

EXCLUSIVE ECONOMIC ZONE AND CONTINENTAL SHELF (ENVIRONMENTAL EFFECTS) ACT 2012 (the Act)

Trans-Tasman Resources Limited iron sand extraction and processing application

M11 – Minute of the Decision-making Committee (DMC) – 15 December 2016

Background

1. The Act requires the DMC to deal with the Trans-Tasman Resources Limited (TTRL) application as promptly as is reasonable in the circumstances, and the DMC must also establish a procedure for hearing the application that is appropriate and fair in the circumstances. This procedure is required to be fair to all participants, and a key aspect to fairness is certainty.
2. The DMC is mindful of the commitment, organisation and preparation that is required by all participants to effectively engage in this process. Certainty enables all parties, and the DMC itself, to prepare and plan for an efficient hearing process within other commitments. The hearing procedures, including the timetable for key steps leading up to and including the hearing, provide the framework for this process. It is important for the robustness and credibility of the process as a whole that the process continues on a stable track that provides certainty for all.

Timeframes

3. There are clear statutory timeframes set in the Act, as well as a power for the DMC to waive or extend those timeframes where circumstances require in order for a robust and just process to be conducted. The timeframes set in the Act reflect Parliament's intention to have a timely, streamlined, and cost effective process. The maximum statutory time between the close of submissions and the start of the hearing is 40 working days. An applicant must provide its briefs of evidence at least 15 working days before the hearing and a submitter must provide its briefs of evidence at least 10 working days prior to the hearing. The dates set in the hearing procedures publicly released on 2 December 2016 set a lawful and reasonable process. In particular, in order for all parties and the DMC to properly prepare for the expert conferencing and the hearing, extra time has been scheduled for these essential steps to be taken before the hearing commences.
4. From the outset, the DMC has considered that a key part of ensuring the purpose of the Act is achieved is for the evidence to be thoroughly tested. This will occur through expert conferencing and careful DMC-led questioning during the hearing. Part of this relies on the questions being available to experts prior to conferencing. The DMC has also expressed the intention for evidence to be read in advance of the hearing so the hearing can proceed with the focus on addressing disputed issues. To achieve all of this, time is required between the exchange of evidence and the presentation of that

evidence at the hearing. A reasonable period of time to prepare evidence is required yet the DMC is mindful, and parties are aware, that the application was publicly notified on 17 September 2016 and the previously redacted information has been publicly available since 9 November 2016.

5. In setting the timeframes within these hearing procedures, the DMC acknowledges that work will need to be done at a time that is traditionally used for vacations, but the Act specifies the days that are not counted as working days, being 20 December to 10 January inclusive.
6. On 13 December 2016, in a joint memorandum, Kiwis against Seabed Mining Inc (KASM), the Fisheries Submitters¹, and TTRL requested the DMC change a number of dates in the timetable. This was supported in full by a memorandum provided on 15 December 2016 by Te Rūnanga o Ngāti Ruanui Trust (Ngāti Ruanui). The request and proposed timetable were supported but with additional points by a joint memorandum provided on 14 December 2016 by the Royal Forest and Bird Protection Society New Zealand Incorporated, Greenpeace New Zealand Incorporated, Environmental and Conservation Organisations of New Zealand Incorporated and New Zealand Sports Fishing Council (“the supporting parties”). The DMC also received correspondence from Counsel for the Fisheries Submitters and Counsel for the Fisheries Submitters (including Talley’s), Ngāti Ruanui and KASM. The memoranda and correspondence is available on the EPA website.
7. The reasons given to change the timetable on behalf of KASM, the Fisheries Submitters, and Ngāti Ruanui are “*to avoid any timetable that requires preparation of evidence during:*
 - a. *Working days exempt under of [sic] the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012; and*
 - b. *The period in January during which submitters and their experts can reasonably be expected to be on vacation.*”
8. The joint memorandum from supporting parties stated that the date of 13 January 2017 only allowed 2.5 working days to prepare evidence from the date of the filing of the Applicant’s evidence once the non-working days are discounted. They stated that the date was not justified.
9. The parties to all the memoranda agreed to retain the 16 February 2017 date to commence the hearing.
10. It was also stated in the 13 December joint memorandum that the DMC should amend the timetable to accord with the dates sought “*in the interests of avoiding further legal argument (and potential proceedings)*”.
11. The potential for legal proceedings is not a relevant reason to amend a timetable. The DMC has taken considerable care in preparing for the hearing and establishing a procedure for efficiently hearing the application that is appropriate and fair in the circumstances. All decisions, including those relating to the timetable, have been made based on the statutory requirements, the requirements of running an efficient and fair hearing, and with due regard to information provided by participants.

