

**BEFORE THE ENVIRONMENTAL PROTECTION AGENCY  
AT WELLINGTON**

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

**AND**

**IN THE MATTER** of the applications by Trans Tasman Resources Limited  
(TTR) for marine and discharge consents to recover  
iron sand under sections 20 and 87B of the Act and

**IN THE MATTER** of an application under section 158 of the Act

**BETWEEN** **Trans- Tasman Resources Limited**

Applicant

**AND** **The Environmental Protection Authority**

EPA

**AND** **Kiwis Against Seabed Mining Incorporated (KASM)**

Respondent

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**MEMORANDUM ON BEHALF OF KASM**

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**To: the Decision-Making Committee**

**Copy to: TTR**

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

1. This memorandum responds to the the minute of the Decision-Making Committee (DMC) dated 14 September 2016 whereby the DMC granted applicant Trans-Tasman Resources Limited (TTR) permission to redact information in its application for marine consents under the EEZ Act.
  
2. On 23rd August 2016, TTR applied for a direction under section 158 of the EEZ Act, seeking to protect certain information forming part of its application for marine consents. TTR sought that the following information be permanently protected from public disclosure:
  - a. Redacted sections of a report by HR Wallingford (2014b), Support to Trans-Tasman Resources: Laboratory Testing of Sediments, DDM7316-RT002-R01-00;
  - b. Redacted sections of a report by HR Wallingford (2015), Support to Trans-Tasman Resources: Source Terms and Sediment Properties for Plume Dispersion Modelling, DDM7316-RT004- R01-00;
  - c. Redacted sections of a memorandum entitled "Contribution to source terms report for TTR" from Matt Pinkerton, NIWA, to Mike Dearnaley, HR Wallingford, dated 4 September 2015; [REDACTED]
  - d. Tables 2-3, 2-4, and 2-5 in a report by Hadfield, M, and Macdonald, H (2015), Sediment plume modelling, NIWA Client Report No. WLG2015---22; [REDACTED]
  - e. Table 5-1 in a report by Pinkerton, M, and Gall, M (2015), Optical effects of proposed iron-sand mining in the south Taranaki Bight region, NIWA Client Report No. WLG2015-26; and [REDACTED]
  - f. Table 1, "1. The industry (employment) multipliers generated/applied by Butcher & Partners", and Point 5 – Direct Expenditure forecasts, in a document entitled

"Confidential Response to EPA Information Request" dated 28 January 2016.

("the sensitive information") [REDACTED]

3. In the TTR memorandum dated 22 August, TTR sets out the general grounds for the requests as the following:
  - a. avoid TTR disclosing a trade secret to competitors;
  - b. ensure TTR is able to comply with its legal licensing arrangements; and
  - c. avoid causing unreasonable prejudice to the commercial position of TTR.
4. At no point in this process was public consultation sought on whether or not the information should be redacted.

#### **Relevant Law**

5. Where an application for marine consent is publicly notified,<sup>1</sup> the full application is to be made available to the public. Decisions on the application are made considering the "best available information"<sup>2</sup>. The EPA may not give a direction if "in the circumstances of the particular case, the public interest in making the information available outweighs the importance of avoiding such offence, disclosure, or prejudice".<sup>3</sup>
6. Under s 158 the applicant can request that sensitive information may remain confidential to "(b) avoid disclosing a trade secret or to avoid causing unreasonable prejudice to the commercial position of the person who supplied, or is the subject of, the information".<sup>4</sup>
7. There is little case law on how the balancing act between commercial sensitivity in s158(1)(b) and public interest in s158(2) should be weighed. However, the wording of

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<sup>1</sup> S 45, EEZ Act.

<sup>2</sup> S 34, EEZ Act.

<sup>3</sup> S 158(2), EEZ Act.

<sup>4</sup> S 158(1)(b), EEZ Act.

s158 reflects s 9 of the Official Information Act 1982 and is described by most commentators as the “public interest test”.

***Nature of Confidential Information***

8. This area is an area for recreational activities, and in close proximity to commercial fishing areas. The activity takes place off the coast of Patea, where local residents surf, fish, gather kai moana, and generally have a strong and profound relationship with the sea. There are also many rocky reefs in this area which provide habitat for marine species.
9. The information that is being redacted concerns two key features of the plume and its effect that are central to the application of TTR for marine consent. These are:
  - a. flocculation and how it affects the plume modelling. The size of the plume and where the effects of the plume will be felt is crucial to the application. There are numerous rocky reefs in the area, a large number unaccounted for. Whether or not the plume will reach into the area where these rocky reefs are is a key question; and
  - b. the heavy metal content of the plume is important to the well-being of marine life, but also concerns issues around bioaccumulation and human health.

