

**BEFORE THE ENVIRONMENTAL PROTECTION AUTHORITY
AT WELLINGTON**

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

AND

IN THE MATTER of a decision-making committee
appointed to hear a marine consent
application by Trans-Tasman Resources
to undertake iron ore extraction and
processing operations offshore in the
South Taranaki Bight

**EXPERT REBUTTAL EVIDENCE OF PHILIP HUNTER MITCHELL ON BEHALF
OF TRANS TASMAN RESOURCES LIMITED**

10 FEBRUARY 2017



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INTRODUCTION

1. My name is Philip Hunter Mitchell.
2. I prepared Expert Evidence dated 19 December 2016 ("**First Statement**") for this hearing on behalf of Trans-Tasman Resources Limited ("**TTRL**").
3. My qualifications and experience are set out in paragraphs 6 – 10 of my First Statement.
4. I repeat the confirmation given at paragraph 11 of my First Statement that I have read the Code of Conduct for Expert Witnesses and agree to comply with it.
5. The purpose of this Rebuttal Evidence is to respond to three matters raised in submitter evidence, as follows:
 - (a) The extent to which the provision of "baseline information" for an application is necessary;
 - (b) The concept of a "*favouring caution*" and "*adaptive management*" as they relate to the TTRL proposal to extract and process iron sand within the South Taranaki Bight ("**STB**") ("**the Project**" or "**the Application**") in the context of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 ("**EEZ Act**"); and
 - (c) The proposed consent conditions.
6. In preparing this evidence I have reviewed all the statements of evidence issued by the submitters, and I address below each of the points set out in paragraph 5 above.

BASELINE INFORMATION

7. There is a theme of criticism from those in opposition to the Application that:
 - (a) TTRL has not provided "baseline information" of sufficient detail to understand the potential effects that may result from the Project; and
 - (b) The proposed Baseline Environmental Monitoring Plan ("**BEMP**") programme should have been conducted prior to the Application being lodged, as it is asserted that this constitutes "best practice".
8. In my opinion there is a clear and distinct difference between:
 - (a) The amount of "baseline information" that is necessary to understand what the actual and

potential effects of a project on the environment will be, such that consent can be granted; and

- (b) What “baseline information” is necessary in order to establish a dataset of sufficient detail to enable “before and after” environmental status surveys to be compared.
9. In terms of (a) above, the evidence of TTRL's expert witnesses demonstrates that there is more than sufficient information available to allow the actual and potential effects of the Application to be properly assessed and understood.
10. With regard to paragraph 8(b) above, the purpose of the baseline monitoring (provided for under the BEMP and which would be undertaken prior to extraction commencing if consent is granted) is to provide the level of detail needed for “before and after” comparisons of the state of the environment.
11. In my opinion it would not have been appropriate for TTRL to undertake the BEMP before consent was granted. I consider that the details of the BEMP need to be endorsed by the Decision Making Committee (“**DMC**”) as being appropriate. If, for example, the DMC considered that the BEMP required amendment by: adding monitoring locations; and/or adding monitoring parameters; and/or altering monitoring frequencies; then the baseline data would be invalid and the BEMP would need to be repeated.
12. In my opinion, having the DMC “sign off” on the scope and details of the BEMP is a fundamental pre-requisite to granting consent, and that decision should not be pre-empted by prematurely undertaking the BEMP.
13. I further note that I have been involved in numerous situations where “baseline information” of the type required by the BEMP is collected once consent has been granted and prior to the commencement of the consented activities.

THE PRECAUTIONARY APPROACH AND ADAPTIVE MANAGEMENT

14. Another common theme raised in the submitters' evidence is related to the need to “favour caution”¹ where the available information is “uncertain or inadequate”² and subsequently the concept of an “adaptive management approach”³.

¹ EEZ Act, section 61.

² Ibid.

³ EEZ Act, section 64.

