Before a Decision-Making Committee
Of the Environmental Protection Authority

EEZ100015

Under	the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012
In the matter of	an application for a marine dumping consent to dump dredged material at a deep-sea site east of Great Barrier Island
By	**Coastal Resources Ltd** Applicant

OPENING LEGAL SUBMISSIONS ON BEHALF OF COASTAL RESOURCES LTD

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INTRODUCTION

1. Coastal Resources Limited (**CRL**) is seeking a marine dumping consent under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (**EEZ Act**).

2. Consent is required because the material to be dumped is dredged marine sediment, which the EEZ Act defines as waste[1] and forbids to be dumped in the exclusive economic zone (**EEZ**) *unless* regulations allow it to be authorised by a marine consent, and a marine consent is obtained.[2]

3. Regulations provide for consenting of CRL's proposed dumping as a discretionary activity,[3] and the EEZ Act enables CRL to seek a marine dumping consent.[4]

4. CRL's proposal is to dump up to 250,000m^3 of dredged material per annum, for a term of 35 years. The material will come from coastal dredging operations predominantly in the Auckland region, where it will be excavated by mechanical diggers. It will be transported to the dumping site in bottom-dump barges — some self-propelled, and some towed by a tug — in loads up to a maximum size of 1,200m^3. A maximum of two dumping events per day are proposed, with at least a one hour gap between each dumping event.

5. The proposed dump site is the Northern Disposal Area (**NDA**), which is an existing dump site 25km east of Great Barrier Island, where the sea is about 140m deep.

6. CRL holds a consent to dump up to 50,000m^3 of dredged material at the NDA, and has dumped in excess of 200,000m^3 of material under that consent between 2013 and 2018. There is immediate demand to dispose of more dredged marine sediment than can be accommodated under the existing NDA consent limit. For the foreseeable future, demand is projected to increase steadily.

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[1] Section 4.

[2] Section 20G.

[3] Clause 33 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects – Discharge and Dumping) Regulations 2015, clause 33.

[4] Section 38.

7. All dumping at the NDA to date has involved the release of dredged material at the sea surface directly above the centre of the NDA (±50m). The proposed dumping will involve the release of dredged material at a range of defined points, all within 500m of the centre of the NDA (allowing the larger volume to settle over a wider area, forming a wider but less deep mound on the seabed).

8. The NDA is a 1,500m radius circle, so the proposed release within 500m of the centre, will mean all material is released at least 1,000m inside the nearest boundary of the NDA. This will ensure that the effects of the dumping can be adequately managed and monitored by reference to the NDA boundary.

9. The majority of the dredged material (~95%) will settle directly onto the seabed within a few hundred metres of the release location, well inside the NDA boundary. The small remainder will remain suspended in the water column as a plume for some time, likely to be long enough that ocean currents will carry it across the NDA boundary before it settles. However, the plume will be sufficiently dispersed that any amount crossing the NDA boundary is not expected to have any adverse effect, either while still suspended or upon settling.

10. To be clear, the present application does not, and cannot, seek approval of the dredging activities that produce material for disposal. Those activities occur outside the EEZ (within the coastal marine area) and are not regulated by the EEZ Act.

11. Further, while CRL has in the past conducted some dredging operations of its own, that is no longer part of its business; and nor does CRL transport dredged material to the NDA. All dredging, transporting, and release of dredged material is performed by third parties. As the current consent holder (and intended future consent holder) CRL is the manager and operator of the disposal site. Its responsibility is to administer the consent, and ensure that all conditions of consent are met.[5]

12. CRL does not "own" the NDA, or have any greater claim over it than any other person; but as the holder of the dumping consent, it can decide who it allows to dump dredged material at the site, and can do so on a basis that will ensure all such dumping complies with the consent conditions.

[5] Evidence of Simon Male, 25 October 2018 at [45] and [46].

13. The task for this DMC is to take into account all of the relevant considerations under the EEZ Act and determine whether consent should be granted; and if so, what conditions should apply.

14. CRL will submit that the proposed dumping will have no material impact on any existing interests, and with suitable conditions of consent all potential adverse effects of the proposed dumping can be avoided or mitigated to an appropriate level. CRL will submit that granting consent is consistent with the purpose of the EEZ Act, and all relevant principles and guidance under the Act.

Disposal of Dredged Material in the Auckland Region

15. Marine dredging in and around Auckland is increasing. Marine dredging is essential for the maintenance of existing marina and port facilities, and essential for the development of new marine facilities.

16. Since 2000 Auckland is the only region in New Zealand that has generated applications for disposal of dredged material in the EEZ.[6]

17. Elsewhere in New Zealand ports and marinas tend to dispose of their dredged material within the coastal marine area.[7] That is not an option in Auckland due to restrictive planning provisions.[8]

18. Combining this with the lack of practical or viable disposal options on land, means the only remaining option is for disposing of the increasing volume of Auckland's dredged material at sea, beyond territorial limits.

19. Auckland's reliance on offshore disposal was recognised over 25 years ago, when a multi-stakeholder group called the Disposal Options Action Group was formed to assess all options for disposing of the region's growing volume of dredged material.[9] The options they considered included reclamation, beach renourishment, habitat enhancement or creation, landfill disposal, commercial and industrial application and forestry applications. The Group concluded that the only viable options were:

[6] Letter of Advice from Maritime New Zealand, 30 April 2010, Appendix 7a to the Application.

[7] Evidence of Simon Male, 25 October 2018 at 10.

[8] Evidence of David Hay.

[9] Northern Disposal Area – Physical Oceanography Assessment, Dredged Material Disposal Options and International Deep Water Disposal Sites (Beca, 22 April 2018) ("Beca Report") Appendix 4 to the Application, at 9 to 13.

(a) Use as fill for port reclamation; and

(b) Marine disposal in water deeper than 100m.

20. Since then, most dredged material from the Auckland region has been disposed either in waterfront reclamations, or at one of two offshore sites: the AEDG and the NDA.

Waterfront Reclamations

21. Waterfront reclamation has absorbed a significant share of Auckland's dredgings over the past 20 years, including at Viaduct Harbour and at the Fergusson Container Terminal.

22. The only current project is the Fergusson reclamation, which was consented in the late 1990s and now nearing completion.[10]

23. There are no further consented Port reclamations in the Auckland-Waikato region, and for reasons elaborated in Mr Hay's evidence,[11] no further larger scale reclamations in Auckland can reasonably be expected.

The AEDG

24. The AEDG (Auckland Explosives Dumping Ground) is located in deep water (600m – 1,200m) east of Cuvier Island. It was historically used by the navy for disposal of unexploded ordnance.

25. However, both the presence of unexploded ordnance and the considerable depth of the site are problematic.[12] The presence of unexploded ordnance presents risks of explosion either from the dumping itself or from any monitoring that is able to be undertaken. The depth makes accurate monitoring of environmental effects all but impossible, making it difficult to meet New Zealand's obligations under the London Convention.[13]

26. For these reasons, around 2007 Maritime New Zealand informed industry that the AEDG was no longer suitable as a long term option. But lack of

[10] Beca Report, above n 9 at 12.

[11] At [106] to [115].

[12] Beca Report, above n 9 at 12; and Letter from Maritime New Zealand, 30 April 2010, Appendix 7a to the Application.

[13] The 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter, 1972.

alternatives led Maritime New Zealand (who at that time held regulatory responsibility) to continue to issue small scale dumping permits for the AEDG as an 'interim measure'.

