

**BEFORE THE ENVIRONMENTAL PROTECTION AUTHORITY
AT WELLINGTON**

IN THE MATTER of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (**EEZ Act**)

AND

IN THE MATTER of an application for a further extension of time for public submissions on the applications by Trans-Tasman Resources Limited for marine and discharge consents to recover iron sand under sections 20 and 87B of the EEZ Act

BETWEEN **Trans-Tasman Resources Limited**
Applicant

AND **Environmental Protection Authority**
EPA

AND **Fisheries Inshore New Zealand Limited, New Zealand Federation of Commercial Fishermen Inc, Talley's Group Limited, Southern Inshore Fisheries Management Company Limited and Cloudy Bay Clams Limited**
Fisheries Submitters

AND **Te Runanga o Ngati Ruanui Trust**
Ngati Ruanui

**MEMORANDUM OF COUNSEL FOR
FISHERIES SUBMITTERS AND NGATI RUANUI**

Dated: 16th March 2017

Regarding Minute 35 and further proposed changes to the hearing schedule

Counsel Acting

ROBERT MAKGILL
BARRISTER

Instructing Solicitor

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MAY IT PLEASE THE DECISION-MAKING COMMITTEE:

INTRODUCTION

1. This memorandum is filed on behalf of the Fisheries Submitters and Ngati Ruanui (**Submitters**).
2. The Decision-Making Committee's (**DMC**) minute dated 15 December 2016 (**Minute 11**) directed that the hearing of Trans-Tasman Resources Limited's (**TTR**) application would commence on 16 February and close on 12 April 2017. The TTR hearing schedule, Version Date: 8 February 2017, subsequently set the hearing down for 15 working days with closing submissions on 17 and 20 March 2017.
3. The DMC's minute dated 15 March 2017 (**Minute 35**) proposes to extend the hearing schedule and close the hearing on 8 May 2017. Minute 35 states that this additional time is required to address evidential matters and the development of proposed conditions (see paragraphs [1] and [4]).
4. The Submitters are unclear as to how many additional hearing days are anticipated under Minute 35 (e.g. whether it is only the days expressly provided for under Appendix 1 – Proposed Timetable, or whether these are proposed milestone dates). Whatever the case, it is clear the proposed timetable would involve further significant work for the Submitters to meaningfully participate in the hearing.
5. The Submitters respectfully advise that they oppose the proposed hearing schedule under Minute 35 because they do not consider they should be required to undertake further significant work for the following reasons:
 - (a) The DMC has acknowledged that TTR's consultation has not been what it should have been;
 - (b) TTR has made ongoing attempts during the hearing to address information gaps in its application as notified. The Submitters' experts consider, despite the further information supplied by TTR, there is inadequate information to support further expert conferencing or commentary on newly proposed conditions;

- (c) The “*best available information*” at this point in time concerning the TTR’s application is that TTR’s impact assessment is “*uncertain*” and “*inadequate*”;
 - (d) Directions seeking the Submitters’ participate in further expert conferencing and evidence production (resulting from TTR’s additional plume modelling) will cause the Submitters “*unreasonable cost, effort [and] time*”, and
 - (e) The Submitters, after much consideration, have decided they are unable to meet the additional cost, effort and time required to address information gaps in TTR’s application during this hearing, which, in any event, should have been addressed at TTR’s own expense prior to notification.
6. The matters set out under paragraph [5] are addressed in more detail as follows.

INADEQUATE CONSULTATION

7. The “*Excerpt from Transcript of Proceedings, Day 13, 9 March 2017*” records the DMC Chair as stating:

.... it’s clear that for whatever the reasons – and truthfully, I don’t know that those of us who observe from the outside in whatever role; for whatever reasons – there has not been the engagement that should accompany an application of this sort. And I think that would be acknowledged by everybody. Everybody said they would prefer to have seen greater engagement.

And I would simply say to the parties that you owe it to yourselves to make sure that you don’t say, “It’s too late”. Because too late will come. Too late in the process will come because we will get to the point where a decision is made, conditions are formulated and talking will be on an entirely different basis after that.

