

BEFORE THE OTAGO REGIONAL COUNCIL

IN THE MATTER

of the Resource
Management Act 1991

AND

IN THE MATTER

of the resource consent application
by Port Otago to dispose dredging
material near NZCPS protected surf
breaks RM11.153

**PRESENTATION OF
SURFBREAK PROTECTION SOCIETY SUBMISSION IN OPPOSITION**

**Surfbreak Protection Society
Surfbreak.protection@gmail.com**

**Presented by David Storck LLB, M.Com Law.
Auckland University**

Ph 0274 837996

Introduction

1. My name is David Michael Storck and I am Vice President of the Surfbreak Protection Society (SPS) a charitable organisation set up to protect surf breaks.
2. I am not paid to be here and SPS has no financial interest in the outcome of this Application.
3. As I have advised the Hearing Panel that I am not a currently practicing lawyer I do wish to point out that I do have legal knowledge and experience. I have two law degrees and I have held a practicing certificate for approximately 22 years and I have been admitted to the bar in New Zealand and the Turks and Caicos Islands, a British Independent Territory in the Caribbean. I have taught law to business students at Auckland University of Technology and Mt Albert Unitec part-time for approximately 14 yrs.
4. I am also a keen surfer. I won the over 50's division of the New Zealand long board surfing circuit (which did come to Dunedin for some events) in both 2006 and 2009. I first surfed Karitane on 14 October 1974 (I remember as I took a day off from study as it was my birthday). I have also surfed at Aramoana and just two days ago (Sunday 5 May 2013) at Whareakeake. I produce a photo I took on my cell phone before we suited up.
5. I am here today to go over the main points of SPS's submission, comment on some of the evidence produced yesterday and introduce our expert witnesses.
6. SPS wishes to point that it understands that, in this particular case, DOC's neutral stance on this application was influenced by a reliance on information received

through Port Otago's contracted experts that the surf breaks would not be adversely affected. They also advised SPS that they had time constraints on the amount of hearing they could attend.

7. Surf breaks are difficult to explain to people who do not surf and many people are not aware of their value and their sensitivity. Surf breaks can be lost due to interference from man. For instance I remember many great surfs on Omaha Bar north of Auckland when younger but returned from overseas to find the surf break completely gone and rock groin in its place.
8. SPS believes surf breaks with quality waves are an invaluable resource and should be protected. There is a wealth of information on the value of surf breaks and some of this is covered in our original Submission. (I will refer to SPS's original submission here.)
9. However this submission will focus mainly on the current law as opposed to explaining the benefits of surf breaks.
10. SPS is pleased that our elected representative have made our job much easier because they have chosen to legally protect surf breaks of outstanding natural character and surf breaks of national significance. This protection has, for the first time, been incorporated in the New Zealand Coastal Policy Statement (NZCPS) in the review of completed in 2010.
11. One of our main goals now, at SPS, is to ensure councils are aware of their legal requirements to protect surf breaks and amend plans accordingly.

12. This hearing is the first real test at council consent level of the protection provided by the NZCPS. SPS expects that there will be further tests to come, including at the Environment Court level, in the future.
13. This relatively new law provides that councils 'must' (the word 'must' is used under the heading - "Application of this Policy Statement") protect these surf breaks by 'ensuring' activities do not adversely affect them. A 'precautionary approach' 'must' be adopted. That is the law.
14. SPS respectfully submits (as per our original Submission) that a precautionary approach is not adopted in the Application and is not provided for in the amended draft consent conditions presented yesterday.
15. SPS's view is that, if consent was granted, NZ law would not be complied with.
16. We are advised by eCoast that the monitoring provided for in the draft consent conditions is not monitoring which could show whether there has been any adverse affects to the wave quality of the protected surf breaks.
17. SPS also notes the draft consent allows for photographic monitoring and video 'capable' monitoring but our advise is that this also is insufficient and unclear as to exactly what is to be provided.
18. The conditions also provide for a website to allow surfers to record their personal observations of surf quality. SPS believes this method to be unscientific and ineffective and not acceptable as an accurate monitoring method of any damage to the surf breaks. It would perhaps, to take the Albatross example, be similar to setting a website allowing bird lovers to record their Albatross observations.