27. There are now no current approvals for dumping at the AEDG, which leaves the NDA as the only site within the EEZ that is currently approved to receive dredged material.

The Evolution of the Northern Disposal Area

28. In 2008 CRL partnered with Waikato University, to research and identify a new offshore disposal site, resulting in the identification of the NDA.

29. In 2009 CRL obtained approval from Maritime New Zealand to undertake a one-year trial dumping programme at the NDA.

30. The results of the trial were used to apply for CRL's current consent. The current consent was granted in 2012 and authorises the dumping of up to 50,000m^3 per annum until the end of 2032, subject to conditions.

31. The current consent was granted by Maritime New Zealand under the Maritime Transport Act. Since then, responsibilities for regulating discharges and dumping in the EEZ have transferred from Maritime New Zealand to the EPA. Under section 164A of the EEZ Act, CRL's dumping permit, became a "deemed marine dumping consent"(EEZ900012).[14]

The Relevance of CRL's Deemed Marine Dumping Consent

32. This DMC must assess the full extent of CRL's proposal — there is no ability to discount the effects of the dumping volume permitted under the current consent, and examine only the 'additional' effects of the proposed dumping. It is the effect of the whole that must be assessed.

33. Of relevance to this, if CRL's application is granted, then CRL intends to surrender its existing consent when it gives effect to the new consent: there will only ever be one consent being implemented, with one suite of conditions applying.

[14] Application Appendix 1.

34. The current consent does not therefore establish a *de facto* 'permitted baseline' of effects. But it is relevant, and highly so, because in practice it has furnished a considerable volume of monitoring data that informs the assessment of the present application. As at 1 October 2018 there had been 545 trips to the NDA, and dumping of approximately 223,205m^3 of dredged material. In accordance with its current consent, CRL has undertaken comprehensive monitoring of benthic fauna, contaminants, sediment grain size and changes in bathymetry at the NDA as the cumulative dumping totals have passed 10,000m^3, 50,000m^3, 100,000m^3, 150,000m^3 and 200,000m^3. The latest of these was submitted to the EPA (as required) after the present application was lodged.

35. As a consequence of this monitoring activity, more is known about the NDA than any other potential dumping site in the EEZ, and the effects of dumping activity to date have been monitored and reported as required.

36. The current consent may also be useful as a guide to the formulation of conditions, if the DMC is minded to grant CRL's application. However, some caution is required in this process. The conditions of the current consent reflect the regulatory regime that applied at the time the consent was granted. In particular, that regime did not prohibit adaptive management conditions, and placed significant reliance on the "characterisation" of material prior to dredging.

37. This is most obvious in condition 1 of the current consent, which requires CRL to obtain two further approvals from the EPA prior to undertaking any dredging:

    (a) The EPA must approve CRL's plan for sampling the source site in order to characterise the sediments to be dredged.[15]

    (b) Once CRL has undertaken sampling in accordance with the approved plan, the EPA must approve CRL's sampling results before dredging can proceed.[16]

38. These requirements conform with the Marine Protection Rules[17] and the Guidelines for Sea Disposal of Waste (**Guidelines**),[18] which the Director of

[15] Condition 1(a)(i).
[16] Condition 1(a)(ii).
[17] Marine Protection Rules, Part 180 – Dumping of Waste and Other Matter.

Maritime New Zealand was required to apply, and have regard to (respectively) when deciding whether to grant the dumping permit.

39. However, no requirements to 'characterise' source sites prior to dredging has been carried over into the EEZ Act under the transfer of obligations from Maritime New Zealand to the EPA.

40. That is noteworthy because conditions that require additional approvals of the sort described above are unlikely to be lawful for the present application: such conditions might defer a necessary element of the EPA's consent decision, which would be improper; or alternatively, might contribute to an adaptive management approach that is now statute-barred for marine dumping consents.

41. There is further discussion on the adaptive management issue later in these submissions. For present purposes, it is sufficient to record that CRL's proposed conditions will avoid both these problems, in large part by removing any "approval" role for the EPA in relation to characterisation. In a general sense, CRL's proposed conditions move the focus for compliance off *dredging* and onto *dumping*.

42. CRL still proposes to characterise source sites, and to do so in conformity with all key elements of the Guidelines. Mr West has distilled those key elements into schedules proposed to be incorporated into the conditions. If the DMC decides to grant consent on those conditions, then characterisation testing will continue to play a crucial role, assuring both CRL and the EPA that the character of the dredged material is such that the *dumping* will comply with the strict environmental limits proposed as conditions of consent.

INTRODUCTION TO THE LEGAL FRAMEWORK

43. The EEZ Act contains a great many provisions that are relevant to, and will guide, the DMC's assessment.

44. To simplify that task, these submissions divide the provisions into three groups, and address each group in turn. These groupings are not explicit within the Act, but are offered as a convenient way to understand and apply the Act's requirements.

[18] Advisory Circular, Part 180: Dumping of Waste or Other Matter, New Zealand Guidelines for Sea Disposal of Waste.

45. The first group, "Statutory Guidance", covers what might be called the "higher-order" or "umbrella" provisions in the EEZ Act, i.e. those that provide guidance on core principles and concepts that apply broadly across the assessment, such as the information principles in s 60. Within this group, the submissions also address how the Act deals with international obligations and Māori interests.

46. The second group, "Statutory Assessment Criteria", covers those provisions containing more detailed and precise guidance or "decision-making criteria", predominantly contained in sections 59, 60 and 62. This is where the Act explicitly directs the DMC to take into account effects on the environment, effects on existing interests and consider whether there are alternative options for reuse, recycling or treating the dredged material.

47. Thirdly, these submissions address one important issue in relation to conditions: the Act's prohibition of adaptive management conditions for marine dumping consents. Avoidance of adaptive management is likely to be one of the key issues for this DMC's consideration. The submissions will address the meaning of adaptive management, and how CRL's proposed conditions have been modified to avoid adaptive management, as recently interpreted by the High Court in the *TTR Appeal*.[19] No other comments on the conditions are made at this stage, as the conditions are continuing to evolve, and there has not yet been time to consider the position reached in the conference between planners yesterday.

STATUTORY GUIDANCE

The Purpose of the EEZ Act

48. The purpose of the EEZ Act is set out in section 10(1) as being:

    (a) to promote the sustainable management of the natural resources of the EEZ and continental shelf; and

    (b) to protect the environment from pollution by regulating or prohibiting discharges of harmful substances and dumping or incineration of waste/other substances.

[19] *The Taranaki-Whanganui Conservation Board s v The Environmental Protection Authority* [2018] NZHC 2217 ("TTR Decision").

49. Sustainable management is defined in section 10(2):

> In this Act, sustainable management means managing the use, development, and protection of natural resources in a way, or at a rate, that enables people to provide for their economic well-being while—
> (a) sustaining the potential of natural resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
> (b) safeguarding the life-supporting capacity of the environment; and
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

50. Three important observations can be made.

51. First, the purpose explicitly states that one of the Act's aims is to protect the environment by *regulating* the dumping of waste. Such dumping is not prohibited, and the scheme for marine dumping consents enables them to be assessed as discretionary activities.

52. As it was put by the High Court determining the *TTR Appeal:*[20]

> I do not accept the submission that the protection from pollution purpose overrides the sustainable management of natural resources purpose. There is no absolute prohibition on the discharge of a harmful substance. Section 10 clearly anticipates that there will be cases where this is appropriate, otherwise the reference to regulating such a discharge would be meaningless.

