

**BEFORE THE ENVIRONMENTAL PROTECTION AUTHORITY  
AT WELLINGTON**

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

**AND**

**IN THE MATTER** of an application for marine consent under section 38 of the EEZ Act by Trans-Tasman Resources Limited to undertake iron ore and processing operations offshore in the South Taranaki Bight

**BETWEEN** **Trans-Tasman Resources Limited**  
Applicant

**AND** **Environmental Protection Authority**  
EPA

**AND** **Fisheries Inshore New Zealand Limited, New Zealand Federation of Commercial Fishermen Inc, Talley's Group Limited, Southern Inshore Fisheries Management Company Limited and Cloudy Bay Clams Limited**  
Fisheries Submitters

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**MEMORANDUM ON BEHALF OF FISHERIES SUBMITTERS**

**Dated: 12<sup>th</sup> May 2017**

Regarding DMC Minute 43

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Counsel Acting  
**ROBERT MAKGILL**  
BARRISTER

Instructing Solicitor  
**PETER DAWSON**  
DAWSON & ASSOCIATES  
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**MAY IT PLEASE THE DECISION-MAKING COMMITTEE:****INTRODUCTION**

1. Counsel acts for Fisheries Submitters.
2. This memorandum addresses:
  - (a) The Decision-Making Committee's (**DMC**) Minute dated 9 May 2017 (**Minute 43**);
  - (b) The Fisheries Submitters' wish to reply to the further written statement of evidence to be prepared by Dr Robertson;
  - (c) The Fisheries Submitters' time allocation for closing legal submissions;
  - (d) The Fisheries Submitters' view that directions their planning expert participates in further conferencing on conditions reinforces the impression of unfairness and predetermination;
  - (e) The Spatial Mapping information provided by Trans-Tasman Resources Limited (**TTR**) on 9 May 2017; and
  - (f) TTR's claim to confidentiality in respect of reports Mr Shawn Thompson agreed to release to the Fisheries Submitters while giving evidence at the hearing on 17 February 2017.

**REPLY TO DR ROBERTSON**

3. The DMC has directed Dr Robertson to provide a written statement addressing questions that were put to him by the Fisheries Submitters in a memorandum dated 1 March 2017.<sup>1</sup> This statement is to be provided by 17 May 2017.

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<sup>1</sup> M43 at para [10].

4. By way of background, Dr Robertson provided fisheries advice to the DMC on 21 February 2017. This included a review of the Fathom report, and the fisheries evidence of TTR and the Fisheries Submitters. Dr Robertson provided an addendum to his report responding to criticism of his use of the term “adaptive management” on 28 February 2017.
5. The Fisheries Submitters provided further questions for Dr Robertson on 1 March 2017 and filed rebuttal evidence to Dr Robertson’s evidence on 3 March 2017.
6. Given the clear divergence of views on the effects of fishing between Dr Robertson and the Fisheries Submitters’ experts, the Fisheries Submitters request an opportunity to reply Dr Robertson’s responses to the Fisheries Submitters questions.

#### **TIME ALLOCATION FOR CLOSING SUBMISSIONS**

7. Counsel refers to Appendix 1 of Minute 43 and notes that closing submissions are scheduled for 23 and 24 May 2017.
8. In a memorandum, dated 7 March 2017, counsel requested additional time be allocated to the Fisheries Submitters to present their closing submissions. The reasons for this request are set out in that memorandum at paras [6] and [7].<sup>2</sup>
9. In response to that memorandum, the DMC issued Minute 32 agreeing to allow the Fisheries Submitters one hour for closing submissions on the basis that to do so would be consistent with the time period that had been allocated to counsel for KASM and Greenpeace for their opening submissions.<sup>3</sup>

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<sup>2</sup> In summary, counsel represents five separate entities that make up the Fisheries Submitters. This group, together with five expert witnesses from Jacobs, have addressed a wide range of legal and factual issues prior to, and during, the hearing. Accordingly, additional time is required for closing submissions.

<sup>3</sup> Minute 32, 8 March 2017, at para [5].

