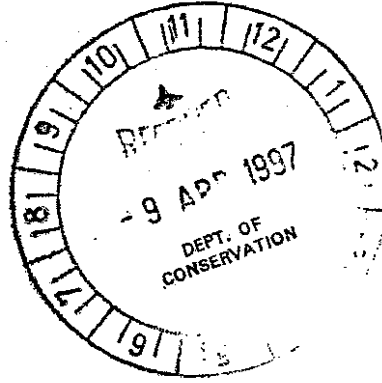




CPA 0151/0152/0155/0207



DIRECTOR-GENERAL OF CONSERVATION	
For Draft Reply	
For Comments	
<input checked="" type="checkbox"/> For Appropriate Action	
For Direct Action	
For Record	
MINISTER OF CONSERVATION	

5 February 1997

97/8068

Minister of Conservation

**RESOURCE MANAGEMENT ACT
SECTION 120 NOTICE OF APPEAL/INQUIRY
AND SECTION 271A INTENTION TO APPEAR AS A PARTY**

1. Whangamata Marina

The Department today lodged, under your delegated authority, a Section 120 Notice of Appeal/Inquiry with the Environment Court. The Notice deals with the decisions and recommendations of the Waikato Regional Council on four applications (including two restricted coastal activities) by the Whangamata Marina Society for activities associated with a 205 berth marina in Moanaanuanu Estuary adjacent to Whangamata Harbour.

The Department is opposed to the applications. The proposed marina is in an area of salt marsh which will be destroyed. The salt marsh is of national conservation importance and the loss of this habitat is a significant adverse effect which has not been recognised and adequately mitigated for. The site has been identified in the Proposed Regional Coastal Plan as an area of significant conservation value (ASCV).

The Department has a number of concerns with the Hearing Committee's recommendations and we believe that in their deliberations they have failed to:

- (i) promote sustainable management of national and physical resources; and
- (ii) ensure that the adverse effects of the activities on the environment are avoided, remedied or mitigated; and
- (iii) have proper regard to the New Zealand Coastal Policy Statement, in particular policy 1.1.2; and
- (iv) have proper regard to the actual and potential effects of the proposed activity, in that:
 - (a) the activities would have an adverse effect on the ecology of Whangamata Harbour due to the loss of saltmarsh, mangrove, eelgrass and shellfish beds; and
 - (b) the activities would have an adverse effect on the habitats of rare and endangered bird species, namely the New Zealand Dotterel and the Variable Oyster Catcher.

A copy of the Notice is attached for your information.

2. Appearance at Environment Court as a Party to Proceedings

The Department recently filed three RM Act section 271A Notices with the Environment Court indicating our intention to be a party to proceedings related to three coastal permit application inquiries. The applications are:

- The Auckland Regional Services Trust application to construct the America's Cup facilities at the Viaduct Basin; and
- Ports of Auckland's application to extend the Fergusson Container Terminal; and
- Watercare Services' application to upgrade Mangere Wastewater Treatment Plant.

Inquiries into the Auckland Regional Council's recommendations on the above applications were sought by a number of parties. The Department made submissions and gave evidence to the Council Committees set up to consider the applications. Because the Environment Court's hearing is de novo it is important that the Department is involved in order to ensure that gains made in securing conditions remain intact as a result of the inquiry process.

3. Recommendation

It is recommended that you:

← MOC

- (i) note that the Department has sought an appeal/inquiry into the Waikato Regional Council's decision/recommendation relating to a proposed marina at Whangamata; and
- (ii) note that the Department intends to be involved in the Environment Court inquiries relating to the America's Cup development, the Fergusson Container Terminal expansion and the Mangere Wastewater Treatment upgrade.

pp MOC notes.

Wren Green
 Director, Planning and External Agencies Division
 for Director-General

Encl.

Noted

[Handwritten signature]

Hon Dr Nick Smith
 Minister of Conservation

*Unhappy re: Whangamata Issue.
 Need full information.*

RELEASED UNDER THE OFFICIAL INFORMATION ACT

IN THE ENVIRONMENT COURT

APPEAL/INQUIRY No

IN THE MATTER of an appeal/inquiry under Section 120
of the Resource Management Act 1991

BETWEEN MINISTER OF CONSERVATION

Appellant

AND

WAIKATO REGIONAL COUNCIL

Respondent

AND

WHANGAMATA MARINA
SOCIETY

Applicant

NOTICE OF APPEAL/INQUIRY UNDER SECTION 120 OF
THE RESOURCE MANAGEMENT ACT 1991

To: The Registrar
Environment Court
Wellington

1. Appellant

Name: Minister of Conservation

Address: Parliament Buildings
Molesworth Street
WELLINGTON

The Minister lodged a submission dated 8 March 1996 in respect of four applications, including two for restricted coastal activities, (Numbers 953758, 953759, 953760 and 953761) by the Whangamata Marina Society to the Waikato Regional Council for the construction of a marina and ancillary hardstand and parking areas in the Moanaauanu Estuary of Whangamata Harbour.

2. Name of Decision/Recommendation-maker (The respondent)

Waikato Regional Council

3. Date of Decision/Recommendation

20 December 1996

4. **Date on which notice of decision/recommendation was received by appellant**

23 December 1996

5. **Nature of the application on which the decision/recommendation was made**

The application on which the recommendation was made related to applications by the Whangamata Marina Society for four coastal permits (including two for restricted coastal activities) associated with the construction of a marina and ancillary hardstand and parking areas in the Moanaanuanu Estuary of Whangamata Harbour.

6. **Description of the land or resource affected by the decision/recommendation**

The land or resource affected by the recommendation comprises areas in the Moanaanuanu Estuary of Whangamata Harbour (the harbour).

7. **The grounds on which the appeal/inquiry is based are:**

The grounds for the appeal/inquiry are that the decisions/recommendations of the Waikato Regional Council that the coastal permit applications of the Whangamata Marina Society be granted is contrary to the Resource Management Act 1991 in that it failed to:

- (i) promote sustainable management of national and physical resources; and
- (ii) ensure that the adverse effects of the activities on the environment are avoided, remedied or mitigated; and
- (iii) have proper regard to the New Zealand Coastal Policy Statement, in particular policy 1.1.2; and
- (iv) have proper regard to the actual and potential effects of the proposed activity, in that:
 - (a) the activities would have an adverse effect on the ecology of Whangamata Harbour due to the loss of saltmarsh, mangrove, eelgrass and shellfish beds; and
 - (b) the activities would have an adverse effect on the habitats of rare and endangered bird species, namely the New Zealand Dotterel and the Variable Oyster Catcher.