Evidence

19. Mr Jose Borrero from eCoast will present evidence from Dr Shaw Mead and himself.

20. The evidence will show, inter alia, that:

- a. The AEE provided by the Applicant is insufficient to non-existent.
- b. There has been no assessment of existing wave quality.
- c. The Surfing Wave Dynamics report provided by the Applicant does not relate to surfing wave quality.
- d. The impacts on Whareakeake of a proposed increase of 7-fold disposal volumes at the Haywood site are largely ignored.
- e. There was no monitoring at all planned for Whareakeake (remote photographic and video capable monitoring has now been added to the amended consent conditions presented yesterday at the Hearing) and monitoring proposed will not show the impact of disposal on wave quality.
- f. Statements in the report stating that near shore dumping has a positive effect on the surf at Aramoana are unsupported. That the 'A' frame type focused waves are produced by refraction over the off shore ebb-tidal delta and not due to disposal mounds. (As confirmed in Dr Combs evidence yesterday.)
- g. The Applicant has produced no evidence that the proposed activities will not adversely affect the surf breaks.
- h. That the disposal proposed will have significant potentially negative impacts on the surf breaks.
- i. That the proposal will not promotes sustainable management of the surf breaks and will not be exercising a precautionary approach as legally required and that consent should not be granted without further detailed conditions.

21. Finally I will be asking a local surf businessman Rod Rust to give a local perspective to possible results of the granting of consent in its current form.

Background

22. Essentially consent is sought to enable the applicant to dredge the Otago channel. That dredging will, we understand, enable the applicant to allow larger ships to come into the Port with a view to increasing the usefulness and profits of Port Otago thereby resultantly have numerous beneficial positive effects for the people and communities of Dunedin, Otago and New Zealand generally. The critical issue requiring determination in this case is whether consent for the dredging can be granted to allow these benefits without at the same time not only failing to promote the sustainable management of natural and physical resources but also failing to follow the legal requirements of the NZCPS.

23. There were meetings with Port Otago and local surf representatives and SPS to try to come to agreement however I understand that at the second prehearing report on 17 September it was agreed that Port Otago would provide draft conditions of consent and a broader monitoring program with 1 – 2 weeks of that meeting so the parties could discuss this further before the Hearing. This draft was not provided and further discussions between the parties did not take place. Similarly the writer understand that there was to be a meeting between Port Otago and SPS scientists to prepare a Summary of Proposal but this also did not take place. Thus SPS is relying on our expert advice from eCoast.

The Law

S104 - Resource Management Act 1991 (RMA)

24. S104 of the Resource Management Act 1991 provides that councils, when considering an application must have regard, amongst other matters, to the NZCPS.
25. There was mention made of S104 2A RMA yesterday. This section provides that when the holder of the consent applies for a new consent for the same activity then the consent authority must have regard to the value of the investment of the existing consent holder. This section, it is submitted, would only apply if the consent holder had invested in infrastructure that would lose value if the consent was not granted. SPS is not aware of any such investment and Port Otago has not produced any evidence of such. For instance, SPS understand that Port Otago could continue to use their dredge at alternative disposal sites.
26. To be balanced also with the effect, if any, of s104 2A, is the fact that surf break protection for the surf breaks that could be damaged by the consent, was not part of the law under the NZCPS when the earlier consent was granted.

NZCPS - Precautionary Approach

27. The NZCPS provides in Policy 3 that councils must adopt ‘a *precautionary approach* towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse.’

Uncertain, unknown, or little understood, but potentially significantly adverse.

28. Are the effects of the disposal sought ‘uncertain, unknown, or little understood, but potentially significantly adverse’?

