

**BEFORE THE WHANGAREI DISTRICT COUNCIL**

**IN THE MATTER OF** the Resource Management Act 1991 (“RMA”)

**AND**

**IN THE MATTER OF** proposed plan change 91 (Hazardous  
Substances) to the Whangarei District Plan

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**LEGAL SUBMISSIONS ON BEHALF OF CHANNEL INFRASTRUCTURE NZ LIMITED**

**9 March 2023**

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## **INTRODUCTION AND SUMMARY**

1. These submissions have been prepared on behalf of Channel Infrastructure NZ Limited (“Channel Infrastructure”) in relation to Plan Change 91: Hazardous Substances (“PC91”) to the Whangarei District Plan (“District Plan”).
2. Channel Infrastructure made a submission<sup>1</sup> and further submission<sup>2</sup> on PC91.
3. Channel Infrastructure supports PC91. It broadly endorses the approach taken by Whangarei District Council (the “Council”) to hazardous substances: being to address residual risks to people, property and the environment, and reverse sensitivity after other industry controls and legislation have been complied with. Channel Infrastructure considers this approach is most appropriate and efficient<sup>3</sup> and avoids unnecessary duplication in the regulation of hazardous substances.

## **SCOPE OF SUBMISSIONS**

4. These submissions will:
  - (a) Briefly set out the background to Channel Infrastructure;
  - (b) Address the statutory and planning context; and
  - (c) Discuss the Council’s proposed approach to hazardous substances and set out our conclusions.

## **BACKGROUND TO CHANNEL INFRASTRUCTURE**

5. Channel Infrastructure is New Zealand’s leading fuel infrastructure company. It owns and operates the Marsden Point Import Terminal (“Import Terminal”), an import and distribution terminal for the fuel needed to power New Zealand’s economy. The Import Terminal receives imported refined fuels from customers, which are stored on site and distributed primarily to the Auckland and Northland markets.
6. The Import Terminal is zoned Heavy Industrial in the District Plan and is covered by the Marsden Point Energy Precinct (“MPEP”).<sup>4</sup>

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<sup>1</sup> Submission #002, dated 19 September 2022.

<sup>2</sup> Further submission #X007, dated 11 November 2022.

<sup>3</sup> Including in the sense of the requisite section 32 evaluation. Refer to the S32 Report at paras [109]-[112].

<sup>4</sup> PREC6.

7. Channel Infrastructure also owns and operates the Marsden Point to Auckland Pipeline (the “Pipeline”), a 170-km long high-pressure fuel pipeline which runs from the Import Terminal to the Wiri Oil Terminal in South Auckland.
8. The Pipeline is designated along its entire length, including in the District Plan.<sup>5</sup>
9. The Import Terminal and Pipeline are regionally and nationally significant infrastructure resources, and their uninterrupted and efficient operation is of critical importance nationally. Channel Infrastructure is deemed a ‘lifeline utility’ pursuant to the Civil Defence Emergency Management Act 2002.
10. Channel Infrastructure has a range of detailed policies, systems, and procedures to regulate the use and handling of hazardous substances. It is externally monitored by agencies including WorkSafe and the Environmental Protection Authority. By way of example, the Pipeline operates pursuant to certificate of fitness that is issued on a five-yearly basis<sup>6</sup> by Lloyd’s Register International.<sup>7</sup> Channel Infrastructure also holds a site wide Location Compliance Certificate covering certain hazardous substances which is required to be renewed annually. There is a long list of compliance plans and stationary container certificates also with a range of compliance requirements. In addition, Channel Infrastructure provides a Safety Case to Worksafe for approval which is reviewed every five years. There are numerous other management plans and controls in place to ensure the safe use, storage and disposal of hazardous substances at the Import Terminal.

