UNDER the Resource Management Act 1991 (RMA)

AND

IN THE MATTER of submissions on the proposed Waikato District Plan

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LEGAL SUBMISSIONS FOR THE OIL COMPANIES (BP OIL NEW ZEALAND LTD, MOBIL OIL NEW ZEALAND LTD & Z ENERGY LTD)

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INTRODUCTION

1 Hazardous substances & contaminated land should not be contentious topics for a "next generation" plan, notified post-2017. Central government has provided directive, top-down guidance, to avoid duplication between national instruments and district plan provisions. This includes:

- Removing Council's statutory function to manage the effects of storage, use, disposal and transport of hazardous substances. The Regional Council function has also been deleted: ss30 and 31 RMA[1];
- Substantial reform of health and safety functions and duties under the HSW Act 2017. The legislation and 2017 regulations impose onerous duties for business (PCBUs) to manage risk for hazardous substances;
- 2017 regulations to control hazardous substances, including by type and quantity;[2]
- MHF regulations (for major facilities);
- HSNOCOP44 & HSNOCOP45;[3]
- MfE Guidelines (Hazardous Substances under the RMA, 2019[4])
- a national standard for contaminated sites (NESCS).

2 In light of these policy directives, the starting point for the proposed plan should be less, not more, regulation of hazardous substances. Plan controls should be "the exception, not the norm". Duplication is to be avoided, and consent triggers should be reserved for regulatory gaps. This is confirmed by MFE Guidance that all parties, including the s42A planner, agree is relevant:

> "In most cases, the HSNO Act and the HSW Act controls are adequate to avoid, remedy or mitigate environmental effects of hazardous substances. However, **in particular circumstances** it may be appropriate that RMA controls are used, subject to robust s32 analysis to ensure that such controls are effective and efficient. The expectation is that controls on hazardous substances in RMA plans will be the **exception rather than the norm**.." (MFE Guidance (2019), Introduction) (emphasis added)

3 Plan provisions recommended by the s42A planner swim against this regulatory tide. Chapter 10 is basically rewritten, with a significant increase in recommended controls. These include:

- Introduction, reflecting an interventionist approach to risk management;

[1] RLAA 2017
[2] HSW (Hazardous Substances) Regulations 2017
[3] HSNOCOP44 Below ground stationary container systems for petroleum – design and installation; HSNOCOP45 Below ground stationary container systems for petroleum – operation. Both **attached**.
[4] Produced by Georgina McPherson (EIC)

- Changed emphasis in objectives and policies, reflecting Council's newfound role as arbiter of risk;
- rules regime; a range of activities now trigger consents, but were previously permitted status;
- Blanket consents regime for service stations. **All** service stations require consent (ranging from controlled to non-complying).
- No quantitative assessment of risk, beyond the assertion that service stations may be incompatible with sensitive activities and zones.

4 The Oil Companies are directly affected by this regulatory approach. They ask the Panel to reject recommended changes put forward by the s42A planner. These are not appropriate, or duplicate controls that already exist. There are no identified gaps that merit intervention.

5 The Oil Companies particular interest is in service stations, but scope of relief is wider, including Objective 10.1.1, Policies 10.1.2, 10.1.3 & 10.1.4, definition of "hazardous facility", and related methods and rules.

6 In terms of activity status, and specific to service stations, the Oil Companies seek:

- Permitted status in all zones where petrol and diesel are stored under-ground;
- Consent trigger where petrol and larger quantities of diesel are stored above-ground (50,000L petrol, diesel > 100,000L);
- Ms McPherson's planning opinion is that this regime is principled, efficient and effective, in light of other controls. This does not preclude consent triggers for service stations in residential zones, on unrelated issues (such as amenity).

7 Relevant issues are:

- Legal framework
- *Taranaki Energy Watch* decision
- RPS
- Operative plan
- Mr Schaffoener's report
- S42A report
- Relief

Legal framework

8 The underlying purpose of the relevant legislation appears to be agreed. This is identified by Tompkins Wake as follows:

> [10] HSNO regulates the management, disposal, classification, packaging and transport of hazardous substances..The controls imposed by the EPA manage the risks of hazardous substances and safeguard people and the environment..
>
> [11] The HSW legislation aims to secure the health and safety of workers, workplaces and communities. From 1 Dec 2017 the rules around managing hazardous substances that affect human health in the workplace have been transferred from HSNO to the Hazardous Substances Regulations under HSW..
>
> [12] The RMA is focused on sustainable management.."