10. The timetable has been extended by the DMC<sup>4</sup> since Minute 32 was issued, and additional information and new evidence has been requested.<sup>5</sup> In particular, TTR has provided a further tranche of new evidence and proposed conditions.
11. The Fisheries Submitters have reluctantly agreed, due to the swelling costs of participating in these proceedings, to meet the costs of answering TTR's new evidence to protect the significant investment in the production of evidence and presentation of their case to date.
12. The length of these proceedings, and the large amount of evidence that has been generated as a result of the way the proceedings have been conducted, means that there are a significant number of legal issues that counsel for the Fisheries Submitters will need to address in order to fairly state their case.
13. Counsel respectfully requests that a further 30 minutes be allocated to present the Fisheries Submitters closing submissions. One and a half hours is considered the minimum necessary for counsel to adequately state the Fisheries Submitters' case in opposition to approval of the application.

### **CONFERENCING ON CONDITIONS REINFORCES IMPRESSION OF UNFAIRNESS AND PREDETERMINATION**

14. The DMC has directed at paragraph [12] of Minute 43 that:

... the planning experts attend expert conferencing on the conditions on 23 May 2017, after the substantive witnesses appear, but before the planning experts appear at the hearing to present final comments as outlined in Appendix 1 of this minute.
15. The Fisheries Submitters have advised in three separate memoranda that they cannot meet the costs of further conferencing in these proceedings.<sup>6</sup> It should be clear to the DMC, in this respect, that the Fisheries Submitters cannot afford to continue to endure the imposition of further evidential costs.

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<sup>4</sup> Minute 38, 22 March 2017.

<sup>5</sup> Minute 41, 10 April 2017.

<sup>6</sup> Memorandum of counsel on behalf of the Fisheries Submitters and Ngati Ruanui dated 16 March 2017, at paragraph [30]; Memorandum on behalf of Fisheries Submitters dated 29 March 2017, at paragraph [14]; and Memorandum of Fisheries Submitters dated 5 May 2017, at paragraphs [8] and [9].

16. This is especially the case where the Fisheries Submitters' expert evidence has been unequivocal on the point that no conditions can satisfactorily address the absence of:
  - (a) Quantitative and qualitative baseline information on the receiving environment; or
  - (b) Independently validated inputs to model the potential extent of the proposed mining operation's plume.
17. The Fisheries Submitters consider that these proceedings have been run more akin to a collaborative (or iterative) process designed to reach agreement between the different parties. The DMC's directions, in this respect, have sought to address information gaps in TTR's application with a view to reducing the uncertainty as to environmental effects.
18. Collaborative (or iterative) processes can be a useful way of resolving areas of disagreement and bringing parties together. The Fisheries Submitters acknowledge that the DMC has probably embarked on this approach in an attempt to reach an outcome that is satisfactory to all parties. However, that is not the DMC's role in a contested hearing. Rather, the DMC's function is to impartially consider the cases of the applicant and submitters.
19. The fact that the DMC has directed TTR to continually produce new information to address gaps clearly identified in the DMC's 2014 decision,<sup>7</sup> and required submitters to produce further evidence in response to that information, has created the perception that this hearing is being conducted with one outcome in mind; granting consent to TTR. The requirement for the Fisheries Submitters to further conference on conditions only reinforces that perception.
20. The Fisheries Submitters neither have the funds, nor the inclination, to continue to engage in conferencing on conditions of consent where it is their case that conditions cannot address the deficiencies in TTR's application.

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<sup>7</sup> *Trans-Tasman Resources Ltd Marine Consent Decision*, Environmental Protection Authority, dated 17 June 2014.

21. In the circumstances, the Fisheries Submitters intend to prepare a planning statement of evidence, as indicated in their memorandum of counsel dated 9 May 2017, addressing the planning response to the issues alluded to in paragraph [16] of this memorandum.

### **TTR'S SPATIAL MAPPING**

22. On 2 March 2017, while providing his oral evidence, Capt. Smith referred to a chart included in his Power Point Presentation which set out the tracks of several inshore vessels for a period of some 10 years.
23. Capt. Smith was asked by the DMC to provide a clearer diagram with the trawl tracks of the inshore vessels more clearly shown.<sup>8</sup> This was provided to EPA staff together with a nautical chart (NZ45) by way of a supplementary brief of evidence of Captain Smith dated 6 March 2017.
24. During the interactions with the DMC, the DMC commented that the information on catches in the area had been requested of Ministry for Primary Industries.<sup>9</sup> To Counsels' knowledge this information has not been provided.
25. The Fisheries Submitters have a number of concerns with the spatial mapping information provided by TTR. In addition to not addressing the aforementioned information, the spatial map:
- (a) Does not record depths, navigation warnings, or other key features of hydrographic charts including navigational warnings;
  - (b) Does not have a complete key that would assist interpretation of the map. For example, assuming the red arrows represent current flows, neither the intensity of the currents nor the time period the currents represent is explained;
  - (c) Provides no obvious time scale covering the information recorded on the map;

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<sup>8</sup> Transcript 2 March 2017 Page 797; paragraphs [10].