¹ The Fisheries submitters are Fisheries Inshore New Zealand, New Zealand Federation of Commercial Fishermen Inc, Talley’s Group Limited, Southern Inshore Fisheries Management Co Ltd, McDonald and Brown Ltd, and Cloudy Bay Clams Ltd.

12. In respect of the remaining reasons given in both the memoranda, the working days had already been accounted for in the timetable issued by the DMC on 2 December 2016. The timeframe for preparing evidence does not begin the day the applicant provides their evidence but it is acknowledged that some period of time beyond that date is appropriate for the efficient addressing of issues in submitter evidence.
13. The reasonable expectation of a vacation in January needs to be considered in the light of the notice that all participants have had as to the timing of these proceedings. The date the application was lodged meant that January was always going to be a working part of the proceedings. The DMC notes that the hearing would have originally started prior to the Christmas break. Neither the fact that work will be required during the month of January nor the fact the work will now be preparation of evidence rather than attendance at the hearing make the timetable dates unreasonable. In order to ensure an efficient process leading up to the hearing commencing on 16 February 2017, the DMC expects working days to only exclude those days specified by the Act.
14. The Hearing Procedures outlined that applicant's evidence was due to be filed on 19 December 2016 and it is proposed in the joint memorandum that date be shifted to 13 January 2017. The DMC was previously advised by the applicant that it would have its evidence available on 19 December 2016. The DMC has already made arrangements to read this evidence over the Christmas/ New Year period as well as the submissions that have been received on the application. The DMC does not consider there to be any sufficient reason to change this date.
15. The Hearing Procedures also outlined that submitters' evidence was due to be filed on 13 January 2017 and it is proposed in the joint memoranda that date be shifted to 27 January 2017. The DMC has carefully considered the ability of parties to provide evidence in the timeframe and also the ability of the DMC and the EPA staff to consider material and provide advice prior to the hearing. The DMC is prepared to shift this date to 24 January 2017 in order to ensure that work is not required over the statutory non-working days. This allows for 10 working days after the applicant's evidence is provided. In addition, as the non-working days relate to the formal conduct of business only, the parties are able to avail themselves of the additional days if they choose, as will be the case for the DMC and EPA staff.
16. Any additional time for evidence to be provided would compromise the remaining work needed before the start of the hearing and could compromise the start date for the hearing.
17. Similarly, it is not practical to shift the dates suggested for the timing of submitting questions (moving from 20 January to 7 February) and posting the accepted questions on the EPA website (moving from 30 January to 14 February). To accommodate the request as far as practicable, the DMC has instead shifted these dates to 30 January and 7 February 2017 respectively.
18. The expert conferencing will now begin on 13 February 2016 and cross over with the start of the hearing, which is not unusual in these large cases.
19. The joint memorandum of the supporting parties also raised a concern with the date for parties to confirm whether or not they wish to be heard (among other procedural information needed to set the

timetabling for the hearing). It was stated that “*most lay submitters will pay little attention to this date during the holiday period and given it falls one day after the holiday period closes, some submitters who may wish to appear at the hearing and produce further evidence may miss out.*” It is also stated that moving this date to 27 January “*will not have any flow on effects to the other dates in the timetable, nor will it negatively disadvantage the other parties.*”