8. The Submitters respectfully point out that the purpose of consultation, from an applicant's perspective, is to satisfy its obligation to assess the impacts of its application under s 38 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (**EEZ Act**).
9. Consultation is the best starting point for an applicant to determine the potential impacts of its proposal on the environment and other interests. TTR's continued lack of information on the impacts of its proposal on the environment and various existing interests (notwithstanding the Submitters' legal submissions, evidence and expert caucusing) is a strong signal that the information supporting TTR's application remains inadequate and uncertain.

TTR'S ONGOING ATTEMPTS TO ADDRESS INFORMATION GAPS

10. Jacobs advised the Fisheries Submitters in a memo dated 16 March 2017 (*inter alia*) that:
 - (a) There is insufficient time provided in the proposed timetable to allow review of TTR's additional information by the submitters' technical experts.
 - (b) The second JWS on Sediment Plume Modelling makes it clear that values presented in the JWS have not been independently validated and source data has not been provided to the independent experts. It is also considered that the values proposed are an "*average worst case*" and not "*true worst case*".
 - (c) The outputs from the re-run model should be presented in a report. The outputs from re-run modelling need to then be considered by TTR's impact assessment technical specialists to consider whether the level of impact has changed based on the revised modelling, with updated reports provided to the Submitters experts. The Submitters experts then need time to consider TTR's expert findings and respond.

- (d) Even if expert plume conferencing is reconvened, given the values used in the model have not been independently validated, the same concerns remain in terms of independent validation as expressed in the second JWS on Sediment Plume Modelling.
 - (e) It is not appropriate to discuss conditions at this time because a review of the re-run modelling outputs and subsequent review and update of the Impact Assessment has not been completed.
 - (f) The proposed timetable requires significant extra work for the Fisheries Submitters' technical experts including (*inter alia*) time required for independent expert review and comment, attendance at additional/reconvened expert conferencing sessions, and additional hearing attendance. The Fisheries Submitters' experts estimate, in addition to the 600 hours of expert time expended to date, a further 250 hours of expert time would need to be spent in order to satisfy the proposed timetable under Minute 35.
 - (g) It appears independent experts are being asked through the revised hearing schedule to provide advice and commentary in a very short timeframe. This could result in significant errors in judgement and decision-making.
 - (h) Sufficient information should have been provided in the application as notified. The level of uncertainty and inadequacy of information has lead Jacobs to conclude the current application should either be withdrawn by the Applicant or refused by the DMC.
11. A copy of Jacobs' expert advice is attached to this memorandum as **annexure "A"**.

THE BEST AVAILABLE INFORMATION IS THAT THE IMPACT ASSESSMENT IS UNCERTAIN AND INADEQUATE

12. Joint Witness Statements (**JWS**) have been prepared following expert conferencing on a range of issues. A number of JWS identify matters of uncertainty with the information provided, or disagreement with the interpretation of that information.
13. The first JWS for Sediment Plume Modelling indicates that:
 - (a) The experts disagree, at paragraph [30], on how the differences between the NIWA and HR Wallingford interpretation of the laboratory results for the settling velocity tests should be incorporated in the sediment plume modelling;
 - (b) All experts agree, at paragraph [31], that an increase in the source terms would have a proportional effect on the plume. Some experts considered that this might be significant; and
 - (c) Other experts considered, at paragraph [33], that the modelling should be repeated using the NIWA interpretation.
14. This lead to the DMC to direct that a second expert sediment plume conferencing session should take place to establish appropriate worst case scenario parameters.
15. The second JWS on sediment plume modelling states at paragraphs [8], [12], and [16] that the independent experts have not been provided with complete reports or source data, and therefore cannot confirm the values provided by TTR.
16. TTR have now provided worst case modelling from HR Wallingford (on 16 March 2017). This has not been reviewed by independent experts. Furthermore, any change in distribution or sediment rate reaching other areas will need to be reassessed by the technical experts.

