

**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 marine consent under section 38 of the EEZ Act by Trans-Tasman Resources Limited to undertake iron ore and processing operations offshore in the South Taranaki Bight

**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

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**MEMORANDUM ON BEHALF OF FISHERIES SUBMITTERS**

**Dated: 8<sup>th</sup> February 2017**

In response to DMC Minute 20 on expert conferencing

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Counsel Acting  
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**MAY IT PLEASE THE DECISION-MAKING COMMITTEE:**

1. Counsel acts for Fisheries Inshore New Zealand Limited (**FINZ**), The New Zealand Federation of Commercial Fishermen Inc, Talley's Group Limited, Southern Inshore Fisheries Management Company Limited and Cloudy Bay Clams Limited (**Fisheries Submitters**).
2. This memorandum:
  - (a) Refers to Minute 20 of the Decision-Making Committee (**DMC**), dated 3 February 2017;
  - (b) Requests that Dr Hume and Mr Todd undertake expert conferencing on coastal stability/processes.
  - (c) Invites the DMC to reconsider the exclusion of:
    - i. Dr Gregory Barbara from expert conferencing on "*effects on fishing*", given he is an independent expert who addresses effects on fishing at paragraphs [66] to [85] of his primary statement of expert evidence dated 23 January 2016;
    - ii. Dr Barbara from expert conferencing on "*effects on benthic ecology*", given he is an independent expert who addresses benthic fauna and ecology at paragraphs [8], [9]; [12(d)], [15(c), (d) and (i)], [40], [48], [50] and [51], [56], [67] to [71], [73], [75] and [76], [81], [85] and [86(d)] of his primary statement of expert evidence dated 23 January 2016; and
    - iii. Dr Jeremy Helson and Mr Andrew Smith from expert conferencing on "*effects on fishing*", pursuant to paragraph [4] of Minute 20, for the reasons set out under paragraphs [4] to [26] of this memorandum.

### **COASTAL STABILITY/PROCESSES CONFERENCING**

3. Appendix 2 of Minute 20 lists expert witnesses with no topic or peer including Dr Terry Hume and Mr Derek Todd. Dr Hume is nominated by the Applicant to give evidence on coastal stability, and Mr Todd by the Fisheries Submitters to give evidence on coastal processes. Although different terms are used to describe their evidence, these experts discuss the same issues in their evidence. It is respectfully submitted that expert conferencing between Dr Hume and Mr Todd should take place under the topic of coastal stability/processes.

### **THE ROLE OF AN EXPERT WITNESS**

4. An expert witness has an overriding duty to assist the court impartially on relevant matters within their area of expertise.
5. Dr Helson and Mr Smith understand that their duty in these proceedings is to provide the DMC with impartial evidence. They recognise that they are bound by the Code of Conduct for Expert Witnesses in the Environment Court Practice Note 2014 (**Code of Conduct**), even in circumstances that might be considered prejudicial to the Fisheries Submitters' interests.
6. Dr Helson and Mr Smith's respective decisions to affirm the Code of Conduct were not made lightly as a Fisheries Submitters' employee and contractor. Both read the Code of Conduct and discussed its requirements with counsel prior to affirmation. In these discussions Dr Helson and Mr Smith made it clear that they would seek to prepare their evidence objectively in any event, given the importance of having working expertise on fisheries management and fishing operations within the South Taranaki Bight (**STB**) placed before independent consultant experts unfamiliar with their particular fisheries expertise.
7. It is respectfully submitted that to exclude the participation Dr Helson and Mr Smith from expert conferencing on "*effects on fishing*" would mean that:
  - (a) Expert conferencing on "*effects on fisheries*" excludes important expertise on fishing, fisheries operations and fisheries management, which is unlikely to be otherwise be offered by the Ministry of Primary

Industries (**MPI**) or other available experts; and

- (b) The resulting joint witness statement on “*effects on fisheries*” would not be based on the best available information.
8. The Fisheries Submitters acknowledge that the views of expert employees (and possibly contractors) have the potential to be coloured by the views of their employers. However, the same can easily be said of independent experts whose paymasters are developers or submitters on any particular proposal. The objectivity of independent experts can be influenced by the expectation of a certain result or the promise of future work pending the outcome of such a result.
  9. These issues are invariably addressed through questioning by another party or the relevant judicial body where such concerns exist. If an expert witness is hostile, or unwilling to give ground where ground should be given, this is often a sign that they have lost the ability to exercise objectivity and that less weight should be placed on their evidence than that of other expert witnesses.
  10. As expert conferencing occurs before a hearing takes place and witnesses are questioned, it is often not possible to form such a view until the hearing has commenced. That is why the Environment Court does not in practice exclude expert witnesses from conferencing prior to a hearing, unless it is demonstrable from their written evidence that clear bias exists. In any event, witnesses that cannot reach agreement with other experts do not prevent those other experts from reaching agreement. Furthermore, their inability to reach agreement, where others are able, can be a signal that they lack objectivity.
  11. It is suggested that in the present circumstances a reasonable approach would be to recognise Dr Helson and Mr Smith’s respective undertakings under the Code of Conduct, but to determine the appropriate weight to be given to their evidence following conferencing, oral evidence and their answers to any questions that have been put to them.