20. The purpose of collecting this information from submitters is so that the EPA can form a hearing timetable, book venues, equipment, interpreters and so forth. This cannot be done in an effective manner if left until late in the process. Further, if parties are preparing evidence then they are aware of whether or not they wish to be heard so are able to inform the EPA of this. While the deadline for this is 11 January 2017, parties are most welcome to advise the EPA of their requirements prior to the Christmas break if this is more convenient for them.
21. The revised timetable is attached to this Minute and the revised hearing procedures incorporating these changes will be posted on the EPA website with this Minute.
22. Given the large number of parties, and the cumulative effects of numerous requests to change the timetable up to this point, the DMC now expects all parties to meet the timetabled commitments. While there will always be an opportunity for individuals to raise specific unforeseen circumstances that prevent compliance with the general timeframes, the DMC expects leave to be sought in writing prior to the non-compliance with the timetable. The DMC will consider the circumstances of such requests on a case by case basis.

Hearing locations

23. The memorandum received today from Ngāti Ruanui also raised the issue of hearing locations. The DMC acknowledges the offer of hospitality provided in the memorandum and will be considering the proposal next week.

Communication

24. A key requirement for a fair and robust process is for all participants to treat each other and the process (which includes the DMC itself) with respect. The hearing procedures specifically require this (paragraph 6), as does the Environment Court Practice Note to which expert witnesses must adhere (paragraph 1.2).
25. Any correspondence with the DMC is to be carried out through the EPA staff (as outlined in paragraph 10 of the Hearing Procedures). While the process dispenses with some formalities, in order to ensure an efficient and respectful process, a level of formality is required and expected by the DMC of all parties participating in the process at all times. For any party represented by counsel, it is expected that any correspondence with the DMC will be by memorandum. All correspondence with the DMC will be put on the EPA website after it has been considered by the DMC, and usually at the same time as the response from the DMC is provided by way of Minute. If the DMC requires comments from parties, this will be requested by Minute on the website.

26. Parties should also note the correct name of the Environmental Protection Authority is not the Environmental Protection Agency. Templates for memoranda should be updated accordingly.

For the DMC:

A handwritten signature in blue ink, appearing to read 'Alick Shaw', with a large, stylized initial 'A'.

Alick Shaw
DMC Chair
15 December 2016

Updated detailed timetable - 15 December 2016

DATE	ACTION	Hearing Procedure PARA REFERENCE
17 September 2016	Public Notification of application	N/A
5pm 12 December 2016	Extended submission period closes	N/A
12pm 19 December 2016	Applicant evidence due with the EPA	14 - 20
22 December 2016	EPA confirm hearing locations	35
12pm 11 January 2017	<p>Parties must have confirmed with the EPA:</p> <ul style="list-style-type: none"> - If they wish to speak at the hearing and any witnesses (both expert and non-expert) they wish to appear on their behalf (names and topics/area of expertise) - If they wish to make an opening representation - Which hearing location they prefer or if they wish to present via video conference - If they are unavailable to appear at the hearing on any date/time - If they need an interpreter (e.g. for Te Reo Māori or sign language) - If they intend to present information using any electronic media 	<p>36</p> <p>46-51</p> <p>36, 74-78</p> <p>36</p> <p>81-85</p> <p>79-80</p>
17 January 2017	Hearing Notice issued	37
12pm 24 January 2017 [12pm 13 January 2017]	Submitter evidence (expert and non-expert evidence) due with the EPA	14-20
30 January 2017 [20 January 2017]	List of questions for any parties or witnesses due with EPA	66-73
7 February 2017 [30 January 2017]	Conferencing and/or Pre-hearing Meeting Timetable issued	30
7 February 2017 [30 January 2017]	List of approved questions made available on EPA website	69
13 February – 17 February 2017 [7 February – 13 February 2017]	Expert Conferencing and Pre-hearing Meetings (if required) (attendees to be available these days)	23-34
16 February 2017	*Hearing begins	35-44
12 April 2017	*Proposed date for the hearing to close (if maximum 40 working days for hearing is needed)	N/A
TBC	*Decision due (20 working days after the close of the hearing)	N/A

*Under the EEZ Act the EPA has the power to waive compliance with the timeframes above and these dates may change.