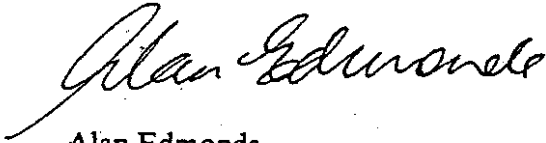
8. **Relief Sought:**

8.1 That the applications for resource consents be declined.

8.2 That the Environment Court reports to the Minister of Conservation that he does not accept the recommendation of the Hearing Committee and that he declines the applications for restricted coastal activities.

8.3 That the appeal/inquiry be allowed.

Dated at Wellington this 5th day of February 1997.



Alan Edmonds
Deputy Director-General of Conservation
acting under an instrument of delegation
dated 2 October 1991.

Address for service of the Appellant

Regional Conservator
Department of Conservation
Private Bag 3072
Hamilton

Telephone No: (07) 838 3363
Fax No: (07) 838 1004

Annexures:

- (a) Copy of submission to which reference relates;
- (b) Copy of recommendation of the respondent;
- (c) Copy of the application and application notice;
- (d) Names and address of persons to be served with a copy of this notice.



Department of Conservation
Te Papa Atawhai

DIRECTOR-GENERAL OF CONSERVATION	
For Draft Reply	
For Comments	
→ For Appropriate Action	
For Direct Action	
For Record	
20 February 1998	
MINISTER OF CONSERVATION	

Our Ref: RMR-C242

TO: Grant Baker, REGIONAL GENERAL MANAGER (NORTHERN)

FROM: Greg Martin, WAIKATO CONSERVATOR

SUBJECT: PROPOSED MARINA AT WHANGAMATA

see note at end of briefing paper
BS

Introduction:

This paper provides an up-date on the state of the Minister's appeal to the Environment Court against a decision by the Waikato Regional Council to allow a marina development at Whangamata.

Since the Minister was last briefed on this case:

- i. the Hauraki Treaty Claim has been formally notified,
- ii. the Conservancy has continued negotiations with the Whangamata Marina Society with a view to settling the case and withdrawing the Minister's appeal (this approach being directed by the Minister himself);
- iii. the Minister has issued a timetable for progressing the Hauraki Gulf Marine Park.

This paper concludes with a request for a further direction from the Minister. The Conservancy asks whether, in the light of developments, the Minister still wants the Department to finalise a 'settlement' with the Marina Society and withdraw the appeal against the marina. If the answer is yes, then the Conservancy expects that the appeal would be withdrawn within about two months.

Background:

On 19 December 1996 the Waikato Regional Council recommended that the Minister grant two separate coastal permits which would allow a 205 berth marina development in the Whangamata Harbour. The Minister has filed an appeal against the Council recommendation. The Hauraki Maori Trust Board has also filed an appeal against the Council recommendation. The appeals are awaiting a hearing date in the Environment Court later this year.

The construction of the proposed marina will involve dredging a marina basin (within the coastal marine area inside the harbour) and depositing dredge material on an area of

saltmarsh (also situated within the coastal marine area) so that a carpark can be established adjacent to the marina. Once the marina is operative there will be a need to dredge the canal once or twice a year to maintain access to the marina basin (although it is noted that some dredging already occurs).

The Minister's judicial role in this case:

Since the development is a Restricted Coastal Activity the Minister has a judicial role in this case. Ultimately he is the final decision-maker, although in practice, the withdrawal of his appeal would be a strong indication that he was prepared to grant the coastal permits in question.

One of the main reasons for the Minister's appeal has always been concern that there is not enough information available on potential adverse effects. The Department considers that the applicant has not provided the decision-makers with a sufficiently detailed Assessment of Environmental Effects (AEE). For example, the planning consultants engaged by the Marina Society did not address impacts on New Zealand Dotterel despite the fact that the Department had signalled its concerns in relation to this endangered species.

If the Minister were to grant the coastal permits when the information provided by the applicants does not provide an adequate assessment of potential adverse effects, he would be abandoning the so-called 'precautionary approach' embodied in Part II of the Resource Management Act.

The Department's evidence in relation to conservation issues:

Before the Environment Court the Department intends (if the appeal proceeds) to call two expert witnesses in support of the Minister's appeal. Those witnesses are:

- a. Dr. Roger Grace, on marine biological issues including saltmarsh and shellfish beds; and
- b. Dr. John Dowding, on New Zealand Dotterel and Variable Oystercatcher.

A copy of the brief of evidence for each witness is attached to this memorandum.

Neither witness is a permanent Departmental employee (although Dr. Dowding is currently working on contract to the Department). Despite the endangered status of the New Zealand Dotterel, the Department does not seem to have done a great deal of work focusing on this species, and Dr. Dowding is recognised as the leading authority in the world.

The Minister's visit to the site:

The Minister visited the site late last year and met with members of the Marina Society. After that meeting he provided the Conservancy with a clear direction that a "settlement" should be negotiated with the Marina Society and the appeal should be withdrawn.

Negotiations with the Marina Society:

The Department has undertaken extensive negotiations with the Marina Society on a 'without prejudice' basis. Those negotiations have resulted in the formulation of a draft agreement which is currently with the Conservancy Solicitor for further work. The agreement would provide for the withdrawal of the Minister's appeal in return for a contribution of labour and money to a New Zealand Dotterel Recovery Project at Whangamata Harbour, just across the channel from the proposed marina. This project would focus on one pair of breeding Dotterel. The contribution by the Marina Society would be worth approximately \$10 000 per annum but it would be conditional on:

- a. The marina proposal going ahead; and
- b. The continued presence of that pair of Dotterel on the beach in question. (In other words, one mustalid or feral cat could put an end to the project and the Marina Society's obligation to support it. In some ways it is difficult to see this project as true mitigation of effects caused by the marina development. After all, those effects are not known. Even if the pair in question is not predated, they might simply decide to leave the area - perhaps because of the effects of the marina construction - and then (somewhat ironically) the Marina Society's obligation to mitigate effects would cease.

