

Working in the CMA: A Developer's Perspective

SYNOPSIS

Construction of a new port at Marsden Point at the entrance to the Whangarei Harbour has commenced. Northland Port Corporation is undertaking the construction after obtaining the necessary consents over the last four years.

The process Northland Port Corporation went through in obtaining consents is reviewed to illustrate the process and highlight the good and the bad as perceived through the eyes of the developer.

The paper is in two parts, the first giving background to the development and the second commenting on the process.

MARSDEN POINT PORT DEVELOPMENT -- BACKGROUND

Project history

Through the resource consent process for this development it will be easy to see that there are a number of areas where the ideal process was not followed. To understand the reasons it is necessary to explain some of the projects long history. Although unique to this development there will be similarities to other work in the CMA where long-term planning is common.

In the early 1960s, it was decided a refinery should be built in New Zealand and after much lobbying Marsden Point in Northland was chosen as the site. The refinery was built and commenced operations in 1964. At the same time the Northland Harbour Board constructed close to the refinery a general cargo/tug wharf with a long approach trestle from the shore.

The chief lobbyist from Northland for the refinery was probably Mr Ralph Trimmer who at that time, and through the seventies, was a very powerful figure in Northland. In his role as a member and then chairman of the Northland Harbour Board, he had a vision of a general cargo port alongside the refinery. The initial vision proposed a single container port servicing the whole of New Zealand using feeder services, taking advantage of the naturally deepwater in the area and the readily available flat land.

When containerisation arrived in New Zealand in the sixties this vision faded, as major container facilities were constructed in Auckland Wellington Lyttleton and Dunedin.

However also during the sixties and seventies, large areas of radiata pine plantings were taking place in Northland. Accordingly the Harbour Board continued with its plans for a general cargo port at Marsden Point. Through the seventies eighties and nineties adjoining beach batches were bought along with adjacent farms.

In 1964 the Whangarei County zoned the land adjoining the area where the new port was expected to be developed, Industrial D. Subsequently in 1977 the Town and Country Appeal Board upheld a Harbour Board appeal and created the Special Marsden Point Industrial zone.

This industrial zoning remains in place today having been carried through to the now Proposed District Plan which has reached the appeal stage.

The Whangarei Harbour

Whangarei harbour is a typically beautiful east coast New Zealand harbour but there are a number of factors which have influenced community interest and attitudes.

Deforestation of the hinterland and for many years the use by the local cement industry of the so-called wet process of cement manufacture, have both contributed to siltation and mangrove growth in parts of the harbour where, within recent memory, there had been sandy beaches and shellfish banks. Early days of the refinery and the major expansion in the Eighties, had raised issues of air emissions, noise and traffic.

This background resulted in a deep rooted suspicion of industry by local people including the tangata whenua. In seeking consents for a major development the Port Company certainly experienced the backlash from this community feeling.

Scope of the Project

A number of studies over a long period, showed that Port Whangarei could not be effectively developed to cope with the increased trade from the 190,000 hectares of radiata pine plantings and a new port was necessary. The studies also showed that Marsden Point was the favoured location in Northland and this fact has not been contested.

The basic parameters of a requirement for three berths, a draught of around 12 m and the need for areas to assemble cargo, were not disputed.

Given the existing harbour depth of 8 to 9 m at a distance of approximately 400 metres from the nearest land, dredging or a combination of dredging and reclamation would be necessary.

Studies Undertaken

From the days when Ralph Trimmer dreamed of a container port, sketches of possible developments in the Marsden Point area were prepared. It was obvious that considerable care would be necessary as the area is subject to reasonably strong tidal currents and the bed of the harbour is predominantly sand and shell. In fact, only by comprehensive studies could it be shown that a port development of the type required was even practical in the area.

In the early 1980s the Danish Hydraulics Institute, at that time recognised as probably the best in the world in their field, were commissioned to undertake both a physical and a mathematical model of the area.

A wide range of possible layouts was tested including that which the then Engineers favoured, and which minimised the reclamation. However this option along with many others was found to have effects on other parts of the harbour which were unacceptable. In fact it was found that to minimise the adverse effects a very restricted range of options was available.

Consents Required

Given the scope of the project, a whole raft of consents was required including coastal permits, land use consents from both District and Regional Councils, discharge permits, and water permits.

