

**BEFORE THE HEARING COMMISSIONERS  
AT WHANGAREI**

**IN THE MATTER** of the Resource Management Act 1991  
(the Act)

**AND**

**IN THE MATTER** of proposed Plan Change 88H – Heavy  
Industrial Zone to the Whangarei District  
Plan

---

**LEGAL SUBMISSIONS ON BEHALF OF THE NATIONAL INSTITUTE OF  
WATER AND ATMOSPHERIC RESEARCH LIMITED**

**3 DECEMBER 2019**

---



**ATKINS | HOLM | MAJUREY**

Vicki Morrison-Shaw  
PO Box 1585  
Shortland Street  
AUCKLAND 1140

## INTRODUCTION AND OVERVIEW

1. Industrial activities are significant contributors to the local economy. Some industrial activities, such as those carried out by the National Institute of Water and Atmospheric Research Limited (**NIWA**) at its Northland Marine and Research Centre (**Northland Centre**), are significant both locally, in terms of the economic contributions and employment they provide, and nationally, as flagships for their particular industries. It is therefore important that such activities are appropriately recognised and provided for in the Whangarei District Plan (**WDP**).
2. Proposed Plan Change 88H – Heavy Industrial Zone (**PC88H**), continues the heavy industrial zoning for the Northland Centre site. This is appropriate given the scale and type of activities carried out at the Centre and the size of the site. While the notified version of PC88H did not specifically recognise and provide for the unique combination of activities undertaken at the Centre, the changes recommended in the relevant s.42A report<sup>1</sup> attempt to do that – at least in part. However, further changes are required to ensure that the full range of activities undertaken at the Northland Centre are appropriately recognised and provided for.
3. The purpose of these submissions is to provide the context and legal basis to support the additional changes to PC88H sought by NIWA.

### Evidence

4. NIWA is calling evidence from the following two witnesses in support of its position:
  - (a) Mr Kenneth Becker, who is the Regional Manager – Bream Bay at NIWA. In his evidence, Mr Becker provides an overview of the Northland Centre site, the current activities occurring on site, the planned future development of the site as well as the implications that PC88H will have for those activities and development.
  - (b) Mr Luke Faithfull, who is an associate at Mitchell Daysh. Mr Faithfull will address planning issues relating

---

<sup>1</sup> Part 5 – s.42A Report – Industry.

to PC88H and provide the detail of the further amendments sought.

### **Outline**

5. These submissions are organised as follows:
  - (a) overview of NIWA;
  - (b) legal framework;
  - (c) approach to addressing remaining concerns; and
  - (d) conclusion.

### **OVERVIEW OF NIWA**

6. NIWA is a Crown Research Institute whose mission is:

*“To conduct leading environmental science to enable the sustainable management of natural resources for New Zealand and the planet.”*
7. NIWA's work is, inter alia, intended to:
  - (a) enhance the economic value and sustainable management of New Zealand's aquatic resources and environments;
  - (b) provide a greater understanding of the climate and the atmosphere; and
  - (c) increase resilience to weather and climate hazards in order to improve the safety and wellbeing of New Zealanders.

### **The Northland Marine and Research Centre**

8. NIWA's Northland Centre is a leader in its field. It is New Zealand's largest and most fit for purpose facility. It undertakes cutting edge research that has significantly contributed to the commercial development of aquaculture and marine science in New Zealand.
9. The Centre was first established as an aquaculture and marine science research facility in 2001 on land leased from Mighty River Power (now Mercury). The site was chosen after an extensive site selection process. The key desirable characteristics of the site were:

- (a) the large available land area (some 8.4 ha) – providing room for expansion;
  - (b) the permissive Business 4 zoning which enable(d) a large range of commercial and industrial activities in recognition of the highly modified nature of the land within the zone;
  - (c) the four existing seawater take and discharge pipelines, intake/outfall structures, and associated consents; and
  - (d) the coastal location of the site, given the Centre has a functional and operational need to be located in the coastal environment.
10. In 2014 NIWA purchased the site and renamed the facility the Northland Marine and Research Centre.
  11. Over the last 17 years, NIWA has established and built its marine science and aquaculture activities to the point that they are now recognised as being of both regional and national significance. Aquaculture is a key contributor to the local and regional economy and has been earmarked as a future growth area for Northland.
  12. NIWA has commenced implementing plans for further development of the Northland Centre. The importance of this planned development was recognised in the Tai Tokerau Northland Economic Action Plan and the 2019 Refresh of that Plan.<sup>2</sup> This planned development requires an appropriately enabling planning framework to ensure the benefits flowing from the development are able to be achieved.