53. Second, the EEZ Act's definition of sustainable management is significantly different to the definition in the Resource Management Act 1991 (**RMA**). The focus under the EEZ Act definition is on enabling "economic well-being" and there is no mention of social and cultural wellbeing; nor of health and safety. I discuss the importance of these differences later in these submissions.

54. Third, the purpose of the EEZ Act is not directly invoked in any of the detailed provisions that guide the decision-making process (ss 59 – 62). This too significantly differs from the RMA, where consent authorities are required to take account of all the prescribed consenting considerations (in s 104) "subject to Part 2" (which includes the s 5 purpose of the RMA).

55. Here, by comparison, the EEZ Act 'points' in the other direction: Section 10(3) states that "in order to achieve the purpose" decision–makers must take into account the decision-making criteria (ss 59-60) and apply the

[20] TTR Decision above n 19 at [102].

information principles (s 61). The suggestion seems to be that if the decision-making criteria are taken into account, and the information principles are applied, then the purpose will have been met.

The Information Principles

56. The information principles set out in section 61 require the DMC to make full use of its powers, base its decisions on the "best available information" and take into account any "uncertainty or inadequacy" in the information available. Where information is "uncertain or inadequate" the DMC must "favour caution and environmental protection".

Full Use of Powers

57. The DMC has "all the powers that are reasonably necessary to enable it to carry out its functions under the EEZ Act."[21] This includes broad powers to require and commission the provision of information and advice.[22]

58. In this instance the DMC has been proactive in using its powers:

(a) It has sought and obtained detailed advice from:

(i) Biosecurity New Zealand (MPI),

(ii) the Hauraki Gulf Forum,

(iii) Waikato Regional Council (twice),

(iv) Department of Conservation,

(v) Auckland Council (twice),

(vi) Fisheries New Zealand (MPI) and

(vii) Maritime New Zealand.

(b) It has sought and obtained a report (and an addendum) from Nga Kaihautu Tikanga Taiao (**NKTT**) to assist the DMC to understand Maori world views on the application.

[21] Section 15 of the EEZ Act.
[22] Sections 54 and 56 of the EEZ Act.

(c) The DMC has engaged a number of external consultants with expertise in relevant areas to assess specific aspects or attributes of the proposal:

(i) Daniel Leduc on marine ecology;

(ii) Claus Pederson on oceanography and sediment dispersal;

(iii) Kieran Murray on economics, and

(iv) Catherine Clarke on potential conditions of consent.

(d) In addition to the written reports from these experts, including addendum reports from some of them, the DMC has also required these independent experts to attend and participate in expert conferencing with the applicant's and other parties' experts, which has contributed to the joint witness statements.

(e) Further, the DMC has issued three separate further information requests to CRL, to each of which CRL has responded.

59. While the Act does not define what the "full use of powers" requires, the High Court has suggested they (along with the other information principles) seem to be designed to facilitate the making of decisions in circumstances where the absence of hard information might otherwise mean no consents would be granted.[23]

60. Through its engagement with the application, and its proactive seeking of information that may be useful to its decision (as outlined above) the DMC has turned its mind to this issue, and acted in accordance with the statutory requirements.

Best Available Information

61. Under s 61(1)(b) this DMC is required to base its decisions on the "best available information". The obligation is not to obtain *all* information but, as s 61(5) makes clear: "The best information that, in the particular circumstances, is available without unreasonable cost, effort or time."

[23] TTR Decision above n 19 at [266].

62. What is reasonable (or not) in terms of cost, effort or time will always vary between cases. The explicit statutory link between the information and "the particular circumstances" of the case is a clear direction to look at applications on the facts and on a case by case basis.

63. In relation to resource management decisions the Court of Appeal has observed that there is always more information or evidence that can be sought on an issue, and decision-makers frequently have to make decisions based on incomplete data.[24] If anything, this is even more true of deep water environments in the EEZ, about which we typically know even less than we do about land-based environments.

64. The Fisheries Act also contains a provision (s 10) requiring decision-making to use "the best available information", which has been acknowledged as being directed to the problem of decision-making in conditions where there is a significant degree of uncertainty. On this, Elias CJ has said, "Imperfect information is not, however, a reason for postponing or failing to take measures to achieve the purpose of the Act".[25]

65. The requirement to base your decision on the best available information may come up in relation to the question whether the NDA contains any hard substrate (rock or shell) that could provide habitat for protected coral species. On that potential issue, CRL draws attention to the significant sampling that has occurred within the NDA, none of which has detected hard substate or any of the epifauna that it might accommodate.

66. In addition to its sampling program, CRL has obtained multi-beam acoustic backscatter surveys of the whole of the NDA four times in the past 5 years; as is required under its existing consent. Those surveys, which are capable of detecting hard substrate to relatively small sizes have found no such substrates within the entire NDA. While this does not definitively rule out the possibility of some smaller rocks or groups of rocks somewhere within the NDA area, there is no evidence to suggest their presence.

67. This DMC must keep in mind that that the standard of 'proof' in the assessment of an application like this is the general civil legal standard. Factual matters are to be determined on the 'balance of probabilities' (not

[24] *Ngāti Rangi Trust v Genesis Power Limited* (2009) 15 ELRNZ 164 (CA) at [62].
[25] *New Zealand Recreational Fishing Council Inc v Sanford Ltd* [2009] NZSC 54, [2009] 3 NZLR 438 at [9].

'beyond reasonable doubt' as is required in a criminal setting). While CRL accepts that the available information does not entirely rule out the possibility of small quantities of hard substrate somewhere within the NDA, that remains only a *possibility*. The preponderance of evidence all points towards the conclusion that the seabed in the NDA comprises flat, featureless, sandy silt.

68. Consistent with this, all of the experts on ecology have agreed that the likelihood of stony corals in the NDA (which rely on the presence of hard substrate) is none to very low. CRL submits that this comfortably satisfies the balance of probabilities standard.

69. Further, the only work that could materially alter the certainty of this conclusion would be to undertake a comprehensive video survey of every inch of the entire NDA – which will be discussed by Mr West when he gives his evidence. This would be prohibitively expensive, and time-consuming, and would well exceed the "best available information" standard.

Uncertainty or Inadequacy

70. CRL submits that at the conclusion of this hearing the DMC will be able to find that there is no material uncertainty or inadequacy in the information about CRL's proposal. The following submissions are therefore offered to assist the DMC should it reach a different conclusion on this aspect of the application.

71. The phrase "uncertainty or inadequacy" is not defined in the EEZ Act.

72. The ordinary meaning of uncertainty is: "not known, reliable or definite; not completely known or sure".[26]

73. The ordinary meaning of inadequate is: "lacking the quality or quantity required, insufficient."[27]

74. These words need to be considered in their statutory context. The triple requirements of section 61(1) make plain that even where the DMC has made "full use of its powers" and has the "best available information", the information may *still* be "uncertain or inadequate". This clearly indicates that

[26] Concise Oxford English Dictionary, 12th Ed (2011).
[27] Concise Oxford English Dictionary, 12th Ed (2011).

uncertainty or inadequacy may be present even where all appropriate effort has been made to reduce or eliminate these factors.

75. To properly understand the significance of any residual uncertainty or inadequacy, guidance must be taken from the Act's prescription for how a DMC should act in the face of such factors. The Act does not require an application to be declined in such circumstances. Rather, it requires the DMC to "take into account" the uncertainty or inadequacy[28] and to favour caution and environmental protection.[29]

76. If the DMC concludes that there is any remaining uncertainty or inadequacy about CRL's proposal, then the DMC should examine that in the context of its ability to understand and manage the effects of the proposal. As described by the High Court, there is an inherent uncertainty about the exact nature of the deep-water environment surrounding New Zealand.[30] It may not be realistic to require such uncertainty to be eliminated, and the Act does not set such an unattainable standard. It rather enables decision-making to proceed in the face of uncertainty, requiring the decision-maker to be properly cognisant of the scale and extent of that uncertainty.

