

19-D-01559

21 AUG 2019

s 9(2)(a)

Dear s 9(2)(a)

Thank you for your email of 24 July 2019 requesting the following under the Official Information Act 1982 (the Act):

'...copies of all information held relating to the delegation of the Marina decision from Minister Carter to Minister Benson-Pope (including any other potential delegations proposed, considered or discussed) following the outcome of the judicial review proceedings, including:

- a) agendas;*
- b) notes;*
- c) minutes;*
- d) filenotes;*
- e) emails;*
- f) memorandums;*
- g) recommendations;*
- h) correspondence;*
- i) text messages;*
- j) other electronic medium;*

prepared by, provided to, or received by:

- i. The Minister for the Environment;*
- ii. The Ministry for the Environment.'*

The Ministry for the Environment has identified five documents in scope of your request, as listed in the attached table. One document has been refused due to it being publicly available, and some out of scope information has been removed from the documents being released to you.

You have the right to seek an investigation and review by the Office of the Ombudsman of my decision to withhold information relating to this request, in accordance with section 28(3) of the Act. The relevant details can be found on their website at: www.ombudsman.parliament.nz.

Please note that due to the public interest in our work the Ministry for the Environment publishes responses to requests for official information on our website on our [OIA responses page](#) shortly after the response has been sent.

If you have any queries about this, please feel free to contact our Executive Relations team.

Yours sincerely



Glenn Wigley
Director, Natural and Built System (Marine)

Released under the provision of
the Official Information Act 1982

List of documents

Document no.	Document date	Content	Decisions	OIA sections applied
1	December 2006	Decision on Whangamata Marina Society Inc's Restricted Coastal Activity Applications	Refuse	18d Information available publicly ¹
2	August 2008	Whangamata Marina – Chronology of Events	Released in full	
3	August 2008	Briefing 08-B-0818 Whangamata Marine – Chronology of Environment Waikato and Thames Coromandel District Council Consent Processes	Released in full	
4	November 2008	RMA Amendment Ideas: A preliminary analysis of announced policy options	Released in part	Note, out of scope information has been removed
5	March 2009	Topic area note: Role of Minister of Conservation under the RMA	Released in part	Note, out of scope information has been removed

¹ Please see the pdf document located at <https://www.beehive.govt.nz/release/whangamata-marina-decision-released>

Whangamata Marina – Chronology of Events

Note this chronology is based on information supplied by Environment Waikato, Thames Coromandel District Council, the Department of Conservation and Environment Court decisions.

Date	Event
Nov 1995	<p>Applications lodged at Environment Waikato (EW) Whangamata Marina Society (WMS) lodged four coastal permit applications with Environment Waikato (EW) to:</p> <ul style="list-style-type: none"> • Construct a 205 berth marina with associated coastal works (953758) • Discharge seepage water during construction (953759) • Discharge drainage water (953760) • Place fill onto salt marsh and reclaim land (953761) <p>Two of the applications were for restricted coastal activities (953758 and 953761). All four applications were notified on 10 February 1996 and 40 submissions were received, 23 were opposed.</p>
Dec 1996	<p>EW Hearing Committee Recommendation EW granted two coastal permits and recommended that the Minister of Conservation grant the restricted coastal activities. Note the Minister of Conservation's representative recommended the restricted coastal activities permits be declined.</p> <p>The recommendation included specific reference:</p> <ul style="list-style-type: none"> • To occupy up to 4 hectares of the coastal marine zone • Construct and operate a 300 meter and 50 meter breakwater.
Jan & Feb 1997	<p>Appeals lodged on EW consents and recommendations Appeals were lodged on the EW decision and recommendations from:</p> <ul style="list-style-type: none"> • Whangamata Maori Committee • The Hauraki Maori Trust Board • Te Kupenga o Ngati Hako Inc • The Minister of Conservation • Whangamata Marine Society Inc • Whangamata Golf Club. <p>When considering the appeals it became clear to the Environment Court that resource consent applications also had to be obtained from Thames Coromandel District Council (TCDC). The Court ruled that it would not hear appeals on the regional consents until such time as land use consents had be granted or declined by TCDC, and any appeals lodged.</p>
Sep 1997	<p>Applications lodged at Thames Coromandel District Council (TCDC) WMS lodged applications with TCDC to:</p> <ul style="list-style-type: none"> • Undertake earthworks (number) • Establish Marina facilities (number). <p>The applications were notified on date number submission were received number in opposition.</p>

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July 1998	<p>TCDC Hearing Committee Recommendation TCDC appointed independent commissioner on the hearing committee as land owned by TCDC forms part of the marina application site. The committee recommended that the consents be granted.</p>
Aug & Sep 1998	<p>Appeal on TCDC decisions Appeals were lodged on TCDC decision to grant consents to WMS by:</p> <ul style="list-style-type: none"> • Hauraki Maori Trust Board • Whangamata Marina Society • Te Kupenga o Ngati Hako Inc • Minister of Conservation.
1999-2005	<p>Coastal occupation variation to Proposed Regional Coastal Plan (PRCP) A variation to PRCP was notified by EW in October 1999 which made occupation of coastal space a discretionary activity (previously permitted for the purpose identified in the application). This variation adopted by EW in 2001 and became operative October 2005.</p>
Feb 2001	<p>Interim decision on consent appeals (Environment Court) In this decision (A21/2001) the Environment Court noted the benefits from the marina proposal but noted the PRCP did not provide sufficient policy guidance as to the appropriate location for a marina in Whangamata, and lack of criteria to allow such as development within the Whangamata Area of Significant Conservation Value. The decision was issued on an interim basis in order to provide EW with the opportunity to make changes to the PRCP to address this issue.</p>
2003-2007	<p>Marina variation to Proposed Regional Coastal Plan (PRCP) A marina variation to the PRCP was notified in 15 March 2003 by EW to provide guidance on the appropriate development and location for marinas. EW released their decision on March 2004 which removed the area zoned for marina activity at Whangamata.</p> <p>The council decision was appealed by:</p> <ul style="list-style-type: none"> • TCDC • Whangamata Marine Society • Te Kupenga o Ngaiti Hako • Hauraki Maori Trust Board. <p>In October 2005 the Environment Court upheld the council decision for marina provisions a marina zone at Whangamata (A174/2005). The Minister of Conservation approved the Marina Variation in June 2007 and it was made formally operative in 21 December 2007.</p>
Oct 2005	<p>Decision on Appeals (Environment Court) The Environment Court appeal process stretched over a number of years and involved a series of decisions:</p> <ul style="list-style-type: none"> • A025/01 19 February 2001 – interim decision on application • A145/04 30 November 2004 – decision requiring further consents to be sought for trucking movements to remove excess material • A175/05 26 October 2005 – decision allowing additional truck movements to remove excess material associated with the proposal.