The scope of the dredging, the likely reclamation, and the length of wharf structures, all clearly became Restricted Coastal Activities under section 117 of the RMA and therefore subject to consent from the Minister of Conservation.

Consents were therefore required from the Minister of Conservation, the District Council and the Regional Council.

Key Issues

The following were identified as the key issues

- Dredging: approximately 4 to 5 metres in depth of material needed to be removed with a total quantity of approximately 2.4 million cubic metres.
- Disposal of material: while reclamation was required and would provide a location for dredgings, ocean dumping or other shore disposal means were also considered.
- Reclamation: model studies showed a reclamation was necessary to deflect the current and prevent erosion of Marsden Point around the Refining Company jetties.
- Stormwater disposal: large paved areas of storage for logs or other products and therefore large volumes of run-off in wet weather. Discharges into the harbour were recognised as being of concern to many people.
- Noise: the port would need to work 24 hours a day and operational noise particularly at night-time was certain to be an issue.
- Traffic: large numbers of heavy trucks particularly logging trucks in what was basically a quiet area.
- Visual: land on the opposite side of the harbour in particular had become a popular residential area over recent years and there would be concerns about the visual aspects, including possible glare from lighting.
- Dust: air discharges had been an issue for the refining Company.
- Services: sewage discharge to the harbour would obviously not be permitted and alternative disposal had to be found. Other services such as water supply, power and communications would need to be provided.
- Ballast water: discharge of ballast water is suspected as a means of importing foreign organisms.
- Antifouling leachates: TBT's, although banned on pleasure craft in New Zealand for some years, are still used on international shipping and the leaching of active ingredients and their possible effects on shellfish is an issue.
- Economics: in-depth studies were undertaken into cargo flows and the economic impacts of the port, including alternatives of other locations for development or using existing ports.

Each of these issues required study and expert analysis sometimes involving several different areas of expertise.

Over just the last 5 years, 18 technical experts and a number of lawyers have been involved at a cost of \$5.5m. This cost does not include any staff time.

The process

The development to date has already spanned three decades and has involved many experts with many different skills. Very broadly the process can be summarised into the decades as follows.

The Seventies	initial planning land acquisition District Council scheme zoning
The Eighties	detailed modelling both physical and mathematical forestry port study
The Nineties	re-examination of hydrodynamic modelling EIA reports by NPC 1993 review of reports by Parliamentary Commissioner for the Environment 1994 redrafting of EIA reports and formal submission of consent applications Sep 96 additional information request responded to by NPC October 96 planning report by independent panel of experts May 97 hearing Commissioners appointed and hearings held six weeks June and July 97 Commissioners decision December 97 seven appeals lodged March 98 Environment Court hearing March 99 decision of Environment Court approving consents and agreements and recommending RCA approvals May 99 decision of Minister of Conservation approving RCA's Dec 99

DISCUSSION ON THE PROCESS

Planning Documents

The RMA clearly envisages certain activities should be provided for in the CMA.

Export ports are vital to the economy of the country as they serve as the gateway for the nation's exports. In the case of Northland, with over 190,000 hectares of radiata pine forest the lack of a suitable port would devalue those forests dramatically.

From the developers point of view Regional and District plan authors should be leaders in making provision for **appropriate** development rather than taking the 'fortress lock it up' approach.

District Plan

The Whangarei District Plan has for over 30 years made provision for a port at Marsden Point by zoning as Industrial a large area of adjacent land.

Regional Coastal Plan

From a developers point of view this document is disappointing. The plan fails to recognise the importance of some industries that are required to be located in the CMA such as ports or barge terminals.

As an illustration NPC has a lease of 50 hectares of seabed at Marsden Point. This area was, until 1988, vested in the Northland Harbour Board. The leased area is within a larger area of the harbour which was designated for "Harbour Works and Proposed Harbour Works" in 1985.

The adjacent land has been zoned Marsden Point Special Industrial with recognition of its potential port use in the District Scheme for over 30 years. Yet the Proposed Regional Coastal Plan makes no provision for any additional port facilities in that area and the area is zoned Marine 2 (Conservation) Management Area. Obviously this did not assist the case for the port.

