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**SUBMISSION ON THE RESOURCE MANAGEMENT (SIMPLIFYING AND  
STREAMLINING) AMENDMENT BILL**

To: Clerk of Select Committee  
Local Government and Environment Select Committee  
C/- Committee Secretariat  
Parliament House  
Parliament Buildings  
WELLINGTON

**SUBMISSIONS FOR  
SURFBREAK PROTECTION SOCIETY INCORPORATED**

## **Introduction**

1. This is a submission from **Surfbreak Protection Society Incorporated** (“SPS”) on the Resource Management (Simplifying and Streamlining) Amendment Bill.

SPS is a representative group of surfers and friends dedicated to the conservation of Surfbreaks through the preservation of their natural characteristics, water quality, marine eco-systems and low impact public access for all. .

Surfbreaks are a natural characteristic, and part of the natural character, of the New Zealand coastline/coastal environment, of which there are few when compared to the total length of the New Zealand coastline<sup>1</sup>.

Surfbreaks contribute to amenity values/recreational amenity and natural character of the coastal environment; surfbreaks and surfing enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety.

SPS has concerns and is opposed to aspects of the Resource Management (Simply and Streamlining) Amendment Bill; it also supports some aspects of the Bill.

## **SPS Submissions, Reasons, Decisions Sought**

2. The specific provisions of the Resource Management (Simplifying and Streamlining) Amendment Bill (“the Bill”) that SPS’s submission relates to, the reasons for its submissions, and the decisions sought by SPS, are as follows:

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<sup>1</sup> Scarfe (2008) states that there is only: “one surfing break every 39km to 58km. Many of these surfing breaks are only surfable a few days per month or year when the tide, wind and wave conditions are suitable.”

## **SPS Submissions in Opposition**

### **A. Security of costs – Clause 133 and section 284A of the Act.**

This proposal would, in SPS's submission, be a major barrier to environment and community groups such as SPS and others raising legitimate issues for the benefit of the community and the environment as a whole. SPS submits that this change would empower a Judge to require objectors to provide potentially tens or hundreds of thousands of dollars in a bond before they are allowed to embark on an appeal in the Environment Court; once again this will severely curtail public participation. SPS further submits that this provision ignores the fact that there is already the ability for the Court to dismiss "frivolous and vexatious" objections (s. 279(4) of the Act). Amendment clause 133 which repeals section 284A of the Act is opposed by SPS and SPS seeks that it be deleted.

### **B. The removal of the decision role of the Minister of Conservation in restricted coastal activities – Clause 20.**

The Minister of Conservation acts on behalf of the Crown as the "owner" in the coastal marine area. Currently the Minister is the final decision-maker for large projects or complex applications that are restricted coastal activities. Removal of this power will also prejudice any future iwi or hapu rights to protect the seabed and foreshore in coastal areas. SPS submits that the Bill removes this power and passes it to the regional council. This issues is close to SPS's heart; the coast of New Zealand is owned by all New Zealanders and it is therefore paramount, in SPS's submission, that the final decision making powers in this context continue to reside with the Crown (through the Minister of Conservation) which represents all New Zealander's, and must act in the best interests of the community as a whole (which it is submitted regional council's would not necessarily do). To improve the current process SPS submits that applicants could be asked to seek consent from the Minister of Conservation prior to having that matter resolved through the Act's processes.

SPS seeks that Clause 20 be deleted.

**C. Limitation of appeals on policy statements and plans and the removal of cross-submissions – Clauses 132 and 136.**

SPS submits that this severely undermines public participation and the development of robust policies and plans. This is an important avenue for people to work through policy statements and plans; and SPS submits that there must be a vehicle under which the community can discuss/submit on aspects of council's policy statements and plans to seek better outcomes for the benefit of the community, the environment and the country as a whole. Even councils are known to appeal their own decisions or support other appeals as a means of fixing mistakes in their decisions and or achieving consistency in approaches (which results in certainty). SPS submits that the proposed amendments are short-sighted as most plan and policy appeals are resolved through mediation without going to a full hearing – this is a cost effective outcome resulting in an outcome that the community is happy with. Full appeals have assisted resolving controversial issues, e.g. minimum river flows or critical subdivision controls in the coastal environment (in order to preserve and protect the natural character of the coastal environment and avoid inappropriate subdivision etc) in, for example, the Whangarei and Far North districts. SPS seeks that those amendment clauses 132 and 136 be deleted.

