# AHM News

## INTRODUCTION

In this month's newsletter we address the EPA's approval of seabed mining, amendments to the National Policy Statement for Freshwater Management, the new National Environmental Standard for Plantation Forestry, and recent Supreme Court decisions.

## EPA GIVES GREEN LIGHT TO SEABED MINING

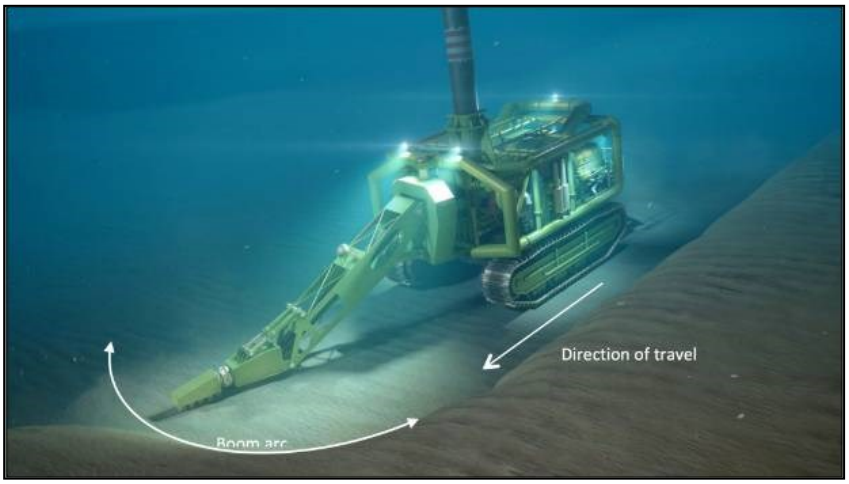
The Environmental Protection Authority recently granted consents to Trans-Tasman Resources Limited (TTR) enabling it to mine iron sand over 26 km offshore in the South Taranaki Bight.

This grant followed an earlier refusal in 2014 when TTR's first application was rejected by the EPA as being premature.

The decision making process involved seven weeks of intensive hearings and over 13,000 submissions, and many complex and often novel legal issues.

The Consent was granted for a term of 35 years and subject to a comprehensive set of conditions to manage the effects of the activity. The activity is predicted to add $59 million to New Zealand's GDP, royalties of about $6.15m a year, $310m in export earnings, and employ 230 people in New Zealand in total. The granting of this consent constitutes a world first in maritime mining permit approvals.

The decision to grant has proved controversial – not only because it is the first time that such an activity has obtained consent in New Zealand, but also because the panel was evenly split on the decision with the Chair utilising his casting vote to confirm the grant.




Appeals are allowed on questions of law and seven appeals have been lodged. Mike Holm and Vicki Morrison-Shaw were counsel for TTR on this application.

## AMENDMENTS TO THE NATIONAL POLICY STATEMENT FOR FRESHWATER MANAGEMENT

The Government, following a consultation process earlier this year, announced in August that it had made changes to the NPSFM in order to ensure that freshwater quality improves over time.

The changes:

- Support the Government's target of making 90% of New Zealand's lakes and rivers swimmable by 2040. These include requirements on Regional Councils to improve water quality, to set regional targets, and to report on how they are tracking with achieving regional targets every five years.
- Impose new monitoring requirements using macroinvertebrates, indigenous flora and fauna and mātauranga Māori, require the establishment of methods for responding to monitoring, and that monitoring information be made publicly available.
- Impose new requirements – including setting the target nutrient level - for managing nutrients such as nitrogen and phosphorus in rivers;
- Clarify the meaning of Te Mana o te Wai;
- Require regional councils to consider the economic well-being of communities when setting environmental limits;
- Provide clarity about the meaning of requirement to maintain or improve "overall" water quality;
- Clarify the exceptions to national bottom lines in the case of significant infrastructure;
- Clarify how the requirements apply to coastal lakes and lagoons.

The amendments came into force on 6 September 2017.

Refer to the Ministry for the Environment's website at http://www.mfe.govt.nz/fresh-water/national-policy-statement-freshwater-management/2017-changes for further details.

## NO 'DAM' WAY – SUPREME COURT SAYS NO TO LAND SWAP FOR RUATANIWHA DAM

In July 2017 the Supreme Court released its decision dismissing appeals which sought to validate the proposed Ruataniwha Dam land swap. At issue was the Director-General's decision to revoke the conservation park status of 22 hectares of the Ruahine Forest Park so that the land could be exchanged for other land provided by the proposed dam developer, Hawkes Bay Regional Investment Company Limited. The reason for the exchange was that it would be inundated by the dam that the Company was proposing to build on the Makaroro River.

The Director-General's decision was upheld in the High Court but overturned on appeal by a majority in the Court of Appeal. The key issues considered by the Supreme Court were whether:

- it was lawful to revoke the conservation park status in order to allow it to be exchanged as stewardship land; and
- revocation decisions can be taken on the basis that the exchange will enhance the conservation values of land managed by the Department and promote the purposes of the Act.

