BEFORE THE ENVIRONMENTAL PROTECTION AUTHORITY 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 mine iron sand under sections 20 and 87B of the Act and
BETWEEN	**Trans- Tasman Resources Limited** Applicant
AND	**The Environmental Protection Authority** EPA
AND	**Kiwis Against Seabed Mining Incorporated (KASM)** Submitter

---

MEMORANDUM FOR KASM AND GREENPEACE ON MINUTE 41
Dated 18 April 2017

Duncan Currie/Ruby Haazen
8 Mt Eden Road
Eden Terrace
AUCKLAND
rghaazen@gmail.com
Ph: 021-144-3457

1. This Memorandum responds to Decision-Making Committee (DMC) Minute 41, in which the DMC has prepared a list of additional questions and requests for information. KASM and Greenpeace have very serious concerns about this Minute and request that this Memorandum be placed before legal counsel for the Environmental Protection Authority (EPA) as a matter of urgency.

2. KASM and Greenpeace concerns echo those of the Joint Memorandum filed on behalf of the Fisheries Submitters and Te Rūnanga o Ngāti Ruanui Trust dated 16 March 2017 and the Memorandum dated 30 March on behalf of the Fisheries Submitters, but we submit they have become even more pointed and urgent. In particular, counsel draws attention to paragraphs 8-12 of the 30 March Memorandum, of the Fisheries Submitters, including that:

> *"8. It is for Trans-Tasman Resources Limited (TTR) to prove its application under the Exclusive Economic Zone and Continental Shelf Act 2012 (EEZ Act or Act)."*
> *"9. Gaps in information supporting TTR's application should have been addressed prior to lodgement, or prior to notification under sections 41 or 42 of the Act."*
>
> *"11. ... Minutes 37 and 38 are contrary to the administration of natural justice in these proceedings. This is because, inter alia, those minutes provide significant further time and opportunity for TTR to iteratively address information gaps in its application at the "cost, effort and time" of submitters.*
> *12. It is respectfully submitted that Minutes 37 and 38 place further unreasonable burden on submitters (in addition to the significant cost, effort and time already expended), and do not correctly apply the information principles under sections 61 or 87E of the Act."*

3. Minute 41 poses:

   (a) extensive questions to the Applicant, on the plume modeling, sediment plume-ecology, krill aggregations and an open-ended question, on *"more recent cetacean evidence that may be relevant"*, under Appendix 1;

   (b) questions for other experts following revised optical modelling and elevated SSD levels, under Appendix 2:

   (c) questions for marine acoustic experts under Appendix 3;

   (d) questions, concerning a preferred list of data to be spatially mapped under Appendix 4.

4. KASM and Greenpeace are very concerned at the breadth of new evidence sought from the Applicant, submitters and the EPA in these proceedings. By way of example, the DMC has sought, project site and environment-specific modelling which will enable it to better understand the potential effects of the project's noise on marine mammals. In essence, the DMC is inviting the Applicant to submit evidence that should have accompanied the notified application.

5. Another invalid request is the request in paragraph 9 to "Provide a copy of report entitled "Trans-Tasman Resource Ltd consent application: Ecological Monitoring" (James, M. R., MacDiarmid, A., February 2016. 13 pp.) referenced on page 211 of the IA. The IA states that the Response and Compliance Limits have been determined from the ecological monitoring assessment presented in this report, however it is not included with the

Technical Reports which support the IA." This report is but example of how the Applicant failed to supply a fit for purpose assessment, but even more important is that the report is one of numerous reports that were submitted to the first DMC but not to this DMC. Quite simply, it is not in evidence. If the Report was submitted now, it would be *de novo* evidence and therefore invalid: as with other *de novo* evidence, it would require caucusing, exchange of evidence and hearing of the witnesses. It is just too late.

6. Counsel refers to our opening submissions, where we stated in paragraph 6 that:

> *"Key issues such as insufficient benthic baseline evidence, insufficient marine mammal and noise evidence, inadequate oceanographic investigations of the affected area including rocky shoals and inadequate economic evidence remain."*

And at paragraph 16 that:

> *"TTR have had the opportunity to address at least some of the uncertainties. After the first DMC considered the first application, they found that more baseline work should have been undertaken prior to the application being lodged:*
> *We consider comprehensive and longer-term baseline studies of the presence of marine mammals in the STB would have assisted us to understand the importance of the STB to various species and what they use this area for (e.g foraging, breeding, calving, migrating etc.). The absence of this information leaves us uncertain as to the significance of the proposed mining area and the wider area of the STB affected by the mining operation to cetaceans. [351] Yet that work was not done. This is discussed below."*