15. Based on the evidence prepared by TTRL's technical experts, I do not consider that the information available to the DMC is "*uncertain or inadequate*", such that the DMC would be required to "*favour caution*".
16. Furthermore, I am satisfied that the information available is the "*best available information*", as required by section 61(5).
17. An adaptive management approach cannot be applied to a marine discharge consent.
18. The evidence of Natasha Sitarz, on behalf of Royal Forest and Bird Protection Society of New Zealand Incorporated (specifically paragraphs 82 – 104) addresses adaptive management. Ms Sitarz states that "*a staged approach is optional and that section 64 should be read so that adaptive management is not a staged approach, instead a staged approach can form part of an adaptive management approach*".
19. I disagree with Ms Sitarz for the reasons I will now explain.
20. First and foremost, section 63(2)(a)(iii) states that the EPA may impose conditions requiring the consent holder to "*monitor, and report on, the exercise of the consent and the effects of the activity*". The TTRL monitoring and management framework proposed in the conditions proffered by TTRL does exactly that and no more.
21. I stated in my First Statement that adaptive management has a limited applicability in this case, but only as a "*back stop measure*"⁴. That analysis was a simplified one, to the point that upon a more in depth analysis, I consider it to be incorrect.
22. In my opinion, an "adaptive management approach" exists only where there is considerable uncertainty around the scale and extent of effects and there is a need to take an experimental approach to a project so that uncertainty around effects can be assessed at an initial scale and the proposal adapted in order to address those effects.
23. In the marine setting, I am aware of a number of cases where adaptive management has been required, and I have been involved in a number of them personally. In all the cases I am

⁴ Paragraph 149.

aware of⁵, staging was fundamental to the consents being granted.

24. I am also aware of two land based examples⁶ where adaptive management has been included in consent conditions.
25. While neither land based example involved staging, given the acknowledged technical uncertainty involved, an experimental approach was required to be taken, before confirming specific details of how each project was to be implemented.
26. I consider that the Project is fundamentally different from all the above examples, primarily because it does not propose staging or experimentation and, as described in the evidence of TTRL's technical experts, the assessments made are not "*uncertain or inadequate*".
27. I consider that the TTRL approach, as provided for in the proposed consent conditions, is consistent with section 63(2)(a)(iii) of the EEZ Act which provides for the consent holder to be required to "*monitor, and report on, the exercise of the consent and the effects of the activity it authorises*".
28. I do not consider that requiring the Project to cease if Compliance Limits or Interim Sediment Quality Guideline-High values are not met⁷ amounts to an "adaptive management approach". This condition is simply restating that compliance must be achieved.
29. If the approach of setting limits, monitoring the activity against those limits, and reviewing the appropriateness of the effects on the environment, were deemed to be an "adaptive management approach" under the EEZ Act, then, in my opinion:

⁵ Clifford Bay Marine Farms Ltd v Marlborough District Council EnvC Christchurch C131/2003;

Biomarine Limited v Auckland Regional Council EnvC Auckland A14/2007;

Minister of Conservation v Tasman District Council HC Nelson CIV-2003-485-1072;

Golden Bay Marine Farmers v Tasman District Council EnvC Wellington W19/2003 and Golden Bay Marine Farmers v Tasman District Council EnvC Wellington W89/2004;

Crest Energy Kaipara Ltd v Northland Regional Council EnvC Auckland A132/2009.

⁶ Geotherm Group Ltd v Waikato Regional Council EnvC Auckland A47/2006;

Lower Waitaki River Management Society Inc v Canterbury Regional Council EnvC Christchurch C80/2009.

⁷ Proposed Consent Condition 6

- (a) It would be extremely unlikely that anything other than a trivial discharge with *de minimis* effects could ever gain consent under the EEZ Act; and
- (b) Not taking the approach proposed would be irresponsible and constitute a “great leap backwards” in terms of environmental management.

PROPOSED CONSENT CONDITIONS

- 30. A number of submitters have suggested amendments to the proposed consent conditions. These have been addressed in the rebuttal evidence prepared on behalf of TTRL.
- 31. Rather than provide an amended set of consent conditions now, it is my preference to do so following expert caucusing and / or at the end of the hearing. My intention in proposing this approach is to avoid the DMC being unnecessarily burdened with multiple versions of evolving consent conditions.

CONCLUSIONS

- 32. I consider that sufficient information has been provided to enable the potential environmental effects to be understood by the DMC.
- 33. In my opinion:
 - (a) It is standard environmental management practice for a BEMP to be completed following the granting of consent and prior to a project being undertaken; and
 - (b) It is particularly important for the scope of the BEMP to be “signed off” by the DMC.
- 34. I do not consider that the environmental management approach proposed by TTRL constitutes an “*adaptive management approach*” as contemplated by the EEZ Act. In particular:
 - (a) The Project is not being staged;
 - (b) There is no experimental aspect to it; and
 - (c) Based on the evidence of TTRL’s technical experts, there is no “*uncertainty or inadequacy*” in the information provided.



Philip Hunter Mitchell

10 February 2017