

MEMORANDUM

TO: Surfbreak Protection Society
FROM: Environmental Defence Society Community Advice
DATE: 10 July 2012
RE: Whangamata Surf Break

INTRODUCTION

1. You have asked us to advise you of your legal options in relation to resource consents 121398 and 121399 and the effect the exercise of these consents is having on the Whangamata bar.
2. Resource consent numbers 121398 and 121399 were granted on 1 September 2010. The consents allow:
 - a) the disturbance of no more than 10,000 m³ per year of natural marine material from the bed of the Whangamata Harbour for maintenance dredging purposes; and
 - b) the deposit of up to 10,000 m³ per year of clean sand on the foreshore of Whangamata harbour.
3. You have provided us with a copy of the report entitled *The Whangamata Bar: Dredging of the Moana anu anu Stream and Observed Adverse Effects on the Whangamata Ebb Tidal Delta* ("the Report").
4. The Report provides evidence that the exercise of resource consents 121398 and 121399 is causing adverse effects on the Whangamata bar.
5. The Report also provides evidence that:
 - a) the dredging activities carried out under resource consent 121398 are possibly exceeding the volume limits of the consent, and
 - b) activities which the Whangamata Marina Society Inc is purporting to carry out as permitted activities under rule 16.6.10 of the Regional Coastal Plan are not being carried out within the volume limits of that rule.

NEW ZEALAND COASTAL POLICY STATEMENT 2010 (NZCPS)

6. Schedule 1 of the NZCPS recognises Whangamata bar as a surf break of national significance.
7. Policy 16 of the NZCPA provides the following:

Protect the surf breaks of national significance for surfing listed in Schedule 1, by:

- a. ensuring that activities in the coastal environment do not adversely affect the surf breaks; and*
- b. avoiding adverse effects of other activities on access to, and use and enjoyment of the surf breaks.*

8. Regional policy statement and regional plans must give effect to the NZCPS. The NZCPS does not provide any practical remedies that could address your concerns.

HAURAKI GULF MARINE PARK ACT 2000 (HGMPA)

9. Schedule 3 of the HGMPA contains a map indicating the boundary of the Hauraki Gulf Marine Park. Whangamata is included within this area.

10. Section 7 of the HGMPA recognises the national significance of the Hauraki Gulf:

(1) The interrelationship between the Hauraki Gulf, its islands, and catchments and the ability of that interrelationship to sustain the life-supporting capacity of the environment of the Hauraki Gulf and its islands are matters of national significance.

(2) The life-supporting capacity of the environment of the Gulf and its islands includes the capacity—

(a) to provide for—

...

(ii) the social, economic, recreational, and cultural well-being of people and communities:

(b) to use the resources of the Gulf by the people and communities of the Gulf and New Zealand for economic activities and recreation:

...

11. Section 8 of the HGMPA contains objective relating to the management of the Hauraki Gulf:

To recognise the national significance of the Hauraki Gulf, its islands, and catchments, the objectives of the management of the Hauraki Gulf, its islands, and catchments are—

...

(b) the protection and, where appropriate, the enhancement of the natural, historic, and physical resources of the Hauraki Gulf, its islands, and catchments:

...

(d) the protection of the cultural and historic associations of people and communities in and around the Hauraki Gulf with its natural, historic, and physical resources:

(e) the maintenance and, where appropriate, the enhancement of the contribution of the natural, historic, and physical resources of the Hauraki Gulf, its islands, and catchments to the social and economic well-being of the people and communities of the Hauraki Gulf and New Zealand:

(f) the maintenance and, where appropriate, the enhancement of the natural, historic, and physical resources of the Hauraki Gulf, its islands, and catchments, which contribute to the recreation and enjoyment of the Hauraki Gulf for the people and communities of the Hauraki Gulf and New Zealand.

12. Section 9 of the HGMPA provides that regional policy statement and regional plans must not conflict with sections 7 and 8. Section 9 also requires a consent authority to have regard to sections 7 and 8 when considering an application for a resource consent in the Hauraki Gulf. The HGMPA does not provide any practical remedies that could address your concerns.

THE CONSENT CONDITIONS

13. The deposition consent contains condition 22 requiring profile monitoring of the beach area subject to deposition. The decision report indicates that this was inserted to provide information on the way in which the beach responds to the beach nourishment and to provide information on any possible effects on beach dynamics. However, as noted in your report, there is no requirement to monitor effects on the Whangamata bar.
14. The disturbance and deposition consents contain conditions 23 and 26, respectively, which provide that the Waikato Regional Council (“the Council”) may, within two months either side of 01 September 2012 serve notice on the consent holder of its intention to review the conditions of this resource consent.
15. Conditions 23 and 26 allow the Council to review the resource consent conditions for the following purposes:
 - a) to review the effectiveness of the conditions of this resource consent in avoiding or mitigating any adverse effects on the environment from the exercise of this resource consent and if necessary to avoid, remedy or mitigate such effects by way of further or amended conditions; or
 - b) if necessary and appropriate, to require the holder of this resource consent to adopt the best practicable option to remove or reduce adverse effects on the surrounding environment; or
 - c) to review the adequacy of and the necessity for monitoring undertaken by the consent holder.