77. What is ultimately required is that the information be sufficient and adequate to identify the type of activity being proposed, the likely effects of the activity, and the suitability and effectiveness of measures (i.e. conditions) to avoid, remedy or mitigate those adverse effects.

Favouring Caution and Environmental Protection

78. The DMC is required to "favour caution and environmental protection" where (and only where) information is uncertain or inadequate.[31] As stated above, CRL contends that there is no material uncertainty or inadequacy in the information available to the DMC; and so the following submissions are offered to assist the DMC if it reaches a different conclusion on this aspect of the application.

79. The phrase "favour caution and environmental protection" is not expressly defined in the EEZ Act.

[28] Section 61(1)(c).
[29] Section 61(2).
[30] TTR Appeal Decision at [266].
[31] Refer sections 34, 61 and 87E of the EEZ Act.

80. "Environment" is broadly defined: it is "the natural environment, including ecosystems and their constituent parts and all natural resources of… the exclusive economic zone."

81. The ordinary meaning of favour, caution and protection are:[32]

(a) "Favour" – approval or liking, preferential treatment, work to the advantage of;

(b) "Caution" – care taken to avoid danger or mistakes, warn; and

(c) "Protection" – the act of protecting, preserving, keeping safe from harm or injury.

82. So in other words, to favour caution and environmental protection in this setting means to prefer a careful approach that keeps the natural EEZ resources safe from harm.

83. That is supported by the advice provided to the Select Committee during the Act's formulation. The Select Committee requested an explanation of the decision to use the phrase "favour caution"[33] rather than a reference to the "precautionary approach" and was advised:[34]

> The policy intent of the Bill is to take a cautious approach to risk management in situations of scientific uncertainty such as when information is uncertain, unreliable or inadequate. Rather than merely noting the term "precautionary principle" or "precautionary approach", the EEZ Bill aims to provide more meaning as to what the concept entails for regulators, the EPA and those applying for, and objecting to, marine consent applications. Similar to s 10 of the Fisheries Act … the EEZ bill requires "caution" where information is uncertain or inadequate. This is just one method of allowing for care and a cautious approach when information about an activity and its effects is uncertain. The EEZ Bill also provides for other ways in which caution can be exercised…. Thus, like other New Zealand environmental management regimes governing the ocean, the EEZ Bill is consistent with the precautionary approach without explicitly stating it.

84. The relevant words have been interpreted by other DMC's determining marine consent applications, and more recently by the High Court. There is

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[32] Concise Oxford English Dictionary, 12th Ed (2011).

[33] The Bill at first reading contained materially the same directives to favour caution and environmental protection when facing uncertain or inadequate information, in clause 13. The amendments made by the Select Committee moved that text, but retained materially the same wording, into what is now s 61.

[34] Ministry for the Environment advice to the Local Government and Environment Select Committee on the EEZ Bill (12 February 2012) <www.parliament.govt.nz>.

consistent agreement that the words do not seek to incorporate an extraneous "precautionary" ideal[35] — which has its genesis in the Rio Declaration.[36] Parliament considered whether or not there should be an express requirement to apply the precautionary principle but decided (because of a lack of certainty around exactly what that concept means) to use the words "favour caution and environmental protection" instead.[37]

International Obligations

85. International instruments (such the London Convention[38]) are only binding to the extent that they are incorporated into domestic legislation. Section 11 of the EEZ Act indicates that Parliament has incorporated New Zealand's international obligations within the Act itself.

86. In order for the DMC to consider the specific provisions of an international instrument there would need to be clear evidence that it set out relevant and authoritative guidance on one of the relevant decision-making criteria. In the absence of such evidence, the EEZ Act should be deemed to give effect to all relevant international obligations.

87. This approach is consistent with the supplementary order paper explaining the final changes to the section:[39]

> Clause 11, which provides for the Act to be interpreted under various international conventions, is replaced. New clause 11 records that the Act continues or enables the implementation of New Zealand's international obligations so that a decision-maker under the Act does not need to look beyond the Act to be sure that he or she is complying with those obligations. (Emphasis added)

88. It is also consistent with the approach taken by the EPA in previous EEZ Act decisions which have considered international obligations, and consistent with the High Court's findings in the *TTR Appeal*:[40]

> The particular way that Parliament has determined how New Zealand's relevant international obligations will be applied in relation to marine activity and discharge consents is to refer to them in s 11 and indicate that compliance with the Act is the

[35] TTR Appeal decision at [314] and [336].
[36] 1992 Rio Declaration on Environmental and Development A/Conf 151/26 V1 (1992).
[37] TTR Appeal decision at [334].
[38] The London Convention is the Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter, 1972.
[39] Explanatory Note, House of Representatives, Supplementary Order Paper No. 100 of 14 August 2012, at page 14.
[40] Above n 19 at [171].

way that the legislature has decided to discharge New Zealand's obligations under the various international conventions. None of the international conventions are incorporated directly into New Zealand's domestic law.

Effects on Māori Interests

89. Section 12 of the EEZ Act sets out how the Treaty principles have been given effect to through the provisions of the Act.

90. Importantly, section 12 does not impose any express requirement on the DMC to take into account the principles of the Treaty when making decisions on applications. Just as s 11 is the manner in which the legislature has chosen to implement New Zealand's obligations under international conventions, s 12 has been said by the High Court to be the manner in which the legislature has chosen to respect and give effect to Māori rights and to take those into account in relation to the effects of activities on existing interests.[41]

91. Of relevance to this case, section 12 indicates that Māori interests will be recognised and respected in the manner required by the Act by:

(a) Seeking advice from the Māori Advisory Committee / Nga Kaihautu Tikanga Taio (**NKTT**) under section 18; and

(b) Taking into account the effects of the activity on existing interests, under section 59.

92. Existing interests are defined (exhaustively) in section 4 of the Act. In relation to Māori interests, they include:[42]

(a) the interests a person has in a Treaty of Waitangi settlement; and

(b) the interests a person has in a protected customary right or customary marine title;

neither of which are relevant in this case.

93. CRL acknowledges that effects on cultural and spiritual values, on kaitiakitanga and on sense of identity are matters of concern and

[41] *TTR Decision* above n 19 at [174]

[42] Refer definition of "existing interests" in section 4(1)(a), (d), (e) and (f).

importance to iwi; and a number of submitters have raised concerns of this sort.

94. These matters require careful assessment. The submitters do not claim that the values of concern to them are recognised or manifested in a Treaty settlement. They are not an "existing interest" in that sense.

95. The other possibilities for taking account values of this sort, would seem to be that they might amount to an "existing interest" of another sort (under s 59(2)(a)), or that the DMC may consider them relevant and reasonably necessary to consider under s 59(2)(m), both of which are addressed below.

Can cultural values/interests be an existing interest?

96. An interest under s 59(2)(a) other than an interest in a Treaty settlement, is required to be an interest in an "activity". If a lawfully established activity gives rise to a cultural interest, then the cultural interest seems to be a component of the existing interest that may be taken into account. For example, a customary fishing activity could give rise to existing interests of two sorts: the fishing activity itself would be an interest, but it could also be an 'expression' or manifestation of traditional knowledge and cultural relationships. Both aspects could be taken into account.