One of the conditions imposed by the Regional Council in its original decision was that the Marina Society would have to contribute \$40 000 for saltmarsh restoration somewhere in the Whangamata Harbour. Although this was a condition imposed by the Regional Council it would seem that the intention is that the Department should supervise the spending of the money. The reality is that there are only two areas of saltmarsh of any significant size in the Whangamata Harbour, and one of those is the site of the proposed marina carpark. The \$40 000 in mitigation for saltmarsh is therefore likely to be spent at the one remaining area of significant saltmarsh at the far end of the harbour.

The Marina Society has not been prepared to do a great deal of compromising during the course of the negotiations. The Society pleads a lack of resources and consistently points to the fact that it is a community based organisation without major financial backers. For this reason it says it cannot fund extensive mitigation. It also denies that such mitigation is necessary, but once again, this assumes the AEE is adequate when in fact the Department does not consider it to be so. The Society's lack of resources may well be part of the reason for the lack of an adequate AEE.

The mitigation required to address potential adverse effects on NZ Dotterel and other fauna cannot be ascertained until work has been done to assess those adverse effects. The Marina Society have not come up with any mitigation for potential effects on Variable Oystercatcher or shellfish beds. The mitigation (\$40 000) for saltmarsh seems inadequate, with the Regional Council's own staff now (privately) suggesting that \$200 - 300 000 might have been more appropriate. As mentioned above, the proposed mitigation for effects on Dotterel (\$10 000) would be lost if the pair across from the marina development were to cease to be there. This is the case even though according to Dr. Dowding 1% of the world NZ Dotterel population are potentially affected by the marina development.

The Conservancy believes that even if the Minister's appeal against the marina were unsuccessful, the Environment Court would be highly likely to impose mitigation

conditions on the Marina Society equal to, or better than, those proposed under the "negotiated settlement". In other words the only real advantage in the "negotiated settlement" from the Department's point of view is the saving of resources which would otherwise be expended in progressing the appeal.

Current relationship with Hauraki Maori Trust Board:

The Waikato Conservancy has a close working relationship with the Hauraki Maori Trust Board. The CEO of the Trust Board is also a member of the Waikato Conservation Board. There is a need for the Department to consult with Hauraki on many issues, and during the formulation of various management plans. This is in keeping with section 4 of the Conservation Act.

The Auckland Conservancy also works with the Hauraki Trust Board, and indeed there is overlap between the two conservancies on some issues. The proposed Hauraki Gulf Marine Park is one such issue. Both Auckland and Waikato Conservancies will be involved in the consultation process which will surround the formation of the marine park.

The Department is concerned that if the Minister's appeal against the proposed marina development were withdrawn, the Department may lose credibility with Hauraki Iwi. Withdrawing the appeal might also make consultation on conservation issues more difficult in future.

It is difficult to say what effect withdrawing the appeal may have on Hauraki Iwi's attitude to the marine park proposal. The Conservancy would certainly not want to overstate the potential effect in that regard, especially given that Hauraki Iwi have already indicated that they may not support the marine park proposal. Nevertheless, the Trust Board will be displeased by any decision to withdraw the Minister's appeal against the marina development, and this could well have flow on effects in terms of consultation over the marine park.

On appeal to the Environment Court the Trust Board are to some extent relying on the Department's evidence in relation to shellfish beds (the evidence of Dr. Grace) to support their concerns about kaimoana. Although the Trust Board could still call Dr. Grace themselves, there are still likely to be allegations that the Department has weakened the Iwi case by withdrawing the Minister's appeal.

Four potential scenarios:

Four potential scenarios in relation to the appeals are set out here with brief commentary:

- i. The Minister withdraws his appeal, and Iwi either advance their own appeal and lose, or decide they cannot advance an appeal on their own - The Department would no doubt be accused of not standing up for conservation issues, and Iwi may use this to challenge the adequacy of the Crown's stewardship of natural resources.
- ii. The Minister withdraws his appeal, Iwi advance their own appeal and win - There would then be no 'mitigation' for New Zealand Dotterel or saltmarsh, this being unnecessary since the marina would be unable to proceed. Once again, the Department

might be challenged on its ability to act as steward of the conservation estate (particularly the coastal marine area).

iii. The Minister does not withdraw his appeal and that appeal is unsuccessful - The downside would be an award of costs against the Department. Since it seems likely that the Court would require some further mitigation from the Marina Society to address the situation in relation to NZ Dotterel, any such award of costs would probably be quite low (if indeed any costs were awarded at all).

iv. The Minister does not withdraw his appeal and that appeal is successful - Obviously the downside here is the damage which may be done to the Department's relationship with the Whangamata Marina Society. Although the people of Whangamata township may have views on whether the marina should go ahead (there being townspeople for and against the proposal), it is members of the Marina Society who will be most disappointed if it does not proceed. It is worth noting that this is not a case of people wanting to develop private land. The land in question is public land (mainly seabed) and the Whangamata Marina Society will not be acquiring title from the Crown. The Society is seeking coastal permits which would allow relatively exclusive use of public land by the owners of about 200 boats. This is not a case where the Department is seeking to limit a landowner's use of private land. The Crown is the owner of the land in question, land which the Marina Society will be effectively acquiring at no cost, and the Department is simply seeking to protect conservation interests.

Since the Marina Society is not prepared to accept the "information costs" associated with their proposal (by providing an adequate AEE), there has been an attempt to shift those information costs onto the public (i.e. community groups, the Department of Conservation, and the Regional Council). The cost of any work undertaken by people outside the Marina Society to gather information on the potential effects of the proposed development might be regarded as 'externalities'. In fact no one has done sufficient work to ascertain the effects on NZ Dotterel, Variable Oystercatcher, and shellfish beds.