29. SPS believes that this is the case and this is confirmed by our expert advice and also confirmed by evidence from Port Otago as follows:

30. At #31 of Dr McComb's Statement of Evidence presented yesterday he states that the 'mound in the shallow part of the Heywood ground influences the swell corridor to Whareakeake' and in #33 that 'selective dumping within the Haywood ground is a technique that can be usefully employed to mitigate potential negative effects on the swell corridor to Whareakeake'.

31. At #37 of the Statement is stated that a mound at Aramoana will 'alter the wave crest and height patterns' and that the effects can 'be minimised by distributing the sediments evenly' and that an opportunity is presented to 'test the potential benefits from a mound on surf quality.'

32. However it is also stated in #20 that the process that defines the unique aspects of surf quality at Aramoana 'are conserved regardless of the mound morphology or indeed absence of a mound.'

33. At #21 it is stated that the postgraduate dissertation of Kilpatrick (2005) reaches the conclusion that presence of a mound at Aramoana has a positive effect on surf quality but repeats that the mound is not the 'pre-eminent factor' to provide quality surf but it is the offshore bar. It should be noted also that, as pointed out in SPS's original submission Kilpatrick continues on to state that:

“The fact that waves have been observed to break on the spoil ground suggests that the spoil ground may in fact be reaching its maximum size if it is to continue to enhance surf conditions at Aramoana. Once the spoil grounds reach a level where the waves break continuously on the spoil mound, only degenerative effects will be observed in the inshore surf conditions.”

34. And, at #40 it is stated, in reference to disposal at Aramoana that 'an effect that initially has a positive outcome may subsequently result in a temporary negative effect as material disperses and gradually welds to the shoreline'.
35. And keeping in mind that 'the wave quality is conserved' at Aramoana in the 'absence of a mound' at #43 it is stated that 'there is a rare experimental opportunity' to examine the 'potential for gaining positive surfing results' and that 'while experimental' the tests will be monitored.
36. And in the ORC Officers Report recommending consent it is stated at #164 that "effects on the surf breaks are unknown and potentially detrimental" and at #166 "the affect of the continued disposal activity at the Aramoana disposal ground on wave generation could be both positive and negative".
37. In Mary O'Callahan's Statement at #46 it is stated that 'the key issue is potential future effects associated with on-going disposal volumes which may be positive or negative' and at #48 'this monitoring work is expected to result in a better understanding of the relationship between disposal and "surfability", in order to develop a management plan approach which minimises any long term negative effects on the surf breaks.'
38. SPS has been advised by experts in the field that the results of the proposed increase in disposal sought are uncertain and may be adverse to the surf wave quality of the protected breaks.
39. SPS's opinion is, accordingly, that the affects of the disposal are clearly uncertain, unknown, or little understood, but potentially significantly adverse to the legally

protected surf breaks so Policy 3 applies and a *precautionary approach* MUST be used.

40. What does 'precautionary' mean? The word is not defined in the NZCPS so the normal dictionary meaning should be used. The Chambers English Dictionary 7th Edition defines precautionary as.

'a caution or care beforehand, a measure taken beforehand.'

41. 'Beforehand' is defined as being

'before the time, in advance or anticipation, by way of preparation.'

42. Thus precautionary means doing something before the event that may cause damage. SPS believes a precautionary approach is not adopted in the draft consent terms because wave quality monitoring is provided (although our experts advise that the monitoring provided for in the draft conditions is insufficient) after the disposal with a report due to council 2 years 6 months after commencement of what SPS understands is 2-fold increase of disposal at Aramoana and 7-fold increase at Heywood from previous disposals. This is NOT precautionary.

43. Mary O'Callahan in her Statement of Evidence at #50 states that "it is an existing activity for which there is no evidence of significant adverse effects to date, so a precautionary approach has already been established." With respect, it is SPS's opinion that this is an incorrect interpretation of the requirement placed on council to adopt a precautionary approach. To satisfy the required 'a measure must be taken' 'before' an event and it will not satisfy the requirement (although may provide some information to assist in satisfying it) to refer back to something done before the requirement to adopt a precautionary approach came into effect. SPS has also been

advised that there have been significant adverse effects at Aramoana (waves breaking on the mound off-shore and a bridge of sand moving from the mound to shore affecting the surf quality) and further a precautionary approach requirement could not be satisfied by looking at results from an activity with 2 to 7 times less volume than that proposed.