97. This should be read alongside the guidance contained in section 60. Section 60 states what matters the DMC must have regard to when considering effects on existing interests, and the list it provides is predominantly focused (in paragraphs (a) to (c)) on the potential displacement effect of a marine consent. That is, it requires the DMC to consider to what extent the proposal may physically displace the existing interest. While paragraph (d) allows regard to be had to 'any other matter', it is difficult to infer that this was intended to capture an entire body of cultural interests that arise without some physical manifestation in the area of the proposed new marine activity.

Cultural values/interests as "another relevant and reasonably necessary matter"

98. The other possibility for taking account of cultural interests arises under the catch-all provision in s 59(2)(m): taking account of such interests as an "other matter" relevant and reasonably necessary to determine the application.

99. Placing any significant reliance on that possibility also requires caution. Section 12 clearly indicates that the specific part of s 59 that Parliament intended to utilise in order to recognise and respect the Crown's responsibility under Te Tiriti o Waitangi, is the part dealing with "effects of activities on existing interests" – i.e. s 59(2)(a).

100. It would be contrary to that guidance to rely on s 59(2)(m) to introduce significant cultural considerations.

Perspective

101. Finally, on this topic, the DMC has the benefit of NKTT's report and addendum. NKTT has clarified that its report employs the term "interests" in a wider sense than the current definition in the EEZ Act.

102. As recommended by NKTT, CRL has sought and obtained a cultural impact assessment. That assessment, from Ngai Tai ki Tamaki does not oppose the application but encourages the EPA to consider investing in alternative disposal options.

103. On balance, there is plainly a tension between dumping dredged material at sea, and the cultural and/or spiritual interests expressed by a number of iwi submitters in the maintenance of mauri as an aspect of kaitiakitanga. However, the NDA is already affected by the dumping activity lawfully conducted under CRL's deemed marine dumping consent, and CRL's proposal will not displace any physical activity of a cultural nature. On this basis, and taking into account the cultural impact assessment of Ngai Tai ki Tamaki, CRL submits that the residual concerns of other iwi submitters do not warrant the consent being declined.

STATUTORY ASSESSMENT CRITERIA

104. The matters listed under section 59(2) and (2B) are all matters that this DMC is required to "take into account".

105. This standard has been discussed in many cases, all of which have in common the recognition that to take something into account is different than the obligation to "apply" something.

106. For present purposes a useful summary may be that of the High Court in *New Zealand Transport Agency v Architectural Centre Inc.*[43] where Brown J discussed the view that the phrases "shall have regard to" and "take into account" could be regarded as synonymous. He said:

> In my view, the expression "to take into account" is susceptible of different shades of meaning. I consider that the two phrases can be viewed as synonymous if the phrase "to take into account" is used in the sense referred to by Lord Hewart CJ in *Metropolitan Water Board v Assessment Committee of the Metropolitan Borough of St. Marylebone* "of paying attention to a matter in the course of an intellectual process". The key point is that the decision-maker is free to attribute such weight as it thinks fit to the specified matter but can ultimately choose to reject the matter.

107. This reasoning was accepted and adopted an EEZ Act setting in the TTR Appeal.[44]

108. All of the relevant matters under subsection (2) and (2B) must therefore be paid attention, but ultimately it is for the DMC, on the evidence it hears, and in accordance with the other statutory guidance, to attribute to those matters such weight as it sees fit.

109. In the following sections, these submissions outline CRL's position in relation to each of the relevant matters under ss 59 and 62.

Matters That Do Not Have to be Taken Into Account

110. On a marine dumping application such as this, there are four matters in section 59(2) that do *not* have to be taken into account:[45]

(a) the effect on human health that may arise from effects on the environment;[46]

(b) the economic benefit to New Zealand of allowing the application;[47]

(c) the efficient use and development of natural resources;[48] and

(d) best practice in relation to an industry or activity.[49]

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[43] *New Zealand Transport Agency v Architectural Centre Inc.* [2015] NZHC 1991, [2015] NZRMA 375.
[44] TTR Decision above n 19 at 159.
[45] Section 59(2B).
[46] Section 59(2)(c).
[47] Section 59(2)(f).
[48] Section 59(2)(g).

111. The DMC is not precluded from assessing these matters — it is simply not required to take them into account. Given the matters to be taken into account include any matters the DMC considers relevant and reasonably necessary to determine the application, it would arguably be open to the DMC (in appropriate circumstances) to consider one of these non-mandatory factors.

112. Economic benefit to New Zealand may be such a factor in this case.

113. The removal of economic benefit from the list of mandatory considerations for dumping activities may be because dumping has historically rarely occurred at a scale likely to benefit the national economy.

114. However, in CRL's case the proposed dumping will meet a pressing need to dispose of material to be dredged in readiness for the Americas Cup, and may also be utilised by Ports of Auckland Limited for disposal of its regular maintenance dredging. As assessed in the Market Economics report, both of these activities are of a scale and significance that give rise to economic consideration on national scale. It would also be consistent with the economic elements of the Act's purpose (to promote enabling of people to provide for their economic well-being) to take these economic factors into account.

Effects on the Environment

115. Effects on the environment are an obvious focus for attention, being identified in paragraps (a) and (b) of section 59(2). Paragraph (a) is concerned with effects of the proposed activity, including any cumulative effects, wherever those effects may occur. Paragraph (b) is concerned with the effects of *other activities* undertaken in the area, which might include effects of activities not regulated under the EEZ Act. These two paragraphs ensure that the effects of the proposal are fully considered both in isolation and in addition to effects of other existing activities.

116. In this case there is limited existing activity occurring within the NDA, and none of it at a scale that would require it to be considered in an 'aggregated' way alongside the effects of CRL's proposal.

[49] Section 59(2)(i).

Contamination

117. Dredged marine sediments can contain contaminants, so an effect of concern is that the proposed dumping may contaminate the NDA.

118. To address this, CRL proposes definitive upper limits on all contaminants of potential concern. Importantly, these limits will apply *inside* the NDA at all the primary sampling sites, as well as at the NDA boundary.

119. CRL relies on Mr West, who has identified all contaminants most likely to be present, or most likely to give rise to a potential ecological impact, using his knowledge of characterisation data for marine dredgings in and around Auckland. The list is proposed to be included in the conditions of consent.

120. The limits to be applied are the "ISQG-Low" values from the Australian and New Zealand Guidelines for Fresh and Marine Water Quality 2000.

121. Every time monitoring is triggered by a defined volume of disposal (i.e. in 125,000m^3 increments), the seabed at all of the 19 sample sites (1 at the centre, 4 at 500m, 4 at 1,000m, 8 at 1,500m and 2 outside the NDA) will be tested for contaminant levels against the relevant ISQG-Low values.

122. This combination will ensure that adverse ecological effects from contaminants are avoided.

123. In addition, CRL will continue to require the sediments of any source sites to be sampled and characterised for any contaminants *before* CRL accepts dredged material from those sites for disposal at the NDA. Those steps will provide CRL with a reasonable basis (in respect of contamination) to allow the dumping to proceed – but importantly the former requirement for characterisation of source sites to be approved by the EPA is no longer proposed. The characterisation testing will still be provided to the EPA for its information, but the EPA will no longer exercise a gatekeeper function. The reasons for this are discussed below under the section addressing conditions.

