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Report to Wellington Regional Council
from Paula Hammond, Manager, Consents Management

Permission to Seek a Declaration and Direction from the Environment Court

1. Purpose

To allow the Wellington Regional Council to seek a declaration and direction from the Environment Court.

2. Exclusion of the Public

Grounds for exclusion of the public section 48(1) of the Local Government Official Information and Meetings Act 1987 are:

That the public conduct of the whole or relevant part of the proceedings of the meeting would be likely to result in the disclosure of information for which good reason for withholding would exist, i.e. to maintain legal professional privilege.

3. Background

CentrePort Limited has applied for resource consents to dredge areas of the Wellington Harbour. The first application involves dredging 250,000 cubic metres of material from the harbour entrance and disposing of the material off Fitzroy Bay. The second application is to dredge 22,000 cubic metres of material from around the container wharf in Wellington Harbour and dispose of the material south of Matiu (Somes) Island.

The applications to dredge and dispose of the material require resource consents under the Resource Management Act 1991 (RMA) and our Regional Coastal Plan for the Wellington Region (RCP).

In August 1998, as a result of the New Zealand Government having signed an international treaty, the RMA was amended to be read subject to an overlay provided by sections 15A and 15B. The Resource Management (Marine Pollution) Regulations 1998 also took effect.

Section 15A (Restrictions on dumping and incineration of waste or other matter in coastal marine area), section 15B (Discharge of harmful substances from ships or offshore installations), and section 138A (Special provisions for dumping) do not fit neatly into the RMA's framework, and nor in particular with section 12 (Restrictions on use of coastal marine area). Sections 15A and Section 15B do not even fit neatly with one another, and there is also uncertainty in the manner in which some rules in the RCP apply.

Sections 12, 15A and 15B of the RMA, however, are relevant to CentrePort Ltd's consent applications.

4. Why is a declaration needed?

Council has sought legal opinion on the issues raised by the difficult fit of sections 15A and 15B. The legal complexity of these issues means that obtaining a declaration or declarations from the Court at the outset will ensure that the correct procedures are followed and so avoiding delays further down the path.

Under section 311 of the RMA, a declaration can be sought from the Environment Court to provide clarification or determination on issues that are open to interpretation. Among other related matters, the main issues we need to seek a declaration(s) from the Environment Court are outlined below:

4.1 RMA considerations

Section 12(6) of the RMA states:

- *This section [section 12] will not apply to anything to which section 15A or 15B applies.*
- We need to seek certainty as to whether the restrictions outlined in section 12 (such as disturbance of the seabed) are inherent in the activities provided for in sections 15A or 15B (dumping and discharging of material). Resolving that issue will determine whether section 12(6) applies, and moreover which activities indeed have *Restricted Coastal* status ('RCA').
- Clarify if sections 15A and 15B are mutually exclusive, and therefore whether consents required under one or both sections.

4.2 Regional Coastal Plan considerations

- The words *Harbour entrance* have not been defined in the Regional Coastal Plan and determinations need to be made on the impact this has on the rules that contain provisions relating to the harbour entrance. In particular we need to ascertain that severing the words *Harbour entrance* from the RCA rules 37 and 38 does not affect the meaning of the rest of those rules so that the rules stand for the purpose of the applications. We may seek an amendment under section 292 of the RMA to remedy the defect.
- Are the discharges proposed under CentrePort's applications of the type referred to in section 107(1) of the RMA? This issue is important because the

Rule 57 of the RCP addresses relevant discharges and conveys RCA status. Rule 57 refers to “*the discharge of the type referred to in section 107(1) of the Resource Management Act 1991*”. Section 107(1) refers to “*a coastal permit to do something that would otherwise contravene section 15 or section 15A...*”. However, there is no reference in section 107(1) to the discharge provisions of section 15B.

5. Risks of not seeking a declaration

It is particularly important to determine what has lawfully been required as a RCA. If an activity is an RCA, different procedures which will require the Minister of Conservation to make the decision about the applications. It is critical that the correct authority hears and determines the correct applications to ensure the consents are not subject to any immediate High Court challenge on matters of law and procedure. If resource consents were to be granted to CentrePort by the wrong authority, those consents would then be invalid.

6. Communication

Discussions have already been held with representatives from the Department of Conservation and CentrePort regarding this matter. Both parties are supportive of seeking a declaration to clarify the issues.

No further communication with other parties is necessary at this stage.

7. Recommendation

It is recommended that the Council:

- (1) *Seek a declaration from the Environment Court under sections 310 and 311 of the Resource Management Act 1991 in relation to CentrePort’s applications to dredge in the Wellington Harbour and disposal of the dredge material.*
- (2) *That, subject to legal advice and pursuant to section 292 of the Resource Management Act 1991, seek direction from the Environment Court to amend the Regional Coastal Plan for the Wellington Region regarding ‘Harbour Entrance’ in rules 37 and 38.*

Report prepared by:

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