 2 of HSNO defines “hazardous substances” as:

Hazardous substance means, unless expressly provided otherwise by regulations or a EPA notice, any substance –

(a) with 1 or more of the following intrinsic properties:

i. explosiveness:

ii. flammability:

iii. A capacity to oxidise:

iv. Corrosiveness:

v. Toxicity (including chronic toxicity):

vi. Ecotoxicity, with or without bioaccumulation; or

(b) which on contact with air or water (other than air or water where the temperature or pressure has been artificially increased or decreased) generates a substance with any 1 or more of the properties specified in paragraph (a).

39. Mandatory Direction 1 in the definition Standard of the NPS reads:

“Where the definitions List incorporates a definition from legislation, the definition applied is the version included in the legislation on the date of gazettal of this standard.”

40. Council cannot amend a term in the definitions list. That is, Council cannot add a list of substances nor exclude certain substances from the NPS definition. Mandatory direction 1 makes it clear that Council must use the definition as defined in the Definitions list if the term is used in the plan in the same context.

41. Council can define terms that are a subcategory of, or have a narrower application than a defined term in the Definitions List. The Guidance document on the definitions Standard explains that a sub-category definition is a definition for a term or phrase used within a definition. For example, the definition of reclamation refers to “the formation of permanent dry land”. As such, Council could choose to define “permanent dry land” as a sub-category. Given the NPS definition simply refers to the meaning in section 2 RMA, it is not possible to have a sub-category.

42. Narrower applications of definitions in the Definitions List are anticipated where this is needed to manage specific issues. For example, “quarries” is defined in the definitions List,

but Council chooses to have a narrower definition for “farm quarry” to manage them separately.

43. Given the section 2 RMA definition for hazardous substances (adopted by the NPS) is not limited to the substances defined in section 2 of HSNO, it may well be that other substances are considered hazardous substances. However, there is no ability to make this clear in the definition. The only option is to make it clear in the relevant rule. For example, Council could amend the relevant rule to read “The use, storage or disposal of hazardous substances (including substances with XYZ properties) ...” You could then include a new definition for “Substances with XYZ properties.” The definition could make it clear that it applies only to a particular rule.
44. It appears such amendments to rules are contemplated to be consequential changes. Mandatory Direction 3 makes it clear that when a definition in the list is used, consequential amendments may be required to the plan to ensure the application of the definition does not alter the effect or outcomes of plans. The purpose of Foundation Standard 1 also makes it clear the planning standards do not alter the effect of plan provisions.

CONCLUSION

45. In conclusion, while the explicit function of local authorities to control the storage, use, disposal, or transportation of hazardous substances was removed from sections 30 and 31 RMA in 2017, it is still appropriate for district plans to include provisions relating to hazardous substances/hazardous facilities. HSNO, HSW and the RMA all play a complementary role in managing risk to human life and health from hazardous facilities. The regimes have similar yet distinct functions which can work together to minimise the risk to those within the hazardous facility and the wider environment.
46. We conclude that, subject to an evaluation under section 32 or 32AA, the PDP can provide rules in relation to the control of hazardous substances to ensure that landuse effects associated with the storage, use, transportation and disposal of hazardous substances are being appropriately managed in the district. Provisions in the PDP, particularly in regards to those matters set out in paragraph 28 of this letter, will ensure appropriate control of matters that are not covered by the functions of HSNO and HWA (as set out in the Council’s expert’s background report). The provisions will also meet the requirements of the Waikato Regional Policy Statement and the overall purpose of the RMA.

Yours faithfully
TOMPKINS WAKE



Bridget Parham/Kirsty Dibley
Partner/Solicitor

ATTACHMENT 1: Other proposed district plans/operative district plans post 2017 RLAA amendments

Proposed Queenstown District Plan

1. There is no hazardous substances section in the Proposed Queenstown District Plan. The Proposed Plan's definition of "hazardous substances" does not refer to HSNO or the HSW.

Hazardous Substance: means any substance with one or more of the following characteristics:

- (a)
 - i explosives
 - ii flammability
 - iii a capacity to oxidise
 - iv corrosiveness
 - v toxicity (both acute and chronic)
 - vi ecotoxicity, with or without bio-accumulation; or
- (b) which on contact with air or water (other than air or water where the temperature or pressure has been artificially increased or decreased) generates a substance with any one or more of the properties specified in paragraph a to this definition.

2. Hazardous substances are not controlled under any chapters of the Proposed Queenstown District Plan. However, "hazardous substance" is used in the definitions of "Airport Activity", "Cleanfill" and "Waste Management Facility".

Proposed New Plymouth District Plan

3. The Proposed New Plymouth District Plan was notified on 23 September 2019. It contains a hazardous substances chapter in its Plan: District-wide Matters / HAZS – Hazardous Substances.
4. The Proposed Plan adopts the definition from section 2 of the RMA for "Hazardous Substance". The Proposed Plan also defines "Significant Hazardous Facilities" as:

Significant Hazardous Facilities: means the use of land and/or buildings (or any part of) for one or more of the following activities

1. Manufacturing and associated storage of hazardous substances (including manufacture of agrichemicals, fertilisers, acids/alkalis or paints).
2. Petroleum exploration and petroleum production.
3. The storage/use of more than 100,000L of petrol.
4. The storage/use of more than 50,000L of diesel.
5. The storage/use of more than 6 tonnes of LPG.
6. Galvanising plants.
7. Electroplating and metal treatment.
8. Tanneries.
9. Timber treatment.
10. Freezing works and rendering plants.
11. Wastewater treatment plants.
12. Metal smelting and refining (including battery refining or recycling).
13. Milk processing plants (except where milk processing plant is specifically designed to contain and store milk so that any reasonably potential spillage of milk is contained

within the site of the plant until it can be disposed of to an approved wastewater system).