Benthic Ecology

124. Benthic biota within the areas impacted by the deposition of settlement will be buried or smothered. Significant mortality of individuals will occur at the centre of each disposal site within the NDA. However monitoring conducted

under the current consent has assessed the high mortality zone to be to less than 500 metres from the disposal centre (following disposal of 150,000m3)).

125. Further, the experts on sediment dispersion have jointly agreed that the vast majority (~95%) of the dumped material descends rapidly and directly to the seabed during the disposal process. Related to this, the ecology experts have agreed that the monitoring data suggests there is a gradient of effects on benthic ecology:[50]

(a) At the disposal centre, there are ecologically significant impacts;

(b) At 500m there are potential limited impacts but it is not cler whether they are ecologically significant; and

(c) At 1,500m there is no ecologically significant impact.

126. Accordingly, CRL proposes a 'hard limit' in the conditions of consent to ensure no discernible impact on benthic biota occurs at the NDA boundary.

Fish

127. CRL's evidence – a combination of the sediment modelling by Mr Andrews and the ecology assessment by Mr West – is that no significant effects on fish are expected either within or beyond the NDA boundary.

128. This position is well-supported in respect of pelagic fish: both the NIWA assessment and the evidence of Mr Duffy are that effects on pelagic fish are likely to be short lived and confined. While they both express more doubt about the effects on demersal fish, it has been agreed (in the joint witness statement on ecology) that fish populations in the NDA are naturally low, and most likely to comprise transient and mobile species common to the north-eastern New Zealand coast.

129. Taking into account all the relevant evidence, CRL will submit that there is no reasonable basis for any concern about potential adverse effects on fish.

[50] Joint Witness Statement. 20 November 2018 at [11].

Seabirds

130. Effects on seabirds have been assessed for CRL by Mr West, and his assessment is largely supported by the NIWA review. They conclude in common that the potential effects on seabirds, including cumulative effects, will be less than minor to negligible and that disposal of marine sediments at the NDA is not expected to adversely affect any seabirds at population level.

131. CRL proposes a condition in relation to the management of vessel lighting to address a concern expressed in submissons about the potential attraction of seabirds to vessel lighting.

Marine Mammals

132. CRL relies on the evidence of Mr Childerhouse in relation to potential effects on marine mammals.

133. His evidence will be that the proposed operation poses a very low or low risk to marine mammals, and that the proposed mitigation and conditions are appropriate to the level of risk. He recognises the difficulties of marine mammal detection and has discussed these and other marine mammal issues with Professor Jeffs, who has relevant expertise, though is not participating in this process as a marine mammal expert. Nevertheless Mr Childerhouse and Professor Jeffs agree that the risks of marine mammal strike during transit or dumping is low, that there is limited value in undertaking the monitoring as originally conceived in the application, and they have recommended some refinements to those conditions, which CRL is content to adopt.

134. The one remaining area of disagreement between Mr Childerhouse and Professor Jeffs is in relation to the impacts of noise on marine mammals. Mr Childerhouse considers a number of factors to be relevant, including:

(a) the dumping vessels are relatively small and low powered, and they transit at relatively low speed;

(b) they will be constantly moving with no sustained noise within any area and

(c) even assuming a maximum number of trips per year, the number of movements would be less than 1% of the total vessel movements already occurring in the Hauraki Gulf annually.

For these and other reasons Mr Childerhouse concludes that the risk of impact on marine mammals from underwater noise is low, and CRL relies on that assessment.

Oceanography

135. CRL relies on the evidence of Connon Andrews in relation to oceanography and matters of sediment dispersal, though on such matters there are very limited areas of disagreement remaining between Mr Andrews and his peers, Dr Longdill and Dr Pederson.

136. They collectively agree that the great majority of the dredged material will, on discharge, fall rapidly and directly to the seabed, leaving approximately 5% available for far-field dispersion.

137. They also agree that the volumes proposed to be disposed, the depth of the NDA and the physical processes mean that the disposal mound is unlikely to affect coastal processes in terms of ambient or extreme waves and in terms of current patterns.

138. They say there will be negligible effects on adjacent shorelines, and once deposited on the seabed, the likelihood of resuspension of sediments is also negligible.

139. As for far-field modelling they share some reservations about the use of mean (i.e. average) concentrations rather than peak concentrations, and agreed in conferencing that additional outputs from the model (disclosing peak values) should be obtained. Mr Andrews has obtained such outputs, and will present those as part of his supplementary evidence. Among other things he will say the additional material supports a conclusion that plume tends to reach the NDA boundary within 3 hours of disposal, under either of the modelled scenarios (involving 2 different barge sizes), and the maximum far field concentrations are predicted to be less than 3mg/L at the NDA boundary.

140. Mr West will address this additional information in terms of ecological effects.

Effects on Existing Interests

Fisheries

141. Effects on commercial fishing are of course related to the effects on fish themselves, as addressed above.

142. On the present information there appears to be relatively little commercial fishing activity within the NDA, and CRL has relied upon Mr West's assessment and the advice of Fisheries New Zealand. Fisheries New Zealand says the NDA is likely to support low densities of benthic or transient pelagic fish of interest to fisheries; these fish can generally avoid any dumping disturbance; and therefore any effect on the fish is likely to be practically either scientifically undetectable or, if detectable, ecologically very small, with the subsequent impact on fisheries likely to be even smaller and more difficult to detect.

143. Consistent with this, the industry body Fisheries Inshore New Zealand is no longer pursuing its submission in relation to the application, though it supports the formation of a liaison group as proposed in CRL's volunteered conditions.

Recreation

144. CRL has not identified any impacts on recreational users. It is expected that recreational boaters would occasionally traverse the site, which will not be affected by the proposal, and otherwise the recreation potential of the immediate area is very limited due to the location.

145. CRL also relies on Mr Andrews' assessment that the risk of any impact on the surf breaks at Great Barrier Island is negligible.

Other Existing Users

146. The only other existing user appears to be the New Zealand Defence Force, which occasionally uses the general area for training purposes. Under its existing consent, CRL provides notice of dumping events to the Defence Force, and is able to ensure that dumping is managed to avoid any conflict of use. CRL is proposing to maintain this arrangement and has proposed conditions of consent to give effect to this.

Biological Diversity and Integrity

147. The matter that section 59(2)(d) requires the DMC to take into account is:

> The importance of protecting the biological diversity and integrity of marine species, ecosystems, and processes.

148. To a significant extent this factor overlaps with the various environmental effects that have been addressed above under section 59(2)(a).

149. It is noteworthy that paragraph (d) seems to elevate this consideration by including the words "the importance of protecting". However, it remains the case that this element, in common with all other elements within section 59, is a matter to be taken into account, and plainly this means that protection is not itself a necessary outcome.

150. The only adverse effect of the dumping that warrants consideration in relation to s 59(2)(d) is the severe effect that dumping will have on benthic ecology. It is inescapable that the dumping of dredged sediment will have an adverse effect on the benthic biota within the reasonably confined area where the initial settling occurs. As the marine ecology experts put it in their joint witness statement, the disposal centre site is ecologically significantly impacted.

151. However, it is equally clear that with distance from the disposal site these effects lessen. At 1,500 metres the sampling suggests there is no ecologically significant impact.

152. What this amounts to is that CRL canot identify with precision where the most severe effect of the project ends: it cannot say what the precise distance is from the disposal location at which the settling of the sediment ceases to have an ecologically significant impact on benthic biota. However, this is not due to any shortfall in the abilities or efforts of CRL or its consultants. The ecosystems and marine processes involved are sufficiently complex that no amount of further analysis could likely identify with precision the exact distance at which the effects on benthic ecology change from being significant to insignificant.