Any actual effects on Variable Oystercatcher and shellfish beds (and such effects cannot be predicted with the information at hand) will simply be an environmental subsidy in favour of the members of the Marina Society. The same will be true of effects on Dotterel which are of a magnitude greater than that mitigated against by the Marina Society's proposed contribution to the NZ Dotterel Recovery Project.

Why the Conservancy advises against withdrawing the appeal:

The Conservancy would prefer not to withdraw the Minister's appeal, but will of course be guided by the Minister himself. The Conservancy advises against withdrawing the appeal for the following reasons:

1. **Inadequate information for the Minister to discharge his judicial role.** This dearth of information (particularly in relation to NZ Dotterel, and shellfish beds) means the Minister cannot be certain that the Marina Society will be avoiding, remedying, or mitigating potential effects of the development. That being the case, it would not seem possible, as a matter of law, for the Minister to sign off on the coastal permits.

2. **Bad precedent in terms of RMA planning practice.** If the Minister were to grant the coastal permits, based on the information at hand, he would be endorsing a transfer of "information costs" to groups and public bodies other than the applicant, and thereby abandoning the so-called 'precautionary approach'.

3. **New Zealand Coastal Policy Statement 1994 (NZCPS).** The NZCPS is a statutory document issued by the Minister under the Resource Management Act. It reflects the key role the Department plays in managing the coastal marine area. Chapter 1 is headed 'National priorities for the preservation of the natural character of the coastal environment including protection from inappropriate subdivision, use and development'. Policy 1.1.2 provides as follows:

It is a national priority for the preservation of the natural character of the coastal environment to protect the areas of significant indigenous vegetation and significant habitats of indigenous fauna in that environment by:

- (a) *avoiding any actual or potential adverse effects of activities on the following areas or habitats:*
 - i *areas and habitats important to the continued survival of any indigenous species;*
 - ii *areas containing nationally vulnerable species or nationally outstanding examples of indigenous community types;*
- (b) *avoiding or remedying any actual or potential adverse effects of activities on the following areas:*
 - i *outstanding or rare indigenous community types within an ecological region or ecological district;*
 - ii *habitat important to regionally endangered or nationally rare species and ecological corridors connecting such areas; and*
 - iii *areas important to migratory species, and to vulnerable stages of common indigenous species, in particular wetlands and estuaries;*
- (c) *protecting ecosystems which are unique to the coastal environment and vulnerable to modification including estuaries, coastal wetlands, mangroves and dunes and their margins;*
- (d) *recognising that any other areas of predominantly indigenous vegetation or habitats of significant indigenous fauna should be disturbed only to the extent of reasonably necessary to carry out approved activities.*

The Department considers that the present lack of an adequate AEE makes it impossible for the applicant to satisfy the criteria set out in this policy.

4. **The Department of Conservation's Strategic Business Plan 1998.** This document places a greater emphasis on marine conservation issues. In the public mind, withdrawing the appeal may be seen as counter to the thrust of the Strategic Business Plan.

5. **Conservation issues.** These issues are detailed (to the extent that they can be identified with the information at hand) in the evidence of Dr. Dowding and Dr. Grace. The conservation issues which the Department is particularly concerned about are (in this order):

- NZ Dotterel
- Variable Oystercatcher
- Shellfish beds

- Saltmarsh

It is noted that the Whangamata Harbour is an internationally significant site for both NZ Dotterel and Variable Oystercatcher, because in terms of the Ramsar Convention the harbour provides habitat for at least 1% of the world population of those two species.

6. **Relationships with Hauraki Maori Trust Board.** It is suggested that these relationships (which extend beyond the Waikato Conservancy and may impact on the Hauraki Gulf Marine Park proposal) will be damaged if the Minister's appeal is withdrawn *without the Department being in a position to explain the decision to withdraw on sound legal, planning, or conservation grounds.*

7. **Conservancy's inability to explain any withdrawal of the appeal to third parties.** The Conservancy considers that any decision to withdraw the appeal could not be justified on legal, RMA planning, or conservation grounds. Neither could a decision to withdraw the appeal be justified in terms of the strength of the case. It would therefore be very difficult to explain to third parties why the appeal had been withdrawn.

If, for example, Hauraki Maori Trust Board asked the Conservancy to explain its decision to withdraw from the appeal, the Conservancy could say that it has little evidence of adverse effects on conservation values. But the Board could very easily counter this answer by arguing that the legal onus rests on the applicant to show that there are not going to be adverse effects, and they could point out that the applicant in this case has failed to provide an adequate AEE. The precautionary approach means that the Department has no onus to prove adverse effects.

For the same reason, it would be difficult for the Department to say that we are satisfied with the level of mitigation because you cannot quantify mitigation when you do not know what level of adverse effects are to be mitigated? In trying to justify the decision to withdraw the appeal in this way the Department would undermine its own credibility. Developers elsewhere on the Coromandel would be given a clear message that substandard information gathering and a poor assessment of environmental effects, when coupled with political lobbying, is a cheaper and perhaps even more effective approach to resource planning issues than taking a proper approach and doing the ground work before lodging a resource consent application.

RECOMMENDATION: That the appeal be advanced and not withdrawn.

Approve / Decline

Proceed but continue to attempt to reach a negotiated outcome.



Hon. Dr. Nick Smith
Minister of Conservation

Date:

Our Ref:

04 March 1998

Copied from Wkto
Cscg file.

TO: FILE NOTE
FROM: Aaron Martin

SUBJECT: WHANGAMATA MARINA SOCIETY DATED 3 MARCH 1998 :
TELEPHONE CALL FROM GRAEME CAMPBELL

My briefing paper in relation to the marina appeal was received by the Minister yesterday. Graeme complimented me on the report saying that it was very good. The Minister and Graeme discussed the matter for quite some time and the upshot of the discussion was that:

The Conservancy should proceed with advancing the appeal to the Environment Court but should continue discussions if there is an opportunity of having our concerns addressed - ie filling the information gap which currently exists.

Graeme and I had a discussion which reinforced the fact that a settlement is very unlikely because it is not likely that the Society is going to be able to address the information gap. Nevertheless we would not close the door on that possibility.

Graeme advanced the opinion that if the Society goes to appeal in the Court it might well face a cost award if there is inadequate information on effects on dotterel and oystercatcher.