9 The HSW (2017) regulations address on-site safety for storage of most classes of hazardous substances, including petrol and diesel (both Class 3). An important point, made by Lynette Wharfe in planning evidence for Horticulture New Zealand, is that the RMA is not sole arbiter of land use controls, referring to the Hazardous Substances (Hazardous Property Controls) Notice 2017.[5]

10 It appears to be common ground that district plans have a residual or limited role to manage storage and use of hazardous substances in light of the RLAA 2017 (and deletion of the s31 RMA function). This arises from the integrated management function in s31 RMA.[6] It is a diminished function, because HSW legislation and regulations largely address risk management, and cover the field for relevant risks posed by most service stations.[7] Oil Companies are responsible for managing on-site risk that may affect sensitive receptors.

11 Given agreement on high-level principles, Counsel is largely[8] in agreement with the Tompkins Wake opinion,[9] but this does not lead to the conclusions (and recommendations) stated in the s42A report. And the RPS does not justify the provisions recommended by the s42A officer. RPS Policy 4.2.9 is not directive as to content; it is left to territorial authorities to decide the content of provisions. Key points are as follows:

12 Tompkins Wake cites the MFE Fact Sheet: additional controls under the RMA should be necessary and not otherwise covered by the HSNO or HSW Acts; extra controls may be appropriate if existing HSNO or HSW controls are not.[10] The premise is sound, but

[5] Lynette Wharfe, primary evidence at [8.9]
[6] ..(a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:
[7] Tompkins Wake cites the MFE Fact Sheet: additional controls under the RMA should be necessary and not covered by the HSNO or HSW Acts; extra controls may be appropriate if existing HSNO or HSW controls are not.
[8] But not completely, as discussed below
[9] Appendix 6 to s42A report, Tompkins Wake letter dated 22 Nov 2019 (**Tompkins Wake**).
[10] Tompkins Wake at [15]-[16]

no-one from the Council team has reviewed in detail the existing HSW 2017 Regulations, to identify why these do not cover the field, or fail to address relevant risks to sensitive sites and zones, such that a resource consent regime is appropriate.

13 As noted by Ms McPherson, to justify a consent trigger in the proposed plan, there has to be a relevant risk or regulatory gap (that it is appropriate to manage). The s42A planner has not provided quantitative risk assessment, to demonstrate individual fatality risk, for sites adjacent to service stations (where petrol and diesel are stored underground).[11] The Council team has not quantified probability or consequence of harm to sensitive receptors and zones.

14 Both Tompkins Wake, and the s42A planner's report, rely on Mr Schaffoener's report for technical input.[12] But Mr Schaffoener ("in the time available") did not review the detail of HSW (2017) regulations.[13] We are left with his high-level comments, largely based on review of a (2018) EPA Report, itself of questionable relevance.

15 Mr Schaffoener's report does not provide a reasonable basis to find that HSW legislation and regulations are inadequate, or justify the recommended framework.[14] Other problems with his report are discussed below.

16 Specific intervention needs specific justification. The Oil Companies rely on the HSW legislation and regulations as sufficient to manage on- and off-site risk for <u>most</u> hazardous storage & use activities, including service stations (assuming under-ground storage of petrol and diesel). It is not effective, efficient or appropriate to require resource consent for storage and use of these products. There are vires problems with control of activities on public roads, already regulated under HSW regulations.