153. However, this does not mean that an appropriate level of certainty is unavailable or that the adverse effects are unable to be appropriately managed and monitored. Those outcomes are achievable, as they do not

depend on the identification of the precise distance at which effects *change* from significant to insignificant. Rather, those outcomes rely on being able to identify with sufficient certainty a distance at which the effects *will be* insignificant, and this is what CRL has done. The distance is 1,500m, ie the NDA boundary. The NDA is not merely the site at which the material is released — all of the material will be released within 500m of the centre. The NDA extends a further 1,000m in every direction, and does so in order to represent the area beyond which CRL is committing to produce no ecologically significant impact on benthic biota.

Rare and Vulnerable Ecosystems and Habitats of Threatened Species

154. The likelihood of rare and vulnerable ecosystems or threatened species being present in the NDA was discussed between the ecology experts at their conference and their views recorded in the joint witness statement. They agreed that the likelihood of stony corals occurring within the NDA (the focus on stony corals being the result of their protection under the Wildlife Act) when not occurring in adjacent areas is none to very low. As discussed above, CRL relies on this collective assessment in combination with the considerable sampling that has been undertaken (and the multibeam acoustic backscatter) to assert that on the balance of probabilities there is no likelihood of stony corals.

155. Nor, as discussed in the joint witness statement of the ecology experts, is there any likelihood of rare or threatened fish or marine mammals. In relation to marine mammals, CRL relies on the evidence of Dr Childerhouse which is that it is unlikely the NDA represents an important area for any marine mammal species.

Nature and Effect of Other Marine Management Regimes

156. Prior to the EEZ Act there was no general regime in place to assess and manage the environmental effects of activities in the EEZ. However, some controls had been developed sector-by-sector, such as under the Fisheries Act 1996, and the Maritime Transport Act 1994. These controls had sufficed because they covered most of the activities then occurring. Rapid technology developments and increased interest in offshore resources led to the development of the EEZ Act, but it was never the intention to displace

existing controls.[51] Rather, the Act was designed to fill the gaps between them.[52]

157. This gap-filling role of the Act is reflected in section 59(2)(h) (the requirement to take into account the nature and effect of other marine management regimes) and three other provisions. Some comments on the other three provisions assists the interpretation of section 59(2)(h).

158. First, section 7 defines the term "marine management regime", both by listing specific MMRs, and stating a broad definition of MMRs to include regulations, rules and policies made, or functions, duties and powers conferred under any Act that applies to the territorial sea and/or the EEZ and/or the continental shelf.[53] This ensures all existing statutes with potential to overlap with the Act are captured in the MMR definition.

159. Second, an applicant is required to specify any measures it will take in accordance with another MMR, that may have the effect of avoiding, remedying or mitigating adverse effects.[54] Notably, avoiding, remedying or mitigating adverse effects need not be the goal of the other measures – it suffices if the steps taken pursuant to another MMR will have that effect, even indirectly. This clearly signals an intention to identify any overlap that might occur at an effects management level.

160. Third, the DMC is prohibited from imposing a condition on a marine consent that would conflict with a measure in another MMR.[55]

161. Read alongside these other provisions, the purpose of s 59(2)(h) is to ensure that the DMC pays due regard to any overlaps that might exist with other MMRs, and will assess those in terms of 'effects' (which is particularly important for avoiding conditions that might conflict) and by reference more broadly to the 'nature' of the other MMR's.

162. An appraisal of the relevance of other MMRs to CRL's proposal is contained in the application and the evidence of Mr Hay. The only regimes that have

[51] *Regulatory Impact Statement, Exclusive Economic Zone and Extended Continental Shelf Environmental Effects Legislation* 20 April 2011, MfE, 2 – 5.
[52] CAB Min (11) 19/7B.
[53] Section 7.
[54] Section 39(5).
[55] Section 63(4).

any noteworthy role to play in respect of CRL's proposal are the Biosecurity Act 1993 and the Wildlife Act 1953.

163. MPI (Biosecurity NZ) has jurisdiction to manage biosecurity risks under the Biosecurity Act, and in that capacity it has been asked to provide advice on biosecurity risks. It has identified limited risks, and its advice is consistent with Mr West's assessment of such risks.

164. Dr Kluza (who authored the advice from Biosecurity NZ) and Mr West have agreed that the risks of invasive organisms surviving at the NDA or transporting from the NDA back to shore and settling is negligible, and the risk posed by emergency dumping en route to the NDA (which has happened only twice in over 500 trips so far) is also low. The risk of hull fouling is greater, but Dr Kluza's advice is that this can be managed through regular maintenance. To this end, CRL has proposed a condition requiring compliance with appropriate MPI clean hull standards.

165. The Wildlife Act 1953 deals with the protection and control of wild animals and birds and the management of game. It is administered by the Department of Conservation. Most species of wildlife are given absolute protection under this Act, as are some freshwater invertebrates and marine species listed in Schedule 7A. However, for reasons already covered above, CRL submits its proposal will not give rise to any effects of concern under the Wildlife Act 1953.

166. As the EEZ Act does not define what is meant by taking into account the "nature and effect" of other marine management regimes, it is appropriate to consider this from a 'gap-filling' perspective. In light of the outlines above, and the further assessment of other MMR's summarised in CRL's application and Mr Hay's evidence, it is submitted that in this instance there are no significant gaps to fill.

Other Matters Relevant and Reasonably Necessary

167. It is notable that case law that addresses the equivalent provision under the RMA[56] has not attempted to provide guidance as to the general meaning of "relevant and reasonably necessary". Its meaning is infinitely varied according to the facts of each situation.

[56] RMA, s 104(1)(c).

168. It is, however, appropriate to take some guidance from the EEZ Act's purpose. A matter cannot be relevant and reasonably necessary to take into account if doing so is inconsistent with the statutory purpose of the legislation.

169. On this basis, CRL submits the DMC might take account under this heading the economic benefits of CRL's proposal, as described in the report by Market Economics; but equally ought not to take into account any social or cultural considerations, given the absence of those themes in the Act's purpose.

170. Further, the fact that the rest of the list in s 59(2) is so comprehensive is itself an indication that the role of paragraph (m) will in most cases be somewhat limited. It is reasonable to infer that Parliament listed all the matters it envisaged would be relevant and reasonably necessary for most regulated activities.

Effects on Human Health

171. The only potential for human health contact is by fish feeding on the seabed at the disposal site being caught and consumed. The low numbers of fish present and the remote location of the site combine to make the risk of human health contact almost zero.

Alternative Methods of Disposal / Reuse, Recycle or Treat

172. Section 59(2B) requires that the DMC take into account two additional specific matters for dumping consents that do not apply for other marine consents. These are:

> Any alternative methods of disposal of the waste; and
>
> Whether there are practical opportunities to reuse, recycle, or treat the waste.

173. For convenience, I address these alongside the matters in section 62, as the subject matter overlaps. Section 62 requires the DMC to refuse this application if:

(a) The DMC considers that the waste may be reused, recycled or treated without:

(i) more than minor adverse effects on human health or the environment; or

(ii) imposing costs on CRL that are unreasonable in the circumstances.

174. Alternatives to dumping of dredged material at the NDA have been assessed for CRL by Mr Hay in a planning sense, and Mr Akehurst in an economic sense. Both of them have to some extent relied on the evidence of Mr Male. While his evidence is not 'expert' evidence in an orthodox sense, he is intimately familiar with the costs, constraints and drivers of marine dredging business, marina operations, land transport costs and the operations of landfill sites.