<sup>9</sup> Transcript 2 March 2017 Page 980 paragraphs [20] to [25].

- (d) Contains no commercial fishing information, such as trawl tracks, aggregation of surf clams or aggregations of krill are overlaid on the map;
  - (e) Is cluttered, hard to interpret and requires a feature that allows layers to be toggled on and off; and
  - (f) Does not assist in ascertaining seasonal shifts in activity.
26. Counsel respectfully submits that the spatial mapping as published on the Environmental Protection Authority's website should be revised and updated to accommodate these concerns.

### **CONFIDENTIALITY OF REPORTS**

27. In the transcript of Shawn Thompson's evidence, on 17 February 2017, he agreed to release two reports referred to in his evidence which had been requested by our clients' experts, namely:
- (a) The report prepared by naval architect Vuyk Engineering, Rotterdam BV<sup>10</sup>; and
  - (b) The Operational Risk Review report.<sup>11</sup>
28. The reports are referred to in the evidence,<sup>12</sup> and during the hearing itself where Mr Thompson agreed to provide the reports.<sup>13</sup>
29. Counsel for TTR provided these reports to counsel for the Fisheries Submitters in an email, dated 26 April 2016, with the caveat that:

The reports are provided to you on a **confidential basis** for review with your client(s) and relevant experts solely for the purpose of assessing TTR's current marine consent application.

**[Emphasis added]**

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<sup>10</sup> See page 208 of transcript of 17 February 2017.

<sup>11</sup> See page 209 of transcript of 17 February 2017.

<sup>12</sup> Report of Shaun Thompson at page Para 15 & 18 of his Second statement "Operational Description".

<sup>13</sup> 17 February 2017 transcript pgs 208 and 209.

30. TTR have further refused to provide the technical design documents attached to the reports (Appendix A and the documents referenced on page 5) on the grounds of commercial sensitivity and confidentiality.
31. The documents referred to in Appendix A (General Arrangement and related documents) are required by the Fisheries Submitters' experts to provide clearer insights into the design draught of the mining vessel in both its light ship and full operational draught, and its ability to deal with adverse weather conditions in the South Taranaki Bight. The general schematic provided by TTR lacks in key details.<sup>14</sup>
32. Counsel for the Fisheries have informed counsel for TTR that these reports cannot be regarded as confidential to counsel and their experts given that this is a notified public hearing, and the reports form part of the evidence already before the DMC. The relevant email correspondence between counsel for the Fisheries Submitters and counsel for TTR is attached as **annexure "A"**.

#### **DIRECTIONS SOUGHT**

33. Counsel respectfully requests that the DMC:
  - (a) Grants leave for the Fisheries Submitters to file evidence in response to Dr Robertson's written statement by 19 May 2017;
  - (b) Allocate one and half hours for the closing submissions of the Fisheries Submitters;
  - (c) Direct TTR's spatial mapping be updated to include the information identified as missing under paragraph [25] of this memorandum; and
  - (d) Direct that the reports discussed under paragraph [27] of this memorandum must be produced to the DMC and all submitters **in full** if TTR wishes to evidentially rely on those reports in support of its application for consent.

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<sup>14</sup>

Fig 1 of the IA at P15.

Dated this 12<sup>th</sup> day of May 2017



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**Robert Makgill / Peter Dawson**

**Fisheries Inshore New Zealand  
Limited, New Zealand Federation  
of Commercial Fishermen Inc,  
Talley's Group Limited, Southern  
Inshore Fisheries Management  
Company Limited and Cloudy Bay  
Clams Limited**

**ANNEXURE "A"**

**EMAIL CORRESPONDENCE BETWEEN COUNSEL FOR  
THE FISHERIES SUBMITTERS AND COUNSEL FOR TTR**

**From:** [Peter Dawson](#)  
**To:** [Vicki Morrison-Shaw](#)  
**Cc:** [Robert Makgill](#); [Renee Hunt](#); [Michael Holm](#)  
**Subject:** RE: Reports  
**Date:** Friday, 12 May 2017 4:46:51 p.m.  
**Attachments:** [image001.png](#)

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Dear Vikki

Further to my earlier email, lead counsel has advised that if your client wishes to rely on these reports they must be introduced into evidence in support of their application.