There have been many submissions on the plan and it is hoped that most issues will be resolved without recourse to the Environment Court.

Consents Required

In the CMA, the consent process is complicated by overlapping jurisdictions.

For the Marsden Point development, NPC has obtained 24 separate consents, 11 of which are from the Regional Council and 8 are from the District Council with 5 Restricted Coastal Activity decisions issued by the Minister of Conservation.

All necessary consents are now held, but arriving at this list was not an easy exercise. It is essential in this area that there be close liaison between the Councils and the Developer.

Role of Councils

For any developer, the role of the local council is very important and can in fact determine whether an industry will site in one area or another. In the case of the CMA, a developer usually proposes a development in a particular area for specific reasons and he will often not have the ability to move to another region. The Council can therefore either encourage and assist the developer or make his life difficult perhaps to the point where he will give up.

Most developments, as with the port, will require from the Council a range of services which are quite predictable and in areas where development is likely e.g. Marsden Point which has

been appropriately zoned for many years, one would expect the services to be available, or at least to be able to be made available within a reasonable time span.

In the case of the Marsden Point Port development, the Whangarei District Council services are adequate, although the road access from State Highway 1 needs upgrading and the contribution to be paid by NPC was a very difficult issue.

In major developments such as ports, where the consent process can take several years and the development a few years thereafter, it is very helpful if there is continuity of people involved, both from the developer and the Councils. Unfortunately, in the writer's experience in both the major developments he has been involved in over the last ten years, the District Councils have suffered from a very high turnover of staff. This can be very frustrating, as inevitably decisions already reached are revisited, or otherwise not fully understood and not interpreted in the manner expected. Clearly this highlights the need for good documentation of decisions and meetings.

By contrast, both the Regional Councils the author has been involved with have had continuity at least of senior staff which has been very helpful.

Both Regional and District Councils should provide in their various planning documents for appropriate development where that can reasonably be foreseen. Obviously this does not give automatic rights to a developer, but at least it gives notice to the community and developers that there is at least a possibility of applications for development in the designated areas.

Council staff should be prepared at an early stage to discuss the proposal with the developer. If Council is of the view that external assistance is required in assessing a particular development, the relevant experts should be appointed and be available to the developer. The developer should know concerns of Council or its experts as early as possible. Arriving before the hearings committee and finding opposing viewpoints which had been unknown previously, does not reflect credit on the developer or the Council.

Council staff or their appointed experts must give their professional opinion. Sitting on the fence does not help Council or the developer.

Role of DOC

To many people, including probably most developers, DOC has from its establishment, had a role that inevitably brings it into conflict with developers or conservationists. Wearing a developer's hat it is difficult to see how a body established as a 'conservation department' can reasonably then assess the merits of a development and be the consent agency. However for the largest developments in the CMA that in fact is the role of DOC. In any significant coastal development, key elements will inevitably be Restricted Coastal Activities and therefore the decision becomes one for the Minister of Conservation. He or she is of course advised by the Department.

Again, as with councils, it is very important that the views of DOC staff are known to the developer at an early stage and a constructive dialogue should take place. It is very difficult if DOC staff present to a hearing large bodies of evidence and information which was not known to the developer prior to the hearing.

If the information tabled has validity it may have made the developer change his plans or not proceed and therefore not waste large sums of money on preparing evidence etc.

On the other hand, even if the evidence does not have real credibility, it may be very difficult at a hearing for the developer to adequately challenge newly introduced evidence. The result may be that flimsy, but credible sounding evidence, could unduly influence the hearings committee.

Dealing with Affected Parties

Who are the Affected Parties

A project of this magnitude is going to affect a wide range of people. Broadly they can be identified as follows:

- community on both sides of the harbour
- adjoining land owners -- particularly New Zealand Refining Company
- harbour users including commercial shellfish gatherers and fishermen
- port users/customers
- tangata whenua

In addition, many people have an interest in the CMA and harbours and therefore take an active interest in any development in the area.

Consultation

It should be the aim of any developer to meet with potentially affected parties at an early stage in the process. Unfortunately, because views of developments in the CMA are often strongly held, parties tend to take entrenched positions very early. In the case of the Marsden Point Port development, some parties had taken positions ten or 15 years ago.

It is believed that this can be attributed to two factors which are probably common in many similar developments.

