

**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

MEMORANDUM ON BEHALF OF FISHERIES SUBMITTERS

Dated: 8th February 2017

In response to DMC Minute 20 on expert conferencing

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MAY IT PLEASE THE DECISION-MAKING COMMITTEE:

1. Counsel acts for Fisheries Inshore New Zealand Limited (**FINZ**), The New Zealand Federation of Commercial Fishermen Inc, Talley's Group Limited, Southern Inshore Fisheries Management Company Limited and Cloudy Bay Clams Limited (**Fisheries Submitters**).
2. This memorandum:
 - (a) Refers to Minute 20 of the Decision-Making Committee (**DMC**), dated 3 February 2017;
 - (b) Requests that Dr Hume and Mr Todd undertake expert conferencing on coastal stability/processes.
 - (c) Invites the DMC to reconsider the exclusion of:
 - i. Dr Gregory Barbara from expert conferencing on "*effects on fishing*", given he is an independent expert who addresses effects on fishing at paragraphs [66] to [85] of his primary statement of expert evidence dated 23 January 2016;
 - ii. Dr Barbara from expert conferencing on "*effects on benthic ecology*", given he is an independent expert who addresses benthic fauna and ecology at paragraphs [8], [9]; [12(d)], [15(c), (d) and (i)], [40], [48], [50] and [51], [56], [67] to [71], [73], [75] and [76], [81], [85] and [86(d)] of his primary statement of expert evidence dated 23 January 2016; and
 - iii. Dr Jeremy Helson and Mr Andrew Smith from expert conferencing on "*effects on fishing*", pursuant to paragraph [4] of Minute 20, for the reasons set out under paragraphs [4] to [26] of this memorandum.

COASTAL STABILITY/PROCESSES CONFERENCING

3. Appendix 2 of Minute 20 lists expert witnesses with no topic or peer including Dr Terry Hume and Mr Derek Todd. Dr Hume is nominated by the Applicant to give evidence on coastal stability, and Mr Todd by the Fisheries Submitters to give evidence on coastal processes. Although different terms are used to describe their evidence, these experts discuss the same issues in their evidence. It is respectfully submitted that expert conferencing between Dr Hume and Mr Todd should take place under the topic of coastal stability/processes.

THE ROLE OF AN EXPERT WITNESS

4. An expert witness has an overriding duty to assist the court impartially on relevant matters within their area of expertise.
5. Dr Helson and Mr Smith understand that their duty in these proceedings is to provide the DMC with impartial evidence. They recognise that they are bound by the Code of Conduct for Expert Witnesses in the Environment Court Practice Note 2014 (**Code of Conduct**), even in circumstances that might be considered prejudicial to the Fisheries Submitters' interests.
6. Dr Helson and Mr Smith's respective decisions to affirm the Code of Conduct were not made lightly as a Fisheries Submitters' employee and contractor. Both read the Code of Conduct and discussed its requirements with counsel prior to affirmation. In these discussions Dr Helson and Mr Smith made it clear that they would seek to prepare their evidence objectively in any event, given the importance of having working expertise on fisheries management and fishing operations within the South Taranaki Bight (**STB**) placed before independent consultant experts unfamiliar with their particular fisheries expertise.
7. It is respectfully submitted that to exclude the participation Dr Helson and Mr Smith from expert conferencing on "*effects on fishing*" would mean that:
 - (a) Expert conferencing on "*effects on fisheries*" excludes important expertise on fishing, fisheries operations and fisheries management, which is unlikely to be otherwise be offered by the Ministry of Primary

Industries (**MPI**) or other available experts; and

- (b) The resulting joint witness statement on “*effects on fisheries*” would not be based on the best available information.
8. The Fisheries Submitters acknowledge that the views of expert employees (and possibly contractors) have the potential to be coloured by the views of their employers. However, the same can easily be said of independent experts whose paymasters are developers or submitters on any particular proposal. The objectivity of independent experts can be influenced by the expectation of a certain result or the promise of future work pending the outcome of such a result.
 9. These issues are invariably addressed through questioning by another party or the relevant judicial body where such concerns exist. If an expert witness is hostile, or unwilling to give ground where ground should be given, this is often a sign that they have lost the ability to exercise objectivity and that less weight should be placed on their evidence than that of other expert witnesses.
 10. As expert conferencing occurs before a hearing takes place and witnesses are questioned, it is often not possible to form such a view until the hearing has commenced. That is why the Environment Court does not in practice exclude expert witnesses from conferencing prior to a hearing, unless it is demonstrable from their written evidence that clear bias exists. In any event, witnesses that cannot reach agreement with other experts do not prevent those other experts from reaching agreement. Furthermore, their inability to reach agreement, where others are able, can be a signal that they lack objectivity.
 11. It is suggested that in the present circumstances a reasonable approach would be to recognise Dr Helson and Mr Smith’s respective undertakings under the Code of Conduct, but to determine the appropriate weight to be given to their evidence following conferencing, oral evidence and their answers to any questions that have been put to them.