## **STATUTORY AND PLANNING CONTEXT**

### **Resource Management Act 1991**

11. The inclusion of rules in a district plan is not mandatory, except to the extent necessary to implement the policies.<sup>8</sup>
12. Section 75(3)(d) requires district plans to give effect to any regional policy statement, and section 75(4)(b) requires that district plans must not be inconsistent with a regional plan.

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<sup>5</sup> CTS-1.

<sup>6</sup> In addition to the certificate of fitness, annual surveillance audits are conducted for compliance and demonstration of the Pipeline’s Integrity Management System.

<sup>7</sup> Lloyd’s Register International is a New Zealand accredited inspection body recognised by Worksafe to issue certificates of fitness pursuant to the Health and Safety in Employment (Pipelines) Regulations 1999.

<sup>8</sup> Sections 72-77 of the RMA apply to district plans. With regards to district rules, section 76 provides territorial authorities a discretion to include rules in a district plan. Section 75 sets out what is to be included in a district plan, including that a district plan is required to state “the rules (if any) to implement the policies”.

13. Section 31 of the RMA sets out the functions of territorial authorities. This section was amended by the Resource Legislation Amendment Act 2017 (“RLAA”) by removing the explicit function to control the adverse effects of the storage, use and disposal or transportation of hazardous substances. With regards to this change, the Ministry for the Environment (“MfE”) has said plan makers should consider existing controls in other legislation and avoid regulatory duplication.<sup>9</sup> Channel Infrastructure acknowledges that territorial authorities retain a broad power under the RMA to manage hazardous substances, however, it considers that other legislation and controls are generally adequate to address environmental effects associated with hazardous substances.
14. Section 32 of the RMA requires a proposal be assessed to determine:
  - (a) The extent to which the objectives are the most appropriate way to achieve the purpose of the RMA,<sup>10</sup> and
  - (b) Whether the provisions are the most appropriate way to achieve the objectives.<sup>11</sup>
15. The Council’s Section 32 Evaluation Report (“S32 Report”) identifies a number of issues with the District Plan’s current approach to hazardous substances,<sup>12</sup> including that it duplicates the regime set out in other legislation and regulations. The S32 Report concludes,<sup>13</sup> with regards to the proposed approach which does not include rules, that it is the most appropriate approach to achieve the proposed objectives as it recognises the role of other legislation and regulatory controls in managing the effects of hazardous substances, and the role for the Council to manage residual risk and reverse sensitivity.
16. The S32 Report further sets out that the provisions do not propose rules for the following reasons:<sup>14</sup>
  - (a) The Council’s planning analysis did not identify any major hazardous facilities that required specific protection buffers in addition to the zone-based rules that manage reverse sensitivity;
  - (b) The planning analysis identified that the role of the District Plan should be limited to managing residual risk;

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<sup>9</sup> Ministry for the Environment: *Resource Legislation Amendments 2017* Fact Sheet 2: Revised Functions for Resource Management Act 1991 Decision Makers. At p2.

<sup>10</sup> S32(1)(a).

<sup>11</sup> S32(1)(b).

<sup>12</sup> Section 3.2.1.

<sup>13</sup> Section 8.2.2 Table 9.

<sup>14</sup> At para [89].

- (c) As part of the Council's rolling review of the District Plan, the Council is undertaking other plan changes that will address natural hazard risk in relation to activities that involve the use, storage and disposal of hazardous substances.

17. Channel Infrastructure endorses the reasons and conclusions set out in the S32 Report.

### **Regional plans and policy statements**

#### *Northland Regional Policy Statement*

18. The Northland Regional Policy Statement ("RPS") does not include any policies or methods relating to hazardous substances.
19. The Import Terminal and Pipeline are identified as regionally significant infrastructure in the RPS.<sup>15</sup> The RPS recognises the risk of reverse sensitivity on regionally significant infrastructure and contains objectives and policies for the protection of regionally significant infrastructure against such effects.<sup>16</sup>

#### *Proposed Northland Regional Plan*

20. Northland has a proposed Regional Plan ("pNRP") which remains subject to a limited number of appeals, but large sections of which can be treated as operative.
21. With regards to hazardous substances, the pNRP includes controls on discharges (to water, land and air) and refuse disposal. Objective F.1.14 provides:

Protect human health, and minimise the risk to the environment from:

- 1) Discharges of hazardous substances.

