

**Before the Board of Inquiry
Waterview Connection Project**

In the matter of **the Resource Management Act 1991**

and

In the matter of **a Board of Inquiry appointed under
section 149J of the Resource
Management Act 1991 to decide notices
of requirement and resource consent
applications by the NZ Transport
Agency for the Waterview Connection
Project**

**SYNOPSIS OF SUBMISSIONS ON BEHALF OF THE
DIRECTOR-GENERAL OF CONSERVATION**

Date of hearing:

Director-General of Conservation

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MAY IT PLEASE THE BOARD:**INTRODUCTION**

- 1 These submissions are on behalf of the Director-General of Conservation, (Director-General) who is the administrative head and Chief Executive of the Department of Conservation (*the Department*).

CONSERVATION ACT

- 2 Section 5 of the Conservation Act 1987 (CA 87) established "a Department of State to be known as the Department of Conservation (the Department) under the control of the Minister of Conservation," (the Minister) who delegates his powers to the Director-General.
- 3 Section 6 of the CA87 provide that the functions of the Department are to administer the CA 87 and the enactments specified in Schedule 1 which include the Marine Reserves Act 1971 and the Wildlife Act 1953.
- 4 Section 6, sets out a number of functions and one of these (section 6 (b)) is to "advocate "for the conservation of natural and historic resources generally". This function thus gives power to the Director-General of Conservation to advocate in the public interest for the sustainable management of natural and historic features under the Resource Management Act 1991 (RMA), where it is believed those features need protection.
- 5 His interest in these proceedings arises out of concern to see that the matters of national importance, established by s.6 (c) of the Resource Management Act (RMA) are recognised and provided for and that maintenance and enhancement of public access to and along the coastal marine area is considered by the Board.

THE DEPARTMENT'S POSITION AND THE SCOPE OF ITS SUBMISSION

- 6 The Department's submission relates generally to the effects of the project on the coastal environment. In particular to that part of the project that lies in Sector 4.

Sector 4 contains the Motu Manawa (Pollen Island) Marine Reserve (the MMMR) which is administered by the Department under the Marine Reserves Act 1971. Section 10.5 page 53 of the Environment Management Services Ltd s42A report (EMS S42A Report) sets out the main elements of the Project in this sector.

- 7 The submission also set out conditions the Department sought to be included in the consents and NoRs if granted and confirmed. These conditions generally relate to the mitigation of the adverse effects of vegetation clearance as the result of the proposed reclamation in the MMMR and project works on Traherne Island
- 8 The Department has worked constructively with the NZ Transport Agency (NZTA) with a view to resolving its concerns, from the outset, and is now satisfied that the concerns raised in its submission are able to be satisfied through the ecological conditions proposed by NZTA.
- 9 We discuss the proposed conditions, and also provide comments on the updated conditions tabled by NZTA, later in these submissions.

SEPARATE APPROVALS

Marine Reserves Act 1971

- 10 NZTA requires an approval under the MRA71 to enable the construction of the reclamation and any associated works in the MMMR. The MRA71, the CA87 and the RMA establish distinct decision making process to achieve different purposes. The purpose of the MRA71 is about preservation of marine reserves, while the RMA is about sustainable management. The MRA does however provide for the construction of public works within a marine reserve with the consent of both the Ministers of Conservation and Transport.
- 11 The evidence of Ms Fullam elaborates on this process. I confirm that discussions are taking place between NZTA and the Department but a formal application has not yet been lodged.

Wildlife Act 1977

- 12 The WA 77 requires permits to be issued for the translocation of fauna.

COMMENTS ON EMS S 42A REPORT

Recommendation to Minister of Conservation

- 13 The question has been raised as to whether this Board is required to make a recommendation to the Minister of Conservation for a restricted coastal activity under NZCPS, Policy 29 (EMS Report (para 9.5.2)
- 14 The Department agrees with Counsel for NZTA for the reasons set out in Paras 240 to 243 of her Opening Statement that this Board is not required to make a recommendation to the Minister of Conservation in respect of the RCA component of this application.

New Zealand Coastal Policy Statement 2010

- 15 Section 104(c) and s 171 (1) (a) RMA recognises that when considering an application for a resource consent and a NoR , a consent authority shall have regard to *inter alia*, the New Zealand Coastal Policy Statement (NZCPS). I would briefly like to refer to relevant policies.
- 16 The New Zealand Coastal Policy Statement 2010 (NZCPS 2010) was gazetted on 4 November 2010, and took effect on 3 December 2010. There are no transitional provisions that relate to hearings already in place, so the provisions of the NZCPS 2010 will be relevant to the Board's consideration under s104(1)(b) and s 171 (1) (a).
- 17 The NZCPS 2010 contains 7 objectives and 29 policies to meet those objectives. The objectives are both preservationist (Objectives 1 and 2) and enabling (Objective 6) which gives recognition to development in appropriate places in the coastal environment.
- 18 A number of the policies have been referred to at para 9.5 (page 36 and 37) of the EMS S42 Report I draw the Board's attention to the following policies 1,5 , 11 which relate to ecological matters/public access and were not referred to in the EMS 42 Report:
- i) Policy 1 which sets out a number of factors included in the "coastal environment", which are to be recognised. These include "coastal vegetation and the habitat of migratory birds (2)(e);