I got the distinct impression that Graeme considered that the points which we were raising were valid points and that this may well have been a factor in influencing the Minister's decision.

In any event, as Graeme says, "we have the steer we wanted".

Aaron Martin
CONSERVANCY SOLICITOR

Our Ref: 3

4 March 1998

TO: NOTE FOR FILE

FROM: Aaron Martin

SUBJECT: WHANGAMATA MARINA : RMR-C242

I attended Simon Menzies office at Harkness Henry at 4 pm for a prearranged meeting. Only the two of us were present. I advised Simon of the Department's approach in this case, namely there remained an 'information gap' and that until such time as that gap had been addressed the Minister would not be in a position to withdraw its appeal. I stressed on a number of different occasions during the 50 minute meeting that the Conservancy would consider any information which the Marina Society could present, but there would need to be a concerted effort to address the information gap.

The precautionary approach means that adequate information (and the onus is on the applicant to supply this information) must be provided BEFORE any question of mitigation can be finalised. (And that is putting aside the question of whether mitigation is acceptable under the NZCPS anyway.) The Minister has a judicial role in this case as consent authority and cannot ignore the information gap which currently exists. If the Minister is to withdraw his appeal he will need to be in a position to justify that decision to interested parties including Hauraki.

I advised Simon that there had been no meeting with Hauraki Maori Trust Board, despite the indication in my earlier letter (dated 3 February 1998). I told Simon that the matter had been addressed by the Minister and that the direction which had come down to Conservancy was from that high level. I stressed that our approach remained consistent with our original appeal and that if the information gap could be addressed then the Department had been told by the Minister to make all efforts to settle this case. I stressed this point.

I also stressed that the problem was not a product of some 'behind closed doors' dealing with Hauraki and it was simply a case of the Minister needing something to hang his hat on in terms of withdrawing the appeal. It was not appropriate for the Minister to withdraw the appeal while there remained no information on the effects on dotterel and variable

oystercatcher. This has always been our official line in relation to this appeal, notwithstanding our **without prejudice** efforts to 'settle' the matter.

In other words, I took a highly conciliatory approach and was very frank and open with Simon. Simon acknowledged that approach and thanked me for it. He said that his clients would not be happy, but I firmly defended the Department's position by saying that we had actually remained consistent with our appeal throughout and that if adequate information had been provided at the outset then there would not be a difficulty.

There was then some discussion about my recent letter and the reference to the 'Treaty claim' and I was at pains to say that the only issue there was that Hauraki were an obvious stakeholder from our point of view (being a co-appellant and a major player on the Coromandel). I stressed that beyond that, the Hauraki Treaty Claim had no bearing on the marina application whatsoever and I accepted entirely that the law is clear that Treaty claims are not to be taken into account in resource planning cases until such time as the Crown has resolved matters with the iwi in question.

Overall I felt my meeting with Simon was successful, to the extent that it could be without his client present. The meeting was far more reasonable I felt in the absence of his client because I was able to discuss some of the more principled points in the whole situation without having to deal with a constant barrage of questions and allegations of being unreasonable. I referred to the *Stillwater* case and the NZ Coastal Policy Statement and reiterated that our primary concern was to achieve a reasonable level of information which the Minister could hang his hat on when he came to sign the coastal permits. I stressed the Department was not determined to prevent the marina being built and that we would assist the Marina Society in gathering information on *dotterel* in particular, particularly through Dr John Dowding, but the Department would not be in a position to offer money for this purpose.

We were therefore clear that there were really only two options:

- (a) the Marina Society could go to appeal and argue that there was sufficient information to determine effects; or
- (b) the Marina Society could put up more money to address the question of potential effects on *dotterel* by way of some kind of study.

Simon will now take instructions and I will no doubt hear from him in a short course.

Aaron Martin
CONSERVANCY SOLICITOR

DATED

21 July

1998

BETWEEN: THE DEPARTMENT OF CONSERVATION

A N D: WHANGAMATA MARINA SOCIETY INCORPORATED

AGREEMENT

OFFICIAL INFORMATION RELEASED UNDER THE INFORMATION ACT

HARKNESS HENRY & CO

Solicitors

Private Bag 3077

DX GP 20015

HAMILTON

PH: (07) 838-2399

FAX: (07) 839-4043

Solicitor: AS MENZIES

ASM:0805.DOC

AGREEMENT DATED

21 July

1998

PARTIES

1. THE DEPARTMENT OF CONSERVATION ("DOC")
2. WHANGAMATA MARINA SOCIETY INCORPORATED ("WMS")

BACKGROUND

- A. The Waikato Regional Council has granted to WMS certain coastal permits (953759 and 953760) and recommended to the Minister of Conservation that the restricted coastal activity applications be granted (953758 and 953761) ("the permits") associated with the construction and operation of a proposed marina at Whangamata ("the marina").
- B. Various parties including DOC have lodged appeals against the permits which at the date of this agreement remain to be considered by the Environment Court.
- C. The parties have discussed the issues arising under DOC's appeal and have reached agreement as to how those concerns are to be addressed. The parties now wish to record the terms of that agreement.

TERMS OF AGREEMENT

1. THE terms of this agreement (except for clause 2) are entirely conditional upon:
 - (a) WMS obtaining all the necessary statutory and other consents required to undertake the construction and development of the marina; and
 - (b) The marina being constructed and becoming operational.
2. THE appeal to the Environment Court under RMA 93/97 by the Minister of Conservation will be withdrawn.

Dotterel Project

3. IN order to mitigate the possible effects of the marina on the local population of NZ Dotterel, DOC proposes to undertake a project providing both for a protection plan and for the monitoring of breeding attempts/chick fledgling as set out in Schedule 1 to this agreement ("the Dotterel project").

4. SUBJECT to clause 7, WMS agrees to contribute towards the labour and costs of the Dotterel project on the following basis:

- (a) Payment of the sum of \$3,215.00 in the first year and \$1,500.00 per annum thereafter.
- (b) WMS will provide the necessary labour for the Dotterel project under the training, direction and oversight of DOC personnel in accordance with duties specified in Schedule 1 to this agreement.