22. Channel Infrastructure submits that PC91 and the District Plan generally is consistent with the pNRP in its proposed approach to hazardous substances. In particular, Channel Infrastructure considers the Objective HSUB-O1 Residual Risks, and Policies HSUB-P1 Residual Risks and HSUB-P2 People and Communities are consistent with the requirement in Objective F.1.14 of the pNRP to protect human health and minimise the risk to the environment.

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<sup>15</sup> Appendix 3.

<sup>16</sup> For example Policies 5.1.1(e) and 5.1.3.

## Whangarei District Plan

23. As noted earlier, the Import Terminal is located within the Heavy Industrial Zone and is also covered by the MPEP<sup>17</sup>. The District Plan takes a “graduated” approach to zoning around the MPEP and Heavy Industrial Zone that provides for separation from other more sensitive land uses. The Council has identified that the use and storage of hazardous facilities is generally associated with industrial activities within industrial zones.<sup>17</sup> The zone-based approach seeks to manage effects, including reverse sensitivity effects, by avoiding incompatible activities locating in proximity to one another and setting expectations for activities anticipated in each zone.
24. The MPEP enables the existing and potential future operations undertaken by Channel Infrastructure and provides for the recognition of the Import Terminal as regionally significant infrastructure.<sup>18</sup> The MPEP enables “Refinery Activities” as a permitted activity. Refinery activities are broadly defined<sup>19</sup> and includes the use of land, buildings and major structures within the MPEP for activities associated with the production, import, refining, and/or distribution of energy products.
25. The Heavy Industrial Zone anticipates that industrial activities often use, store or produce hazardous materials. The District Plan recognises that the Heavy Industrial Zone:<sup>20</sup>

...should continue to be located away from more sensitive zones, such as Residential...**to ensure that adverse effects on sensitive activities are minimised, as well as to prevent reverse sensitivity and increased risk effects** that may limit the operation and expansion of industrial activities...To support this approach it is critical to protect industrial activities from the encroaching development of sensitive activities.

[our emphasis]

26. The Heavy Industrial Zone is bordered by the Light Industrial Zone. The Light Industrial Zone provides for industrial activities that do not generate objectionable effects, activities that are compatible with industrial activities, but restricts sensitive activities such as residential activities,<sup>21</sup> visitor accommodation,<sup>22</sup> educational facilities<sup>23</sup> and hospitals.<sup>24</sup>

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<sup>17</sup> S32 Report, at para [66].

<sup>18</sup> Objective PREC6-O1.

<sup>19</sup> Definitions chapter of the proposed Whangarei District Plan.

<sup>20</sup> HIZ Issues.

<sup>21</sup> LIZ-R31.

<sup>22</sup> LIZ-R33.

<sup>23</sup> LIZ-R36.

<sup>24</sup> LIZ-R37.

### *Reverse sensitivity*

27. Reverse sensitivity is an ongoing issue for Channel Infrastructure and one which it continues to proactively manage.
28. The MPEP and Heavy Industrial Zone more generally, provide for activities that use, store and dispose of hazardous substances and which may give rise to certain amenity effects.
29. Channel Infrastructure acknowledges that the District Plan includes provisions throughout that seek generally to avoid incompatible activities locating in proximity to each other and avoid reverse sensitivity effects.<sup>25</sup> Channel Infrastructure further supports the express provision for the avoidance of reverse sensitivity effects in PC91.<sup>26</sup>

### **Other legislation**

30. The proposed Issues section of PC91 references, by way of example, a range of legislation and industry regulations which relate to hazardous substances, including the Hazardous Substances and New Organisms Act 1996 (“HSNO Act”) and Health and Safety at Work Act 2015 (“HSW Act”).
31. The HSNO Act is the primary legislation to manage hazardous substances in New Zealand. The stated purpose of the HSNO Act is to:<sup>27</sup>

Protect the environment, and the health and safety of people and communities, by preventing and managing the adverse effects of hazardous substances and new organisms.