**D. Elimination of Council duties to summarise and respond to submissions and to call for further submissions on resource plans and policies – clause 148.**

The publicly stated rationale for this is to save time and to have Plans and Policies be finalised quickly, but the further or “cross-submission” process, in SPS's submission, allows the community, individuals, businesses and others to indicate to the Council whether they support or oppose a proposal and points made in submission by others. This also enables councils to identify parties with which these issues should be further discussed. SPS submits that this process and the summarising of submissions is an essential process for good plan and policy development.

SPS seeks that amendment clause 148 be deleted.

**E. The removal of the right of all interest groups and other parties to join appeals where they were not submitters in the first instance – clause 131.**

The current provisions of the Act (s 274(1) and (2)) allow groups or businesses “representing a relevant aspect of the public interest”, such as SPS, to join a case despite not being original submitters. This change will likely to mean those with a financial interest can join but environmental and community groups, such as SPS, cannot; this will ultimately, it is submitted, reduce public participation and lead to community groups, such as SPS, having to submit on more notified matters, and being excluded from proceedings if they don't. This provision has previously been used to allow community groups, such as SPS, and business associations to join cases to add the robustness of the process, and that should not be changed. Once again, the proposals, in SPS's submission, are deliberately aimed at reducing public participation and purposely trying to keep groups such as SPS from becoming involved for the good of the community and the environment as a whole; the converse is that development is made easier at the expense of the community and environment as a whole – this is 2009 not 1950!?

SPS seeks that amendment clause 131 be deleted.

**F. Removing the non-complying category of resource consents - clauses 147 and 152 and the first schedule of the Bill.**

SPS submits “non-complying” is a category which is easy to understand and is an important measure of the degree of an activity; it is also well understood having now been in place for 18 years. SPS submits that removing the “non-complying” category will lead to greater uncertainty for the environment as more activities get put in the lower “default” discretionary category. The non-complying category of resource consent fits between discretionary and prohibited in a hierarchy from permitted to prohibited. The purpose of the sequence of types was designed to provide potential applicants for consents with a set of signals that would indicate the likely acceptability of their proposals, and so save investment in projects that would be unlikely to get approval. SPS submits that the proposed removal of the non-complying category will reduce this

signalling and will likely lead to less ability for councils to reject proposals and reduce the environmental constraints on an activity as councils rarely put activities in the prohibited category. It will also just add to the workload of council and the community with lots of cost and doubtful benefits of sorting out this change and amending plans.

SPS seeks that amendment clauses 147 and 152 and the first schedule of the Bill be deleted.

**G. Delaying the legal effect of proposed plan changes until a final decision is made thus placing the environment at risk - clause 59.**

SPS submits that this change could make changes to vegetation control or coastal control rules in plans irrelevant as developers move quickly to get consents under the old rules and thus defeat the purpose of the change. In SPS's submission, it will effectively induce other such pre-emptive behaviour at the expense of the environment.

SPS seeks that amendment clause 59 be deleted.

**H. Removal of the presumption the resource consents must be notified will mean even fewer consents are notified - clause 68.**

The Bill proposes to remove the presumption in favour of notification (section 93), this is of significant concern to SPS. Already less than 5 percent of consents are notified. The Courts have used the presumption in favour of notifying to support notification of consents when councils have not notified significant decisions. The proposed changes in clause 68 gives local authorities' powers to write non-notification into Plans, and that in the case of proposed section 94AAC actually prohibit notification when effects are considered to be minor. This means the community, and groups such as SPS, will have no chance to participate in assessments of whether effects are minor or not, and councils can be prosecuted for notifying consents if it is found that the effects are in fact minor when a council judged them otherwise. SPS submits that public participation goes to the heart of democracy; the proposed amendments will, once again, ultimately strip away layers of democracy for New Zealanders.

SPS seeks that amendment clause 68 be deleted.