12. Counsel notes that the Applicant's questions (approved by the DMC) to Dr Helson and Mr Smith specifically address the issue of apparent bias arising from their employment by fisheries industry stakeholders. The DMC has excluded them from caucusing (subject to this request for reconsideration) without having the benefit of their responses to those questions.

### **REQUEST FOR RECONSIDERATION**

13. At paragraph [4] of Minute 20, the DMC has invited a party, who considers that a witness can and has clearly demonstrated their independence, to request a reconsideration of the exclusion of that witness from conferencing.
14. The Fisheries Submitters seek reconsideration of the exclusion of Dr Helson and Mr Smith.

#### **Dr Helson**

15. Dr Helson is employed as CEO of FINZ. FINZ is a commercial fisheries stakeholder organisation that represents multiple interests in the fishing industry including quota holders and commercial fishers. In this role, he is required to balance competing interests and provide objective input to its members, MPI and other forums. As such, he is highly experienced in providing objective advice in contentious circumstances.
16. As is evident from his curriculum vitae (**CV**) attached under **annexure "A"**, he has a considerable depth of experience in fisheries management gained through a senior position within government together with his role in a fisheries stakeholder organisation.
17. It is respectfully submitted, that whilst Dr MacDiarmid may have expertise on the effects on fish, she has little relevant experience in fishing and fisheries management. To exclude Dr Helson would prevent important information on existing fishing interests from being discussed and factored into any joint witness statement. This was a clear weakness during the first hearing of the Applicant's proposal.

18. Dr Helson holds a doctorate in Zoology focussed on marine ecology. He has provided expert evidence before a number of judicial forums, including the Environment Court, District Court, Environmental Protection Authority (**EPA**) and Consent Authorities. Of particular relevance, Dr Helson provided expert evidence during the hearing of Chatham Rock Phosphate Limited's application to mine phosphate on the Chatham Rise and took part in expert conferencing for that hearing. Accordingly, Dr Helson is well versed in providing evidence under the Code of Conduct.
19. In regard to the "*effects on fishing*" conferencing, it is respectfully submitted that an MPI nominated expert (unless he or she has a detailed knowledge of the fishing industry) is unlikely to be able to provide evidence on the potential effects of the proposal on commercial fishing activities. As is evident from his CV, Dr Helson has worked for MPI in a senior capacity and has the benefit of being able to assess the application from both a regulatory and industry perspective.

#### **Mr Smith**

20. Mr Smith has acted as an independent consultant to a variety of international fisheries stakeholders over the past 20 years. He continues to act as an independent consultant and is currently contracted (amongst others) to Talley's Group Limited as the operations manager.
21. Mr Smith has considerable local and international fishing and fisheries management experience. A copy of Mr Smith's CV will be forwarded to the EPA on the morning of 9 February by counsel's instructing solicitor.
22. As a deep-sea fishing master, Mr Smith has extensive experience of fishing within the STB. His experience and expertise are not replicated by other available fishing experts. To exclude him from conferencing on "*effects on fishing*" would mean that other experts would not be able to discuss his expertise and experience of navigating and fishing within the STB.
23. Mr Smith has given evidence before a number of judicial forums including the District Court, High Court, Environment Court and EPA. As a consultant, he is familiar with his obligations under the Code of Conduct.

**Additional grounds**

24. Both Mr Smith and Dr Helson have confirmed their agreement to abide by the Code of Conduct. They have undertaken the necessary preparation to provide their evidence objectively and to apply their experience in a neutral, informative and practical manner so as to assist the DMC with its decision-making responsibilities.
25. It is respectfully submitted that many of the expert witnesses in this matter could face similar challenges to their independence given that their employers variously contract to MPI, the Fishing Industry, other stakeholders and the Applicant. They overcome these challenges through diligently abiding by the Code of Conduct.
26. Replacing Dr Helson and Mr Smith with experts appointed by MPI or the EPA is inappropriate insofar as these experts have not prepared evidence and are unlikely to bring the same qualifications and experience to the table. Notwithstanding, the Fisheries Submitters support the inclusion of independent experts appointed by MPI and the EPA attending conferencing alongside Dr Helson, Mr Smith and Dr MacDairmid.