Our client has instructed us to seek directions from DMC to that effect.

Regards

**Peter Dawson**  
**Dawson & Associates Limited**

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**From:** Peter Dawson  
**Sent:** Friday, 12 May 2017 3:31 PM  
**To:** 'Vicki Morrison-Shaw' <[vicki.morrison-shaw@ahmlaw.nz](mailto:vicki.morrison-shaw@ahmlaw.nz)>  
**Cc:** Robert Makgill <[robert@robertmakgill.com](mailto:robert@robertmakgill.com)>; Renee Hunt <[renee@maritimelaw.co.nz](mailto:renee@maritimelaw.co.nz)>; Michael Holm <[mike.holm@ahmlaw.nz](mailto:mike.holm@ahmlaw.nz)>  
**Subject:** RE: ABS Design Approvals.

Hi Vikki

With respect, these documents should have been provided together with Mr Thompson's evidence at the outset, and our expert (Dr Clarke) had requested them previously.

In our experience Class design approvals do not normally comment on the ability of a vessel to withstand anticipated weather conditions but would set safe operational parameters for the vessel.

I will obtain instructions on your proposal that these be provided by TTR under the terms of a confidentiality agreement.

In the interim, could you confirm whether these have been provided to Maritime New Zealand?

Regards

**Peter Dawson**  
**Dawson & Associates Limited**

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**From:** Vicki Morrison-Shaw [<mailto:vicki.morrison-shaw@ahmlaw.nz>]  
**Sent:** Friday, 12 May 2017 2:05 PM  
**To:** Peter Dawson <[peter@maritimelaw.co.nz](mailto:peter@maritimelaw.co.nz)>  
**Cc:** Robert Makgill <[robert@robertmakgill.com](mailto:robert@robertmakgill.com)>; Renee Hunt <[renee@maritimelaw.co.nz](mailto:renee@maritimelaw.co.nz)>;  
Michael Holm <[mike.holm@ahmlaw.nz](mailto:mike.holm@ahmlaw.nz)>  
**Subject:** RE: Reports

Hi Peter

I refer to your email of 11 May.

I note that the reports you refer to in para 1 of your email were provided- with the exception of Appendix A.

With respect to that Appendix and the technical design documents referred to in para 2 of your email I am instructed that these contain very detailed design documentation for the mining vessel- put together for independent expert review and approval by the American Bureau of Shipping (ABS). This included review and approval for the design draught of the mining vessel and its ability to deal with weather conditions in the STB.

Proof of this approval has been provided by TTR as part of its application.

Your client could have requested access to this material at the outset rather than this very late stage of the hearing when there is clearly very little time.

TTR would be willing to provide your client access to the information on the basis that it is for consideration by a suitably qualified and experienced naval architect and/or other suitably qualified independent expert retained by your client and is subject to a conventional confidentiality agreement which reflects the high value of the intellectual property inherent in the documentation and ABS review and approval process.

This would be no different to the arrangement made between TTR and Origin on the same topic.

Kind regards

Vicki Morrison-Shaw

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**From:** Peter Dawson [<mailto:peter@maritimelaw.co.nz>]  
**Sent:** Thursday, 11 May 2017 4:27 p.m.  
**To:** Vicki Morrison-Shaw; Michael Holm  
**Cc:** Robert Makgill; Renee Hunt

**Subject:** Reports

Hi Vicki

I refer to the exchange of emails in regard to the provision of the reports. Two issues arise:

1. The reports are referred to in the evidence (report of Shaun Thompson at page Para 15 & 18 of his Second statement "Operational Description"), and during the hearing itself where Shaun Thompson agreed to provide the reports (17 February 2017 transcript pgs 208 and 209). These reports cannot be regarded as confidential to counsel and their experts given that this is a notified public hearing, and the reports form part of the evidence already before the DMC.
2. TTR have refused to provide the technical design documents attached to the reports ((Appendix A and the documents referenced on page 5) on the grounds of commercial sensitivity and confidentiality. The design documents (General Arrangement and related documents) are required by our experts to provide clearer insights into the design draught of the mining vessel and its ability to deal with the weather conditions in the STB. The general schematic you refer to (fig 1 of the IA at P15) is lacking in key detail. Accordingly the Fisheries Submitters require these appendixes to be produced.

