

**BEFORE THE ENVIRONMENTAL PROTECTION AGENCY
AT WELLINGTON**

IN THE MATTER

of an application for marine consent
under the Exclusive Economic Zone
and Continental Shelf (Environmental
Effects) Act 2012

BETWEEN

TRANS TASMAN RESOURCES LTD

Applicant

AND

**ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW
ZEALAND INCORPORATED**

Submitter

**MEMORANDUM OF COUNSEL FOR THE ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED**

10 March 2017

Royal Forest and Bird Protection Society of New Zealand Inc.
PO Box 2516
Christchurch 8140
Ph 03 9405524
Solicitor acting: Peter Anderson
p.anderson@forestandbird.org.nz

MAY IT PLEASE THE COMMISSIONERS

1. This memorandum responds to:

(a) Minute 28, relating to adaptive management; and

(b) the memorandum of counsel for the EPA dated 3 March 2017 (the EPA memorandum).

2. Forest & Bird disagrees with paragraph 78 and 79 of the EPA memorandum, which concluded:

78. That said, in our view a relatively narrow interpretation of "adaptive management approach" is supported by the text of section 64 itself, read in light of the EEZ Act's purpose. Adopting such an approach, "adaptive management approach" would mean:

(a) allowing an activity to commence on a small scale or for a short period, or in stages otherwise contemplated by subsection 64(4), with its effects monitored, and where a possible conditioned outcome is the activity being discontinued on the basis of the observed effects; or

(b) any other approach reflecting, through conditions, that an appropriate possible response to the activity's effects, following ongoing assessment, is the consented activity being discontinued altogether.

79. We acknowledge, however, that a range of interpretations is available, on the words of section 64.

3. Section 64 is clear and unambiguous in its meaning. There are not a range of interpretations available. Even if there was, the interpretation set out in paragraph 78(b) is not one of them. In particular, the conclusion at 78(b) that adaptive management is any other approach involving the activity being discontinued altogether is contrary to the plain words in section 64, specifically the words "*or continued with or without amendment*" in section 64(2)(b).

SECTION 64

4. Section 64 defines adaptive management. This definition is very broad, and includes an approach that allows an activity to be undertaken so that its effects can be assessed and the activity discontinued, or continued with or without amendment, on the basis of those effects.

64 Adaptive management approach

(1) The Environmental Protection Authority may incorporate an adaptive management approach into a marine consent granted for an activity.

(2) An adaptive management approach includes—

(a) allowing an activity to commence on a small scale or for a short period so that its effects on the environment and existing interests can be monitored:

*(b) any other approach that allows an activity to be undertaken so that its effects can be assessed and the activity discontinued, **or continued with or without amendment**, on the basis of those effects.*

(3) In order to incorporate an adaptive management approach into a marine consent, the EPA may impose conditions under section 63 that authorise the activity to be undertaken in stages, with a requirement for regular monitoring and reporting before the next stage of the activity may be undertaken or the activity continued for the next period.

5. Section 64(2)(a) and (3) relate to staging and is not relevant here as staging is not proposed. The issue here relates to the interpretation of section 64(2)(b) and whether the conditions proposed by TTR amount or contribute to an adaptive management approach as defined in section 64(2)(b).

Approach to statutory interpretation

6. Section 5 of the Interpretation Act 1999 provides the basis for interpreting legislation:

5 Ascertaining meaning of legislation

(1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

7. The Supreme Court gave guidance on the interpretation of section 5 in *Commerce Commission v Fonterra Co-Operative Group Ltd*¹

[22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5.

The text

8. Section 64(2)(b) is capable of interpretation on its face. An adaptive management approach is where conditions provide for the activity:
- (a) be undertaken so its effects can be assessed; and
 - (b) can be discontinued, or continued with or without amendment, depending on the assessment of effects.
9. The interpretation in the EPA memorandum is that an adaptive management approach requires that the activity be discontinued. This is not consistent with the plain words of section 64(2)(b), in particular the words “*or continued with or without amendment*” are ignored.
10. A standard review condition does not meet the definition of adaptive management because any consideration of adaption to be considered through a separate and formal review process.
11. The effect of adopting an interpretation based on the plain meaning of section 64 is that the information required at the consenting stage needs to

¹ [2007] NZSC 36, [2007] 3 NZLR 767 at [22]

be robust enough that the DMC is confident of the scale of effects and that further assessment of effects is not necessary after consenting to manage any adverse effects which might arise.

The purpose

12. It is submitted that the purpose supports the plain words of section 64. The purpose of the EEZ Act is contained in section 10, which provides:

10 Purpose

(1) The purpose of this Act is as follows:

(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. Section 10(1)(b) was added by section 7 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Amendment Act 2013 (the 2013 Amendment Act) , which came into force on 31 October 2015. It signals a more protectionist approach to the discharge of harmful substances than in relation to other aspects of EEZ management.

14. That is, the EEZ generally is to be sustainably managed, but a more stringent approach is anticipated for the discharge of harmful substances, where the environment is to be protected.

15. Protection is not defined in the EEZ Act. In *Royal Forest and Bird Protection Society of New Zealand Incorporated v New Plymouth District Council*, the Environment Court considered the meaning of protection and concluded that it mean keep safe from harm, injury or damage.