## LEGAL FRAMEWORK

13. The law applying to plan changes is summarised in the s.42A report(s) for this hearing, and addressed to a certain extent in the submissions of other parties. It is not intended to repeat

---

<sup>2</sup> Section 3.2, page 5 and section 5.2 page 16 of the *Tai Tokerau Northland Economic Action Plan*. Available from: <http://s3-ap-southeast-2.amazonaws.com/nnzlibrary/documents/Tai-Tokerau-Northland-Prosperity-Roadmap-February-2016.-Web.pdf?mtime=20160203141217>. See also: Land and Water Projects, page 17 of the *Tai Tokerau Northland Economic Action Plan 2019 Refresh*. Available from: <https://www.northlandnz.com/assets/Resource-Hub/Economic-Action-Plan/2019-Tai-Tokerau-Northland-Economic-Action-Plan.pdf>.

that material unnecessarily here. There are however, two matters which require comment.

### **Existing Use Rights**

14. Existing use rights are provided for in section 10 of the Act. This section allows an activity to contravene a rule in a district plan if the activity:
- (a) was lawfully established before the rule became operative or the proposed plan was notified; and
  - (b) the effects of the use are the same or similar in character, intensity, and scale to those which existed before the rule became operative or the proposed plan was notified.
15. As noted in *Mawhinney v Auckland Council*, existing use rights can carry lawfully established activities through many district plan cycles.<sup>3</sup> The Court must consider the factual situation at each of the dates that the relevant rules came into force.<sup>4</sup> However, existing use rights “cannot be called in assistance by the appellant to protect expectations.”<sup>5</sup>

### **Concerns with Council's reliance on existing use rights approach**

16. In the s.42A report the Whangarei District Council (**Council**) recognises that the Northland Centre site has existing use rights, which:
- (a) apply to its existing large-scale marine science, research and aquaculture facilities;<sup>6</sup> and
  - (b) exempt it from the building setbacks applying to boundaries within the Heavy Industrial Zone.<sup>7</sup>
17. The s.42A report then uses the existence of these rights as the basis to reject NIWA's submission that its site should be exempted from the building setback rules.<sup>8</sup>

---

<sup>3</sup> *Mawhinney v Auckland Council* [2018] NZEnvC 15 at [64] to [68].

<sup>4</sup> *Mawhinney v Auckland Council* [2018] NZEnvC 15, at [68].

<sup>5</sup> *Nicholls v District Council of Papakura* [1998] NZRMA 233, p 11.

<sup>6</sup> S.42A report at [202].

<sup>7</sup> S.42A report at [114].

<sup>8</sup> S 42A report at [114].

18. While such rights would apply to existing buildings, they cannot be used to protect future development<sup>9</sup> (from building setback and other standards such as the planting requirements proposed).<sup>10</sup>
19. To date, NIWA, and its commercial tenant, have developed over half of the 8.4 ha site. However, NIWA expects to have completed the development of the remaining 3.4 ha of the site by June 2020.<sup>11</sup> This development involves the construction of new buildings and facilities on the site and includes the relocation and upgrading of some of the existing office buildings and structures on the site.
20. NIWA wishes to ensure that its land use and activities at the Northland Centre site are provided for and protected, both now and into the future. NIWA considers that the best and most transparent way to do this is to include provisions in PC88H (and/or within a site-specific precinct) which expressly provide for its activities - rather than attempting to rely on existing use rights which, as noted, could only ever amount to partial recognition.

#### **Scope for Precinct**

21. Mr Faithfull suggests that an alternative to amending the PC88H provisions is to instead provide for the Northland Centre's activities through the use of a precinct approach.
22. The legal submissions for the Council have confirmed that there is scope for such an approach to be applied to the Northland Centre site – as the site is owned entirely by NIWA and does not change the planning outcomes sought.<sup>12</sup> It is simply a different, and in my submission, potentially more appropriate method of achieving those outcomes. We address the proposed precinct approach further later in these submissions.

#### **APPROACH TO ADDRESSING REMAINING CONCERNS**

23. As noted, the changes recommended in the s.42A report, address some, but not all, of NIWA's concerns.

---

<sup>9</sup> *Nicholls v District Council of Papakura* [1998] NZRMA 233, p 11.

<sup>10</sup> Refer Rules HIZ-R3 and HIZ-R7.

<sup>11</sup> Statement of Evidence, Kenneth Becker, 5 November 2019, at [14].

<sup>12</sup> Whangarei District Council, Legal Submissions, at [56].

24. NIWA is proposing two alternative approaches for addressing its remaining concerns.
- (a) The first builds on the changes in the s.42A report and seeks further clarifications and exemptions to the same provisions.
  - (b) The second essentially adopts the s.42A recommendations but then seeks the addition of new precinct provisions for the Northland Centre at the end of the Heavy Industrial chapter.

### **Approach 1 – Building on s.42A Recommendations**

25. There are four aspects of the s.42A version of PC88H which NIWA considers require further amendment. These relate to:
- (a) the definition of General Industry;
  - (b) the need for the new research and training objective and policy to more appropriately capture the Northland Centre's activities;
  - (c) the setbacks proposed for buildings and major structures from open space areas adjoining its site; and
  - (d) the planting requirements proposed for sites adjoining open space zones as part of the industrial activity permitted activity standards.