And further, at paragraph 63, we noted that:

> *"• TTR have failed to provide either measurements of the noise made by the proposed mining operation (ships, generator and dredge to be used) or measurements of the background "ambient" noise off Taranaki. (Slooten para 15)"*

7. Nearly two months later, after the evidence has been filed and rebutted, the experts caucused, the marine mammal experts called and questioned, and recalled, the DMC is now inviting the Applicant to present the evidence that it should have included in its environmental assessment and in its primary evidence. It is contrary to natural justice and the Act[1] to now invite evidence at this late stage to complete the assessment that should have been completed prior to notification. KASM and Greenpeace's marine mammal noise expert, Professor Leigh Torres, is now unavailable due to serious illness. Moreover, if the noise impact assessment had been properly carried out prior to notification, (1) other submitters may have made submissions on other areas of the application, including those who made no submissions, and (2) KASM and Greenpeace - and others - may have called different experts. If the noise information now sought had formed part of the impact assessment as notified, further submissions may have been received, others may have wished to be heard and the submissions themselves may have varied from those filed.

8. It is now abundantly clear that the EPA should not have accepted the application as complete, as the impact assessment under s 39 was manifestly inadequate. Both the EPA and the Applicant had ample opportunity to assess the application as incomplete, as they had the advantage of the first DMC's decision and trenchant criticism of the inadequate information and uncertainties that accompanied the first application. The EPA clearly should have requested further information under section 42. But it cannot now do that: the request may be "made at any reasonable time before a hearing" (s 42(2)).

[1] See Analysis below of s 53, 57, 61 and 62 EEZ Act.

9. KASM and Greenpeace also have very serious concerns, with respect to spatial mapping, that " [t]he DMC asks the EPA staff to work with the applicant to produce this information in this format to the extent practicable." This amounts to the EPA being directed to assist the Applicant to prepare evidence in support of the application.

10. It is KASM and Greenpeace's submission that this hearing has "seriously gone off the rails" in terms of *Marlborough Aquaculture Ltd v Chief Executive, Ministry of Fisheries* [2003] NZAR 362 (HC). The Court of Appeal in *Singh v Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 220, [2014] 3 NZLR 23 accepted that [40] "there may be cases where the Court's intervention by way of judicial review may be justified. Cases of this type are likely to be exceptional but where it is demonstrated that an error of law or process has occurred which is likely to have a material influence on the final decision, the Court may be prepared to intervene."

11. The Court set out the matters that would guide a Court when a decision is not final. They are [38]:

> (a)The nature of the statutory power being exercised.
>
> (b) The stage that has been reached in the relevant statutory process.
>
> (c) The extent to which the statutory power is likely to be influential in the ultimate decision.
>
> (d) Whether there are any further opportunities in the statutory process to correct any apparent error including the availability of a right to

appeal or seek judicial review of a decision ultimately reached at the conclusion of the statutory process.

12. Counsel applies the *Singh* tests to the present proceedings under the following headings A to D.

A. The nature of the statutory power being exercised.

13. The powers are set out in the Exclusive Economic Zone and Continental Shelf Act 2012 (EEZ Act). Sections 53,57, 61 and 62 are most apposite:

> **53 Hearings to be public and without unnecessary formality**
> (2) The EPA must establish a procedure for a hearing that is appropriate and fair in the circumstances.
>
> **57 Directions to provide evidence within time limits**
> (2) The applicant must provide its briefs of evidence at least 15 working days before the hearing.
> (3) The EPA may direct a submitter who is intending to call expert evidence to provide briefs of the evidence to the EPA before the hearing.
> (4) The submitter must provide the briefs of evidence at least 10 working days before the hearing.
> (5) The EPA must, as soon as practicable after the EPA receives the briefs of evidence, give—
> (a) a copy of the applicant's brief of evidence to every submitter; and
> (b) a copy of a submitter's briefs of evidence to the applicant.
>
> **61 Information principles**
> (1) When considering an application for a marine consent, the Environmental Protection Authority must—
> (a) make full use of its powers to request information from the applicant, obtain advice, and commission a review or a report; and
> (b) base decisions on the best available information; and
> (c) take into account any uncertainty or inadequacy in the information available.
> (2) If, in relation to making a decision under this Act, the information available is uncertain or inadequate, the EPA must favour caution and environmental protection.
> (3) If favouring caution and environmental protection means that an activity is likely to be refused, the EPA must first consider whether

taking an adaptive management approach would allow the activity to be undertaken.
(4) Subsection (3) does not limit section 63 or 64.
(5) In this section, best available information means the best information that, in the particular circumstances, is available without unreasonable cost, effort, or time.

