

**BEFORE THE OTAGO REGIONAL COUNCIL**

**File No:** 2010:193

**IN THE MATTER**

**Of the Resource Management Act 1991**

**AND**

**IN THE MATTER**

**Of Applications by Port Otago Limited for resource  
consents for Project Next Generation**

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**Legal Submissions on Behalf of the Director-General of Conservation**

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## Legal Submissions on Behalf of the Director-General of Conservation

MAY IT PLEASE THE HEARING PANEL

The following matters are submitted on behalf of the Director-General of Conservation:

### Introduction

1. Port Otago Limited, the applicant, has applied for a number of resource consents to allow it to undertake Project Next generation - in essence upgrading the current shipping channel in the Lower Otago Harbour by dredging to deepen and widen the channel to allow larger container ships to enter and dock at Port Chalmers. The applicant also seeks a number of associated resource consents. The applicant wishes these resource consents to last for up to 35 years, although the major work and proposed dumping at the new AO site is to be undertaken over the next 20 years.
2. The Director-General of Conservation (the Director-General) and the applicant have been in discussions over this proposed activity since August 2007. As a result of these discussions the Director-General's concerns over many matters in the Lower Harbour had been addressed. However, the Director-General still had concerns over various outstanding matters when these applications were publicly notified.
3. The Director-General submitted in opposition to these applications, seeking that they be declined, in August 2010
4. Following the lodging of this submission the Director-General has continued to talk with the applicant about the Director-General's concerns and has now reached agreement with the applicant about how those concerns could be addressed.
5. At today's hearing, I will briefly discuss the Director-General's submission, outline the agreement reached with the applicant, discuss relevant matters in the Resource Management Act, identify the varying roles of the Minister of Conservation the Director-General and the Department of Conservation, discuss certain relevant sites of public conservation land in the Lower Harbour, and call brief evidence for the Director-General from one witness:

- Bruce Hill, Community Relations Officer - RMA Planning, to provide planning evidence and detail the proposed conditions agreed with the applicant which resolve the Director-General's concerns.

### **The Director-General's Submission**

6. The Director-General's submission raised concerns about inadequate information then available from the applicant on the applications, and potential adverse effects.
7. The potential adverse effects identified by the submission are:
  - a) Siltation;
  - b) Turbidity;
  - c) Sedimentation;
  - d) Elevated nutrient levels;
  - e) Release of contaminants, previously buried in sediment, into the wider environment;
  - f) Noise;
  - g) Lights; and
  - h) Physical disturbance.
8. These potential adverse effects may have impacts on the environment in the Lower Harbour, and out at the new proposed dump site A0 and the receiving waters at this site.

### **Agreement with the Applicant**

9. The Director-General and the Applicant have reached an agreement which resolves the concerns raised in the Director-General's submission. The agreement proposes the addition of a number of conditions to the draft resource consents. The detail of the proposed conditions will be set out in the evidence of Mr Bruce Hill, to follow. However, in summary the proposed conditions cover the following matters:
  - a) requiring the activity not to be taken near sensitive sites at times of year when those sites are being used as significant habitat for indigenous fauna.
  - b) requiring the applicant to take actions to avoid interaction with aggregations of seabirds and any marine mammals

- c) requiring the applicant to undertake baseline monitoring and establish an ongoing study to determine what effects on both the physical and biological environment the activity may be causing at the AO site
  - d) requiring the applicant to establish and service a technical group which will receive and assess the monitoring information, and be able to make recommendations to the applicant as to changes in the activity, which the applicant will be required to consider and if practicable implement.
10. The balance of my submissions will briefly outline relevant legal matters.

**The Resource Management Act 1991**

11. The Resource Management Act 1991 (the RMA) defines “effect” broadly in s3:

**3 Meaning of “effect”**

*In this Act, unless the context otherwise requires, the term **effect** ... includes—*

- (a) *Any positive or adverse effect; and*
- (b) *Any temporary or permanent effect; and*
- (c) *Any past, present, or future effect; and*
- (d) *Any cumulative effect which arises over time or in combination with other effects—*

*regardless of the scale, intensity, duration, or frequency of the effect, and also includes—*

- (e) *Any potential effect of high probability; and*
- (f) *Any potential effect of low probability which has a high potential impact.*

12. Having regard to the RMA’s purpose in Part 2 of promoting sustainable management of natural and physical resources, all perceptible effects are relevant. One of the concerns the Director-General had over the application was a lack of knowledge making it very difficult to assess when effects, both actual and cumulative, are occurring over the time sought for the proposed activity by the applicant. This lack of knowledge also made it difficult to assess whether the proposed activity could result in potential effects either of high probability or of low probability but which have a high potential impact.
13. The RMA emphasises sustainable management and so is forward looking in directing decision-makers to be aware of the future and sustainably managing the environment in making decisions under the Act.
14. The proposed conditions agreed with the applicant are forward looking in terms of ensuring appropriate information is obtained and independently assessed to

enable the Otago Regional Council as the consent authority to make decisions on actual and potential future effects which are identified as having an adverse impact on the environment.

### **New Zealand Coastal Policy Statement 2010**

15. The New Zealand Coastal Policy Statement 2010 took effect on 3 December 2010 and is relevant to these applications. Policy 3 (1) is particularly relevant here, stating:

#### ***Policy 3 Precautionary Approach***

*(1) Adopt a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but significantly adverse.*

16. Also relevant is Policy 5 (1) which states:

#### ***Policy 5 Land or waters managed or held under other Acts***

*(1) Consider effects on lands or waters in the coastal environment held or managed under:*

*(a) the Conservation Act 1987 and any Act listed in the 1<sup>st</sup> Schedule to that Act;...*

*and having regard to the purposes for which the land or waters are held or managed:*

*(c) avoid adverse effects of activities that are significant in relation to those purposes; and*

*(d) otherwise avoid, remedy or mitigate adverse effects of activities in relation to those purposes.*

17. And Policy 11 deals with indigenous biological diversity (biodiversity) with an emphasis on protecting biodiversity in the coastal environment and avoiding significant adverse effects and avoiding, remedying or mitigating other adverse effects. Policy 22(1) requires there be assessment and monitoring of sediment levels and impacts on the coastal environment.