17 Georgina McPherson identifies 'where the line should be drawn'. Her planning opinion is that scale is relevant to risk. Large-scale facilities ("significant hazardous facilities"), and not service stations, merit specific consideration under proposed plan provisions, enabling consideration of risk (as a relevant matter for grant of consent). [15]

18 Ms McPherson confirms that service stations are not "significant hazardous facilities" and should not trigger consent for hazardous substances stored underground. Most

[11] This would have required additional expert input from an engineer. QRA assessment is a specialist field.
[12] Tompkins Wake at [30]; s42A planning report at (e.g.) [6], [741].
[13] At p6 of his report; it was appropriate for Mr Schaffoener to identify this as a limitation of his report. In contrast, he focuses on an EPA (2018) HSNO Enforcement Report (the latter, having peripheral relevance).
[14] As recommended in the s42A report.
[15] The term is defined by Georgina McPherson in her evidence at [6.6]

service stations stock > 100,000 litres of petrol or diesel in underground tanks. It is inefficient to house too much product on site.

19 Counsel is advised that there are no service stations in the District that store petroleum products above-ground. Truck stops in other parts of NZ may store diesel (+/- 60,000L) above-ground. In the unusual scenario that petroleum products are housed above-ground for a service station, then Oil Companies agree to a consent trigger for risk assessment, above reasonable thresholds (diesel (>100,000 L)).

Taranaki Energy Watch[16]

20 The decision in *Taranaki Energy Watch* is relevant, but must be considered on its facts. In principle, the Court agreed that it was lawful for the proposed plan to control off-site risk to sensitive receptors from petroleum exploration and production facilities. This was in limited circumstances, reflecting quantitative risk assessments provided for the large number of on-shore petroleum facilities, unique to Taranaki region, and air quality evidence relating to benzene.

21 The Court's starting point was to minimize RMA rules, and avoid duplication with HSW legislation and regulations, unless justified by gap analysis. The proponent (Energy Watch) provided substantial technical evidence to support its' position. District plan controls focused on off-site risks, that the Court agreed were unacceptable to sensitive receptors. No equivalent controls were sought or imposed for service stations.

22 The Tompkins Wake opinion notes that:

> "[24]..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."[17] [Emphasis added]

23 Counsel disagrees with this assertion. The RMA does not require elimination of all risk. There is nothing "necessary" about controls over hazardous substances in the proposed plan. Controls must be justified.

[16] *Taranaki Energy Watch Inc v South Taranaki District Council* [2018] NZEnvC 227 (**Taranaki Energy Watch**)
[17] Refer Tompkins Wake at [24]-[25] for full context.

Giving effect to the RPS

24 Tompkins Wake notes that the proposed plan must give effect to RPS Policy 4.2.9. Counsel notes in response that:

a. the RPS became operative prior to the RLAA 2017, so Policy 4.2.9 may require amendment to reflect the deleted s30 and s31 function;
b. In any event, Policy 4.2.9 is not directive as to content for the proposed plan. It simply states that territorial authorities "..shall be responsible" for developing provisions to control hazardous substances for "all other land". On current wording, it is mandatory for the District Council to manage hazardous substances by way of plan provisions, but there is no mandatory content.

Operative Plan

25 Until recently, a default approach was applied for most district plans, with a consent trigger for hazardous substances of 100,000L petrol or 50,000L diesel underground storage. That practice derived from an earlier (2002) guideline[18] but was not a fully risk-based threshold. For example, petrol is obviously more combustible than diesel. It is not clear from a risk point of view why the threshold is higher for gasoline which is a more hazardous product from a flammability perspective than diesel. The Activity Status Table has higher thresholds for diesel (class 3.1D) than petrol (class 3.1A). The Activity Status Table does not distinguish between above-ground and under-ground storage which is an important risk consideration for flammable materials.

26 Putting this to one side, the s42A report does not identify any relevant issues with the Operative Plan approach to managing hazardous substances storage at service stations, which included permitted status for storage (>100,000 litres petrol, > 50,000 litres of diesel) for under-ground storage, and 6 tonnes of LPG, **in any zone**.

Background Report prepared by Norbert Schaffoener (Resources Consulting)

27 The report is problematic. The author does not:

- state his qualifications and relevant expertise;
- address and state compliance with the Code of Conduct;
- the report contains a mix of opinion[19], legal submission, and the author wears different hats (offering opinions on hazardous substances, natural hazards, case law, limited aspects of some planning instruments).

[18] Land Use Planning Guide for Hazardous Facilities (2002)
[19] For example, Mr Schaffoener opines that:

- address the relevant statutory tests under s32 and s32AA RMA.