5. IN the event of DOC forming the view that the labour supplied by WMS under this agreement is not suitable or to the standard reasonably required for the purposes of the Dotterel project the following provisions will apply:

- (a) DOC will give written notice to WMS specifying the problems with the performance of the labour supplied by WMS and requiring an improvement in the said performance of labour.
- (b) In the event of WMS failing to show an improvement in the performance of labour in terms of the notice within 28 days, DOC will then have the right to supply replacement labour at the expense of WMS to a maximum of \$7,500.00 per annum.

6. AT 5 yearly intervals from the date of this agreement WMS and DOC will jointly review the performance of the Dotterel project. As a result of any such review the parties may decide to increase WMS' financial contribution to the project (set out in clauses 4 and 5) to reflect the effects of inflation. Where, as a result of any such review, there is a difference of opinion between the parties as far as the ongoing financial contribution is concerned, either party may refer the matter to arbitration in accordance with clause 14.

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7. WMS agrees to take the following steps in respect of the Dotterel project:

- (a) To incorporate the obligations of WMS arising under this agreement as part of the duties of the marina manager.
- (b) To acquaint its members with the Dotterel project to inform them of its importance and to encourage members to report to the marina manager any disturbance of the sites, the subject of the Dotterel project.

8. IN the event that the Dotterel project is no longer effective or necessary in terms of protecting and enhancing the population of NZ Dotterel in the vicinity of the proposed marina, the project will be suspended. The decision on suspension will be made by DOC in consultation with WMS and formally notified in writing to WMS and the Waikato Regional Council. In the event of suspension, the obligations under clause 4 will not apply. DOC may decide to lift a suspension and resume the Dotterel project and any such decision will be made by DOC in consultation with WMS and formally notified as above. In the event that the Dotterel project is resumed after a period of suspension, the obligations under clause 4 will also resume.

9. WHERE any consent is required for the activities to be undertaken as part of the Dotterel project (whether in the form of landowner consent, statutory or other regulatory consent or otherwise howsoever) WMS agrees to use its best endeavours to obtain such consent within the parameters feasible having regard to such legal constraints as land ownership in the name of third parties, statutory or other regulatory controls.

Conditions of Consent

10. THE parties have agreed to certain changes to conditions to the permits. Both parties hereby agree to take all steps necessary to obtain by consent from the Environment Court, the changes to the consent conditions as set out in Schedule 2 to this agreement.

General Matters

11. NOTHING in this agreement is to be construed as to create any relationship between DOC and WMS except the contractual relationship created by this contract. In particular without limiting the generality of the foregoing, the parties intend and agree that neither will be deemed to be the agent or employee or partner of the other or to have any authority to

[Handwritten signatures and initials]

SIGNED on behalf of
THE WHANGAMATA MARINA SOCIETY
INCORPORATED by *Nick Kelly*
in the presence of:

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)

[Handwritten signature]

[Handwritten signature]
Solicitor
Hau Hau

RELEASED UNDER THE
OFFICIAL INFORMATION ACT

[Handwritten initials]

[Handwritten initials]

SCHEDULE 1

Management of New Zealand Dotterels in Whangamata Harbour within the area indicated on the attached sketch map as Areas 1 and 2.

1. Predator control

New Zealand dotterels may lay at any time from the beginning of September. Bait stations must therefore be loaded and traps set from 15 August onwards. If no birds have attempted to breed at the site by 15 November in any season, stations may be emptied and traps closed after consultation with Department of Conservation staff. (In the unlikely event that birds arrive after that date, trapping and baiting should resume immediately.) If birds are present, baiting and trapping must continue until either (a) all breeding attempts have ceased or (b) chicks have fledged. Birds are unlikely to lay new clutches after 31 January, but unfledged chicks may be present in February or (exceptionally) in March.

Traps used must target the important potential predators of New Zealand dotterels, i.e. cats, ferrets, stoats, rats and hedgehogs. Leg-hold traps such as Victor 1.5 soft-catch should be used for cats, wire cage traps should be used for cats and ferrets, and Mk VI Fenn traps (in tunnels, to minimise capture of non-target species) or similar should be used for stoats, rats and hedgehogs. A cordon of 15 traps (alternating types of trap) roughly 25 m apart should be set up in the bush in an arc behind the nesting area and meeting the shoreline at either end. Chicks of most shorebirds will hide under shelters such as trap covers, so no traps should be set in the open close to the nesting area itself. Leg-hold and cage traps should be baited with either fish (heads are suitable) or rabbit; Fenn traps may be baited with fish, rabbit or hen eggs.

Fifteen bait stations should be installed, either following the trapline or (preferably) in a separate line further inland; these should be loaded with Talon bait to target possums (which are also egg predators) and rats. The trapline and bait stations should be checked by Department of Conservation staff at the beginning of the season.

Traps must be checked without fail once a day. Any animals in leg-hold or cage traps or those still alive in Fenn traps should be killed as humanely as possible. Bait in traps should be changed when it is no longer fresh; this is normally about once a week. Bait stations should be checked weekly and re-loaded when necessary.

A record should be kept of all animals caught.

2. Signage and fencing of breeding area

The picnic table, existing sign and anything else that encourages people to remain in or near the nesting area should be removed.

A tape and standard fence should be erected around the breeding area by 1 September to (a) reduce the risk of nests being trampled and (b) reduce disturbance to incubating birds or those

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with chicks. Signs explaining the purpose of the enclosure should be installed around the perimeter; at a minimum these should bear the words "Endangered Birds Nesting – Please Keep Out". These or other signs should also indicate that poison baits have been laid in the area. If birds nest outside the fenced area, the fence should be expanded or moved so that the nest is inside it.

Signs should be erected on the south-western shore of the harbour (including at the wharf and boat-launching areas) asking people not to land on the opposite shoreline, not to allow dogs to swim or land there and explaining why. These or other signs should indicate that poison baits have been laid around the breeding area and present a potential hazard to dogs.

Fences and signs lost or damaged must be replaced as soon as practicable.

3. Wardening

There should not normally be more than two or three people with 'principal warden' status in relation to the site. These principal wardens are expected to undertake the bulk of the work, and share responsibility for the site between them. There is no reason why they should not be assisted by others.