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	<p>The final decision on the appeals made on 26 October 2005 (A173/2005) upheld the grant of resource consents by EW and TCDC and recommended the restricted coastal activities be granted by the Minister of Conservation.</p> <p>The recommendation may specific reference to:</p> <ul style="list-style-type: none"> • Contain four hectares of the coastal marine zone • Construct and operate a 300 meter breakwater.
Mar 2006	<p>Minister of Conservation decision</p> <p>The Minister of Conservation refuses to grant the two coastal permits for restricted coastal activities associated with the Whangamata Marina proposal primarily due to concerns about the destruction of a salt marsh and the adverse effects on iwi.</p>
Sep 2006	<p>Judicial review and High Court decision</p> <p>WMS requested a judicial review of the Minister of Conservation decision as it considered the Minister's decision was not according to law.</p> <p>The High Court set the Ministers of Conservation decision aside and directed the Minister to reconsider the whole matter to which the two restricted coastal activities relate.</p> <p>The Minister of Conservation then delegated the decision to the Minister for the Environment at the time to make a final decision.</p>
Dec 2006	<p>Minister for the Environment decision (under delegation)</p> <p>The Minister for the Environment granted the coastal permits for restricted coastal activities as recommended by the Environment Court with a slight amendment to some consent conditions recommended by the Court.</p>
Oct 2007- Mar 2008	<p>EW request for Minister of Conservation to correct defects</p> <p>EW identified some deficiencies in the Whangamata marina proposal where the activity for which consent has been granted does not accurately reflect activity for which the consent was sought, despite no evidence of the intent not grant the consents sought. These deficiencies largely relate to one of the granted coastal permits for a restricted coastal activity (953758) and the occupation of the coastal marine area.</p> <p>EW requested the Minister of Conservation to correct these deficiencies through both:</p> <ul style="list-style-type: none"> • Section 133A of the RMA (30 October 2007); and • Section 119A of the RMA (19 December 2007). <p>The Minister of Conservation did not consider that either request was the best approach to remedy the situation and declined (18 December 2007 and 13 March 2008).</p>

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<p>21 May 2008</p>	<p>Additional consents lodged by at EW Whangamata Marine Society lodged four applications for resource consent related to the Marina. These applications were to:</p> <ul style="list-style-type: none"> • Occupy and use approximately 4 hectares of space in the coastal marine area for the purposes of the Whangamata Marina Basin • Occupy and use space in the coastal marine area associated with ancillary structures outside the Whangamata Marina Basin • To erect a 50 meter breakwater • To remove indigenous plant species from the coastal marine area.
<p>May 2008</p>	<p>EW consultation and non-notification of additional consents</p> <p>EW undertook the following consultation upon receipt of the additional application for consents sought by WMS:</p> <ul style="list-style-type: none"> • Sending copies of the application for comment to Hauraki iwi groups and Department of Conservation (22 May 2008) • Holding a meeting of iwi representatives (27 May 2008) • Providing a draft notification for comment (29 May 2008). <p>The iwi groups raised a number of concerns and considered the applications should be notified as the effects of coastal occupation and mangrove removal had not implicitly been considered.</p> <p>EW considered that the effects of the additional consents were considered as part of the original proposal that has been granted through a full RMA process. Any additional effects from the additional consents would be no more than minor and the consents were not notified on that basis (refer EW #1320733).</p>
<p>Jun 2008</p>	<p>Additional consents granted EW granted four coastal permits to WMS to remove any ambiguity in the coastal consents associated with the Whangamata Marina.</p>

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08-B-0818

12 August 2008

Minister for the Environment

Whangamata Marina – Chronology of Environment Waikato and Thames Coromandel District Council Consents Processes

Purpose

1. To inform you of the process leading to the issuing of consents to the Whangamata Marina Society to develop a marina on Whangamata Harbour.

Background

2. You received a letter on 14 July 2008 from the Hon. Nanaia Mahuta which raised concerns about the performance of Environment Waikato (EW) and Thames Coromandel District Council (TCDC) in processing consents relating to the Whangamata marina proposal.
3. The letter also requested, on behalf of Hauraki Iwi, that you initiate an investigation into the consent processing performance of these councils under section 24A of the Resource Management Act (RMA).
4. In response to this request we have provided you with two briefing notes. The first contained advice on the scope of your ministerial powers along with a possible process to undertake such an investigation. The second provided an outline of the status of the 50 metre breakwater associated with the development of the Whangamata marina.

The Whangamata Marina Society Proposal

5. The Whangamata Marina Society (the Society) proposed to develop a 205 berth marina in the Moanaanuanu estuary of the Whangamata harbour. The proposal involved the development of approximately 4 hectares of inter-tidal mud flat, excavation of approximately 178,000 cubic metres of marine sediment, reclamation of a salt marsh and construction of two breakwaters 340 metres and 50 metres in length (emphasis added).
6. A summary table outlining the key events relating to the issuing of consents for this proposal is included as Annex 1.

Summary of key facts

7. Environment Waikato (EW) heard and considered four coastal permit applications associated with the marina proposal. Two of these related to restricted coastal activities, with the Minister of Conservation having final authority to grant the consents.
8. EW recommended that the Minister of Conservation grant the restricted coastal activity applications, including approval for the marina to *“occupy up to 4 hectares of the coastal marine zone and to construct and operate a 300 metre and a 50 metre breakwater and control structures related to the marina, and dredge a marina basin and channel, for the purpose of a 205 berth marina”* (emphasis added).
9. The recommendation contained a reduction in the length of one of the breakwaters from 340 to 300 metres. Although the EW reporting officer’s report and EW Hearing Committee report referred to a 340 metre breakwater, this was not transferred into the final recommendations and no reasons were provided in the EW Hearing Committee decision for the change. The decision on this application was appealed to the Environment Court.
10. The final decision of the Environment Court, on appeal, included a recommendation that the Minister of Conservation grant the restricted coastal activity permit to *“contain 4 hectares of the coastal marine zone and to construct and operate a 300 metre breakwater and control structures related to the marina basin and channel, for the purpose of a 205 berth marina”* (emphasis added).
11. Differences between the recommendation of the Environment Court and that of the EW Hearing Committee include the omission of a reference to the 50 metre breakwater and a change in the nature of the activity from ‘occupy’ to ‘contain’.
12. These changes were carried over into the recommendations initially considered by the Minister of Conservation. They also carried over into the final decision of the Minister for the Environment acting under delegated authority following a direction from the High Court to reconsider the decision made by the Minister of Conservation on both of the restricted coastal activity applications.
13. Following the granting of consent by the Minister for the Environment EW identified and advised the Society that the scope of the consents obtained did not cover all of the activities associated with the proposal, particularly the occupation of the coastal marine area, construction of the 50 metre breakwater and mangrove removal.
14. To rectify this, and to avoid any uncertainty concerning the authorisations already in place, the Society lodged further applications with EW. The applications were considered by EW on a non-notified basis and consents were granted in June 2008.
15. A more detailed outline of the process is set out below.

Environment Waikato and Thames Coromandel District Council – Applications lodged and decisions/recommendations made

16. The marina proposal had significant seaward and landward components and resource consents were required from EW and TCDC. It also required the approval of the Minister of Conservation for two restricted coastal activities. The decision-making process under the RMA for restricted coastal activities is set out in Annex 2.

Environment Waikato consents

17. The Society lodged four coastal permit applications with EW in November 1995. The applications were to:
- construct a 205 berth marina with coastal works that included dredging of marina basin, control structures, pontoons and slipway (Consent 953758 - restricted coastal activity)
 - discharge seepage water from the marina basin during construction of the marina (Consent 953759)
 - discharge drainage water from excavated marine basin sediment (Consent 953760)
 - place fill onto a salt marsh for a hardstand and parking purposes (Consent 953761 - restricted coastal activity).

All of these applications were publically notified.

18. A diagram that tracks the progress of these applications through the consents process is included as Annex 3.

19. On 19 December 1996 the EW Hearing Committee granted the two coastal permits and recommended that the Minister of Conservation approve the two restricted coastal activity applications. The recommendation associated with Consent 953758 made specific reference to (emphasis added):

“Occupy up to 4 hectares of the coastal marine zone and to construct and operate a 300 metre breakwater and a 50 metre breakwater”.

20. This recommendation contained a reduction in the length of one of the breakwaters from 340 to 300 metres. Although the reports prepared by the EW reporting officer and EW Hearing Committee referred to a 340 metre breakwater, this figure was not the one that was included in the final committee recommendations nor were any reasons for this change set out in the committee’s decision.

21. Six appeals were subsequently lodged covering all aspects of EW’s decisions and recommendations. The appeals related to consent conditions and adverse effects on the ecology, rare bird species and tangata whenua values associated with the harbour (including loss of customary fishing grounds).