14. Fiberglass manufacturing.
15. Polymer foam manufacturing.

For (3) and (4), it does not include the underground storage of petrol at service stations undertaken in accordance with HSNOCOP 44 Below Ground Stationary Container for Petroleum- Design and Installation and HSNOCOP 45 Below Ground Stationary Containers Systems for Petroleum – Operation.

5. We note that the 'Overview' to the Hazardous Substances chapter somewhat addresses the interface between the RMA and HSNO. The Overview states:

HSNO provides the general framework and is the primary mechanism for controlling and managing the use and storage of hazardous substances but the following matters fall within the scope of the Resource Management Act 1991:

1. Effects on sensitive activities and areas, the coastal environment, historic heritage and other identified features;
2. Reverse sensitivity issues between existing lawfully established hazardous facilities and new sensitive activities;
3. The risk to public safety e.g. risks to the general public beyond a site boundary and from natural hazards that could affect hazardous facilities; and
4. Management of cumulative effects of multiple hazardous facilities near each other.

6. We consider that this approach is consistent with the areas identified above at paragraph 28 for when RMA controls may be necessary in a district plan. The chapter then goes on to state:

The provisions in this chapter address these matters as they relate to **significant hazardous facilities**. With respect to risks to surrounding land uses from significant hazardous facilities, these relate to emergency events that have low probability of occurring but high potential harm to people and damage to property. The level of unacceptable risk that has informed the provisions in this plan is based on intentionally recognised and accepted evidence. For this plan, the risk (probability of an event occurring i.e. frequency x consequence) of 1/1,000,000 (1×10^{-6} or read as one in a million) per year of fatality to an individual person if they were to spend 365 days per year, 24 hours per day at that location, is the level of unacceptable risk for residential use from these events.

For some significant hazardous facility sites, Risk Management Contours are in the District Plan to manage the existing significant hazardous facility and sensitive activities near these facilities. For other significant hazardous facility sites where Risk Management Contours are not in the District Plan, Council uses a non-District Plan layer to identify the location of significant hazardous facilities, from which a 250m separation distance applies. Where no Risk Management Contour is mapped in the District Plan for a significant hazardous facility, proposed works to this facility and sensitive activities seeking to locate in proximity to this facility will require a site specific technical report prepared by a suitably qualified and experienced person to be provided to the Council, to establish the extent of the risk area.

7. Finally, we note that you have also reviewed the approach taken in the Proposed New Plymouth District Plan and consider that the proposed rules in this plan are quite different to those notified in the PDP in relation to hazardous substances. However, you have advised that you are looking at taking a similar approach to New Plymouth's Proposed plan in respect of the format of the hazardous substance and contaminated land chapter, as directed by the National Planning Standards. This being, that the PDP would include the provisions controlling hazardous substances for the various zones in one chapter, being

Chapter 10 – Hazardous Substances. You advise that you will most likely group all of the notified zone rules together into one single rule under your Hazardous Substances chapter.

Invercargill District Plan

8. While the Invercargill District Plan was notified in 2013, prior to the RLAA, we provide commentary on it as we understand it adopts a similar approach to that in the notified PDP. We also note that the Infrastructure, Hazardous substances and Energy provisions in this District Plan were recently tested before the Environment Court, albeit by way of consent order.¹⁰ The provisions were recently made operative on 30 August 2019. We have provided a summary as follows.
9. Part 2 includes the issues, objectives and policies for both District Wide matters as well as Area Specific matters. Relevantly, Part 2 addresses the interface between the RMA and HSNO provides:

The Hazardous Substances and New Organisms Act 1996 and the Resource Management Act 1991 complement each other. The Hazardous Substances and New Organisms Act 1996 provides the framework for developing technical standards for the use, storage, transportation, inspection, identification and regulation of hazardous substances. **The Resource Management Act 1991 outlines responsibilities councils have to control the effects of the use or development of land, and to prevent or mitigate any adverse effects that may result from the use, storage, disposal or transportation of hazardous substances. The Resource Management Act 1991 is focused on site-specific controls on the use of land and on managing the risks to the local environment.** It requires councils to take an effects-based approach to managing hazardous facilities. [Emphasis added]
10. We note that the District Plan Part 2 sets out objectives and policies in regard to the control of hazardous substances and Part 3 provides specific rules for hazardous substances. Chapter HAZ-R1, Rule 9 provides that unless provided for in HAZ-R1.1 – HAZ-R1.8, the manufacture storage, use and management of hazardous substances not exceeding the quantity limits and other requirements stipulated in APP9 – Appendix 9 Hazardous Substances, is a permitted activity. In that regard, the District Plan Appendix 9, provides quantity thresholds (similar to Waikato DC rules) for identified classes of hazardous substances.

¹⁰ *The Oil Companies et al v Invercargill City Council* Judge Hassan, 10 November 2017.