***Weighing of the Factors***

10. TTR’s memorandum of 22 August and the DMC decision dated 14 September both fail to set out in full any consideration and balancing of factors in the determination of whether or not information should be made public .
11. The following consideration in favour of disclosure of the information apply:

- a. **Transparency:** transparency enhances levels of citizens' trust in decision makers, and maintains integrity in the public sector. If the DMC and TTR can be seen to be held to account for their actions, they are more likely to operate in the public interest.
  
- b. **Participation:** Informed public participation leads to better decisions that are more likely to be accepted. Timely access to information is important. In this situation, as a minimum, the deadline for submissions must be extended to take into account that not all the information has been made publicly available.

The Committee that recommended the enactment of the OIA said this about participation<sup>5</sup>:

*For many people the arguments for greater access to official information start with participation, on the principle that a better informed public is better able to play the part required of it in the democratic system—and to judge policies and electoral platforms. It is expected too that the critical and at times difficult choices that governments have to make for our society will be better resolved if the community is well informed. In this way also political decisions would have a stronger claim to be made in the name of the community.*

- c. **Accountability:** One of the key environmental effects of this application concerns the size and nature of the plume. The decisions of the DMC affects people's way of life and livelihoods. There must be accountability in the DMC decision as to the environmental effects of the plume and its heavy metal content. There is a large public interest in disclosure of information that illuminates the DMC decision making processes, including the advice and options considered and the reasons for the decision.

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<sup>5</sup> Committee on Official Information. Towards Open Government: General Report. (December 1980) at 14.

This area and its resources form part of the public good. In that sense, the tendering of the area is essentially the spending of public good, similar to the spending of public money. The High Court has recognised that:<sup>6</sup>

*It is fundamental to the [official information legislation] that the public are to be given worthwhile information about how the public's money and affairs are being used and conducted, subject only to the statutory restraints and exceptions.*

The Dank committee that recommended the enactment of the OIA said this about accountability<sup>7</sup>:

*Another argument often stressed is that access of citizens to official information is an essential factor in making sure that politicians and administrators are accountable for their actions. Secrecy is an impediment to accountability, when Parliament, press, and public cannot properly follow and scrutinise the actions of government or the advice given and options canvassed. Divisive suspicion of government and its advisors is encouraged when decisions are made without recognisably comprehensive public presentation of how they have been arrived at.*

- d. Health, safety and the environment:** There is large public interest in keeping the public adequately informed of any risk or danger to public health (in this case through bioaccumulation of heavy metals in the food chain) and any risk to the environment. People must be informed of this information so that they can make informed decisions about the degree of risk or danger they find acceptable. The degree of risk that, for example, heavy metals or the plume poses to kai moana may shift a person's position on whether or not they are opposed to this application. This information simply cannot remain confidential.

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<sup>6</sup> *Wyatt Co (New Zealand) Ltd v Queenstown-Lakes District Council* [1991] 2 NZLR 180 at 190.

<sup>7</sup> Committee on Official Information. *Towards Open Government: General Report*. (December 1980) at 14.

12. The above factors must be considered taking into account the purpose of the EEZ Act which states<sup>8</sup>:

*The purpose of this Act is—*

*(a) to promote the sustainable management of the natural resources of the exclusive economic zone and the continental shelf; and*

*(b) in relation to the exclusive economic zone, the continental shelf, and the waters above the continental shelf beyond the outer limits of the exclusive economic zone, to protect the environment from pollution by regulating or prohibiting the discharge of harmful substances and the dumping or incineration of waste or other matter.*

13. Submitters are unable to consider whether or not the application meets the purpose of the EEZ Act if they are not aware of these key environmental effects and the scope of these effects, how the effects were calculated, and given the opportunity to critique and analyse the information.