Thames Coromandel District Council consents

22. In September 1997 the Society lodged applications with TCDC to:
- undertake earthworks involving the movement of approximately 180,000 cubic metres of fill from the estuary onto several adjacent parcels of land (owned by TCDC)
 - establish marina facilities within the Marina Activities Policy Area (e.g. carparking, washdown area, amenities block).
- Both of these applications were publically notified.
23. A hearing was held in July 1998 before an independent commissioner. TCDC appointed an independent commissioner as it owned land that formed part of the proposed marina site. The consents were granted on 20 August 1998.
24. Six appeals were subsequently lodged against the TCDC decision to grant consent to both of these applications. The appeals related to consent conditions, destruction of a wahi tapu site and the adverse effect this would have on Hauraki Iwi, effects on Iwi cultural, spiritual and historical values and effects on kaimoana.

Environment Waikato – Variations to the Proposed Coastal Plan

25. During the appeal process two variations were introduced by EW to the Proposed Regional Coastal Plan (PRCP), both of which were relevant to the Whangamata marina proposal.

Occupation variation

26. On October 1999 a variation to the Proposed Regional Coastal Plan was notified to address the issue of coastal occupation. The variation was adopted by EW in 2001 and became operative along with the Regional Coastal Plan in October 2005.
27. The relevance of this variation to the Whangamata marina proposal is that, at the time the application was first lodged, the occupation of coastal space for the purpose identified in the application was a permitted activity (Rule 23 PRCP). By contrast, the variation made *occupation of coastal space by structures* a discretionary activity requiring a resource consent (Rule 16.4.26).

Marina variation

28. In considering the appeals on the Whangamata marina proposal, the Environment Court noted that the Proposed Regional Coastal Plan did not provide a sufficiently robust policy basis to determine an appropriate location for a marina at Whangamata. It also noted the lack of qualifying criteria to support such a development in the Whangamata Area of Significant Conservation Value identified in the proposed plan. The Court issued an interim decision (A025/01) in order to provide EW with the

opportunity to make changes to the proposed plan to address this issue, should it wish to do so.

29. In March 2003 EW notified a variation to the Proposed Regional Coastal Plan to address marina development. The purpose of the variation was to provide specific rules in relation to use and occupation of coastal space by marinas, and included policy guidance and zoning of the area covered by the Whangamata marina proposal.
30. The decision on the marina variation issued by EW in March 2004 included a recommendation to remove the marina zonings. This was appealed by the Society, TCDC and two Iwi groups. The Environment Court issued a final decision on this matter in October 2005 which upheld the variation and reinstated the area proposed to be zoned for marina activity at Whangamata. The variation was approved by the Minister of Conservation in June 2007 and became operative on 21 December 2007.
31. The relevance of this variation to the Whangamata marina proposal is that it provided the Environment Court with the policy guidance it considered necessary to make a decision on the resource consents sought by the Society. The variation also made the use and *occupation of space for the specific purpose of a marina basin* a discretionary activity, with EW as the consent authority (Rule 16.2.10).

Environment Court - Appeals lodged and decisions/recommendations made

32. The decisions made by EW and TCDC resulted in nine appeals being lodged with the Environment Court - six appeals against the decision of EW (1997) and three against TCDC's decision (1998).
33. The appeal process extended over a period of eight years, with the Court issuing four related decisions on 19 February 2001, November 2004 and 26 October 2005 (refer Annex 1 for further detail).
34. The Court noted in its final decision (A173/05) on the resource consent and coastal permit applications, and recommendations to the Minister for Conservation, that all of these decisions "*effectively relate to one another, and should be read in their totality in order to appreciate fully the various factors bearing on the lengthy process concerning the marina proposal and the ultimate outcome*".
35. In issuing its final decision in October 2005 the Court upheld the grant of resource consents by EW for two coastal permits (Consents 953759 and 953760). It further upheld a consent granted by TCDC regarding the effects associated with truck movements to remove excess material from the proposed marina area.
36. The Environment Court also recommended that the Minister of Conservation grant consent to the two coastal permit applications

relating to the restricted coastal activities (Consents 953758 and 953761), including a set of draft conditions.

37. Leave was reserved by the Court for counsel acting on behalf of the Society, EW and TCDC to lodge and serve a joint memorandum specifying the final form of the consent conditions. This memorandum was provided to the Court and formed the basis on which it issued an order on the final form of the conditions in December 2005. This was based on a memorandum received from counsel for the above parties.
38. The final recommendations made by the Environment Court were largely in accordance with those prepared by the EW Hearings Committee, with the exception of some of the wording in Consent 953758. In contrast to the EW Hearings Committee recommendation relating to this consent the Court recommended the following (emphasis added):

“To contain 4 hectares of the coastal marine zone and to construct and operate a 300 metre breakwater and control structures related to the marina and dredge a marina basin and channel, for the purpose of a 205 berth marina”.
39. Key areas of change in this recommendation included the absence of a reference to the 50 metre breakwater, and alteration of the wording recommended by the EW Hearings Committee from “occupy up to 4 hectares” to “contain 4 hectares”. No reasons were provided by the Court for the changes made, nor were any directions made as to how these matters should be addressed.
40. The changes included in the Court’s final recommendation were subsequently carried over into the final decision made by the Minister for the Environment (acting under delegated authority) to grant the permits to carry out restricted coastal activities associated with the marina proposal.

Minister of Conservation – Original decision on permits for restricted coastal activities

41. The Minister of Conservation, the Hon. Chris Carter, considered the recommendations made by the Environment Court concerning the two coastal permits and on 7 March 2006 released a decision refusing to grant the applications.
42. The reasons for this decision revolved around the adverse effects on the ecology of the Whangamata harbour that would result from the reclamation of the salt marsh for a parking area, and the impact that the proposal would have on Maori and shellfish beds in Whangamata.

High Court – Judicial review of Minister of Conservation’s decision

43. In response to the Minister of Conservation’s decision the Society made application to the High Court for judicial review.

44. Their application contended a number of matters including: that the Minister had exceeded the scope of his powers, that his evaluation of the salt marsh and lwi matters was premised on his own findings on the evidence and that his processes were in breach of natural justice.
45. After hearing the arguments the High Court concluded that the decision should be set aside and directed the Minister to reconsider the two restricted coastal activity applications (Consents 953758 and 953761). It also directed that the Minister could seek amplification or clarification of aspects of the Environment Court's earlier reports.

Minister for the Environment (acting under delegated authority) – Final decision on permits for restricted coastal activities

46. Following consideration of the High Court's judgement the Minister of Conservation decided to exercise the option provided by the Court to refer his original decision to another Minister to reconsider. The then Minister for the Environment, the Hon. David Benson-Pope, was approached and agreed to accept a transfer of the Minister of Conservation's decision making power under section 119 of the RMA to reconsider the restricted coastal activity permits.
47. Consistent with the opportunity provided by the High Court the Minister sought clarification from the Environment Court on aspects of it's report. In particular the Minister presented the Court with a series of questions regarding the restricted coastal activity permits. The Court, in response, supplied a full reply to these questions directly to the Minister.
48. The permits were subsequently granted by the Minister in December 2006, subject to conditions (Consents 953758 and 953761). In granting Consent 953758 he made a minor alteration to the description of the restricted coastal activity that was recommended by the Environment Court. This involved the inclusion of numbering to discretely separate the associated components as follows (emphasis added):
- "To (i) contain 4 hectares of the coastal marine zone; and (ii) to construct and operate a 300 metre breakwater and control structures related to the marina, and (iii) dredge a marina basin and channel, for the purposes of a 205 berth marina"*
49. The Minister also amended the conditions recommended by the Environment Court. These included slight wording changes to conditions 1 and 2 as follows (emphasis added – new wording is underlined, previous wording is struck through):
1. *The design and construction of the works (being the marina, bund, breakwater, channel rip-rap wall and associated facilities) authorised by this consent shall be in accordance with the principles outlined in the document entitled "Whangamata Marina Society - Proposed Whangamata Marina - Assessment of Environmental Effects and Resource Consents" dated 22*