## DIRECTIONS SOUGHT

27. The Fisheries Submitters respectfully seek the following directions:
- (a) That Dr Gregory Barbara is included in the expert conferencing sessions on “*effects on fishing*” and “*effects on benthic ecology*”;
  - (b) That Dr Hume and Mr Todd undertake expert conferencing on coastal stability/processes; and
  - (c) That Dr Helson and Mr Smith are included in expert conferencing on “*effects on fishing*”.

Dated this 8<sup>th</sup> day of February 2017



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**Robert Makgill**

**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**

## ANNEXURE “A”

## CURRICULUM VITAE OF DR JEREMY HELSON

# Dr Jeremy Helson

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## Solutions-Driven Chief Executive with Expertise in Sustainable Resource Use

Well-respected advisor with extensive knowledge of environmental management and governance within New Zealand. Works collaboratively with industry and the government to drive change, advance research and promote sustainable yet commercially-viable resource use. A politically-astute individual with excellent understanding of ministerial decision-making; practiced in formulating policy and providing appropriate advice while building productive relationships with key stakeholders. A confident presenter and negotiator, skilled in evaluating ambiguous information to take calculated risks and propose viable alternative management options. Takes a culturally-sensitive, collaborative approach to achieve results and to develop and mentor others.

## Tertiary Education

### *Bachelor of Laws, Victoria University of Wellington, Mar 2004–Nov 2011*

An academic transcript is available upon request.

### *Doctor of Philosophy in Zoology, Victoria University of Wellington, Mar 1998–Jun 2001*

My PhD focused on marine ecology and explained an anomalous distribution of mussels in the Wellington Region.

### *Bachelor of Science with Honours (First Class), Victoria University of Wellington, Mar 1995–Nov 1995*

I received the Dr FG Maskell Prize in Zoology 1994, this prize is awarded annually to the top undergraduate zoology student.

### *Bachelor of Science in Zoology, Victoria University of Wellington, Mar 1991–Nov 1994*

My undergraduate degree focused primarily on zoology, biology, and ecology. I also completed a range of papers in economics, geology, mathematics, statistics and physics.

## Career History

### *Fisheries Inshore New Zealand Ltd*

*Chief Executive Feb 2014 to present*

Fisheries Inshore New Zealand is an industry-good body that represents the interests of fishers and quota owners in coastal fisheries. These fisheries are diverse, complex and face a range of challenges. As Chief Executive I am responsible for management of all strategic and operational aspects of these fisheries.

### *Seafood New Zealand Ltd*

*Director Oct 2014 to present*

Seafood New Zealand is the industry's peak body and advances key strategic initiatives for the entire sector.

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***Ministry for Primary Industries (formerly Ministry of Fisheries)***

***Manager Deepwater Fisheries Dec 2011 – Feb 2014***

This role was responsible for managing New Zealand's deepwater and middle-depth fisheries. These fisheries comprised approximately 80% of New Zealand's commercial fish catch and have an annual export value of \$600-700 million. I managed six staff and a budget of \$11-15 million; this included responsibility for deepwater fisheries research.

In this role I provided both strategic policy advice on managing deepwater and middle-depth fisheries and also management of specific on-the-water issues such as sea bird mitigation measures. A feature of deepwater fisheries management is the relationship with Industry. This matured to the point where deepwater fisheries are co-managed through a formalised MOU that results in a shared vision, common business plans, sharing of resources and close and constructive working relationships.

***Principal Advisor; Senior Fisheries Analyst; Policy Analyst, May 2004 to Dec 2011***

- Experience managing fisheries, and the wider marine environment, both domestic and international
- Sound understanding of New Zealand fisheries and the associated legal environment
- Excellent track record of completing major work in fisheries
- Well-developed relationships within the Ministry, with Ministers and with external stakeholders
- Trusted and respected participant in deepwater fisheries management

***Self-Employed Consultant Marine Biologist***

Jan 2001 to present

***Tokyo University of Fisheries***

Japan Society for the Promotion of Science Postdoctoral Fellow, Nov 2002–Dec 2003

***Victoria University of Wellington***

Lecturer in Marine Ecology, Feb 2002–Jun 2002

***Victoria University of Wellington***

PhD studies, Mar 1998–Jun 2001

***ANZ Banking Group***

Settlements Officer, Jun 1997–Feb 1998

**Referees**

Available upon request.

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## Publications

### *Academic Publications*

Helson JG. 2015. Bottom Trawling – International Legal Obligations and New Zealand's Performance. *Journal of Environmental Law*, conditionally accepted.

Helson JG, Leslie S, Clement G, Wells R, Wood R. 2010. Private rights, public benefits: Industry-driven benthic protection. *Marine Policy*, 34(3): 557-566.

Helson JG, Gardner JPA. 2007. Variation in scope for growth: a test of food limitation among intertidal mussels. *Hydrobiologia*, 586(1): 373-392.