(i) legacies from the past

It is probably fair to say that Harbour Boards were something of a law unto themselves, and in a number of past developments the local community were not adequately consulted and were probably somewhat aggrieved. Communities tend to remember such events and although Port Companies are different bodies today, they are probably still viewed by many people in the same light as their predecessors, the Harbour Boards.

(ii) coastal development constraints

In planning a port for particular trades there are a number of factors that one has to deal with and which are not negotiable. The key is the size of vessel that has to be handled which in turn dictates the depth of water required and the manoeuvring area for those

vessels. Extensive modelling is then required to arrive at a layout that ensures there are no significant adverse effects beyond the development area.

In the case of the Marsden Point development a wide range of alternative layouts was studied. It was found the layout could only be varied within a very small range without adverse effects becoming apparent.

This apparently simple situation was not easily understood by some of the community and a failure to meet requests for significant changes to the layout was considered as showing inflexibility and a failure to consult properly.

In fact, there were many changes to the project as a result of input from the community and others. These included a very much upgraded stormwater treatment system, noise control measures, landscaping and visual, access road upgrading, and a raft of other mitigation measures.

Tangata Whenua

Perhaps the biggest challenge facing a developer in the CMA is dealing effectively with tangata whenua.

There are two fundamental initial problems:

- (i) which group or groups hold tangata whenua status for the area and
- (ii) who are the appropriate people within those groups with whom communication should take place.

The local Regional or District Councils should be able to assist with advice in both of these areas, but it is a changing scene and different groups are challenging what has been traditional customary practice in some areas. It is also not unusual in the CMA to find that more than one iwi will need to be involved in detailed consultation.

In the case of the Marsden Point proposal it is clear that iwi consultation again suffered because of the protracted gestation period.

Over the twenty year period, many meetings were held involving a number of different people and parties on both the side of NPC and iwi.

It is now clear, that at times there were very significant misunderstandings in that where NPC believed it had been speaking with people who had authority to speak on behalf of the iwi, that was simply not the situation as perceived by others. There was also both elected members and staff involved from NPC with a lack of continuity.

Local iwi were philosophically opposed to dredging in the harbour entrance area and yet a port could not be developed without dredging. This led to a fundamental difference which could only be resolved if the NPC did not proceed with the port.

NPC were perceived as being inflexible in not modifying the proposal. NPC had the view that they had made very significant modifications including major changes to stormwater treatment, considerable improvements to foreshore access for the community and offers of mitigation in a number of areas.

By today's standards, the consultation process especially in the first 10 to 15 years of the last 20 years was not text book stuff. However the whole process was very much a learning curve as the RMA became law and practices developed.

Inevitably each party blamed the other and it became very difficult to have meaningful dialogue in the crucial period during which the port EIA was actually being prepared and presented.

Management Plans

In order to satisfy Council experts and the Commissioners that a particular end result was achievable, much of the evidence was very detailed.

A standard condition of consent then required that the Consent Holder undertake "....all authorised activities in general accordance with the description and plans submitted and..... in accordance with the approved Construction/Management Plan".

The consent conditions of course also specified performance standards e.g. suspended solids concentration in dredging decant water.

Having shown that particular standards are achievable, and having that standard specified, a developer should expect to be able to have flexibility in how he achieves that result.

In practice it has proved necessary to write Management Plans and if these differ from the proposal submitted with the evidence, explain why. If in the light of experience it is necessary to alter procedures, it is again a requirement to go through the Management Plan change, consult again with the Community Liaison group and seek approval from the appropriate Council.

Management Plans and agreement with groups such as community representatives or Councils should be limited to those areas that affect those groups e.g. timing. Work methods should be described for information purposes only.

After all the RMA is supposed to be effects based legislation.

To minimise the problem, developers must word their applications and their Management Plans as vaguely as possible, clearly allowing that their proposal is only one method of achieving the desired end result.

A cynical developer would suggest that the process is aimed at enhancing and continuing employment opportunities.

The Hearing

The Marsden Point Port proposal was heard by an appointed panel of five Commissioners. The hearing took six weeks, two weeks of which was held on the local Marae.

176 separate submissions were received on the applications and 59 groups elected to give evidence at the hearing. In some cases there were several people presenting evidence on behalf of one submission.