November 1995, produced by WORKS Consultancy, and the further information provided as supplements to this document

2. *The ~~marina and associated activities~~ works shall be positioned as defined in the plans as shown in the document referred to condition 1 as further modified during the consent process and by the plans revised October 2004. The works shall not occupy a larger area than that which is described in that document. The general form, position and layout of the works shall be in accordance with those outlined in the supporting information of this application.*

Environment Waikato – Post decision requests to remedy deficiencies with restricted coastal activity permits granted

50. In October 2007 EW wrote to the Minister for Conservation, the Hon. Steve Chadwick, requesting her to correct, under section 133A of the RMA (minor corrections of resource consents), what it considered to be 'errors' and 'inconsistencies' in one of the restricted coastal activity permits granted by the Minister (Consent 953758). These were:
 - the omission of any reference to the 50 metre breakwater (as identified in the original application and included in the EW reporting officer's and EW Hearing Committee reports and recommendations);
 - the reference to a 300 metre breakwater instead of a 340 metre breakwater (as identified in the original application and referred to in the EW reporting officer's report and EW Hearing Committee report, but not included in the recommendations) ;
 - the omission/lack of a specific right for the consent holder to occupy the marina basin contained by the breakwater (as identified in the original application and included in the EW reporting officer's and EW Hearing Committee recommendations);
 - the omission of the word 'approximately' to qualify the area of 4 hectares to be contained (as identified in the original application but changed in the EW reporting officer's and EW Hearing Committee recommendations to 'up to'); and
 - the reference in the consent to coastal marine 'zone' not 'area' (not previously identified).
51. The Department of Conservation (DoC) briefed the Minister in November 2007 and recommended that she should not exercise her discretion to amend the consent as sought by EW. The briefing took into account such matters as:
 - the intention of section 133A and its focus on correcting minor mistakes or defects;

- the 15 working day timeframe within which an amended decision is required to be issued following the granting of consent (noting the ability to extend the timeframe under section 37 of the RMA); and
 - that it was not clear whether the matters raised were mistakes, let alone minor.
52. In December 2007 the Minister replied to EW declining to amend Consent 953758 in the manner sought.
53. In response EW wrote a further letter to the Minister in December 2007. The letter noted her earlier decision and raised an alternative option to change the consent under section 127 of the RMA (change or cancellation of consent conditions). To do this EW sought the written consent of the Minister under section 119A of the RMA (residual powers of regional councils).
54. DoC briefed the Minister on this matter in March 2008. In summary they recommended that the Minister respond to this further request highlighting the following:
- that in the absence of an application to review the consent conditions, she was not in a position to decide whether or not to give her consent under section 119A of the RMA;
 - that section 127 of the RMA only allows the applicant to apply for changes to the conditions of consent rather than additional consent for activities not covered by the existing consent; and
 - that EW consider, as an alternative way of progressing this matter, seeking a declaration from the Environment Court.
55. In March 2008 the Minister replied to this further request indicating that she would withhold providing her written consent under section 119A of the RMA.

Environment Waikato – Further consent applications lodged by the Whangamata Marina Society

56. EW conveyed the outcome of their requests to the Minister of Conservation to the Society and advised them that further consents were required to cover the deficiencies identified.
57. On 21 May 2008 the Society lodged four further applications relating to the development of the Whangamata marina. The applications sought to:
- occupy and use approximately 4 hectares of space in the coastal marine area for the purposes of the Whangamata marina basin (as implied by the original application);
 - occupy and use space in the coastal marine area associated with structures erected outside the Whangamata marina basin that are ancillary to the marina development, including control structures and channel lining (as implied by the original application);

- erect a 50 metre breakwater associated with the development of the Whangamata marina (as intended by the original application); and
- remove indigenous plant species from the coastal marine area associated with the Whangamata marina (as contemplated by the original application).

All of these applications were discretionary activities.

58. The Society noted in lodging these applications that the need arose not because of different or additional activities or effects, but due to concerns about the wording of the original consents granted and the need to ensure that any unconsented activities were authorised.
59. On receipt of the applications EW forwarded a copy to several Hauraki Iwi and a meeting was subsequently held on 27 May 2008. The Iwi representatives collectively raised concerns about the applications and considered that they should be publically notified. As an outcome of the meeting EW agreed that it would prepare a draft notification report and circulate a copy to Iwi representatives for comment.
60. The formal responses received from Hauraki Iwi on the draft notification report identified adverse effects from the further consent applications relating to:
 - occupation of coastal space by the marina and associated structures;
 - removal of mangroves (which was not implicit in the Environment Court decision); and
 - adverse effects on a local population of moko skink (associated with mangrove removal).

Iwi considered that these effects were not adequately considered by the Environment Court or EW and that Hauraki Iwi were adversely affected.

61. However, EW considered that the additional consents sought would not result in any additional effects, as the substantive effects associated with the marina proposal had already been thoroughly assessed through the original consent process. The council consequently decided to consider the further applications on a non-notified basis and granted the consents on 17 June 2008.

Thames Coromandel District Council – Further related consent applications lodged

62. As well as the four additional applications lodged with EW, four further marina related applications were lodged with TCDC between December 2007 and May 2008. Three of the applications sought earthworks consents and were lodged by parties aside from the Society. The applications sought approval to relocate excavated fill from the marina site to properties owned by the applicants.

63. The fourth application was lodged by the Society and involved a variation to the trucking consent issued by the Environment Court in 2005 (A175/05). In particular the Society sought to vary the transport routes originally approved by the Court so that fill could be deposited on alternative sites.
64. The applications were considered by TCDC on a non-notified basis and were granted in July 2008, subject to conditions. However, TCDC have yet to formally issue the consents as there are still fees outstanding.

Use of Ministerial investigative powers under the RMA – Implications for Whangamata marina proposal

65. As previously advised there is a hierarchy of powers available to you under the RMA to influence the exercise or performance of local authority functions, duties or powers. These include:
- requesting information about the exercise of their RMA responsibilities (s.27);
 - investigating their performance and recommending specific actions to be implemented (s.24A); and
 - appointing a person or persons to carry out local authority functions where recommended actions have not been implemented (s.25).
66. These powers are principally investigative and do not include the ability for you to directly influence decisions on particular resource consents, especially where these have already been granted.
67. The chronology of events outlined in this briefing note illustrate that the original series of permits and consents granted for the Whangamata marina proposal have been through a lengthy and substantive process of hearings and determinations, including recourse to the Environment Court and the High Court. Consequently, any further investigation into the performance of the local authorities involved in these proceedings is likely to offer little more than a retrospective insight into the respective consent processes undertaken.
68. The current concerns around the marina proposal largely appear to centre on the recent permits that the Society has sought and obtained from EW, and more particularly around the council's consideration of these on a non-notified basis. Reconsideration of the process undertaken by EW in arriving at this decision is, once again, not a matter over which you have the ability to influence. If Hauraki Iwi, or any other party, is concerned that EW has not followed due process in arriving at this decision, there is a means of redress readily available to them in the form of an application to the High Court for judicial review.

Recommendations

We recommend you:

- (a) **Note** the chronology of events outlined in this briefing note relating to the consents processes associated with the development of the Whangamata marina.
- (b) **Note** the powers available to you under the RMA to influence the exercise or performance of local authority functions, duties or powers.
- (c) **Note** that these powers are principally investigative and do not include the ability to directly influence decisions on particular resource consents, especially where these have already been granted.
- (d) **Note** that recent concerns raised about the exercise of due process by Environment Waikato regarding further applications lodged by the Whangamata Marina Society are outside your ability to influence.
- (e) **Note** that legal recourse is available to Iwi and others to address their concerns through application for judicial review to the High Court.