12. Counsel notes that the Applicant's questions (approved by the DMC) to Dr Helson and Mr Smith specifically address the issue of apparent bias arising from their employment by fisheries industry stakeholders. The DMC has excluded them from caucusing (subject to this request for reconsideration) without having the benefit of their responses to those questions.

REQUEST FOR RECONSIDERATION

13. At paragraph [4] of Minute 20, the DMC has invited a party, who considers that a witness can and has clearly demonstrated their independence, to request a reconsideration of the exclusion of that witness from conferencing.
14. The Fisheries Submitters seek reconsideration of the exclusion of Dr Helson and Mr Smith.

Dr Helson

15. Dr Helson is employed as CEO of FINZ. FINZ is a commercial fisheries stakeholder organisation that represents multiple interests in the fishing industry including quota holders and commercial fishers. In this role, he is required to balance competing interests and provide objective input to its members, MPI and other forums. As such, he is highly experienced in providing objective advice in contentious circumstances.
16. As is evident from his curriculum vitae (**CV**) attached under **annexure "A"**, he has a considerable depth of experience in fisheries management gained through a senior position within government together with his role in a fisheries stakeholder organisation.
17. It is respectfully submitted, that whilst Dr MacDiarmid may have expertise on the effects on fish, she has little relevant experience in fishing and fisheries management. To exclude Dr Helson would prevent important information on existing fishing interests from being discussed and factored into any joint witness statement. This was a clear weakness during the first hearing of the Applicant's proposal.

18. Dr Helson holds a doctorate in Zoology focussed on marine ecology. He has provided expert evidence before a number of judicial forums, including the Environment Court, District Court, Environmental Protection Authority (**EPA**) and Consent Authorities. Of particular relevance, Dr Helson provided expert evidence during the hearing of Chatham Rock Phosphate Limited's application to mine phosphate on the Chatham Rise and took part in expert conferencing for that hearing. Accordingly, Dr Helson is well versed in providing evidence under the Code of Conduct.
19. In regard to the "*effects on fishing*" conferencing, it is respectfully submitted that an MPI nominated expert (unless he or she has a detailed knowledge of the fishing industry) is unlikely to be able to provide evidence on the potential effects of the proposal on commercial fishing activities. As is evident from his CV, Dr Helson has worked for MPI in a senior capacity and has the benefit of being able to assess the application from both a regulatory and industry perspective.

Mr Smith

20. Mr Smith has acted as an independent consultant to a variety of international fisheries stakeholders over the past 20 years. He continues to act as an independent consultant and is currently contracted (amongst others) to Talley's Group Limited as the operations manager.
21. Mr Smith has considerable local and international fishing and fisheries management experience. A copy of Mr Smith's CV will be forwarded to the EPA on the morning of 9 February by counsel's instructing solicitor.
22. As a deep-sea fishing master, Mr Smith has extensive experience of fishing within the STB. His experience and expertise are not replicated by other available fishing experts. To exclude him from conferencing on "*effects on fishing*" would mean that other experts would not be able to discuss his expertise and experience of navigating and fishing within the STB.
23. Mr Smith has given evidence before a number of judicial forums including the District Court, High Court, Environment Court and EPA. As a consultant, he is familiar with his obligations under the Code of Conduct.

Additional grounds

24. Both Mr Smith and Dr Helson have confirmed their agreement to abide by the Code of Conduct. They have undertaken the necessary preparation to provide their evidence objectively and to apply their experience in a neutral, informative and practical manner so as to assist the DMC with its decision-making responsibilities.
25. It is respectfully submitted that many of the expert witnesses in this matter could face similar challenges to their independence given that their employers variously contract to MPI, the Fishing Industry, other stakeholders and the Applicant. They overcome these challenges through diligently abiding by the Code of Conduct.
26. Replacing Dr Helson and Mr Smith with experts appointed by MPI or the EPA is inappropriate insofar as these experts have not prepared evidence and are unlikely to bring the same qualifications and experience to the table. Notwithstanding, the Fisheries Submitters support the inclusion of independent experts appointed by MPI and the EPA attending conferencing alongside Dr Helson, Mr Smith and Dr MacDairmid.

DIRECTIONS SOUGHT

27. The Fisheries Submitters respectfully seek the following directions:
- (a) That Dr Gregory Barbara is included in the expert conferencing sessions on “*effects on fishing*” and “*effects on benthic ecology*”;
 - (b) That Dr Hume and Mr Todd undertake expert conferencing on coastal stability/processes; and
 - (c) That Dr Helson and Mr Smith are included in expert conferencing on “*effects on fishing*”.

Dated this 8th day of February 2017



Robert Makgill

**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**