32. The HSNO Act sets out a wide range of controls, including in relation to import and manufacture of hazardous substances, approvals for hazardous substances and imposes a general duty on every person who imports possesses, or uses a hazardous substance to ensure that:<sup>28</sup>

Any adverse effect cause by an act or omission of that person in relation to that substance...on any other person or the environment is avoided remedied or mitigated

33. The HSW Act sets out workplace controls for hazardous substances.

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<sup>25</sup> For example Objective DGD-O5; Policy DGD-P2; and Rules LIZ-R14-R16;LIZ-R21-R22; LIZ-R26-R39; HIZ-R20; HIZR-22-R37; GRZ-R35, and RPROZ-R9.

<sup>26</sup> Objective HSUB-O2 and Policy HSUB-P4.

<sup>27</sup> S4.

<sup>28</sup> S13(1)(a).

34. There are also a range of regulations pursuant to the HSW Act. Relevantly for Channel Infrastructure, this includes:
- (a) Health and Safety at Work (Hazardous Substances) Regulations 2017; and
  - (b) Health and Safety in Employment (Pipeline) Regulations 1999.<sup>29</sup>
35. Therefore, there is a significant level of regulation on hazardous substances in a range of legislation and controls outside the RMA. It is simply not necessary to duplicate these controls and regulation in the District Plan. MfE explained with regards to the RLAA changes that the intent of the change to ensure that councils only place additional controls on hazardous substances where necessary to control effects not addressed by the HANO Act or HAW Act and further said duplicating controls can be confusing for users.<sup>30</sup> It is more efficient and effective to manage the residual risks of hazardous substances, as PC91 proposed to do.
36. There are a range of matters which are relevant to resource management, but which are best controlled by other legislation or regulation, for example:
- (a) In *Kawarau Jet Services Holdings Ltd v Queenstown Lakes District Council*<sup>31</sup> it was acknowledged that the safety of jet boating operations is managed outside of the RMA, under the Maritime Rules.
  - (b) The High Court<sup>32</sup> has held that Civil Aviation Rules govern overflying aircraft, therefore while noise provisions could be imposed in relation to airport use, after take off and before landing, the effects were outside the ambit of the RMA.
  - (c) In a decision regarding the introduction of airport noise controls, it was accepted that, notwithstanding an absence of planning noise controls applying to the relevant airport at the time of the decision, a number of controls were in place in accordance with various other publications, including in accordance with the Civil Aviation Authority.<sup>33</sup>
  - (d) In considering the relationship between the RMA and the Building Act, the Court focused on the respective legislative purposes and found that territorial

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<sup>29</sup> The Government recently sought feedback on updating these regulations.

<sup>30</sup> Above n9. At p5.

<sup>31</sup> ENC Christchurch C126/09 .

<sup>32</sup> *Dome Valley District Residents Society Inc v Rodney District Council* [2008] NZLR 821.

<sup>33</sup> *Ardmore Airfield Tenants and Users Committee v Ardmore Airport Ltd* ENC Auckland A23/05 at [20]-[25].



authorities should only impose controls related to building works where they are necessary to achieve a resource management purpose.

37. While Channel Infrastructure accepts that it is open to Council to include controls relating to hazardous substances, it submits that management regimes under the HSNO Act and HSW Act are comprehensive, robust and appropriate to manage hazardous substances. It is therefore not necessary or efficient for the District Plan to include duplicate controls. Rather, the District Plan should focus on addressing any “gaps” in those regimes. Channel Infrastructure considers this is achieved by focusing on managing residual risks associated with hazardous substances, which is the approach proposed by PC91.