Craig Mallett
Acting General Manager, Local Government Group

Date:

Date:

Hon Trevor Mallard
Minister for the Environment

Minister's Comments

Administration

	Action Sought	Deadline
Minister for the Environment	N/A	N/A

Ministry for the Environment Contacts

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			Work	Cellphone
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* Suggested first contact (please allocate).

Annex 1: Whangamata Marina – Chronology of Events

Note: this chronology is based on information supplied by Environment Waikato and Thames Coromandel District Council, and on decisions made by the Environment Court, the High Court, the Minister of Conservation and the Minister for the Environment (under delegation).

Date	Event
Nov 1995	<p>Applications lodged with Environment Waikato (EW) Whangamata Marina Society (WMS) lodges four coastal permit applications with Environment Waikato (EW) to:</p> <ul style="list-style-type: none"> • Construct a 205 berth marina with associated coastal works (consent 953758); • Discharge seepage water during construction (consent 953759); • Discharge drainage water (consent 953760); and • Place fill onto a salt marsh and reclaim land (953761). <p>Two of the applications related to restricted coastal activities (consents 953758 and 953761). All four applications were notified on 10 February 1996 and 40 submissions were received, 23 in opposition.</p>
Dec 1996	<p>EW Hearing Committee Recommendations EW grants two coastal permits and recommends that the Minister of Conservation grant the two permits for restricted coastal activities (Note: the Minister of Conservation's representative on the committee recommended that the restricted coastal activities permits be declined).</p> <p>The recommendation included specific reference to:</p> <ul style="list-style-type: none"> • Occupying up to 4 hectares of the coastal marine zone; and • Constructing and operating a 300 metre and 50 metre breakwater.
Jan - Feb 1997	<p>Appeals lodged on EW consents and recommendations Appeals were lodged to EW's decisions and recommendations by:</p> <ul style="list-style-type: none"> • Whangamata Maori Committee; • The Hauraki Maori Trust Board; • Te Kupenga o Ngati Hako Inc; • The Minister of Conservation; • Whangamata Marina Society; and • Whangamata Golf Club. <p>In considering the appeals it becomes clear to the Environment Court that resource consent applications also need to be obtained from Thames Coromandel District Council (TCDC). The Court rules that it will not hear the appeals on the EW consents until land use consents are granted or declined by TCDC and any subsequent appeals lodged.</p>
Sep 1997	<p>Applications lodged with Thames Coromandel District Council (TCDC) WMS lodges applications with TCDC to:</p> <ul style="list-style-type: none"> • Undertake earthworks; and

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	<ul style="list-style-type: none"> • Establish marina facilities. <p>Both applications were publically notified and 13 submissions were received, 12 in opposition.</p>
July – Sep 1998	<p>TCDC Hearing Committee Recommendations TCDC appoints an independent commissioner to hear the WMS applications. The commissioner grants the two applications in August 1998.</p> <p>Appeals were lodged to TCDC's decisions by:</p> <ul style="list-style-type: none"> • Hauraki Maori Trust Board; • Whangamata Marina Society; • The Minister of Conservation; • Whangamata Golf Club; • Te Runanga o Ngati Pu (withdrawn); and • P.G and L.M Ludwig (withdrawn).
1999-2005	<p>Coastal occupation variation to the EW Proposed Regional Coastal Plan (PRCP) In October 1999 EW notifies a variation to the PRCP to make occupation of coastal space a discretionary activity (it was a permitted activity at the time that the original WMS applications were lodged). The variation was adopted by EW in 2001 and became operative in October 2005.</p>
Feb 2001	<p>Interim decision on appeals to marina consents (Environment Court – A025/01) The Environment Court notes the benefits of the marina proposal but observes that the PRCP does not provide sufficient policy guidance to grant the consents. The Court issues an interim decision in order to provide EW with the opportunity to make changes to the PRCP to address this issue.</p>
2003-2007	<p>Marina variation to Proposed Regional Coastal Plan (PRCP) In March 2003 EW notifies a variation to the PRCP to provide guidance on developing and locating marinas in the region, including identification of an area zoned for marina activity at Whangamata. EW releases their decision in March 2004. The decision includes the removal of the proposed Whangamata marina zone.</p> <p>EW's decision was subsequently appealed by:</p> <ul style="list-style-type: none"> • TCDC; • Whangamata Marina Society; • Te Kupenga o Ngati Hako; and • Hauraki Maori Trust Board. <p>In October 2005 the Environment Court upholds the council decision on the marina provisions and also reinstates the marina zone at Whangamata (A174/05). The Minister of Conservation approves the variation in June 2007 and it becomes operative on 21 December 2007.</p>

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Feb 2005	<p>Additional truck movement application lodged with TCDC</p> <p>In February 2005 WMS applies for consent to remove and transport additional material excavated as part of the Whangamata marina development [Note: this application arose from a direction of the Environment Court (A145/05)]. The application was publicly notified in February 2005 and 11 submissions were received, 8 in opposition.</p>
May – June 2005	<p>Truck movement decision</p> <p>In May 2005 an independent commissioner hears the WMS application for additional trucking movements and grants the consent.</p> <p>TCDC's decision was subsequently appealed by:</p> <ul style="list-style-type: none"> • Whangamata Maori Committee Inc; • Ngati Whanaunga Environment Unit; • Te Kupenga o Ngati Hako Inc; and • Te Runanga a iwi o Ngati Tamatera.
Oct 2005	<p>Final decision on appeals (Environment Court)</p> <p>In October 2005 the Environment Court issues its final decisions on the marina appeals:</p> <ul style="list-style-type: none"> • A175/05 – upholds the TCDC decision to allow additional truck movements to remove excess material from the marina site; and • A173/05 –upholds the granting of resource consents by EW and TCDC and recommends that the two restricted coastal activity permits are granted by the Minister of Conservation. <p>The recommendation included specific reference to:</p> <ul style="list-style-type: none"> • Containing four hectares of the coastal marine zone; and • Constructing and operating a 300 metre breakwater.
Mar 2006	<p>Minister of Conservation decision</p> <p>The Minister of Conservation refuses to grant the two coastal permits for restricted coastal activities associated with the marina proposal (consents 953758 and 953761).</p>
Sep 2006	<p>Judicial review and High Court decision</p> <p>WMS applies to the High Court for a judicial review of the Minister of Conservation's decision.</p> <p>The High Court sets the decision aside and directs the Minister to reconsider the two restricted coastal activities.</p>
Dec 2006	<p>Minister for the Environment decision (under delegation)</p> <p>The Minister for the Environment (under delegated authority) considers and grants the coastal permits for the restricted coastal activities. The final decision is largely in accordance with the recommendations made by the Environment Court with the exception of some minor amendments to some of the associated consent conditions.</p>

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<p>Oct 2007- Mar 2008</p>	<p>Requests to Minister of Conservation to correct defects EW identifies five areas of deficiency in one of the restricted coastal activity permits (consent 953758).</p> <p>EW requests the Minister of Conservation to correct these deficiencies through:</p> <ul style="list-style-type: none"> • Section 133A of the RMA (30 October 2007); and • Section 119A of the RMA (19 December 2007). <p>On advice from the Department of Conservation, the Minister of Conservation declines to action the requests.</p>
<p>April 2008</p>	<p>Trucking consent variation lodged with TCDC In April 2008 WMS lodges an application for a variation to the trucking consent issued by the Environment Court in 2005 (A175/05). The application (consent RMA/2008/110) seeks a change in transportation routes to permit the deposit of fill at alternative sites from those originally approved by the Court. TCDC considers the variation on a non-notified basis.</p> <p>Three related earthwork applications were also lodged by other parties between December 2007 and May 2008 seeking approval to relocate fill from the marina site to their properties. The applications were received from:</p> <ul style="list-style-type: none"> • Whangamata Golf Club (consent RMA/2008/118); • M.J. Leopold (consent RMA/2007/440); and • O.R and A.J. Sutherland (consent RMA/2008/46). <p>These applications were also considered by TCDC on a non-notified basis.</p>
<p>21 May 2008</p>	<p>Additional consents lodged with EW WMS lodges four further applications relating to the marina proposal to:</p> <ul style="list-style-type: none"> • Occupy and use approximately 4 hectares of space in the coastal marine area for the purposes of the Whangamata marina basin (consent 11871); • Occupy and use space in the coastal marine area associated with ancillary structures outside the Whangamata marina basin (consent 11872); • Erect a 50 metre breakwater (consent 11873); and • Remove indigenous plant species from the coastal marine area (consent 118474).