Helson JG, Pledger S, Gardner JPA. 2007. Does differential particulate food supply explain the presence of mussels in Wellington Harbour (New Zealand) and their absence on neighbouring Cook Strait shores? *Estuarine, Coastal and Shelf Science*, 72: 223-234.

Helson JG, Gardner JPA. 2004. Contrasting patterns of mussel abundance at neighbouring sites: does recruitment limitation explain the absence of mussels from Cook Strait (New Zealand) shores? *Journal of Experimental Marine Biology and Ecology*, 312: 285-298.

Gribben PE, Helson JG, Millar R. 2004. Population abundance estimates of the New Zealand geoduck clam, *Panopea zelandica*, using North American methodology: Is the technology transferable? *Journal of Shellfish Research*, 23: 683-691.

Gribben PE, Helson JG, Jeffs AG. 2003. Reproductive cycle of the New Zealand geoduck, *Panopea zelandica*, in two North Island populations. *The Veliger*, 47(1): 53-65.

### *Consulting Reports*

Helson JG. 2014. The Likely Effect on the Marine Environment of the Proposed Development at Site 10 Kumutoto and Landscaping Whitmore Plaza, the Laneway and Site 8. Prepared for Willis Bond and Company Limited. 9 p.

Helson JG. 2012. The Likely Effect on the Marine Environment of the Proposed Redevelopment of Shed 6. Prepared for Urban Perspectives Ltd.

Helson JG. 2007. The Likely Effect on the Marine Environment of the Proposed Redevelopment of Overseas Passenger Terminal. Prepared for Willis Bond and Company Limited. 18 p.

Helson JG. 2006. The Likely Effects on the Marine Environment of the Proposed Development of the Hilton Hotel at Queens Wharf. Prepared for Urban Perspectives Limited. 9 p.

Helson JG. 2005. The Effects on the Marine Environment of the Proposed Development at North Queens Wharf (Kumutoto Stream). Prepared for Wellington Waterfront Limited. 11 p.

Helson JG. 2004. Description of the soft sediment environment in the area of a proposed seawall along Castlepoint beach. Prepared for Boffa Miskell Ltd. 11 p.

Helson JG, Gardner JPA, Reyes A. 2002. Potential sites for finfish and shellfish aquaculture in the Falkland Islands. Report prepared by The Centre for Marine Environmental and Economic Research for the Falkland Islands Development Corporation. 85 p.

Helson JG, Gardner JPA, Reyes A. 2002. The environmental impacts of aquaculture: a literature review. Report prepared by The Centre for Marine Environmental and Economic Research for the Falkland Islands Development Corporation. 54 p.

Helson J, Gribben PE. 2001. Assessment of the benthic environment underneath two proposed mussel farm leases in Omokoiti Bay, Kaipara Harbour. Prepared for Fisheries Consultancy Services. 16 p.

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Gribben PE, Helson J, Bell A. 2001. Assessment of the benthic environment within Area B of the Wilson's Bay marine farming zone. Prepared for Fisheries Consultancy Services. 19 p.

#### *Conference contributions*

Helson JG. 2014. Panel discussion on spatial distribution of Marine Protected Areas (MPAs). IUCN World Parks Congress, Sydney.

Devery-Smith D, Cooper S, Helson JG. 2009. Marine Protected Areas for New Zealand's Sub Antarctic Islands. Poster presentation at the New Zealand Marine Sciences Society Conference, Auckland, New Zealand.

Helson JG, Clement G, Wells R. 2008. Benthic Protection Areas: Protecting New Zealand's Deepwater Habitats. Fourth International Deepsea Coral Symposium 2008, Wellington, New Zealand.

Helson JG, Clubb S. 2006. Managing the Environmental Effects of Fishing, What's Left After Property Rights? Proceedings of the Thirteenth Biennial Conference of the International Institute of Fisheries Economics and Trade: IIFET 2006, Rebuilding Fisheries in an Uncertain Environment, Portsmouth, UK, 11-14 July 2006. 9 p.

Clubb S, Helson JG. 2006. Pragmatism and Principles: The Challenges of Delivering a Strategy to Manage the Environmental Effects of Fishing in the Face of Uncertainty Proceedings of the Thirteenth Biennial Conference of the International Institute of Fisheries Economics and Trade: IIFET 2006, Rebuilding Fisheries in an Uncertain Environment, Portsmouth, UK. 11-14 July 2006. 7 p.

Helson JG, Gardner JPA. 2000. Where are the mussels on Wellington's south coast? Poster presentation and published abstract at the New Zealand Marine Sciences Society Conference, Hamilton, New Zealand.

Helson JG, Gardner JPA. 1999. Where are the mussels on Wellington's south coast? Poster presentation and published abstract at the New Zealand Marine Sciences Society Conference, Wellington, New Zealand.