62 Decisions on applications for marine consents
(1) After complying with sections 59 to 61, the EPA may—
(a) grant an application for a marine consent, in whole or in part, and issue a consent; or
(b) refuse the application.
(2) To avoid doubt, the EPA may refuse an application for a consent if it considers that it does not have adequate information to determine the application.
(3) If the EPA grants the application, it may issue the consent subject to conditions under section 63.

14. Four observations can be made here.

(a) Firstly, under s 53, the procedure must be appropriate, and fair. The procedure has gone far beyond being fair. Already the Fisheries Submitters and Ngati Ruanui have in effect thrown up their hands in frustration at the efforts to repeat the plume modeling, despite the fact that the plume model remains reliant on information supplied by the Applicant that cannot be independently verified. KASM and Greenpeace repeat the concern of the Fisheries Submitters and Ngati Ruanui 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."*[2] Now, Minute 41 has gone far beyond the plume modeling to other matters and invites the Applicant to call *de novo* evidence.

(b) Secondly, under s 57, the applicant must provide "its briefs of evidence" at least 15 working days before the hearing. Clearly it may

[2] Memorandum on behalf of Fisheries Submitters and Ngati Ruanui, dated 16 March 2017, at paragraph 18.

not provide its briefs of evidence a month after the hearing, which is the case proposed in Minute 41.

(c) Thirdly, under s 61(5) "best available information means the best information that, in the particular circumstances, is available without unreasonable cost, effort, or time." There is clearly a point at which the cost, effort or time becomes unreasonable. The test applies to submitters whose only reasonable opportunity to preserve their interests is by participating in the process and calling evidence. The DMC is not empowered to treat submitters participating in a public process as having a "open cheque books".

(d) Fourthly, under s 61(1)(c), the EPA must "take into account any uncertainty or inadequacy in the information available". S 61(1)(c) clearly contemplates that the information available to the EPA may have uncertainties or inadequacies. It is not the DMC's role to eliminate uncertainty in TTR's application. There is a clear statutory direction as to how the EPA is to treat uncertain information in the exercise of its decision-making powers under sections 61 and 62.

B. The stage that has been reached in the relevant statutory process.

15. Here, the briefs have been provided under s 57, experts have caucused, experts have been called and examined, and experts have been recalled. It is far too late to invite new experts or new or further evidence.

16. KASM and Greenpeace support the contention of the Fisheries Submitters and Ngati Ruanui view that *"[t]he "best available information" at this point in*

time concerning TTR's application is that TTR's impact assessment is "uncertain" and "inadequate"".[3]

17. The DMC should, in our submission, fulfil its statutory obligation to make the decision on the basis of that information, even though this would invariably result in refusal at this juncture, due to the inadequate nature of the Applicant's assessment and evidence. Rather, it is demonstrably clear from Minute 41 that the DMC has embarked on an exercise of completing and in effect proving the Applicant's case. This is an unlawful exercise of power which also significantly prejudices submitters in opposition to the application.

C. The extent to which the statutory power is likely to be influential in the ultimate decision.

18. The power of the DMC will be determinative of the application, and consequently the interests of both the Applicant **and** submitters in these proceedings.

D. Whether there are any further opportunities in the statutory process to correct any apparent error including the availability of a right to appeal or seek judicial review of a decision ultimately reached at the conclusion of the statutory process.

19. There is an appeal under s 105, but only on a question of law (s 105(4)). KASM and Greenpeace are concerned that the DMC's approach will or is intended to foreclose legitimate rights of appeal by running a hearing designed

[3] Memorandum on behalf of Fisheries Submitters and Ngati Ruanui, dated 16 March 2017, at paragraph 5(c).

to answer the Applicant's case on the merits, even when not invited to by the Applicant.

20. In conclusion, KASM and Greenpeace strongly submit that the DMC should withdraw Minute 41 and proceed to make a decision on the application and evidence that has already been adduced at unreasonable cost, effort and time to submitters.

21. To underline the seriousness of this request, KASM and Greenpeace have instructed counsel to place the DMC on notice that:

    (a) The DMC's directions to adduce further evidence at this juncture in the proceedings are an unreasonable and unlawful exercise of statutory powers under the EEZ Act, and

    (b) KASM and Greenpeace reserve their right to address the issues under paragraph 21(a) by way of appeal, judicial review and/or declaratory judgement at the conclusion of these proceedings on the basis that they are such fundamental errors in law as to undermine the validity of any decision that might be made to grant consent.

Respectfully submitted

DEJ Currie/Ruby Haazen

18/04/2017