There were also a number of subsidiary issues relating to consistency with other statutory planning instruments and the creation of marginal strips. In a split decision (3:2) the majority of the Supreme Court found:

> *[127] In summary, we agree with Harrison and Winkelmann JJ that the revocation decision was unlawful because the Director-General was driven by the s 16A test for exchange. It was acknowledged throughout that revocation of the special protected status of the 22 hectares was justified only on the basis of the proposed exchange. The conflation of the two steps circumvented the statutory prohibition on exchange of other than stewardship land. There was*

*no assessment of whether the intrinsic qualities of the land warranted its special protection, despite the scientific reports which showed it had significant conservation values. There was no consideration of whether continuation of protected status was inappropriate or indeed whether the additional protection of ecological area should have been applied to the 22 hectares following the identification of ecological values in the scientific report. Nor is there any discussion of how the values in the unprotected Smedley land might have been protected without the exchange. As the majority in the Court of Appeal remarked, the Department was not concerned with the correct level of protection. The distinct steps were in fact all driven by the proposed exchange. [our emphasis, footnotes omitted].*

Interestingly, the minority Judgement claimed that the majority approach required reading words into section 18(7) so that the revocation decision was subject to an express limitation regarding the intrinsic values of the land no longer warranting it being held as a conservation park. The minority found that no hint of such limitation was found in the language of that section – unlike s 24(3) of the Reserves Act which expressly contained such a limitation. The minority found that if Parliament had intended the Minister's revocation decisions to be constrained in that way the provision would have said so.

While some guidance on the principles and processes that should be used for conservation benefit was subsequently provided by the New Zealand Conservation Authority in May 2016, such guidance does not overcome the statutory interpretation issues. Given the differing opinions between members of the superior court, and the importance of this issue to future revocation decisions, we consider this is an area where further legislative guidance would be helpful.

## NATIONAL ENVIRONMENT STANDARD FOR PLANTATION FORESTRY

A National Environmental Standard for Plantation Forestry (**NES-PF**) has been developed jointly by the Ministry for Primary Industries and the Ministry for the Environment. The NES-PF objectives are to:

- maintain or improve the outcomes associated with plantation forestry activities
- increase the efficiency and certainty of managing plantation forestry activities.

The NES-PF applies to any forest larger than one hectare that has been planted specifically for commercial purposes and harvest and covers eight core plantation forestry activities: afforestation, pruning and thinning to waste, earthworks, river crossings, forestry quarrying, harvesting, mechanical land preparation and replanting.

The NES-PF permits core forestry activities provided their adverse environmental effects are controlled and mitigated. Where a forest operator cannot meet the regulatory requirements for a permitted activity they will need to apply for resource consent. Councils may apply stricter rules in special circumstances where local conditions require a more restrictive approach, for example to manage unique and sensitive environments such as geothermal areas and drinking water supplies, or to protect significant natural areas and outstanding natural features and landscapes.

The NES-PF comes into force on 1 May, 2018.

# WENDCO – LIMITED NOTIFICATION DECISIONS FOR RESTRICTED DISCRETIONARY ACTIVITIES

In July the Supreme Court released its decision on *Auckland Council v Wendco*, which dealt with the legality of Auckland Council's decision to grant non-notified resource consents.

In 2013 Wiri Licensing Trust applied for resource consents for a restricted discretionary activity, including alterations to two vehicle access points, for their property in south Auckland. The resource consents were granted by Auckland Council on a non–notified basis. Wendco challenged this, stating that the modifications had significant adverse effects on traffic flows, thereby impacting the Wendy's restaurant on the adjacent site. Wendco's judicial review challenge was unsuccessful in the High Court, but was successful upon appeal to the Court of Appeal. Auckland Council appealed this matter to the Supreme Court.

The crux of this case came down to whether the adverse effects on the Wendy's restaurant was something which the plan required Auckland Council to factor in when deciding whether notification was required; and if so whether Auckland Council had adequately considered the impact on Wendy's restaurant and had come to a sound conclusion. The Supreme Court found that Auckland Council had adequately considered the impact on Wendy's restaurant and had come to a sound conclusion.

In coming to this conclusion the Supreme Court considered the meaning of the words "relate to" in s 95E(2)((b) RMA. That subsection requires the consent authority when deciding if a person is affected, to disregard any adverse effect of the activity on the person that does not "relate to" a matter for which a rule or national environmental standard reserves control or restricts discretion. The Supreme Court overturned the Court of Appeal's broad interpretation of "relate to", finding:

> *Under s 104C a consent authority determining an application for a restricted discretionary activity may consider "only those matters over which … it has restricted the exercise of its discretion". Unless the effect in question can be said to be a matter over which discretion is reserved it must be disregarded. The approach of the Court of Appeal would introduce a disconnect between ss 95E(2) and 104C, which is not consistent with the overall legislative scheme, and we do not see it as correct.*

It follows that the effects that a consent authority may take into account when assessing limited notification of a restricted discretionary activity are strictly limited to the relevant matters of discretion. Section 95E(2)((b) RMA is not materially amended by the Resource Legislation Amendment Act 2017 so *Wendco* will still apply when the changes to notification provisions come into effect In October 2017.

## Questions, comments and further information

If you have any questions, comments or would like any further information on any of the matters in this newsletter, please contact the authors:


| | | |
|---|---|---|
| Helen Atkins | PH 09 304 0421 | Email helen.atkins@ahmlaw.nz |
| Vicki Morrison-Shaw | PH 09 304 0422 | Email vicki.morrison-shaw@ahmlaw.nz |
| Rowan Ashton | PH 09 304 0425 | Email rowan.ashton@ahmlaw.nz |
| Nicole Buxeda | PH 09 304 0429 | Email nicole.buxeda@ahmlaw.nz |


## We welcome your feedback!

If you know someone who might be interested in reading this report, please feel free to pass it along.

Atkins Holm Majurey produces a regular newsletter with updates on matters of legal interest. If you are not currently subscribed and wish to receive future newsletters straight delivered straight to your inbox, please click this link or email reception@ahmlaw.nz. You can choose to unsubscribe at any time.