- ii) Policy 5 which requires (inter alia) a consideration of effects on land or waters in the coastal environment held or managed under the CA87 and any Act listed in the first schedule to that Act.:
- iii) Policy 6 which requires, in relation to the coastal environment:
 - (1) recognition that the provision of infrastructure, including the generation and transmission of electricity, are activities important to the social, economic and cultural well-being of people and communities ((1)(a)); an
- iv) Policy 11 which gives recognition to the protection of indigenous biodiversity in the coastal environment, including (inter alia):
 - (1) Indigenous ecosystems and vegetation types that are threatened in the coastal environment or are naturally rare.(11 (a) (iii) *Mimulus repens* would fall into this category and
 - (2) the avoidance of significant adverse effects and avoidance, remediation or mitigation of other adverse effects of activities on (inter alia) areas of predominantly indigenous vegetation in the coastal environment.
- v) Policy 19 which recognises the public expectation of and need for walking access to and along the coast that is practical, free of charge and safe for pedestrians. A restriction on public walking access is only to be imposed where such a restriction is necessary inter alia for public safety (19.3) and before imposing any restriction consider and where practicable provide for alternative routes that are available to the public free of charge at all times (19.4).

19 It is submitted that enabling reclamation (Policy 10) for infrastructure in this part of the coastal environment whilst also achieving protection of indigenous vegetation would be consistent with the approach to protection and enablement in the NZCPS 2010.

Hauraki Gulf Marine Park Act

20 It is common ground that the Hauraki Gulf Marine Park Act 2000 HGMP applies to the consideration of the NOR under section 171. Under s.10(1) and (2), in relation to the coastal environment of the Hauraki Gulf, ss7 and 8 are to be treated as a New Zealand coastal policy statement issued under the RMA – but on the basis that if

there is a conflict between those sections and the provisions of any NZCPS issued under the RMA, the latter is to prevail.

- 21 Particular regard must be had to not only the relevant provision of the NZCPS 2010 but also to the relevant sections of sections 7 and 8 of the HGMPA. Section 7 of the HGMPA recognises the national significance of the Hauraki Gulf and its islands, while section 8 sets out six objectives for managing the Hauraki Gulf, its islands and catchments. Any improvement of water quality in the MMMR will have a flow on effect into the wider Gulf.

CONDITIONS

Expansion of Reserves

- 22 It has been suggested by some submitters (Para 10.5.18 EMS s 42 Report) that because approximately 6 hectares of the marine reserve will be lost because of the reclamation then the marine reserve should be extended to compensate. The creation of a marine reserve begins with an application made under section 5 of the MRA 71 and concludes after receiving the concurrence of the Ministers of Fisheries and Transport with the Minister of Conservation recommending to the Governor-General to the making of an Order In Council. As pointed out in the opening statement of Counsel for NZTA (paras 167 to 171) the range of applicants is limited. The Board does not have the jurisdiction to extend the marine reserve. However it is open to any party who is fits into the category of approved applicants to make an application.

Public Access

- 23 Section 105(2) of the RMA requires that "If an application is for a resource consent for a reclamation, the consent authority (in this case the Board of Inquiry) must, in addition to the matters in section 104(1) consider whether and esplanade reserve ... is appropriate and, if so impose a condition under section 108(2)9g)". Ms Fullam addresses this consideration in her evidence.

Comments vegetation conditions

- 24 The Department supports the changes in the updated conditions proposed for vegetation ((V) (10th February 2011 page 55). Many of the changes to the original conditions were made as result of caucusing. The inclusion of the Traherne Island Restoration Plan 2009-2011 as part of the suite of Vegetation Conditions is welcome

as it provides a sound foundation for future co-operation between the local community, central government and territorial authorities to maintain and restore Traherne Island. Hopefully it will be extended beyond 2011.

PART 2 CONSIDERATIONS

25 In the circumstances of these applications and notices of requirement having been referred to a board of inquiry, the Board's consideration of the project as a proposal of "national significance" could be said to be akin to the situation at hand in *The Auckland Volcanic Cones Society Incorporated & Ors v Transit New Zealand & Ors* (A203/2002). The decision in that case, which Your Honour has referred to during the hearing, involved a State highway project that was recognised as being both of regional and district significance. In turning to consider Part 2 issues, the Court had this to say:

"Therefore, our task in this part of our decision in evaluating Part II matters against the NOR proposal is to identify matters which may be of importance in terms of Part II; identify what measures have been taken to avoid remedy or mitigate adverse effects of the proposal on the environment, with particular reference to environmental matters singled out in ss 6 and 7; and then to assess whether those measures are sufficient in view of the importance of the SH20 corridor or whether the damage inflicted by the works associated with that designation will have such an effect upon Part II matters that the work should not proceed."

26 It is submitted that this statement, in the context of considering the notices of requirement at issue in that case, is equally relevant to the NoRs and resource consent applications at issue in this hearing. Thus, it is submitted, the Board is required to consider the measures that are proposed to address adverse effects of the Waterview Connection, with particular reference to the matters in s 6 to 8, and then to consider whether those measures are sufficient, in view of the "national significance" of the project, or whether the project will involve potential effects of such an effect on Part 2 matters that it would not meet the sustainable management purpose of the Act.

EVIDENCE

27 The Director General has filed evidence ;

1..David Charles Havell, a Botanist and Technical Support Officer with the Department whose evidence relates to threatened plant management and weed control management in sector 4. He took part in the ecological caucusing.

2. Marilyn Gay Fullam's, Community Relations Officer of the Department evidence describes the establishment of the MMR, the application by NZTA under the MRA and the provision of public access on the reclamations

CONCLUSIONS

28 The Department considers that the proposed Vegetation Conditions (10/2/11 version page 55) are adequate and sufficient to address the concerns it has raised relating to the adverse effects of the project on significant indigenous vegetation in sector 4 and in adjacent Traherne Island.

Glen Houghton

Counsel for the Director-General of Conservation