## **DISCUSSION OF COUNCIL’S PROPOSED APPROACH TO HAZARDOUS SUBSTANCES AND CONCLUSION**

38. The Council’s approach to hazardous substances in PC91 seeks to avoid unnecessary or inappropriate duplication of existing controls relating to hazardous substances in a range of legislation and industry standards. Those regimes create a comprehensive framework for managing hazardous substances, such that it is not necessary or appropriate for the District Plan to also include controls to address the overall risk. Instead, the District Plan should focus on residual risks to people, property and the environment. This approach is reflected in Objective HSUB-O1 and Policy HSUB-P1 which relate to residual risks.
39. Those other legislative regimes, combined with existing provisions, such as the spatial zoning and underlying zone rules, in the District Plan are effective to manage effects associated with hazardous substances. In particular, the two major hazard facilities in Whangarei (including the Marsden Point Import Terminal) are located in the Heavy Industrial Zone, in which sensitive activities are not anticipated. The graduated zoning from heavy industrial to light industrial to rural and low-density residential creates a ‘buffer’ for sensitive activities.
40. As set out in the Council’s Section 42A Hearing Report (“S42A Report”),<sup>34</sup> the zoning framework is appropriate to manage hazardous substances/facilities to ensure acceptable levels of risks of off-site adverse effects and to prevent sensitive or incompatible activities establishing in areas where hazardous facilities are located to avoid reverse sensitivity effects.

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<sup>34</sup> At [48].

41. Channel Infrastructure opposes the position advanced by a submitter<sup>35</sup> that the proposed approach will lead to unacceptable risks on sensitive activities, and adverse public health and environmental effects.
42. With regards to risks on sensitive activities, these are addressed by Policies HSUB-P3 and HSUB-P4 and are appropriately managed by the Council's graduated approach to zoning and the zoning rules which seek to ensure that incompatible activities are not located in proximity to each other. Channel Infrastructure agrees with the S42A Report that the zone-based approach is the most appropriate way of managing risks to sensitive activities.<sup>36</sup>
43. With regards to public health and environmental effects, Channel Infrastructure considers these are addressed by Objective HSUB-O1, Policies HSUB-P1 and HSUB-P2 of PC91. Additionally, the regional provisions, including in the pNRP and the wider legislative and regulatory regime under legislation such as the HSNO Act manage hazardous substances to ensure human health is protected and environmental risks are minimised.
44. Channel Infrastructure does not agree with the submitter that the focus of PC91 on residual risk is too narrow.<sup>37</sup> Channel Infrastructure considers this focus is appropriate in light of the Council's approach to PC91. As set out in the S42A Report, provisions to manage adverse effects associated with hazardous substances are contained in the zoning rules in the District Plan.<sup>38</sup> Channel Infrastructure agrees with the Council that it is not appropriate or efficient for the District Plan to include provisions to manage overall risk because existing legislative controls comprehensively and adequately address risks and adverse effects associated with hazardous substances.<sup>39</sup>
45. Channel Infrastructure supports the Council's recommendation that the submission be rejected.<sup>40</sup>
46. In summary, Channel Infrastructure acknowledges that the Council retains a broad power under the RMA to include rules in its District Plan to manage hazardous substances. However, Channel Infrastructure considers that Council's approach to PC91 is appropriate for the reasons set out above.

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<sup>35</sup> Submission #005, by Ngā Tai Ora.

<sup>36</sup> At para [46].

<sup>37</sup> Submission #005, by Ngā Tai Ora, at section 2.2.

<sup>38</sup> At para [73].

<sup>39</sup> Section 42A Hearing Report at para [73].

<sup>40</sup> At para [47] and [109].

**CHANNEL INFRASTRUCTURE NZ  
LIMITED**

By its solicitors ChanceryGreen, per:



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CH Simmons / EJ Ellis