

**BEFORE THE ENVIRONMENTAL PROTECTION AGENCY  
AT WELLINGTON**

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

**AND**

**IN THE MATTER** of 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** **The Environmental Protection Authority**

EPA

**AND** **Kiwis Against Seabed Mining Incorporated**  
**Te Runanga o Ngati Ruanui Trust**  
**Talley’s Group Limited**

Submitters

---

**MEMORANDUM OF SUBMITTERS CONCERNING TIMETABLE DIRECTIONS**  
**18 November 2016**

---

Duncan Currie/Ruby Haazen  
21 Shaddock Street  
Eden Terrace  
AUCKLAND  
[rghaazen@gmail.com](mailto:rghaazen@gmail.com)  
Ph: 021-144-3457

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

1. This Memorandum is filed by Kiwis Against Seabed Mining Incorporated, Te Runanga o Ngati Ruanui Trust and Talley's Group Limited (Submitters) in response to Trans-Tasman Resources' (TTR) letter dated 10 November 2016 seeking timetabling directions under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (**EEZ Act or Act**).
2. The Submitters' memorandum addresses:
  - a. TTR's request for timetable directions;
  - b. The Submitters' response to TTR's requested timetable;
  - c. The Submitters' suggested timetable; and
  - d. The directions sought by the Submitters.

**TTR's request for timetable directions**

3. TTR's letter commences by advising that it does not oppose a second *extension "in all the circumstances"*.
4. The Submitters assume TTR's reference to *"in all the circumstances"* means the Environment Court's decision in *Kiwis Against Seabed Mining Incorporated v Environmental Protection Authority*, and particularly the finding that:<sup>1</sup>

*Ultimately we conclude that the **crucial nature of the Sensitive Information in informing the conclusions in the Impact Assessment**, when combined with the **public's right to participate effectively in the consent process**, outweigh any trade secret or business interest of Trans-Tasman by a considerable margin. Accordingly, we set aside the Direction made by the Committee on 14 September 2016 2016 and direct that the information listed in paragraph 4 of Minute 3 of that date be made publicly available.*

**[Emphasis added]**

---

<sup>1</sup> [2016] NZEnvC 217, at paragraph [68].

*Joint Memorandum*

5. TR's letter goes on to state at paragraph [1] that the "*clear and specific intentions of the EEZ legislation with regard to marine consenting timetables has been ... compromised*" by the two extensions to the submissions timeframe.

6. TTR states at paragraph [2] that:

*In the circumstances it would appear a **fair and reasonable compromise** if a third extension of time is in fact granted-for every effort to be made to ensure that a marine consent hearing is still able to commence on or around the 31 January 2017 (the latest date resulting from the first 20 day extension).*

**[Emphasis added]**

7. Further, at paragraph [3] TTR states that:

*With the exception of the technical data released today, the information **most relevant** to the preparation of evidence (the Impact Assessment and supporting documents (as well as the pre lodgement information package) has been available to the parties for months. The parties will also have the evidence of the applicant.*

**[Emphasis added]**

8. The Submitters note that the Applicant's above recorded suggestion that the information "*most relevant*" to the preparation of evidence has been available for months is directly contrary to the Environment Court's finding that:

*There appears to be little dispute between the experts that the (redacted) Sensitive Information is crucial to understanding the plume dispersal modelling relied on by Trans-Tasman in the Impact Assessment. In turn, evaluation of the effects of the plume created by the discharge of process material will be central in determining the application itself. This view is supported by Mr McCabe for KASM **and we agree.***

**[Emphasis added]**

9. The Decision-Making Committee (DMC) issued Minute No.8 on 10 November 2016 (after TTR had sent its letter to the DMC). That Minute records the Environment Court's decision that the plume information previously withheld must be released.

10. Minute No.8 goes on to state in relation to TTR's requested timetable directions that:<sup>2</sup>

*We have given careful consideration to the impact on TTRL. We note this extension may add further fair and reasonable additional costs to the process, particularly when it comes as a second extension of the time period. However, **we consider this can be mitigated to some extent by our consideration of how time may be managed during the processes leading up to the start of the hearing.** We will give this consideration in light of the offer by the applicant to circulate its evidence on 19 December 2016. The dates for the processes leading up to the start of the hearing will be confirmed when the hearing procedures are finalised in the near future.*

**[Emphasis added]**

### **Submitters response to TTR's requested timetable**

11. The first extension was sought by various submitters because (amongst other things):

- a. That the 20-day extension would enable the Environment Court to make a decision in respect of the plume information withheld under Minute No.3;<sup>3</sup>
- b. Submitters need additional time to assess the volume of information supporting the application, and the DMC needed to allow submitters further time for their assessments in order to fulfil its duty under section 61(1)(b) of the Act;<sup>4</sup> and
- c. The DMC re-notified the first TTR application in 2013, as some documents were not available on the EPA website for the entire first submission period.<sup>5</sup>

---

<sup>2</sup> Minute No.8 at paragraph [17].