**I. The requirement that only effects beyond the immediate environment have to be considered when councils decide whether to notify resource consent applications - Clause 68 and proposed section 94AA(a).**

The test is for the notification requirements in proposed section 94AA (Clause 68 of the Bill) to not consider effects within the “immediate environment” of the activity. In sub-paragraph (a) notification is only compulsory if there are effects “beyond the immediate environment” of the activity. SPS submits that not only is this vague, and will lead to uncertainty, it also puts at risk any biodiversity or historic values, for example, on the site itself. Thus if a subdivision or mine, say, were only to destroy rare species in the immediate environment of the subdivision or mine, the council, by this test, would not be required to publicly notify the resource consent. Similarly, loud noise in the “immediate environment” would not be a basis for notification.

SPS seeks that Clause 68 be amended so that in proposed section 94AA (a) the words “*beyond the immediate environment*” are deleted.

**J. Removal of any generic urban tree protection rules - clauses 52 and 151.**

SPS submits that this provision does not just affect single urban trees on private or public land but also rules to protect trees on private land in gullies, riparian areas, and coastal areas in the urban environment. The urban environment is not defined and could be widely interpreted. If this clause was retained, SPS submits that councils could be buried in individual applications to protect each tree.

SPS seeks that amendment clauses 52 and 151 should be deleted.

**K. Removing the requirement to review district plans every 10 years - clauses 54.**

The argument put forward for this is that developing plans has taken a long time. In SPS’s submission this is true but a spurious argument, since future plan reviews have existing plans to build on and will not be nearly as laborious as developing the first rounds. SBS further submits that with changing conditions and pressures, and the increasing numbers of private plan change

applications, plans need regular reviews and it is important for Councils to review their plan every 10 years especially as second or third generation plans are developed.

SPS seeks that amendment clauses 54 be deleted.

**L. Allowing the applicant to veto Councils seeking further information - clause 66.**

SPS submits that an essential part of the Act's resource consent process is obtaining sufficient information to make good decisions, rather than making a fast decision which is a bad decision. While there is a requirement for an environmental assessment to be prepared, there is now to be no audit of that report which was previously required. The current provisions in the Act (section 92A(3)) allows councils to reject a proposal if "*it has insufficient information to enable it to determine an application*". This provision is proposed to be deleted. SPS submits that this is another example of tilting decision making in favour of applicants and of increasing risk to the environment and community.

SPS seeks that amendment clause 66 be deleted.

**M. Applicant is the "process maker" - clause 93.**

If there is a project which an applicant considers is a proposal of national significance (SPS notes echoes of the repugnant National Development Act here) and want a fast process and can pay, then an applicant can ask the Environmental Protection Agency to recommend to the Minister to take the project direct to a Board of Inquiry. SPS submits that this skips the council process and the Environment Court and again undermines public participation in important environmental decision making. For a smaller project an applicant can ask the Council to agree to go direct to the Environment Court (new sections 87C and 87D) or can get the Environment Court to overrule the Council's opposition (new section 87E). SPS submits that the Bill encourages cheque book planning. SPS further submits that this is, once again, not in the interests of the community or the environment.

SPS seeks that amendment clause 93 be deleted.

**N. Making National Environmental Standards (NES) the maximum standard rather than a national minimum - clauses 39 and 40 (new section 44A).**

There are a range of changes in the Bill which position the NES's as maximum standards rather than minimum standard that allow councils to set more stringent standards based on their individual circumstances. SPS submits that the Bill will make no improvement to the process by which these standards are made. This is weak compared to the development of National Policy Statements or rules under a plan in the First Schedule in SPS's submission.

SPS seeks that the amendment clauses 39 and 40 (new section 44A) be amended so that NESs are minimum standards.

**O. Environmental Protection Agency – clause 35 and associated provisions.**

The Bill includes reference to the Environmental Protection Agency (EPA) but it is really, in SPS's submission, only a name and in the first instance will be the head of the Ministry for the Environment, a position subject to direction of the Minister. SPS submits that the EPA should have no political direction in making decisions on whether a project is of national significance and in then establishing a Board of Inquiry to hear the application. SPS submits that these provisions should have been left to the phase two process to allow wider considerations of the role of the EPA.

SPS seeks that clause 35 and associated provisions be tabled by the Committee for further consideration and not for passage in this Bill.

**P. Environments Court's Role – various provisions; the direct referral of matters to the Environment Court - clause 59 - new sections 87C to 87E - or to a Board of Inquiry - clauses 91 and 93 new sections 140 to 150AA.**

There are a number of changes in the Bill which SPS submits down-weigh the role of the Environment Court as a specialist body. Instead of a standing Court, hearing and assessing environmental issues from scratch, heard by a Judge and two expert commissioners, it will often

be replaced by an ad hoc Board of Inquiry. This will generate confusing two-track jurisprudence – one in the Environment Court and one in the Board of Inquiry process. It is unclear to SPS how conflicts will be resolved. This will leave a more tangled legal process and unclear precedence for the future, leading to uncertainty.