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<p>May 2008</p>	<p>EW consultation and notification decision on additional consents lodged</p> <p>Following receipt of the additional WMS applications EW:</p> <ul style="list-style-type: none"> • Sends copies of the application for comment to Hauraki Iwi groups and the Department of Conservation (22 May 2008); • Holds a meeting with Iwi representatives (27 May 2008); and • Provides Iwi with a copy of the draft notification report for comment (29 May 2008). <p>The Iwi groups raise a number of concerns and consider that the applications should be notified. EW determines that the applications will be considered on a non-notified basis.</p>
<p>Jun 2008</p>	<p>Additional consents granted by EW</p> <p>EW grants the four further coastal permits lodged by WMS.</p>
<p>July 2008</p>	<p>Trucking consent variation granted by TCDC</p> <p>TCDC grants the application lodged by WMS to vary a condition of the trucking consent granted by the Environment Court.</p> <p>TCDC grants the three related earthwork applications to relocate excavated fill from the marina site.</p>

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Annex 2: Restricted Coastal Activities

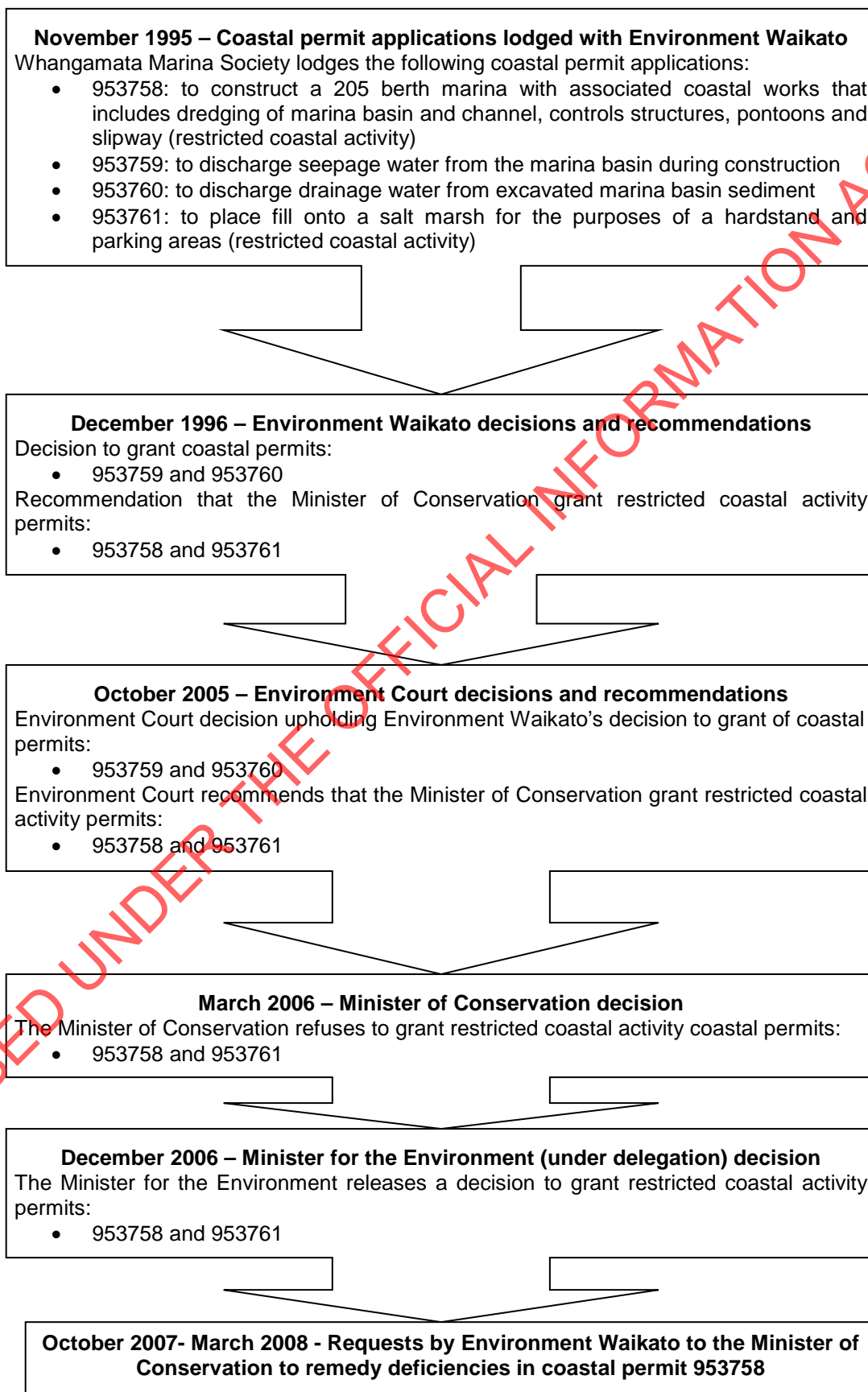
What are Restricted Coastal Activities?

1. A restricted coastal activity is an activity that might have a significant or irreversible adverse effect on the coastal marine area. The New Zealand National Coastal Policy Statement (NZCPS) identifies a number of restricted coastal activities that need to be included in Regional Coastal Plans (RCP's).
2. Regional Coastal Plans can also list additional restricted coastal activities and include specific criteria to control them. All RCP's, and any changes to them, need to be approved by the Minister of Conservation.
3. Examples of restricted coastal activities include reclamations, containing coastal space, exclusive occupation of coastal space, large coastal structures and discharge of human sewage into the coastal marine area.

What is the approval process for Restricted Coastal Activities?

4. A restricted coastal activity application is received by the appropriate regional council or unitary authority, the information is assessed and further information is sought if necessary. The application is then publicly notified and submissions invited.
5. A Council Hearing Committee is convened which includes an appointee of the Minister of Conservation. The Committee considers the application and any issues raised by submitters and prepares recommendations to the Minister of Conservation.
6. Any person who made a submission on an application can appeal the Council recommendations if they are dissatisfied with the outcome. The appeal needs to be lodged with the Environment Court within 15 working days of receiving the recommendation.
7. If there are no appeals the Minister of Conservation considers the recommendations received from the Council before making a decision. If an appeal is lodged the Environment Court hears the application again and provides recommendations to the Minister of Conservation for consideration prior to a decision being made.
8. The Minister of Conservation is required to make a decision within 20 working days of receiving recommendations from either the Council or the Environment Court.
9. If an applicant or submitter is dissatisfied with the decision of the Minister they have a further option available to them by way of application to the High Court for judicial review on points of law.