<sup>3</sup> Memorandum on behalf of Fisheries Submitters, dated 10 October 2016, at paragraph [3](a); and Second Memorandum on behalf of KASM, dated 10 October 2016, at paragraph [2](a).

<sup>4</sup> Memorandum on behalf of Fisheries Submitters, dated 10 October 2016, at paragraph [3](b); Second Memorandum on behalf of KASM, dated 10 October 2016, at paragraph [2](b) and (c); Memorandum of Ngati Ruanui, dated 5 October 2016, at paragraphs [5], [8] and [10]; and Memorandum of Counsel for Forest and Bird, dated 10 October 2016, at paragraph 2(a) and (b).

<sup>5</sup> Memorandum of Counsel for Forest and Bird, dated 10 October 2016, at paragraph 2(b).

*Joint Memorandum*

12. The DMC in its direction under Minute No.7 to extend the submission period for the first time reasoned that:<sup>6</sup>

*We appreciate this extension, particularly as it applies beyond the requestor, may add fair and reasonable additional costs to the process. However, we do not consider this outweighs the potential impact on submitters and the interests of the community if the extension were not granted.*

13. The DMC's direction to extend the submission period for a second time under Minute No.8 was made following the Environment Court's decision that the plume information withheld under Minute No.3 should be made publicly available.

14. The DMC's reasons included that:<sup>7</sup>

*The joint request states the Environment Court identified that the redacted information is considered of "**crucial value**" for the assessment of the application and that the public as well as experts should have the opportunity to assess it.*

***[Emphasis added]***

15. The crucial nature of the plume information is confirmed in a number of passages of the written version of the Environment Court's decision,<sup>8</sup> including the passage cited under paragraph [4] of this memorandum. The written version of the decision was not available to the DMC at the time that it issued Minute No.8.

16. It is respectfully submitted that the DMC's decision to give two directions extending the submission period are a result TTR's own actions and that it would not be "*fair or reasonable*" to require any submitter to "*compromise*" the preparation of their evidence to make up for any lost time experienced by TTR because of its failure to provide complete information in support of its application during the original submission period, or the first extension to the submission period. The first extension was in fact a false re-start, as the application was incomplete during this period.

---

<sup>6</sup> Minute No. 7 paragraph [16].

<sup>7</sup> Minute No.8 at paragraph [14].

<sup>8</sup> [2016] NZEnvC 217, see also for example paragraph [21].

17. In these circumstances, the first extension under Minute No.7 falls into the same category described by Forest & Bird in its memorandum dated 10 October 2016, and paragraph [11](c) of this memorandum, whereby the first TTR application was re-notified because the information supplied in support of that application was incomplete.<sup>9</sup> The second extension was granted because it was only at this point that information crucial to the application was made publicly available.
18. It follows that no submitter should suffer any prejudice or burden, in terms of future timetable directions, resulting from time lost as a result of the Applicant's decision to attempt to withhold information crucial to the assessment of application.
19. The Applicant took the risk of withholding the plume information and should in turn bear any burden as a result of that decision. In simple terms the DMC should not be looking to "*mitigate*" the impacts of decisions made by TTR by way of adjusting timetable directions at the expense of submitters.
20. TRR's decision to withhold the information has already added unnecessary legal and expert witness costs to the Submitters' participation in this notified application. As discussed under the next heading, requiring submitters to prepare for hearing over the normal summer vacation period (as opposed to statutory non-working day period) would cause all submitters significant disruption, time and expense. No submitter should be prejudiced by the judicial and legal consequences of the Applicant's approach to its application (i.e. the Environment Court proceedings and decision).

**The Submitter's proposed timetable**

21. TTR suggests in its letter, dated 10 November 2016, that it might file its evidence on 19 December 2016, and that a hearing could commence around 31 January. The dates for preparation of submitters' evidence would occur during the summer vacation period normally taken in New Zealand over January, and will therefore prejudice the ability of existing submitters (8,000 submitters at last count), and future submitters, to participate in the notified proceedings.

---

<sup>9</sup> See footnote 5 above.