LEGAL REMEDIES

REVIEW OF CONSENT CONDITIONS

16. Conditions 23 and 26 empower the Waikato Regional Council to review the conditions of the resource consent between 01 July 2012 and 01 November 2012.
17. The three bases upon which the Council may review are set out in paragraph 8 above. The Report provides evidence that the exercise of the resource consents is causing adverse effects on the environment, specifically the Whangamata bar. Therefore it provides justification for reviewing the conditions under paragraph (b) of conditions 23 and 26.
18. We could assist you by preparing a letter to the Waikato Regional Council presenting the Report and seeking an undertaking that the Council will formally review the conditions of resource consents 121398 and 121399, with a view to making changes to the consent conditions to avoid or mitigate the adverse effects on the Whangamata bar.
19. We could also assist by hosting a “without prejudice” workshop to discuss this matter, in order to assist the parties to reach a common understanding on the physical processes that are occurring, if this is required. EDS has previously hosted similar workshops, for example we hosted a workshop in relation to the Bryde’s Whale. These have proven successful.

JUDICIAL REVIEW

20. If the Waikato Regional Council decides not to review the conditions of the resource consents you may seek judicial review of that decision. Upon an application for judicial review the High Court will review a decision made by a public body to determine whether it was made in accordance with the law.
21. In order to be successful in a judicial review application you must show that the Council has made an error of law in its decision. The High Court cannot impeach a decision merely because it would have reached a different decision.
22. In order to assess whether the Council has made an error of law we would need to review the reasons for their decision. You may obtain official information by making a request under the Local Government Official Information and Meetings Act 1987. You can find a guide to making an official information request at [this web address](#).
23. The High Court has a discretion whether or not to grant the relief sought, however if your application is successful the remedy will be a direction to the Council to reconsider their decision. The High Court cannot substitute its own decision for that of the Council.
24. Judicial review proceedings must be commenced in the High Court and usually involve considerable expense. The costs of filing an application for judicial review in the High Court is \$483.40 and there will be further costs associated with engaging legal representation.

25. There is also a risk of an award of costs if your application is unsuccessful.
26. If the Waikato Regional Council decides not to review the conditions of the resource consents and you wish to challenge that decision we recommend you seek independent legal advice on the merits of judicially reviewing the Council's decision.

DECLARATION

27. As set out in paragraph 5, the Report provides evidence that:
 - a) the dredging activities carried out under resource consent 121398 are possibly exceeding the volume limits of the consent, and
 - b) activities which the Whangamata Marina Society Inc is purporting to carry out as permitted activities under rule 16.6.10 of the Regional Coastal Plan are not being carried out within the volume limits of that rule.
28. A declaration is a decision made by the Environment Court to clarify matters under the RMA. Section 310 of the RMA provides that a declaration can be sought for a range of reasons including to determine whether an act or omission contravenes the Act.
29. You may wish to consider seeking a declaration from the Environment Court that the conditions on the dredging consent have been breached and/or the Whangamata Marina Society Inc is carrying out an activity in breach of the RMA.
30. Any person may apply to the Environment Court for a declaration. An application for a declaration must be made in accordance with [Form 41](#). You must provide a description of the declaration sought, the grounds for the application and an affidavit in support of the application.
31. The original and one copy of the signed application plus the filing fee of \$56.22 needs to be lodged at the appropriate office of the Environment Court. The notice of application ([Form 42](#)) must be served on the Minister for the Environment, and every person directly affected by the application, within five working days of the application being lodged with the Environment Court. You must also give written notice to the Registrar of the Environment Court of the name and address of each person required to be served with notice and the date of service on each person, within 10 working days of lodging the application.
32. After the Environment Court has heard your case for the declaration it will make a decision as to whether to grant or refuse the application or to make any other declaration it considers necessary or desirable.
33. The Environment Court can award costs against an unsuccessful application for a declaration.
34. A declaration does not provide any practical remedy, however, it can be used as a preliminary step before seeking an enforcement order.

ENFORCEMENT ORDER

35. The Environment Court can be asked to make an enforcement order to require a person to stop doing something which is contrary to the RMA or require a person to do something which is necessary to ensure compliance with the RMA.
36. Anyone can apply for an enforcement order to require a person to comply with the provisions of the RMA (section 316 of the RMA).
37. An application for an enforcement order must be in the format set out at [this web address](#). You will also need to attach an affidavit in support of the application.
38. The original and one copy of the signed application plus the filing fee of \$56.22 need to be lodged at the appropriate office of the Environment Court. Notice also needs to be served on the person against whom you are seeking the order and anyone else directly affected by the application. This must be done within five working days of the application being lodged with the Environment Court. The notice must be in the format set out at [this web address](#). Within ten working days of lodging the application you must also give written notice to the Registrar of the Environment Court of the name and address of each person served with notice and the date they were served.
39. Once the Environment Court has heard your case it will reach a decision either to make the enforcement order or to refuse the application. The order can be made on such terms as the Court sees fit.
40. The Environment Court can award costs against an unsuccessful application for an enforcement order.
41. Failing to comply with an enforcement order is an offence (sections 315 and 338 of the RMA). Corporate entities may be subject to a fine of up to \$600,000.

CONCLUSION

42. Your legal options include:
 - a) seeking an undertaking from the Council to review the consent conditions,
 - b) if it decides not to review the consent conditions, seeking judicial review of the Council's decision,
 - c) seeking a declaration from the Environment Court stating that the consent holder is not complying with the consent conditions and/or is breaching the RMA,
 - d) seeking an enforcement order from the Environment Court on the basis that the consent holder is not complying with the consent conditions and/or is breaching the RMA.