17. The sediment plume modelling is fundamental to understanding the spatial scale of potential impacts of the sediment plume, and hence potential effects on the receiving environment - including effects on fisheries and tangata whenua (existing interests).
18. TTR's impact assessment is currently based on a sediment plume model that contains too many assumptions as to modelling parameters to adequately predict the potential effects of the plume on the environment and existing interest. The Submitters note that this is the very information that TTR sought to have redacted from the application, and which they took to the Environment Court to have disclosed as a matter of public interest.¹
19. In the benthic ecology JWS (refer JWS Benthic Ecology, page 8 Basis of updated impact predictions table, Agreed Facts bullet point 3) the experts agree that the benthic surveys were not temporally optimal and were not intended or designed to document seasonal variability of communities.
20. If the understanding of the receiving environment is uncertain or inadequate, the ability to establish performance standards for monitoring and compliance purposes is extremely difficult, if not impossible.

UNREASONABLE COST, EFFORT AND TIME

21. In considering the application, the DMC is enjoined by s 61 of the EEZ Act to have regard to the "*best available information*" meaning "*information available without unreasonable cost, effort, or time*".
22. The principles developed by the High Court in *New Zealand Federation of Commercial Fishermen Inc v Minister of Fisheries*,² and other decisions concerning s 10 of the Fisheries Act 1996, are explicitly enshrined in s 61(5) of the EEZ Act.³

¹ *Kiwis Against Seabed Mining Incorporated v Environmental Protection Authority*, [2016] NZEnvC 217.

² Wellington CIV-2008-485-2016 (HC).

³ Section 2 of the Fisheries Act 1996 defines "*best available information*" as "*the best information that, in the particular circumstances, is available without unreasonable cost, effort, or time*".

23. As Mallon J held in the *NZ Fed of Commercial Fishermen* decision (at paragraph [40]), this does not require that decisions must be based on the “*best possible information*”; by definition, there will be information that is available, but which it would not be reasonable to obtain, due to the cost, effort or time involved.
24. The Fisheries Submitters have provided at significant cost, effort and time (hundreds of thousands of dollars and hundreds of hours) extensive technical evidence on the effects of the proposed mining activity on their existing interests. This evidence has taken the form of expert and non-expert evidence from a range of witnesses, including fishermen with actual experience in the South Taranaki Bight.
25. Similarly, Ngati Ruanui has devoted some hundreds of hours of staff time, as well as the time of iwi members, and has incurred considerable cost in this process to date to protect their rights. This has diverted scarce tribal resources away from other priorities.
26. Notwithstanding the array of evidence before the DMC provided by the Applicant and submitters alike, the DMC has outlined a further programme of evidence gathering, which entails significant further cost, time and effort to the Submitters. It is respectfully submitted this is unreasonable, as the Submitters do not have unlimited resources and time at their disposal.
27. The Fisheries Submitters’ experts have indicated that the third proposed expert sediment plume conference, together with the additional evidential processes identified in Minute 35, will address information that should have been provided by TTR prior to notification of its application. It is respectfully submitted that to impose further burden on the Submitters to address ongoing information gaps in TTR’s application is unreasonable.
28. It is submitted that a process that imposes unreasonable time and cost burdens on those who are driven to participate, in order to protect their existing interests, can be as much of a breach of those parties’ rights to natural justice as a process which deprives them of a right to be heard at all.

SUBMITTERS ARE UNABLE TO EXPEND FURTHER COST, EFFORT AND TIME

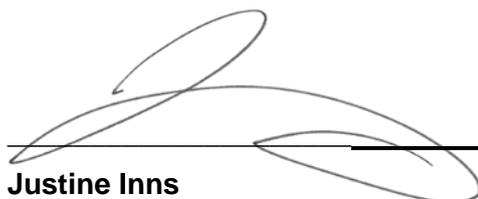
29. The Submitters are of the view that the proposed hearing timetable extension under Minute 35 will impose an unreasonable burden on them. They respectfully advise, after much consideration, that they are unable to meet any additional cost, effort or time in these proceedings over and above those they have already committed to meeting.
30. Counsel for the Submitters have been instructed to present the evidence and submissions they would otherwise have provided under the original timetable, subject to any changes in the DMC's timetable directions. That means the Submitters intend to:
 - (a) Present any remaining evidence to the DMC that has yet to be heard;
 - (b) Comment on a final set of proposed conditions that have been independently reviewed by the Environmental Protection Authority; and
 - (c) Present closing submissions once they and their experts have provided comment on a final set of proposed conditions.
31. The Fisheries Submitters acknowledge, in respect of paragraph [30(a)], that they have agreed to participate in a further expert conferencing session on fisheries. They question, however, whether this conferencing session is a good use of anyone's resources given the fundamental problems that still exist in respect of TTR's plume information.
32. The Submitters respectfully submit, in respect of paragraph [28(c)], that it would be contrary to natural justice to seek further comment on any proposed conditions once counsel for the various submitters have presented their closing legal submissions.

