

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

Trans-Tasman Resources Limited iron sand extraction and processing application

M42 – Minute of the Decision-Making Committee – 21 April 2017

Response to Memoranda regarding Minute 41

1. The Decision-making Committee (DMC) received a memorandum on 18 April 2017 from counsel for KASM and Greenpeace objecting to the requests for information set out in Minute 41. This memorandum referred back to similar concerns raised in an earlier memorandum dated 16 March 2017 from the Fisheries Submitters and Te Runanga o Ngati Ruanui Trust. A further memorandum was received from counsel for Royal Forest and Bird Protection Society of NZ Incorporated on 20 April 2017. These memoranda are available on the EPA website.
2. In essence the concerns raised are that the further information requested from the applicant should have formed part of the original application and it is too late to request it now, particularly given the costs imposed on other parties to review and respond to this information at this stage.
3. The Act imposes an obligation on the DMC to seek information throughout the process and provides wide powers for the DMC to do so. The DMC considers the requests for further information set out in Minute 41, and indeed the requests made by the DMC while questioning witnesses during the hearing, and in earlier Minutes, are entirely within the powers provided by the Act, including under section 55 of the Act. These powers have been exercised in order to discharge the obligations on the DMC imposed by the Act, including to make full use of its powers to request information from the applicant, obtain advice, and commission a review or a report in accordance with section 61 of the Act. These powers will continue to be exercised as required until the close of the hearing.
4. These are complex proceedings and it is not unusual in such proceedings for issues to gain a level of materiality needing to be further explored that was not envisaged at the time briefs of evidence are exchanged. Indeed it is common for decision-makers to seek additional information from applicants (and other participants) during the course of consenting processes, often in response to matters raised by submitters or arising from questioning of experts and other witnesses. One example, albeit on a large scale, was Contact Energy Ltd's proposed Hauauru Ma Raki wind farm, considered by a Board of Inquiry under Part 6AA of the Resource Management Act 1991. In that case the Board's hearing was adjourned between May 2009 and September 2010, during which period the applicant undertook extensive further design and assessment work which became the focus of the reconvened hearing. The Board's decision records the following (at [42]): *"(...) a number of applications for further or altered evidence were received well into the Second Hearing. In addition, caucusing reports were being received by the Board throughout the Second Hearing until just prior to the closing by [Contact]. This led to further opportunities being given for parties to comment (...)* With the

cooperation of the parties, the fullest opportunity to comment and submit has been provided while ensuring fairness."

5. The DMC was mindful from the beginning of this process of this potential for new issues, or different dimensions to identified issues, to arise and be addressed by all parties, as well as their role as the only arbiters of fact in these proceedings. The hearing procedures, the discussion at the prehearing conference and discussions during the hearing have all been consistent in this respect. In particular the DMC has allowed all parties significant latitude in the information provided to the DMC during the hearing – whether requested or not - on the proviso that there is the opportunity for that information to be considered and responded to by all parties.
6. The requests for further information are made with due consideration to the obligation to establish a procedure that is appropriate and fair. The DMC has always taken steps to ensure that there is a process allowing parties an opportunity to respond, and this will continue to be the case. This response may be most appropriate in written form, or expert caucusing, or in some cases appearance at the hearing.
7. It is acknowledged that any response imposes additional costs on parties and the DMC has been very mindful of this when making the further requests. The DMC has, from the beginning, provided a variety of options for parties to participate, including appearance in person or by Skype, and accepting written responses where appropriate rather than requiring people to reappear at the hearing unless there were particular matters needing to be followed up. This was all done with a view to ensuring fairness in terms of the costs inevitably incurred by parties participating in a complex process.
8. The approach of the DMC to use their powers to obtain the best available information was signalled from the beginning of the process, where it was noted in Minute 20 that further expert conferencing may be required, and in response to a question from Mr Currie at the prehearing, the Chair confirmed that opportunity would be available to ask further questions later in the process if new matters arose. For example, the issue of the “worst case” scenario arose during the hearing, including from questioning from KASM/Greenpeace. A significant portion of the additional information requested has arisen from addressing this matter in a reasonably necessary way.
9. There is clearly a point when cost, effort or time to obtain best available information becomes unreasonable. That is a matter to which the DMC must, and does, turn its mind every time it seeks more information, including considering the consequential impact on submitters responding to evidence during the hearing process. The requests in Minute 41 are directed at the applicant, and the cost of complying with the requests was a factor in deciding what was reasonably necessary to be requested. The costs to other parties arise not from the requests directly but from the consequential process of ensuring all parties have the opportunity to respond to the information – as required to ensure a fair and appropriate process.
10. Finally, the DMC notes for clarification that the reference to EPA staff working with the applicant to produce the information for spatial planning refers to administrative discussions to ensure that the information the applicant provides is able to be processed by the EPA given that there are technical limitations on what can be reproduced on the EPA website or made available to the DMC and

parties. The exercise of spatial mapping does not require any new evidence but rather is a request for information already provided during the hearing to be represented in a visual form for the DMC, and all the parties, to use during the remainder of these proceedings.

For the DMC:



Alick Shaw
DMC Chair
21 April 2017