Annex 3: Tracking of original coastal permit applications though the consent process



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RMA Amendment Ideas

A Preliminary Analysis Of Announced Policy Options

November 2008

Ministry for the Environment

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Introduction

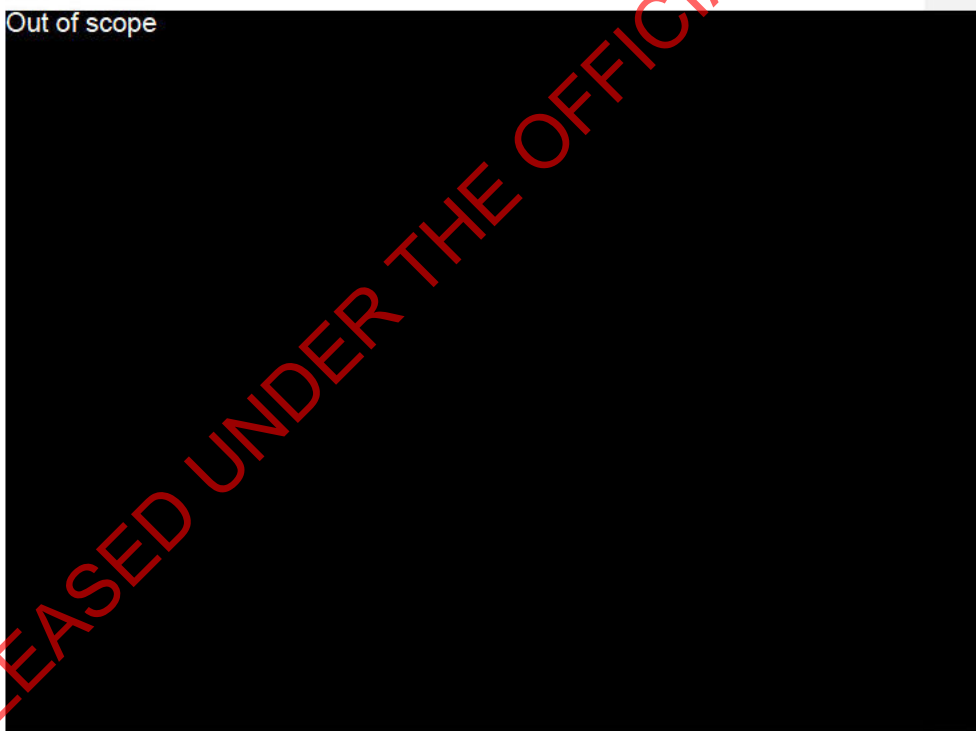
In the lead up to the 2008 general election the National Party released a policy document on proposed reforms to the Resource Management Act 1991 (RMA).

The concept of sustainability is believed to be core to the RMA and its retention is supported. There is also support for the effects based approach and recognition of the need to promote the integrated resource management approach that underpins the RMA.

In a speech to the National Party Annual Conference in 2007 it was ~~reported~~ claimed that cries for reform of the RMA have come from every corner of New Zealand, with Federated Farmers apparently claiming that only 3% of farmers are happy with the RMA and 73% calling for change. Meanwhile the Compliance Cost Panel cited the RMA as being the number one issue for small businesses. The 2006 IMD World Competitiveness yearbook (based on a survey of business executives) ranked New Zealand 61 out of 61 in terms of environmental laws hindering business competitiveness. It was suggested that the Nordic countries have high environmental standards, but strong support for business, so perhaps had a better model based around collaboration.

Many proposals to change the RMA have been around for some time and are acknowledged to go all the way back to Simon Upton's 1999 plans to reform the RMA. Some of these will make up the first phase of proposed reforms.

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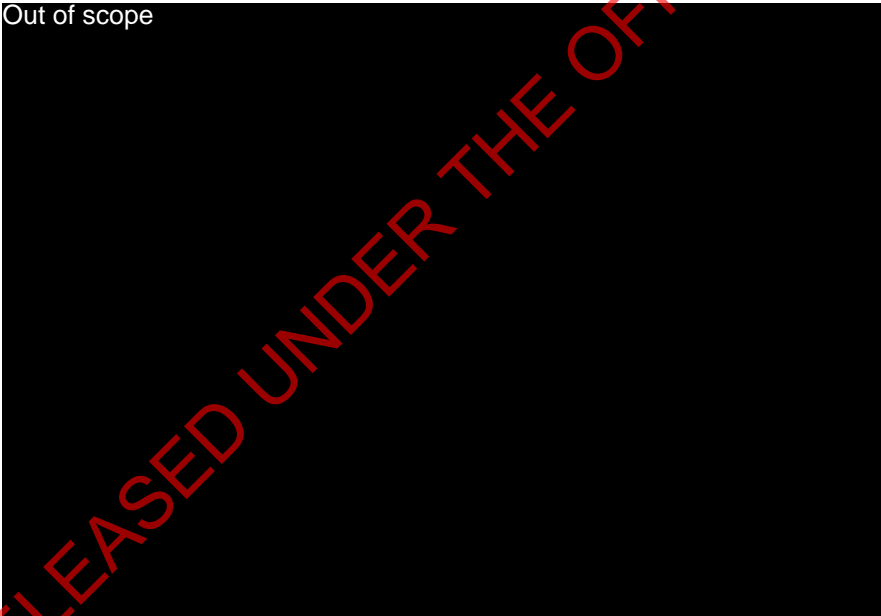
Topic 2: Proposals Specific To Resource Consents:

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(c) Remove the ministerial veto on coastal consents.

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Preliminary Analysis By Topic Area

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Topic Area 2: Resource Consenting

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It is considered wrong that the Minister of Conservation can overturn decisions on restricted coastal activities is wrong when a hearings committee or the Court has spent considerable time hearing and weighing up evidence. The powers of the Minister to prepare and approve the New Zealand Coastal Policy Statement, approve regional coastal plans, appoint a representative on consent committees, and submission and appeal rights is considered to be enough. The Whangamata marina has been cited as an example of a poor process and interference that was drawn out over 13 years.

It is proposed to:

- (c) Remove the ministerial veto on coastal consents.

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³ National Party (2006) *A Bluegreen Visision for New Zealand*, pg 29

³ E g the National Party Conference of 4 August 2007

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- Removing Minister of Conservation's veto on coastal consents (restricted coastal activities): could be more consistent with policy on Minister for the Environment's decision-making powers
 - Could avoid area of risk to the Minister
- We already have direct referral i.e. the call-in process; more efficient to consider how this process can be improved/the glitches ironed out to make this run smoother; one suggestion is to remove the present cap of 8 Environment Judges, as more resources/divisions of the Court would be required for additional direct referrals/call-ins.

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Summary of Reasons For and Against:

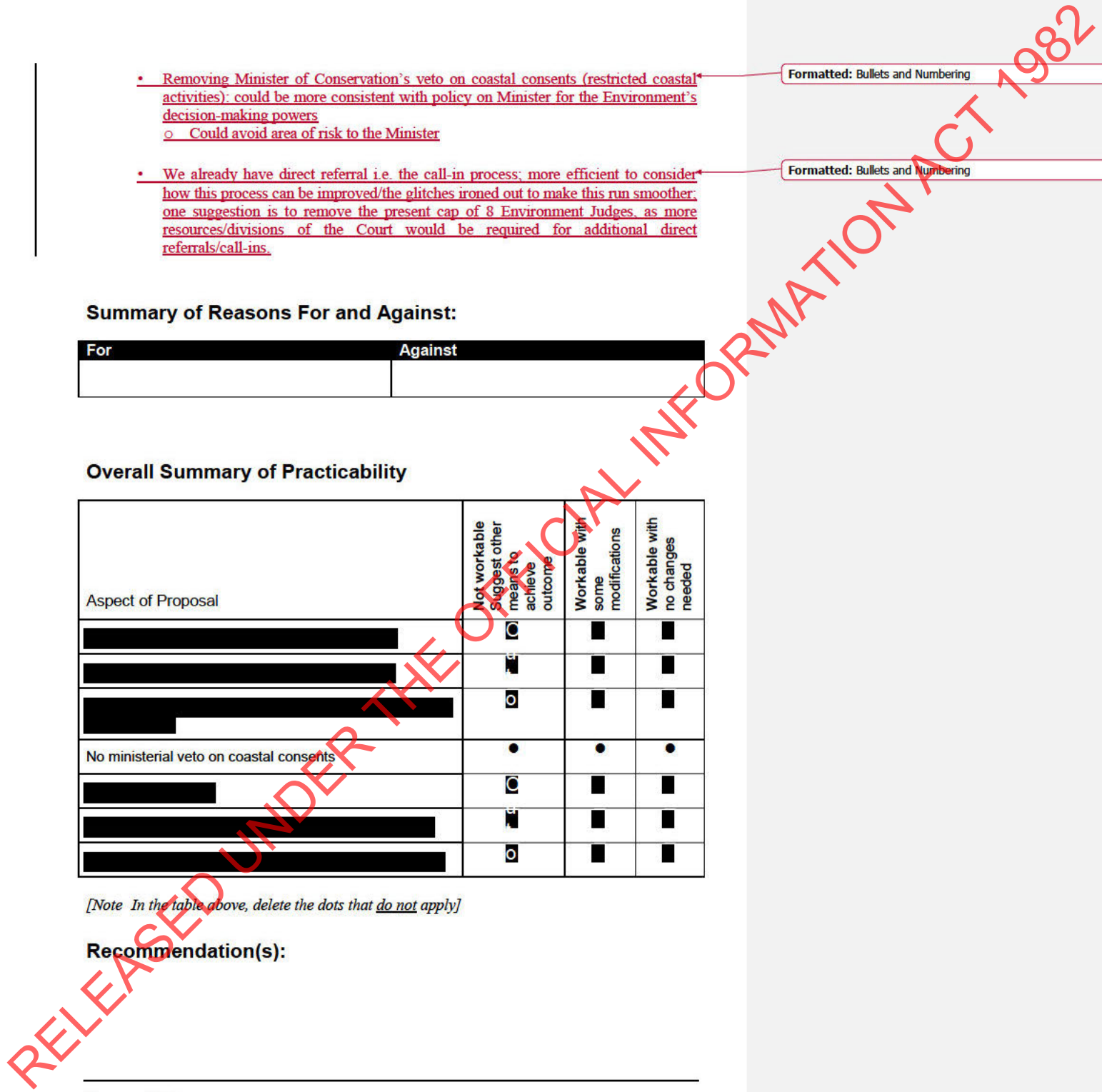
For	Against

Overall Summary of Practicability

Aspect of Proposal	Not workable Suggest other means to achieve outcome	Workable with some modifications	Workable with no changes needed
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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
No ministerial veto on coastal consents	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
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[Note In the table above, delete the dots that do not apply]

Recommendation(s):



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Topic Area 4: RMA Plans

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Topic Area 5: National Direction & Administration

Proposal:

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¹ National Party (2006) *A Bluegreen Visision for New Zealand*, pg 28

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⁵ National Party (2006) *A Bluegreen Vision for New Zealand*, Part 1: Vision

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Recommendation(s):

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Summary of Recommendations

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1. Whangamata Marina

In October 2005 the Environment Court recommended to the Minister of Conservation ('the Minister'), in relation to three appeals lodged by iwi, that applications for restricted coastal activities to construct a marina and place fill on a salt marsh to form a car-park in Whitianga Harbour should be granted subject to conditions.

The Court noted that the evidence on the ecological value of the salt marsh was 'strikingly at variance' and 'difficult to judge,' but accepted the applicant's proposal to reinstate and enhance a nearby salt marsh as offset mitigation. The Court also recommended that effects on iwi ability to gather shellfish and to retain their ancestral connections could be mitigated by conditions.

The Minister made his decision alone, under section 119, after considering the Court's report, section 104, the evidence presented, transcripts and comments made to him by the applicant. Other matters such as correspondence and comments made to the Minister at Whangamata were declared not to form the basis of the Minister's decision.

² 2004-2005 review of the RMA: Departmental Report

The Minister, while expressing sympathy for the time and money spent by the applicant on the proposal, decided not to accept the Court's recommendation. The Minister favoured the evidence that the salt marsh was valuable and should not be destroyed. He also considered the conflicting evidence on iwi access to shellfish and determined that the proposal would have unacceptable effects on iwi relationship with the area which could not be appropriately recognised through conditions. He decided that the proposal would not promote sustainable management overall.

The Whangamata Marina Society Inc applied to the High Court for judicial review of Minister Carter's decision.³

The High Court found that the Minister's duty to make a decision on the application for a restricted coastal activity was statutory, with judgment on section 104 matters being 'factual'. Therefore the Court could review the exercise of the Minister's power. The Court noted that, had the exercise been of a 'political' character, such as the decision to initiate the review of the New Zealand Coastal Policy Statement, then this decision would not have been amenable to the Court's supervision.

The Court also noted that subsections 3 and 4 of section 119 are very unusual in that there is no other similar provision under the RMA. These subsections, while allowing the Minister to identify reasons and matters independently of the report, require the Minister to seek a report on those matters. These provisions have the objective that all matters of relevance to the reasons for granting the report are to be tested in an adversarial setting either by a hearing committee or the Environment Court.

The Minister can, however, differ from the weight to be given to the matters in section 104, provided he or she gives reasons under section 119(1)(b).

The Minister, moreover, does not bring a different 'national' (or political) perspective from the Environment Court; the Court takes a national perspective in any event from the NZCPS.

The Court noted that the process followed by the Minister when reconsidering the evidence was in breach of natural justice and an error of law; the Minister could not have properly considered the evidence by simply reading the material provided sequentially.

The Court also noted that, while it was appropriate for the Minister to use his usual practice of visiting the site, this inevitably placed the Minister in a difficult position if he was to take into account aspects of the visit that had not been taken into account by the Court. If he was minded to do so, he should have referred those aspects back to the Environment Court as required by section 119 (3) and (4). The Minister's staff had taken notes of the visit and the Minister could not adequately resolve the consequences of having the meetings with submitters by declaring that he had disregarded their comments.

The Court also found that the Minister did not respond to concerns from Maori as to the salt marsh and the pipi beds in a way that gave these concerns a 'veto' quality.

The Court further noted that the Minister was a submitter to the plaintiff's application for resource consents for the marina, and on the face of it, this appeared to be odd

³ Whangamata Marina Society Inc v The Attorney-General of New Zealand (2007) 1 NZLR 252; CIV 2006-485-000709

given that the Minister had to make the final decision. But the Court stated that for practical purposes this was a DoC submission.

The Court exercised its power to set aside the Minister's decision. The Court directed the Minister to reconsider the whole matter to which the restricted coastal activity applications related, and to reconsider the application of sections 119(3) and (4) to any information or representations he had acquired or heard outside the Environment Court within 15 working days from the expiry of the right to appeal. The Minister decided not to appeal the High Court decision to the Court of Appeal, and delegated the decision to the then Minister for the Environment, the Hon. David Benson-Pope.

The Minister for the Environment sought clarification from the Environment Court on aspects of its report. The Minister for the Environment granted the permits in December 2006, with minor alterations to conditions and to the description of the restricted coastal activity.

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The Minister has certain powers under the RMA, but is nonetheless bound by it in
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Clause 91 expands the scope of plans that can be called in by the Minister to include
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[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

RELEASED UNDER THE OFFICIAL INFORMATION ACT 1982

Out of scope

[REDACTED]

[REDACTED]

[REDACTED]

RELEASED UNDER THE OFFICIAL INFORMATION ACT 1982