The decision was given on the same Marae five months after conclusion of the hearing.

The hearing was a good example of how such a process should take place, except that the decision took a lot longer than one should expect. However there were reasons for this, involving absence overseas of various key people.

The hearing was held in a very informal atmosphere and submitters were encouraged by the chairman and the panel members to have their say. While this prolonged proceedings, it is doubtful that anyone could have said afterwards that they were denied a fair hearing. At times during the hearings, company representatives probably wondered at the relevance of some evidence. With hindsight, the Chairman's decision to run the hearing as he did was correct and probably reduced the numbers of people who may otherwise have appealed the decision.

Having attended hearings held by Councils and by independent Commissioners the author is firmly of the view that for such a large and complex project as the Marsden Point development a Commissioner panel is very clearly the better option.

For such a panel, it is essential that a wide cross-section of experts be involved and that they have an effective chairman. The Professional advisors and the Coordinator of the experts are also key people. In this regard NPC believe the Marsden Point Commissioners were well served.

The Decision

The decision released some five months after the hearings was a well put together and reasoned set of findings. At the same time it was not voluminous and was easy to read.

Clearly this need not necessarily have been the case and there is a real need for skill and care in this area, to encourage those who have submitted, to feel they have got their message across and minimise the likelihood of appeals.

Inevitably in a decision involving 24 separate consents and a total of 391 conditions, there were some mistakes and some areas where NPC needed to appeal to try and have corrections or modifications made.

Appeals

By the closing time for appeals a total of 10 had been lodged by 7 parties. The following parties appealed:

NPC
 DOC
 Whangarei Heads Citizens Association
 Patuharakeke
 Hori Parata
 One Double Five
 NURM

Discussions commenced immediately between NPC the two Councils and DOC with respect to the NPC and DOC appeals. All matters were cleared prior to a Judicial Conference of the Environment Court on 15th Sep 98, except for the amount of contribution towards the road upgrade.

The Whangarei Heads Citizens Association appeal concerned only the make up and procedures for the proposed Community Liaison group. Several meetings were held and all matters were resolved.

The last four appeals were from iwi groups or the appeals were based on similar very general grounds simply opposing the development.

At a Judicial Conference on 15th Sep 98, one of the parties advised their intention to withdraw their appeal and the other three appellants were required to better define the issues. By 15th September discussions had been held with one of the parties but the other two parties had refused to meet despite real efforts by NPC.

At this stage an independent person was engaged to assist the establishment of dialogue. With hindsight this could have been done earlier.

In November 98 another appellant withdrew.

Agreement was reached with one appellant immediately before the scheduled Environment Court hearing in March 99. No agreement was reached with the other party and the case proceeded to Court. The hearing was frustrating for the Court and NPC as the appellant sought to delay proceedings. The Court dealt with matters efficiently and the hearing concluded after 5 days.

The very broad grounds of appeal required NPC to prepare briefs of evidence on virtually all matters that had been before the Commissioners earlier. Most of these were taken as read by the Court, but NPC faced considerable cost in preparing evidence.

In May 99 the Environment Court dismissed the appeal, granted the various consents and recommended to the Minister approval of the RCA's. The Minister subsequently approved the RCA's.

One appellant lodged an appeal with the High Court but that was subsequently withdrawn.

Unfortunately, because the Environment Court seems to be under resourced, 12 months elapsed from the closing of appeals to the hearing. It was only the Judicial Conference and the impending hearing that encouraged the appellants to take part in serious dialogue.

As a developer this was frustrating and cost real money. It is likely that the true but hidden cost of these delays is far higher than the cost of providing the Environment Court with adequate resources to allow it to shorten the time frame.

Summary

The Marsden Point Port consent process is unlikely to ever be held up as an example of how to go about the obtaining of consents. However that is due to many reasons outlined in this paper and is certainly not a criticism of any of the people involved.

The project was really a classic case of a major consent straddling an era of major change in the whole consent process and a very difficult learning curve for all parties involved.

Obtaining of consents in the CMA is a daunting process under the present legislation not assisted by at this stage the incomplete Regional Coastal Plans that exist in some areas.

There are many lessons to be learnt from the Marsden Point Port process and some of these have been described in this paper.