[63] It will be seen that s 6(c) identifies the protection of significant indigenous vegetation and significant habitats of indigenous fauna as a matter of national importance. The word protection is not defined in RMA. We use it in the sense identified in decisions such as *Environmental Defence Society v Mangonui County Council and Port Otago Ltd v Dunedin City Council* **as meaning to keep safe from harm, injury or damage**. The only gloss which we would put on to that meaning is that it is implicit in the concept of protection that adequate protection is required.

16. It is submitted that this applies equally to the EEZ Act.

17. Harmful substance is defined as:

means any substance specified as a harmful substance by regulations made under this Act

18. The relevant regulations are the Exclusive Economic Zone and Continental Shelf (Environmental Effects—Discharge and Dumping) Regulations 2015, which define harmful substance to include sediments from mining activities.

Meaning of harmful substance

For the purposes of the Act, unless the context otherwise requires, harmful substance means any of the following:

(a) *a substance that is ecotoxic to aquatic organisms and is hazardous for the purposes of the Hazardous Substances (Minimum Degrees of Hazard) Regulations 2001:*

(b) *oil:*

(c) *garbage:*

(d) ***sediments from mining activities other than petroleum extraction.***

19. Section 87F(4), which prevents adaptive management conditions being imposed on a marine discharge permit, was also inserted through 2013 Amendment Act.
20. In my submission, the words and the purpose, as amended in 2015 are consistent. The purpose of the EEZ Act was amended to provide for more protection from discharges of harmful substances.
21. The words of section 64 are consistent with the purpose of the 2013 Amendment Act. The 2013 Amendment signalled protection of the environment from discharges of harmful substances. Section 87F(4) achieves this by preventing adaptive management conditions being imposed on a discharge of harmful substances, thereby increasing the robustness of information needed at the consenting stage and reducing the risk that granting marine discharge consents will not protect the environment. The failure to provide robust information at the consenting stage cannot be rectified through adaptive management.
22. An interpretation that relies on the plain and unambiguous words of section 64(2)(b) gives effect to this purpose by requiring robust information be provided at the consenting stage.

The Conditions

23. It is submitted that some of the planners' attempts to characterise the conditions as Environment Management Conditions or Operations Response Conditions under the RMA is unhelpful.² The question is whether or not the conditions meet the definition of adaptive management in section 64. Whether they can be called something else is irrelevant.
24. The reference to Environmental Management Conditions is unhelpful as all conditions presumably relate to environment management.
25. Conditions that provide for an operational response anticipate that the activity can continue with amendment and are therefore within the scope of adaptive management as defined in section 64(2)(b).

² Joint Witness statement, paragraph 17

26. Condition 5 provides for a response limit and a requirement for an investigation into the cause of the breach of the response limit. This includes the identification of an operational response.³ If the operational response is not effective and the response limits are still breached, then a further investigation has to be undertaken and further operational responses identified.
27. Condition 6 sets out compliance limits and provides that the consent holder has to cease the activity. EPA approval is required before the activity can recommence.
28. It is submitted that these conditions falls within the definition of adaptive management. Conditions 5 and 6 allow the activity to commence, but the activity has to be:
- (a) adapted if monitoring indicates the effects are more than anticipated, that is they, breach the response limit;
 - (b) ceased if monitoring indicates the effects are more than anticipated, that is they, breach the compliance limit.
29. Condition 10 refers to a Seabird Effects Mitigation and Management Plan (SEMMP). The contents of the SEMMP include:
- (a) establishing how to mitigate effects;
 - (b) establishing indicators of adverse effects;
 - (c) identifying response actions if the indicators are met;
 - (d) outlining monitoring requirements for bird strike;
 - (e) providing procedures to alter vessel lighting to reduce incidence of bird strike.
30. Condition 11 contains similar requirements for marine mammals, including operational response.

³ Condition 5(c)

31. Condition 10 provides for the assessment of adverse effects on birds from the activity and the modification of the activity to reduce bird strike. This fits within the definition of adaptive management in section 64(2)(b).
32. These can be compared with Condition 12, which simply sets a compliance limit, which must be complied with. This is not an adaptive management condition.

The EPA memorandum

33. Forest & Bird takes issue with other aspects of the EPA memorandum:

- (a) The distinction between the section 61 context and the section 87(4) context is artificial and untenable.⁴ There is no basis for interpreting section 64 differently depending on whether the application is for a marine consent or a marine discharge consent; and
- (b) The argument that an extreme interpretation of section 64 would conclude that monitoring without more is adaptive management is untenable. It is simply not an available interpretation of section 64 that adaptive management includes monitoring without conditions that provide for change or discontinuance of the activity.

CONCLUSION

34. The words of section 64 and its purpose support an interpretation that an adaptive management approach is where conditions provide for :

- (a) the activity be undertaken so its effects can be assessed; and
- (b) the activity can discontinued, or continued with or without amendment, depending on the assessment of effects.

35. Conditions 5, 6, 10 and 11 provide for the activity to commence and the effects of the plume, the effects on seabirds and marine mammals can be assessed. The assessment in Conditions 5 and 6 involve assessing with

⁴ Paragraph 24, EPA memorandum

respect to response and compliance limits. Condition 11 leaves the assessment to a management plan.

36. However, in each instance operational responses and/or ceasing the activity are anticipated. Conditions 5,6,10 and 11 amount to or contribute to an adaptive management and are barred by virtue of Condition 87F(4).

Dated 10 March 2017

A handwritten signature in black ink, appearing to read "P Anderson", is centered on a light gray rectangular background.

Peter Anderson

Counsel for Royal Forest and Bird Protection Society of New Zealand Inc.