28 The author has previously been criticized for stepping outside expertise.[20] The report is not immune from criticism, for similar reasons. This includes the report's response to submission points ("Appendix 1, Technical Comments"). Much of this is repetitive. All Council's suggested changes are accepted, but other submitters are not given the same treatment. Some overstatement applies (for example, the author says that the hazardous substances chapter for the Christchurch Redevelopment District Plan is irrelevant.[21] It is not clear why.)

29 On the key issue of relevance of the HSW Regulations, Mr Schaffoener properly notes that he has not analysed the regulations in detail:

> "It is claimed in some of the submissions that land use planning requirements for hazardous facilities are unnecessary as the HSNO and HSW legislation, and in particular its Regulations, provide a comprehensive, complete and maximum level of control on all hazardous substances. As an example of limitations in the HSW Regulations in managing hazardous substance risks to acceptable levels in all circumstances, below is a **brief review** of one aspect of the HSW (Hazardous Substances) Regulations 2017..This can be repeated for other matters in relation to the Regulations, however **in the time available** it is impossible for me to document all the respective differences – this would be a task for MfE but to my knowledge has not been undertaken as yet.
>
> ..There may be additional matters that I have not identified **in the time available** to compile this list.."[22] (Bold added)

30 The concession, while properly made, means little weight can be placed on his opinions about regulatory gaps in the HSW regulations.

31 It is also of concern that "time was not available" for a thorough assessment. A full assessment is required, to satisfy the "exception not the rule" approach; i.e. for the s42A reporting officer to confirm that there is a regulatory gap, and that there will not be any double-up with HSW regulations. Counsel will address this further at the hearing.

> "In the context of above, the NPS, the fact that the current Government has a different position to the previous – see the latest proposed RMA amendments – it is evident that central Government is not opposed to sensible land use management approaches such as what is proposed.." (Last para, p8)

[20] Lynette Wharf produces, as part of her primary evidence, the Christchurch Replacement Plan Decision 18 (Chapt 12) dated 15 March 2016

[21] Cf Appendix 1 to Mr Schaffoener's report at 1.7 (Chapter 16-Residential zone, "technical discussion")

[22] Report at p6

32 It is submitted that Commissioners may reject the report as inadmissible (it is proferred as expert opinion, but does not acknowledge or comply with the Code); or attribute little weight. There is a further, important consideration. The s42A planner's assessment relies on Mr Schaffoener's report.[23] If the Panel agrees that Mr Schaffoener's report is inadmissible or merits low weight, then that also affects weight to be attributed to the s42A report.

S42A REPORT

33 The starting point for the s42A report is that RMA controls should not duplicate existing HSNO and HSW controls:

> "[60] The legal opinion reinforces that RMA plans should not double up controls that are provided under HSNO or HSWA. Rather, Policy 4.2.9 in the RPS should be read alongside that conclusion as requiring provisions that control the storage, use, disposal or transportation of hazardous substances where it is considered the HSNO or HSWA controls are insufficient to mitigate the associated risk."[24]

34 From this starting point, the s42A report recommends blanket land use controls on hazardous substances, including service stations in all zones. The rationale is not entirely clear. Ms Overwater identifies that the proposed plan may control land use activities, and that sensitive receptors require protection:

> [741] I have not agreed with this position, and neither has Council's technical expert Mr Schaffoener or legal advisors from Tompkins Wake. his [*sic*] is because we consider that the RMA does have a role to play in managing the effects of hazardous substances in respect to land use activities, particularly from a public health and safety perspective and in sensitive environments.."

35 The assertion, that unacceptable risks are posed to sensitive receptors, meriting resource consent, is made frequently in the s42A report. But there are no hard facts provided in support, for example as to probability and consequence.

36 The s42A report asserts that there is a community expectation of greater control on hazardous substances in sensitive zones. This assertion is used to justify non-complying status.[25] The assertion is contentious, absent any hard data. The reverse

[23] Refer s42A report at H8A:
"[16] In preparing this report I rely on expert advice sought from Norbert Schaffoener from Resources Consulting with regard to technical aspects of the hazardous substances topic.."
[24] S42A report
[25] For example, s42A report at [603] and [604] for the Country Living zone; and at [612]:
"…Although this is a cost, without the proposed provision being included in the plan there is a risk that service station activities may establish within sensitive zones, which on balance I consider to be a much

proposition must also be true: there is a community expectation that service stations should not require resource consent to address the risk of underground storage of petrol and diesel, because these risks are already controlled elsewhere.