Wardens are most effective when they are good advocates and can explain clearly why a protection programme is necessary. They should therefore be familiar with basic facts about the life history and conservation status of New Zealand dotterels; these can be found in the Field Guide to the Birds of New Zealand (Heather & Robertson, 1996) and the NZ Dotterel Recovery Plan (Dowding, 1993). The Department of Conservation normally runs a one-day course for shorebird wardens in spring; one or more wardens from Whangamata should attend.

The Society will best achieve the aims of the project if it undertakes some advocacy. Giving talks, showing videos, getting articles in local newspapers and distributing pamphlets are all things that are done at other managed sites, and are well-received. The Department can provide WMS with advice and assistance on NZ dotterel advocacy if required.

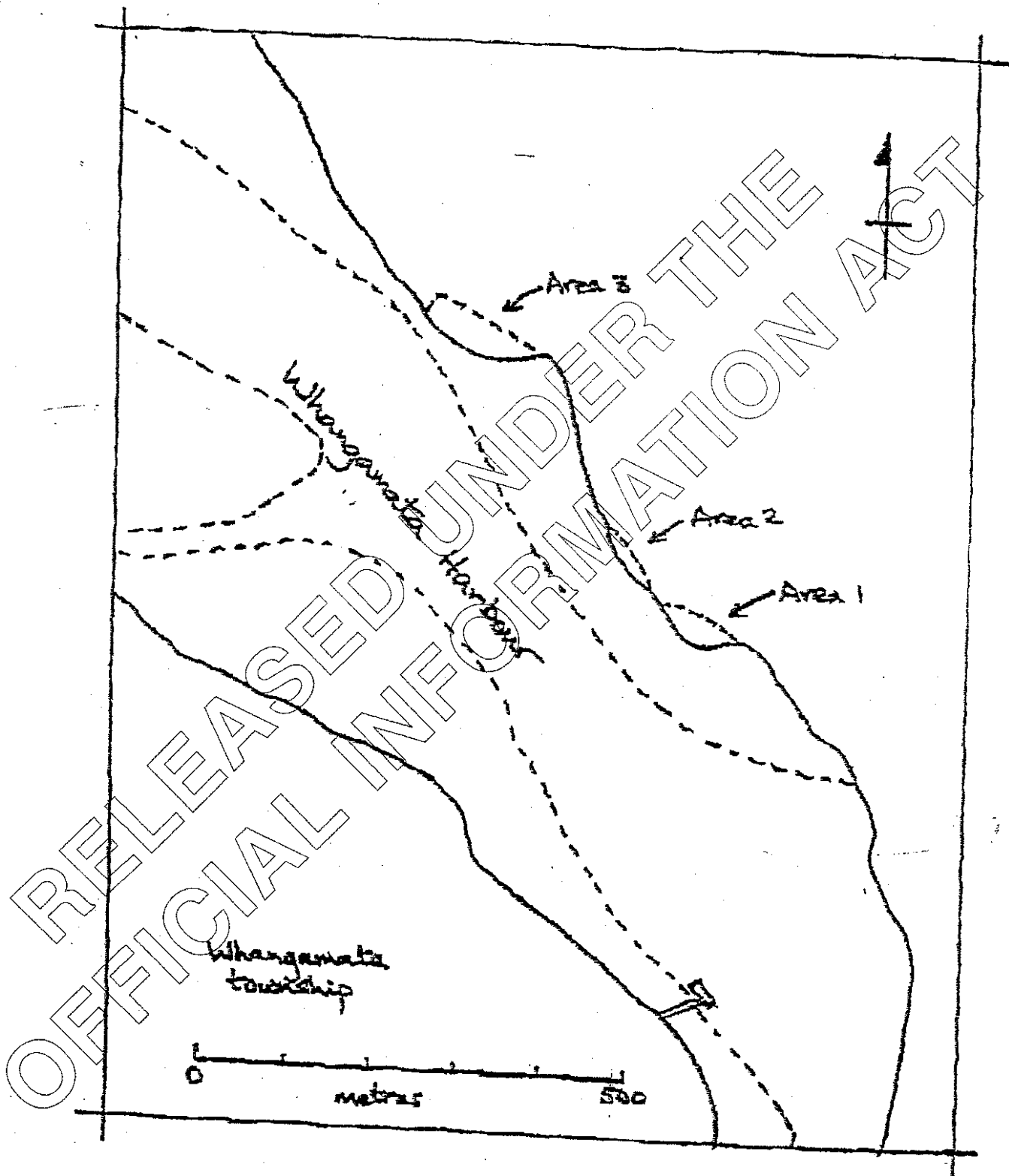
Wardens should check regularly for signs of breeding by the birds; this is probably achieved most easily (and with minimum disturbance) by the person checking traps daily. If birds are performing obvious distraction displays, they will have a nest or chicks and wardens should be advised so that disturbance can be reduced as far as possible. If New Zealand dotterels lose a nest, they will normally re-nest in two-four weeks; they can lay up to four nests in a season.

If nests are found, they should not be marked; markers are likely to attract people and predators and increase the chances of disturbance and predation. Nests should be visited infrequently and checked from as far away as possible; human tracks to and from a nest are likely to be followed by predators. Wardens should limit their visits to the breeding area to 10 minutes duration if possible; if birds have a nest, they will leave it when people arrive and eggs may overheat or chill in 10-20 minutes, depending on conditions.

Wardens should aim to reduce disturbance to breeding birds primarily by discouraging people from landing on the north-eastern shore, and by preventing people and pets from entering the roped-off breeding area at all times. Highest levels of disturbance occur during weekends, school holidays and the summer holiday period from 24 December to 6 February; at these

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Figure 1. Sketch map of the NZ dotterel breeding area on the north-eastern shore of Whangamata Harbour



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SCHEDULE 2

Coastal Permit 953758

26. The consent holder shall retain appropriately experienced and suitably qualified persons acceptable to the Department of Conservation and the Waikato Regional Council to develop an ecological monitoring plan. ...

I. Assessment of habitats including those of mangroves, eels grass, shellfish beds and avifauna communities to specifically include NZ Dotterel and Variable Oystercatcher.

III. Frequency and period of monitoring prior to, during and after construction including attention to the critical breeding periods of the NZ Dotterel and Variable Oystercatcher (October - February).