No confidentiality orders were sought and obtained by TTR in regard to these reports (and their appendixes) and our instructions are to not regard the reports as confidential and to seek the required orders from the DMC directing that the Appendixes be produced urgently.

Regards

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**From:** Vicki Morrison-Shaw [<mailto:vicki.morrison-shaw@ahmlaw.nz>]

**Sent:** Thursday, 27 April 2017 12:45 PM

**To:** Renee Hunt <[renee@maritimelaw.co.nz](mailto:renee@maritimelaw.co.nz)>

**Cc:** Peter Dawson <[peter@maritimelaw.co.nz](mailto:peter@maritimelaw.co.nz)>; Michael Holm <[mike.holm@ahmlaw.nz](mailto:mike.holm@ahmlaw.nz)>

**Subject:** RE: Copies of reports

Hi Renee

Thanks for your email.

I am instructed that the materials requested (Appendix A and the documents referenced on page 5) are technical design documents containing confidential and commercially sensitive information which do not form part of the marine consent application so will not be

provided.

In terms of the vessel layout, Figure 2.1 of the Impact Assessment (page 15) provides a general schematic.

In terms of the design draft of 12m, I am advised that this is based on all process plant tanks being 100% filled and including all stores, crew and effects and spares.

Kind regards

Vicki Morrison-Shaw

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**From:** Renee Hunt [<mailto:renee@maritimelaw.co.nz>]

**Sent:** Thursday, 27 April 2017 11:03 a.m.

**To:** Vicki Morrison-Shaw

**Cc:** Peter Dawson; Michael Holm

**Subject:** RE: Copies of reports

Hi Vicki,

Many thanks for these reports.

We note that Appendix A to the Vuyk Engineering report (the Preliminary General Arrangement) is not attached. Could you please arrange for this to be forwarded to us? We would also like to see the documents referenced in the report on page 5 at paragraph 1.2 (being References [01] to [08]) if possible.

We also note that the design draught of the IMV is stated to be 12m. Can you please clarify with TTR how the design draught is calculated (for example, is it calculated on a light ship basis or fully fuelled, stored and operating basis)?

Kind regards

**Renée Hunt**

Legal Assistant

**Dawson & Associates Limited**

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**From:** Vicki Morrison-Shaw [<mailto:vicki.morrison-shaw@ahmlaw.nz>]

**Sent:** Wednesday, 26 April 2017 7:08 p.m.

**To:** Renee Hunt <[renee@maritimelaw.co.nz](mailto:renee@maritimelaw.co.nz)>

**Cc:** Peter Dawson <[peter@maritimelaw.co.nz](mailto:peter@maritimelaw.co.nz)>; Michael Holm <[mike.holm@ahmlaw.nz](mailto:mike.holm@ahmlaw.nz)>

**Subject:** RE: Copies of reports

Hi Renee

Attached is a copy of the reports as requested. Please note that these reports are not currently in the public domain and may contain personal information (such as the names of workshop attendees). The reports are provided to you on a confidential basis for review with your client(s) and relevant experts solely for the purpose of assessing TTR's current marine consent application.

Kind regards

Vicki Morrison-Shaw

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**From:** Renee Hunt [<mailto:renee@maritimelaw.co.nz>]  
**Sent:** Thursday, 13 April 2017 12:45 p.m.  
**To:** Vicki Morrison-Shaw  
**Cc:** Peter Dawson  
**Subject:** Copies of reports

Hi Vicki,

Looking through the transcript of Shawn Thompson's evidence on 17 February 2017, I note that he has given permission to release two reports that our experts had requested:

1. The report prepared by naval architect Vuyk Engineering, Rotterdam BV (see page 208 of transcript); and
2. The Operational Risk Review report (page 209 of transcript).

Could you please send a copy of each of these reports to us?

Many thanks.

Kind regards

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