37 Overall, there is some irony that more regulation is proposed, not less, by the s42A report. This does not reflect the threshold approach recommended by Ms Wharfe. If specific RMA controls are proposed, beyond the HSNO and HSW regime, then these should avoid double-up, and be specific to the Waikato (not blanket or generic):

> "[8.9] Clearly absent from the options assessed is an approach based on HSNO and inclusion of specific provisions for identified resource management issues considered necessary in Waikato.."

38 As recommended, the new objectives, policies and rules impose substantially greater controls than the transitional plan. This is inappropriate. It is also regulatory overkill; Council does not need resource consent triggers for all zones; and should not target service stations for special controls in residential and other zones.[26]

RELIEF

39 Ms McPherson has prepared a summary table of relief. Counsel will address that at the hearing. Relevant comments include:

40 As noted, the RMA is not a no-risk regime. *Taranaki Energy Watch* focused on unacceptable risks to sensitive receptors, based on expert technical evidence and quantitative risk assessment. Council's assessment is high-level and does not provide sufficient justification for the heavy-handed policy and rules framework proposed.

41 Proposed changes align with the District Council's submission to its' own plan. The scale of change suggests lack of confidence by Council in its notified version, and belated legal and technical input on risk issues. It appears the s42A planner also prepared the District Council submission seeking amendments. Ms Clearwater's advice to the Panel is largely in support of a submission that she helped prepare.[27]

42 At the level of principle, it is agreed that Council has jurisdiction to manage hazardous substances, in carefully calibrated circumstances. So the issue is not really a legal or jurisdictional one. Instead it is the wider question of appropriateness. But appropriateness needs to be judged in light of the statutory context, meaning that it is generally not appropriate to regulate hazardous substances absent sound evidence

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greater cost. The benefit being that such a provision offers protection and reassurance to the community that Council will control the activity and ensure that it is appropriately located."

[26] Rejected by the independent hearings panel for the Chch Replacement District Plan

[27] Counsel is open to correction, if this assertion is somehow wrong, but it does not seem to be.

and a solid planning rationale. Ms McPherson, and other planning experts, confirm there is no sound rationale.

43 Key points are as follows:

- the Regional and District Council function for management of hazardous substances was deleted in 2017 (the RLAA);
- absent an express function, there remains a more general function to manage land use activities to achieve integrated management, and control relevant risks to sensitive receiving environments, where posed by specific activities;
- this general function should be used carefully and in a calibrated manner. Council should avoid blanket controls, duplication or over-regulation;
- larger facilities that pose a measurable risk, such as significant hazardous facilities, may (subject to s32AA) merit controls over risk when in proximity to sensitive receptors;
- the RMA is not no-risk;
- for service stations, there is an important difference between risk posed by underground storage, and risk posed by above ground storage. This is not recognised by the s42A recommendations;
- The Council does not have sufficient expert evidence for the recommended changes.

CONCLUSION

44 In summary, the approach proposed by the Council:

a. Duplicates HSNO and WorkSafe processes in regulating hazardous substances storage;

b. Is contrary to the intent of RLAA2017 and subsequent MfE advice to avoid unnecessary regulation of hazardous substances and engage RMA controls only where necessary and justified through robust s32 analysis;

c. Disregards the findings of the Christchurch Independent Hearings Panel, which rejected the same type of activity threshold table proposed, and adopted a simplified approach where resource consent requirements are not triggered by hazardous substance quantities and risks;

d. Disregards the historic and continuing context in which service station activities are and have been managed in district plans around the country (e.g. permitted status in Operative Waikato District Plan; and excluded from hazardous

substances provisions in the South Taranaki and New Plymouth Proposed District Plans by virtue of the types of hazardous facility that are managed).

45 Georgina McPherson has identified more appropriate wording for proposed plan provisions.

Dated 22nd January 2020

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