27. The consent holder shall undertake the environmental monitoring programme referred to above and forward the results of that programme at the intervals detailed in that programme to the Waikato Regional Council and to the Department of Conservation.

Coastal Permit 953761

3. All sediments placed under the exercise of this consent shall be placed in the marine environment or on the consent holder's site to the satisfaction of the Waikato Regional Council and sand from maintenance dredging will be made available to the Department of Conservation for enhancement of habitat.

8. The completed plans shall be provided to Waikato Regional Council for written approval prior to commencement of the works. The consent holder will forward copies of the draft management plan to the Department of Conservation for comment before completion of the plan.

9. The consent holder shall contribute the sum of forty thousand dollars (\$40,000.00) to a fund that will enable enhancement and restoration works to be undertaken on a suitable habitat area in the Whangamata area that is deemed feasible in writing by the Waikato Regional Council and the Department of Conservation as a mitigation measure for the loss of the salt marsh area by the construction of the marina.

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COPY

15 September 1999

The Registrar
Environment Court
DX CP24004
AUCKLAND

Please refer to: A.S Menzies
Account No: W11A766/1

Dear Mr Johnson

RMA 93/97 - Minister of Conservation v Waikato Regional Council (Whangamata Marina Society Incorporated - Applicant)

The above appeal is one of a number of appeals that relate to the proposal for a marina at Whangamata initiated by the Whangamata Marina Society Incorporated, for whom I act. All appeals are set down for hearing before the Court at Whangamata in the week commencing 4 October 1999.

So far as the appeal by the Minister of Conservation is concerned, discussions between the Department of Conservation on behalf of the Minister, Environment Waikato and my client Society have reached agreement on all matters arising in respect of the Minister's appeal. Accordingly I enclose a Memorandum of Counsel in support of proposed Consent Orders in terms of the draft attached to the Memorandum. It is my understanding that no other parties have given notice, either under s.271A or s.274 of the Resource Management Act 1991 in respect of this appeal.

I would be grateful if you would submit the Memorandum and draft Order to his Honour, Judge Bollard, for consideration. The draft Order is also on disk which is enclosed.

Yours faithfully
HARKNESS HENRY & CO

Per: 

SIMON MENZIES

cc: Tompkins Wake
DX GP20031
HAMILTON

Attention: Mr Parker

- 2 -

The Conservancy Solicitor
Waikato Conservancy
Department of Conservation
Private Bag 3072
HAMILTON

Attention: Aaron Martin

RELEASED UNDER THE
OFFICIAL INFORMATION ACT

IN THE ENVIRONMENT COURT

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an enquiry under section 118
and an appeal under section 120
of the Act

BETWEEN

THE MINISTER OF
CONSERVATION

(RMA 93/97)

Appellant

AND

WAIKATO REGIONAL
COUNCIL

Respondent

AND

WHANGAMATA MARINA
SOCIETY INCORPORATED

Applicant

MEMORANDUM OF COUNSEL IN SUPPORT OF PROPOSED
CONSENT ORDER

HARKNESS HENRY & CO
SOLICITORS
HAMILTON

Solicitor: A S MENZIES

Appellant's Solicitors
8th Floor, KPMG Centre
85 Alexandra Street
Private Bag 3077
DX GP20015, HAMILTON
Tel 0-7-838-2399
Fax 0-7-839-4043

**MEMORANDUM OF COUNSEL IN SUPPORT OF PROPOSED
CONSENT ORDER**

May it please the Court:

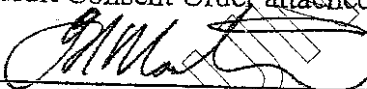
1. This memorandum relates to RMA No.93/97 being an appeal by the Minister of Conservation against the granting of coastal permits to the Whangamata Marina Society Incorporated in respect of a proposed marina at Whangamata.
2. The parties have agreed that the issues arising in respect of the appeal be finalised in accordance with the draft order attached as annexure "A". No other parties have given notice under Section 271A or Section 274 of Resource Management Act 1991.
3. While the Appellant's appeal seeks relief declining the consents, agreement has now been reached on issues which accommodate the main concerns of the Appellant. Accordingly the Appellant now accepts that with that agreement in place, it is appropriate for the consents to remain. The changes proposed in the Consent Order are necessary to reflect the agreement reached.
4. The following is an explanation as to the particular matters involved:

Coastal permit 953758

- a. The wording of Condition 26 has been amended to provide that the "appropriately experienced persons to develop an ecological monitoring plan" are to be acceptable to the Waikato Regional Council after discussion with the Department of Conservation.
- b. The wording of Condition 26 i has been amended to make it clear that avifauna communities specifically include NZ Dotterel and Variable Oystercatcher being species of particular concern to the Appellant
- c. Condition 26 iii has again been amended to provide for particular attention to the critical breeding periods for the NZ Dotterel and Variable Oystercatcher (October-February).
- d. Condition 27 has been amended to provide that the environmental monitoring programme will be forwarded both to the Regional Council and to the Department of Conservation.

Coastal permit 953761


- e. Condition 3 has been amended to provide that maintenance dredgings will be made available to the Department of Conservation for enhancement of the habitat.
 - f. Condition 8 has been amended to provide that the Management Plan is to be submitted to the Department of Conservation for comment prior to completion.
 - g. Condition 9 has been amended to provide that the habitat area in which enhancement and restoration work is to be undertaken is to be in the Whangamata area deemed feasible by the Waikato Regional Council after discussion with the Department of Conservation.
5. There are no issues arising as to costs.
 6. The parties respectfully invite the Court to make orders in terms of the draft Consent Order attached as annexure "A".



 Gregory Neil Martin (Waikato Conservator)
 Counsel for Minister of Conservation

15/09/99

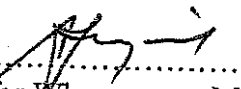
 Date



 R.G. PARKER
 Counsel for Waikato Regional Council

09/09/99

 Date



 A.S. MENZIES
 Counsel for Whangamata Marina Society
 Incorporated
 (Applicant)

14/9/99

 Date

OFFICIAL INFORMATION ACT