### **Definition of General Industry**

26. The definition of General Industry, as proposed in the s.42A report does not fully encompass the current and planned future activities for the Northland Centre.<sup>13</sup> In his evidence, Mr Faithfull has recommended amendments to this definition so that the full range of Northland Centre activities are captured and so that there is certainty for NIWA, its commercial tenant(s), the Council and the general public as to the types of activities currently carried out and/or anticipated to occur on the site.

---

<sup>13</sup> Statement of Evidence, Luke Faithfull, 7 November 2019, at [17].

### ***New research and training objective and policy***

27. Mr Faithfull considers that the new research and training objective and policy (HIZ-NewO1 and HIZ-NewP1 respectively) proposed in the s.42A report are more restrictive than the Business 4 provisions in the operative WDP.<sup>14</sup> This is because the new objective and policy imply that the research facilities need to be related to an industrial activity occurring at the site rather than being an industrial activity in their own right.
28. The Northland Centre is a standalone research facility and would not fit within the new objective and policy as proposed. Mr Faithfull recommends that the new objective be amended to more explicitly recognise and provide for the Northland Centre activities and that the new policy be deleted as the existing policies provide sufficient policy support.<sup>15</sup>

### ***Industrial activity standards***

29. NIWA's activities at the Northland Centre site are generally provided for as permitted activities under the operative WDP. Mr Faithfull details in his evidence how the new rules proposed by PC88H, and in particular rules HIZ-R7(3), HIZ-R7(4) and HIZ-R3(c), will be more restrictive of NIWA's activities.<sup>16</sup>
30. While Mr Faithfull recognises that the Northland Centre activities have existing use rights, these only apply to the activities in their current form.<sup>17</sup> As noted, NIWA has planned developments which will extend the footprint and scale of the Centre's existing activities.
31. Mr Faithfull considers that providing specific exemptions or rules for the Northland Centre site will better enable the activities and planned future development. Mr Faithfull provides a strikethrough version of his suggested amendments to the permitted activity rules HIZ-R7(3), HIZ-R7(4) and HIZ-R3(c) in Attachment B of his evidence.

---

<sup>14</sup> Statement of Evidence, Luke Faithfull, 7 November 2019, at [30].

<sup>15</sup> Statement of Evidence, Luke Faithfull, 7 November 2019, at [31].

<sup>16</sup> Statement of Evidence, Luke Faithfull, 7 November 2019, at [33].

<sup>17</sup> Statement of Evidence, Luke Faithfull, 7 November 2019, at [45].

## **Approach 2 – Northland Marine and Research Centre Precinct**

32. The Northland Centre is a unique site, which serves as a hub for research, science and on-land aquaculture activities in Whangarei. The site is large (some 8.4ha), with key supporting infrastructure (the underground pipelines and intake/outfall structures). The Centre carries out activities not found elsewhere in the District, or even the region.
33. This uniqueness is currently recognised in the operative plan by way of site specific exemptions to standards – such as the building setback rules. Given PC88H introduces additional standards and rules that would require an exemption, a precinct approach may provide a more appropriate planning framework for the site. In this regard, it is noted that PC88H already proposes a precinct approach for the Oil Refinery site (Marsden Point Energy Precinct).

### ***Suggested Precinct provisions***

34. Mr Faithfull has prepared a set of site specific precinct provisions which will be tabled at the hearing.
35. These provisions take a similar approach to the Marsden Point Energy Precinct, by supplementing the s.42A version of the PC88H provisions with a specific objective and policies for the Centre, as well as noting the rules from which the Centre is exempted.
36. Using the s.42A version of the provisions is considered appropriate as:
  - (a) the changes proposed in that report are not site specific, but recognise “the relationship of industrial activities with research laboratories used for scientific, industrial or medical research with training”;
  - (b) other parties, such as Heron Construction, have supported such changes in their evidence; and
  - (c) ensuring the s.42A changes are included in PC88H (rather than only in the Northland Centre precinct) will provide clarity to plan users as to the types of activities anticipated within the zone.
37. Mr Faithfull will take the hearings panel through the proposed precinct provisions at the hearing.

**CONCLUSION**

38. NIWA's primary concerns are to ensure that PC88H:
- (a) recognises the regional and national significance of the Northland Centre and appropriately provides for its existing operations and planned development;
  - (b) contains provisions that are workable, practical and clear; and
  - (c) ultimately, achieves the sustainable management purpose of the Act.
39. The evidence of Mr Becker and Mr Faithfull demonstrates why further amendments to PC88H are required to achieve those goals.

**DATE: 3 December 2019**



**Vicki Morrison-Shaw**

Counsel for the National Institute for Water and Atmospheric Research Limited