SPS seeks that the various clauses and associated provisions dealing with these issues be tabled by the Committee for further consideration and not for passage in this Bill.

While these amendments (i.e. the direct referral of matters to the Environment Court - clause 59 - new sections 87C to 87E - or to a Board of Inquiry - clauses 91 and 93 new sections 140 to 150AA) are apparently designed to save time, SPS submits that they will actually create clogging in the Environment Court as the problem solving and resolving role of Council hearings will be lost.

The bulk of “appeals” to the Environment Court at present are really only designed, in SPS’s submission, as credible threats as a precondition to successful court-ordered mediation. Most such appeals never in fact reach the Environment Court at all. The mediation process is only available via the appeals process and it is in mediation that most appeals are successfully resolved (over approximately 95% or more in recent years). The direct referral of cases to the Environment Court or Board of Inquiry will not only clog those bodies and “burn off” community participation, they will also deprive the parties of mediated outcomes which often deliver much lower cost and better crafted outcomes than court hearings in any event. SPS submits that the role of the Environment Court as a successful mediator will be blocked by direct referral and also by limitations on appeals on plans and policies.

SPS seeks that clause 59 - new sections 87C to 87E – and clauses 91 and 93 - new sections 140 to 150AA - be deleted.

## **SPS Submissions in Support**

### **AA. Increase in the penalties to \$300,000 for individuals and \$600,000 for corporate bodies – clause 141.**

SPS supports the increases but submits that the increases still leave fines at low levels when compared to the maximum penalties under, for example, the Commerce Act; those being \$5 million for bodies corporate and \$500,000 for natural persons.

SPS supports clause 141 and seeks its approval, but also calls for stronger penalties and consistency with legislation such as the Commerce Act noted above.

### **BB. Providing power of the Environment Court to require a review of an offender's resource consent by a council – clause 141.**

SPS submits that this is a common sense approach which should be endorsed so that offender's are/can be held more accountable for their actions which can and do impact on people and communities and the environment.

SPS supports clause 141 and seeks its approval.

### **CC. Allowing enforcement action to be taken against the Crown – clause 5.**

Presently under the Act this action is limited to only local councils and cannot be taken by other parties. SPS submits that that limitation should be removed to promote Crown accountability – the Crown should not be above the law.

SPS supports clause 5 and seeks its approval.

### **DD. Removing a Requiring Authority that is an applicant from the role of the final decision-maker - clauses 110-112.**

SPS submits that this is a major step forward and will stop, for example, roading, transmission and other companies from being both the applicant and the decision-maker which SPS submits brings into question impartiality of decisions and conflict of interest issues.

SPS supports clauses 110-112 and seeks that they be approved.

### **Summary**

3. SPS seeks the decisions set out above, and such other changes as are necessary and consequent on the decisions being granted, for the reasons SPS has provided (and further provides below).

Further, SPS submits that the decisions sought in its submission are consistent with both the broad purpose and principles of the Resource Management Act 1991("the Act") in Part 2 of the Act, the principles of public participation in a democratic society and the principles of natural justice, such as consultation, embodied in well established Administrative Law principles.

The Act is the pivotal legislation that controls activities and developments that impact on the use of natural and physical resources and the environment as a whole. Central to the Act's purpose is how those natural and physical resources are developed, protected and sustainably managed for the foreseeable needs of future generations to provide for their social, economic, and cultural wellbeing.

Public participation is fundamental to achieving the purpose of the Act; in SPS's submission many of the changes suggested to be made by the Bill are in reality aimed at curtailing public participation in order to promote development at the expense of the community and the environment as a whole.

4. SPS wishes to appear before the Committee to be heard in support of its submission and may wish to call witnesses to appear in support of its submission.

5. If others make a similar submission, SPS will consider presenting a joint case with them at a hearing/appearance before the Committee (if appropriate).

Dated 3 April 2009

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**SIGNED** on behalf of

**Surfbreak Protection Society Inc.**

By Monique Davis

Secretary

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