18. Policy 23 (1) deals with discharges of contaminants to water in the coastal environment and requires there be particular regard had to:

*(a) the sensitivity of the receiving environment;*

*(b) the nature of the contaminants to be discharged, the particular concentration of contaminants needed to achieve the required water quality in the receiving environment, and the risks if that concentration of contaminants is exceeded; and*

*(c) the capacity of the receiving environment to assimilate the contamination; and*

*(d) avoid significant adverse effects on ecosystems and habitats after reasonable mixing;*

*(e) use the smallest mixing zone necessary to achieve the required water quality in the receiving environment; and*

*(f) minimise adverse effects on the life-supporting capacity of water within a mixing zone.*

19. It is submitted that the proposed conditions agreed by the Director-General and the applicant will meet these policies where they are relevant as set out below and also as described in the evidence of Mr Hill.

**Various Roles of the Minister of Conservation the Director-General and the Department of Conservation**

20. The Department of Conservation (the Department) is established pursuant to the Conservation Act 1987. The Department's functions are set out in section 6 of that Act and include:

*(b) to advocate the conservation of natural and historic resources generally*

*(g) every function conferred on it by any other enactment*

21. As the Department is not a person with standing to appear before a hearing, the Department's advocacy functions under section 6(b) are carried out by the Director-General.

22. The Department is directed in the carrying out of its functions by the Conservation General Policy, which is also a general policy for the purposes of the Marine Mammals Protection Act 1978.

23. The Marine Mammals Protection Act 1978 as described in its long title is:

*An Act to make provision for the protection, conservation, and management of marine mammals within New Zealand and within New Zealand fisheries waters*

24. Under section 3A of the Marine Mammals Protection Act the Department is required to administer and manage marine mammals in accordance with General Policy and any relevant conservation management strategy. Conservation General Policy 4.4(j) is relevant to this application and states:

*Human interactions with marine mammals and other marine protected species should be managed to avoid or minimise adverse effects on populations and individuals.*

25. Persons are restricted from “taking” marine mammals under the Marine Mammals Protection Act unless they have been granted a permit from the Minister of Conservation or as otherwise authorised under this Act. “Take” as defined in this Act is given an expansive definition and includes to injure, poison, herd, harass or disturb and any attempt to do one or more of these activities.
26. The Marine Mammals Protection Regulations 1992 provide further guidance around any human contact with marine mammals, with particular rules applying to whales, dolphins and seals.
27. The proposed conditions agreed with the applicant will enable the applicant to avoid any contact with marine mammals when approaching the AO site which would not meet the requirements of the Marine Mammals Protection legislation. The Department will assist the applicant in ensuring the competence of observers on board any vessel for this purpose.

#### **Public Conservation Land in the Lower Harbour**

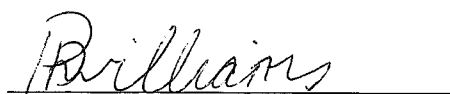
28. There are a number of areas of public conservation land in the Lower Harbour including the Aramoana Ecological Area, and the Taiaroa Head Foreshore Wildlife Sanctuary and adjoining Taiaroa Head Nature Reserve. The internationally significant saltmarsh at Aramoana was given recognition by becoming a specially protected area – Aramoana Ecological Area in 1997. This area is managed by the Department to recognise the special values the area has. The latter two areas protect the habitat for the Taiaroa Head/Pukekura Royal Albatross/*Toroa* colony, and again the Department manages these areas in accordance with their values.
29. These areas and other public conservation land nearby are recognised in the Otago Conservation Management Strategy 1998 as part of the Otago Peninsula Special Place, with the overriding priorities being protection and (where possible)

enhancement of habitat for special species – seabirds, plants, marine mammals and reptiles.

30. The proposed conditions agreed with the applicant will require the applicant to avoid undertaking the activity at times or places when there may be adverse effects on these places and the indigenous species that use these significant habitats, including having regard to times of year when particular species are more likely to be present.

### **Conclusion**

31. I am pleased to be able to say that the Director-General's concerns relating to these applications have been resolved. The Director-General did not want to make undertaking this significant project harder for the applicant. However, the Director-General does want to ensure that adverse effects on the environment are identified and that the applicant makes prompt changes to the way in which the activity is undertaken to avoid remedy or mitigate any significant adverse effects.
32. The agreement by the applicant to undertake baseline and ongoing monitoring, especially in relation to the AO site, and to establish an independent technical group which will assist in setting up the monitoring studies and which has the ability to make recommendations the applicant is required to consider, and which will also reports to the consent authority is highly significant. This agreement to a robust and independent monitoring regime addresses a number of the Director-General's concerns particularly relating to unknown actual and potential adverse effects.
33. I now call Bruce Hill to give evidence on planning matters and in particular set out in detail the proposed conditions agreed by the Director-General and the applicant. Also present at this hearing today are Bruce McKinlay – Technical Support Officer invertebrates and avifauna, Graeme Loh – Ranger biodiversity assets (avifauna), and Jim Fyfe – Ranger biodiversity assets (coastal and marine), who are able to assist with technical matters should the hearing panel have any questions.



Pene Williams

Counsel for the Director-General      15 April 2011