33. Counsel are instructed that the Submitters will make best endeavours, subject to the resource limitations addressed in this memorandum, to comply with a revised hearing schedule.

Dated this 16th day of March 2017



**Robert Makgill / Peter Dawson
Fisheries Inshore New Zealand
Limited, New Zealand Federation of
Commercial Fishermen Inc, Talley's
Group Limited, Southern Inshore
Fisheries Management Company
Limited and Cloudy Bay Clams
Limited**



**Justine Inns
Counsel for Te Runanga o Ngati
Ruanui Trust**

ANNEXURE "A"

JACOBS' RESPONSE TO DMC MINUTE 35

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Subject	Response to DMC Minute 35	Project Name	Fisheries Inshore New Zealand
Attention	Robert Makgill, Peter Dawson	Project No.	IZ074800
From	Helen Anderson - Principal Planner Bruce Clarke- Principal Environmental Consultant		
Date	16 March 2017		
Copies to			

Dear Robert and Peter,

Having reviewed the proposed timetabling as set out in Appendix 1 of DMC Minute 35, we make the following comments:

1. A range of other evidential matters still need to be addressed as listed at Point 2.

We consider that there is insufficient time provided in the proposed timetable to allow review of the additional information by submitter technical experts.
2. 'Worst case modelling' is to be provided by TTR on the 16th March. However as noted in the second JWS on Sediment Plume Modelling (at paragraphs 8, 12, 16 and 29), the values presented in the JWS have not been independently validated and source data has not been provided to the independent experts. It is also considered that the values proposed in the second JWS are an '*average worst case*' and NOT true '*worst case*'.
3. The outputs from the re-run model should be presented in a report. The outputs from the re-run modelling need to then be considered by TTR's Impact Assessment technical specialists in regards to their respective areas to consider whether the level of impact has changed based on the revised modelling, with updated reports provided to independent experts. Submitters' independent experts then need time to consider TTR expert findings and respond.
4. If sediment plume modelling expert conferencing is reconvened, and given the values used in the model have not been independently validated, the same concerns remain in terms of independent validation, as expressed in the second JWS on Sediment Plume Modelling.
5. Should other expert conferencing sessions be reconvened, all experts involved at previous sessions should be involved.
6. With regard to the provision of updated proposed conditions, we consider that this should only occur once experts have confirmed the triggers and impacts. It is not appropriate to discuss conditions at this time because a review of the re-run modelling outputs and subsequent review and update of the Impact Assessment has not been completed.
7. We agree that evidence on conditions should be postponed until after further consideration by other experts of further modelling information.

8. Closing submissions should occur after the 2nd EPA conditions report is provided and after parties have had a chance to comment on updated conditions and the 2nd conditions report.

9. Please note that both Bruce Clarke and Helen Anderson are away overseas in April. Helen Anderson is away from 6th April until 1 May, and Bruce Clarke is away from 14 April to 26 April.

Both Bruce and Helen will be away over the period proposed by the EPA in which parties comment on updated conditions, the 2nd EPA Conditions Report and possible expert conferencing regarding conditions.

10. The proposed timetable requires significant extra work for Fisheries Submitters' technical experts, for example, additional time required for independent expert review of further information/reports and comment, attendance at additional/reconvened expert conferencing sessions, additional hearing attendance. This time will be at a significant additional cost to FINZ. To date Jacobs staff have undertaken approximately 600 hours of work for FINZ on this project. We envisage that the proposed timetable may require an additional 200 to 250 hours of work.

11. It also appears independent experts are being asked through this revised process to provide advice and commentary in a very short timeframe and as such we are concerned that significant errors in judgement and decision making could be made. New information is now being introduced in to the hearing. In our opinion sufficient information should have been provided in the application in the first instance. The level of uncertainty and information gaps and insufficient information with the current application lead to a conclusion that the application should either be withdrawn or declined by the DMC.