*Joint Memorandum*

22. The Submitters note that the DMC was already mindful of the Christmas period when it issued its first extension under Minute No.7:<sup>10</sup>

*We are also mindful of the impact on parties of an extension of time as we approach the Christmas and New Year period. In general where hearings are held in this period there are real issues with availability of witnesses for any party.*

23. It is respectfully submitted that it is not simply the submission period that needs to be taken into account when making timetable directions for hearing. The submission period simply affords submitters an opportunity to come to terms with the application that has been prepared by TTR over the course of several years. The significant preparation time that TTR has had is evidenced in Minute No.7 where the DMC states that “... we note that TTRL has chosen to invest time in its preparation of the application, including over a year in pre-October 2016 lodgement discussions with the EPA.”<sup>11</sup>

24. In these circumstances, there is far less prejudice to the Applicant, in filing its evidence early on 19 December, than there is to submitters in expecting them to prepare evidence (importantly including rebuttal evidence); cross examination notices and legal submissions by 31 January 2016.

25. The DMC must hold a hearing no later than 40 working days after the closing date for submissions under section 51(2) of the EEZ Act. This is a tight timeframe, without having to contend with the intervening Christmas/summer vacation period. Section 4 of the EEZ Act defines working days as excluding the period commencing 20 December and ending with 10 January.

26. The Applicant is suggesting that submitters can brief experts to prepare evidence/rebuttal evidence and attend to all other hearing preparation in the 15 working days between 10 January and 31 January 2017. This fails to take into account that most submitters and their experts will not have returned from leave until mid to late January. Furthermore, it is unrealistic to expect that some 8000 lay-submitters will set aside their summer vacation to accommodate the Applicant’s timeframes. The DMC

---

<sup>10</sup> Minute No.7 at paragraph [18].

<sup>11</sup> Minute No.7 at paragraph [16].

*Joint Memorandum*

will be aware that it is generally thought to be undesirable to have any large public process occur during the summer vacation period (i.e. January).

27. It is respectfully submitted that it is neither fair nor reasonable to provide timetable directions that would allow the Applicant to complete its hearing preparation prior to the Christmas/Summer break, while imposing directions on submitters that require them to undertake the lion's share of their preparation over a time of the year where most people (including experts) will take extended leave for their summer vacation. This would be clearly prejudicial to the ability of all submitters to adequately prepare for hearing. It would also call into question whether the DMC in those circumstances could be said to have properly exercised its duty under section 61 (1)(b) of the Act to "*base decisions on the best available information*".

28. The Applicant should not be entitled to benefit at the expense of submitters, when in its present position is entirely own its own making. Therefore, its decision to attempt to withhold information was found to be unlawful and without evidential support.

29. In the circumstances, the Submitters propose the following timetable:

- |     |                             |   |
|-----|-----------------------------|---|
| (a) | Submission close:           | 12 December 2016  |
| (b) | Applicant evidence:         | 19 December 2016 (assuming the Applicant does not wish to file evidence at the end of January, to which the Submitters would agree) |
| (c) | Submitters expert evidence: | 13 February 2017  |
| (d) | Cross examination Notices:  | 15 February 2017  |
| (e) | Non-expert evidence:        | 20 February 2017  |
| (f) | Hearing Open:               | 27 February 2017  |

30. Caucusing could take place in the last 2 weeks in February, or in March during the hearing as was the case with the first TTR hearing.

31. It is noted that this proposed timetable is broadly consistent with the number of working days allocated under the timetables for TTR's first application and the Chatham Rock Phosphate application. The Submitters consider that it is the most compressed timeframe possible, notwithstanding that they, and many of the other submitters

*Joint Memorandum*

(8000+), would prefer to have additional time to prepare for the hearing.

32. The Submitters consider that other submitters should be provided with an opportunity to reply to the timetable directions sought by the Applicant. It may be that the Submitters to this memorandum can reach an agreement with the Applicant in the meantime that assists the DMC in making its timetable directions.

**Directions sought**

33. The Submitters respectfully seek directions that the DMC:

- a. Establishes a timetable in accordance with paragraph [29] of this memorandum;  
and
- b. Notwithstanding paragraph [33](a), affords other submitters an opportunity to be heard on the Applicant's proposed timetable given that it falls over the summer vacation period.

**Dated 18 November 2016**



---

**Duncan Currie/ Ruby Haazen**

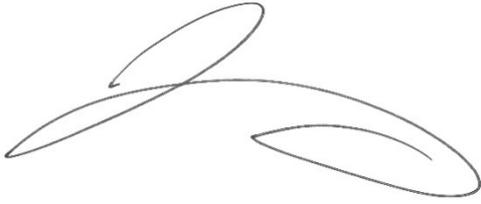
**Counsel for Kiwis Against Seabed Mining**



---

**Robert Makgill**

**Counsel for Talley's Group Limited**

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke.

---

**Justine Inns**

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