***The Decision of the DMC made on 14 August 2016***

14. In the decision of the DMC , 14 August it states: “The DMC is satisfied that an order protecting that information is necessary to avoid disclosing a trade secret or to avoid causing unreasonable prejudice to TTRL’s commercial position.”<sup>9</sup>
15. The DMC’s conclusion that the “publicly available part of TTR’s application for marine consents contains enough information to allow people to understand the nature of the proposed activities” is inaccurate. The DMC must ensure that the “best available information” is before it. The “best available information” includes the public submissions on the application. These submissions must be able to consider the entire application in order to be well informed.

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<sup>8</sup> Section 10, EEZ Act 2012.

<sup>9</sup> Minute and Direction of the DMC, 14 September 2016, at [5].

16. A public submission process enables the DMC to see a full picture of the implications of a proposal. In the DMC decision concerning the 2013 TTR proposal, the public contribution to the process was acknowledged as significant to the DMC's decision:

*We also need to note the effort that has been put in by some submitters who have spent hours and hours reading and discussing the material produced by the applicant and others so that they were in a position to talk knowledgeably to us about their concerns. In that regard, we wish to single out Mrs Karen Pratt whose extraordinary eye for detail has been of considerable assistance to us in a number of areas.<sup>10</sup>* [redacted]

17. Placing confidentiality restrictions on this information also has an effect on the ability of those who do read the information to discuss its content with colleagues and thus limits the entire effectiveness of the experts to provide the best available information. The proposed activity is one that has never before been carried out at this scale, anywhere in world. Therefore, the need for experts to be able to discuss the effects with colleagues, as well as the public debate around this information, is a key part of ensuring that the best available information is put to the DMC.
18. The proposed activity involves an industry that claims it could be worth millions to the New Zealand economy going forward. The economic benefit for New Zealand forms part of that information and the purpose of this Act.<sup>11</sup> Without economic data on the iron ore content, the public is also unable to analyse the economic benefit at a regional and national level. Economic benefits form an important part of TTR's justifications for why New Zealanders should allow mining in the area but this redaction disallows any considered critique of that claim.
19. Information regarding sediment content was made available in the original TTR application in 2013. The application covered some of the same area of seabed. Accepting that the information has been revised, some of the baseline data regarding heavy metal content will likely be the same. Therefore, parts of the redacted

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<sup>10</sup> Decision of DMC on TTR, 2013, at [37]

<sup>11</sup> s 10, EEZ Act.

information are already in the public realm, and should lose its confidentiality status on this ground alone.

20. This is an industry that is developing, and the environmental risk that the New Zealand Public could be left with is of great public interest, as was seen by the thousands of submissions to the first declined consent application. It is a feature of this type of large scale and unknown activity to be undertaken in the exclusive economic zone that is in the public domain that all environmentally relevant parts of the activity must be publicly known. This greatly outweighs the finding that “the information would allow potential competitors to obtain process information without having to incur the significant cost and effort that TTRL has expended in doing so.”<sup>12</sup>
21. The DMC was wrong in its finding that the commercial sensitivity outweighed the public interest. Worse, it came to that conclusion without the benefit of countervailing public submissions.
22. In addition, the DMC failed to ensure that all environmental information, such as the plume modeling, is released. It seems, it did not even on its own volition separate environmental information from other information.
23. The redacted information will add delays and complexity to expert preparation and submission drafting, as well as to the hearing process, and will result in members of the public being excluded for considerable periods. As such, the DMC “*may not give a direction described in subsection (3) if, in the circumstances of the particular case, the public interest in making the information available outweighs the importance of avoiding such offence, disclosure, or prejudice.*” (section 158(2))

### **Relief Sought**

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<sup>12</sup> Ibid.

24. The public interest in the information outweighs the consideration of commercial sensitivity and need for protection of trade secrets. The DMC should release all of the information as part of the application.
  
25. KASM requests that the DMC reassess its direction and allow for public submissions on the issue of confidentiality of information under s 158.
  
26. In such public submissions, KASM will make submissions to the above effect, and in addition, will strongly submit that all information concerning environmental effects – including the plume and flocculation – must be released. Other submitters may raise other issues.
  
27. If this issue is not adequately addressed, KASM gives notice that it will be seeking an order under s 279(3) of the Resource Management Act 1991 to set aside the direction of the DMC in this regard. In light of statutory submission deadlines, we have instructions to file such proceedings if we do not have resolution of this matter by Tuesday 27 September.
  
28. KASM asks that this memorandum be made publicly available on the EPA website.

Respectfully submitted

**Duncan Currie/ Ruby Haazen**

23 September 2016