44. To ensure that one can tell if there are any adverse affects one must (as confirmed by our expert advice) check to see what the current status is beforehand as opposed to seeing what the effects are afterwards with little to compare it to.
45. Perhaps as an example one could look at protecting not surf breaks but the Albatross colony on Taiaroa peninsular. If a 'precautionary approach' to the protection was legally required in regard to an application for a 3 year long line fishing licence in close proximity to the colony (and the council was made aware of the possible danger of the albatross's diving for the fish bait before it sinks and getting entangled on the hook and drowning) then I would respectfully submit it would NOT be a precautionary approach to....

Firstly, give consent without a prior full assessment of the current health of the colony and

And secondly, require that the first report on the health of the colony be provided to the Council some 2 years 6 months after the fishing activity begins.

NZCPS - Policy 13

46. Policy 13 cover general surf breaks by requiring Councils to preserve the natural character of the coastal environment and to protect it. They must avoid adverse

effects on areas of outstanding natural character and natural character is specifically stated as being able to include surf breaks.

Policy 16: Surf breaks of National Significance

47. Policy 16 requires councils to protect the surf breaks of national significance listed in Schedule 1 by:

ensuring that activities in the coastal environment do not adversely affect the surf breaks; and

avoiding adverse effects of other activities on access to, and use and enjoyment of the surf breaks.

48. The definition of 'ensure' is 'to make sure'. The definition of 'safe' is 'unharmd'. SPS believes that a council will not be 'making sure' a surf break of national significance is 'unharmd' by experimenting and trying to mitigate any damage later.

Schedule 1

49. Schedule 1: As we know the surf breaks of national significance include: The Spit or Aramoana, Karitane, Whareakeake or Murdering Bay or Murderers and Papatowai.

Glossary

50. The Glossary defines surf breaks as natural feature that is comprised of swell, currents, water levels, seabed morphology, and wind. The hydrodynamic character of the ocean (swell, currents and water levels) combines with seabed morphology and winds to give rise to a "surfable wave".

51. A surf break includes the “swell corridor” through which the swell travels, and the morphology of the seabed of that wave corridor, through to the point where waves created by the swell dissipate and become non-surfable.
52. “Swell corridor” means the region offshore of a surf break where ocean swell travels and transforms to a “surfable wave”
53. “Surfable wave” means a wave that can be caught and ridden by a surfer. Surfable waves have a wave breaking point that peels along the unbroken wave crest so that the surfer is propelled laterally along the wave crest.

Conclusion

54. In our original submission we asked for no disposal at the Aramoana and Hayward sites until there is a baseline study done so that any adverse affects can be monitored. This is still our stance and that of our expert advisers.
55. The ORC must follow the law of NZ, and according to the NZCPS the three surf breaks which may be affected by the disposal are legally to be protected and a precautionary approach must be used by any Council giving any permits which may affect the surf quality in any way including the swell corridor letting the full swell get in and the shape of the peeling wave. It is a legal requirement and to allow dumping three times more than it has ever been allowed before at the Aramoana site and then to find out what has happened afterwards, does not, it is submitted fall within the definition of a precautionary approach.
56. We disagree with the officer’s report stating that the consent should be given with conditions attached as there is no precautionary conditions attached whatsoever.

57. It is respectfully submitted that the submissions by the applicant as to the disposal having little effect on the surf breaks is speculative, untested, unsubstantiated by evidence and, according to our expert witness, quite wrong.

58. The evidence for SPS will now be called to show that granting consent to the activity will not 'protect' the surf breaks, nor demonstrate the legally required 'cautionary approach, required by the NZCPS and will also not achieve the purpose of the RMA; sustainable management.

DM Storck Vice President
Surf break Protection Society