175. The evidence for CRL is that all alternatives have been identified either as impractical or would impose costs in the order of five or six times the costs of dumping at the NDA.

176. It is important to note that the focus under the relevant provisions is on reusing, recycling or treating the dredged material. Any option that involves disposal on land (i.e. to landfill) in substitution for disposal in the EEZ is not strictly reuse, recycling or treatment. In my submission the processes required to render the material suitable for landfill disposal would not reasonably constitute 'treatment'. Accordingly, the only options that truly fit within the Act's 'reuse, recycle or treat' concepts would be land reclamation.

177. As covered in Mr Hay's evidence there are significant constraints on land reclamation in the Auckland region from a planning perspective. To the extent that Mr Akehurst is able to assess the costs of this option (and he is only able to do so partially), he estimates the costs of this option are approximately double the cost of disposal at the NDA, and if full information were available, he expects the costs would likely be substantively higher.

178. On this basis, CRL maintains there has been adequate assessment of alternatives. In addition to the recent work of Messrs Hay and Akehurst, CRL draws on on the work that began in the early 1990s with the DOAG assessment of a broad range of possible options for disposing of marine sediment from the Auckland Region.

179. From the initial report prepared by Mr Murray (at the DMC's request) an issue was identified, that the estimated demand for disposal, on which the application had been originally based, incorporated a significant contingency component from unidentified sources (1,500,000m^3 over 10 years). In the absence of certainty about the sources, it was questioned whether an adequate assessment of alternatives had been undertaken (or even could be undertaken).

180. In light of Mr Murray's initial report, the demand for disposal of dredged material has been comprehensively reassessed, as documented in the Market Economics report. On the basis of that reassessment CRL is confident that its application for an annual volume of 250,000m^3 is well justified, and CRL no longer places any reliance on the significant contingency that was included in its original demand assessments. The Market Economics assessment reveals that with only a modest contingency (10,000m^3 per annum for capital dredging and 10,000m^3 per annum for maintenance dredging) there is projected demand for 2,793,900m^3 of disposal for the next 10 years, or 279,390m^3 per year over that period.

181. The more accurate identification of likely sources of dredged material not only supports the volume sought by CRL, but also enables alternatives to be assessed based on known geographic locations.

182. In summary, CRL's position will be that a more than adequate assessment of alternatives has been undertaken, and even if reusing, recycling and treating are generously defined to take account of a full range of alternatives, such alternatives would all give rise to unreasonable costs on CRL, not to mention presenting significant planning and practicality hurdles.

CONDITIONS

183. If the DMC is ultimately of a mind to grant the consent, then section 63(1) makes clear it can do so on any condition that it considers appropriate to deal with adverse effects of the activity authorised by the consent, whether those are effects on the environment or effects on existing interests.

184. Section 63(2) goes on to describe various types of conditions that are within the DMC's authority to impose, including conditions requiring the consent holder to:

(iii) Monitor, and report on, the exercise of the consent and the effects of the activity it authorises;

(iv) Appoint an observer to monitor the activity authorised by the consent and its effects on the environment;

(v) Make records related to the activity authorised by the consent available for audit.

185. Outwardly, these are all orthodox types of conditions on environmental approvals and it is unsurprising that they are allowable.

186. However, in relation to all dumping consents, there is a specific additional restriction, which arises out of the combination of section 63(2)(b) and section 64(1AA)(a). Section 63(2)(b) states that the conditions the DMC may impose include, but are not limited to, conditions that "if section 64 applies" amount or contribute to an adaptive management approach. Section 64(1AA)(a) goes on to say that section 64 does *not* apply to marine dumping consents.

187. Read together, these provisions prohibit conditions that together amount or contribute to an adaptive management approach on a marine dumping consent. This is a key matter in the consideration of conditions that might be imposed if the DMC is minded to grant the consent, and requires a careful examination of what an "adaptive management approach" is.

188. First, it is important to distinguish this from considerations of adaptive management in the RMA setting. A number of RMA cases discuss adaptive management, most authoritatively the well known *King Salmon* decision of the Supreme Court. But none of those cases was dealing with statutory provisions of the sort that apply here. Indeed, most of the RMA case law that has evolved around the concept of adaptive management has focused on the issue of whether an adaptive management approach is appropriate in the circumstances of the individual case, rather than on defining what the term means.

189. Unfortunately, the Act itself does not contain a definition of the term, but rather only includes two examples illustrative of what the term includes. These examples are in section 64(2) which states:

> 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.

190. Further, subsection (3) goes on to say:

> 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.

191. The interpretation of these and the other provisions outlined above was a central issue in the second application for ironsand mining by Trans-Tasman Resources. As you know, the DMC decision granting consent for TTR's proposal was appealed to the High Court, where again adaptive management and its meaning was a contested issue.

192. Leave to appeal the High Court's decision has been sought (including leave in relation to the interpretation on adaptive management) and present indications are that such leave is likely to be granted before the end of the year. However, for the time being, the High Court's decision remains the most legally authoritative statement of the law, and it is binding on this DMC.

193. A critical part of the debate in the High Court appeal was whether conditions are "adaptive management" if they require ongoing assessment of an activity (post consent) but make no provision for the activity to be discontinued altogether as a result of that ongoing assessment. The DMC in the TTR application had in effect found that such discontinuance is a necessary part of adaptive management, and therefore provided the conditions do not require the activity to be discontinued altogether, they do not amount to "adaptive management" approach.

194. The High Court disagreed, finding emphatically that discontinuance is not a necessary element of adaptive management. It said adaptive management can also mean a situation where an activity is allowed to be undertaken and its effects assessed on an ongoing basis and allowed to continue, with or without amendment, on the basis of those assessments. The Court's interpretation is well supported by the literal meaning of the words in section 64(2)(b).

195. TTR argued that orthodox monitoring and reporting conditions are allowed despite the prohibition on adaptive management, given they are expressly conditions of the sort listed in s63(2)(a)(iii)-(v) quoted above. The Court did not accept that submission, but its statement of the legal position is relatively subtle and deserves to be set out in full. It said:[57]

> Imposing conditions such as reporting and monitoring, of itself, will not amount to an adaptive management approach. Adaptive management is a tool to be implemented in circumstances where a resource consent would not otherwise be granted because of inadequate or uncertain information. If the tools such as monitoring and reporting are used as part of a regime which is designed to address the fact that, at the time the consent is granted, there is inadequate information about the receiving environment, or the potential effects, then they can be part of an adaptive management approach or contribute to such an approach.

196. In short the Court's view is that monitoring and reporting are not necessarily adaptive management, but they may be adaptive management depending on the intention behind imposing them.

197. It may be useful to note that the conditions that the Court was considering in the TTR appeal broadly required the consent holder:[58]

> To prepare plans setting out indicators of adverse effects revealed by monitoring or identifying potential operational responses to such adverse effects.

198. That is quite distinct from the type of conditions that are proposed here. CRL has made a concerted effort since filing its application to avoid reliance on the development of further plans (often referred to as "management plans" in an environmental setting) requiring certification or approval. Rather, CRL has sought to incorporate into the conditions of consent as presently proposed *all* of the detail that would ordinarily be left for later development through such management plans. Likewise, CRL is not proposing to leave it to later to establish what the indicators of adverse effects might be. Thanks to the history of sampling and monitoring that has already occurred at the NDA, CRL has been able to develop all the necessary 'indicators of adverse effects' now, in advance of any grant of consent. This ensures that the limits imposed by CRL (and subjected to expert review and input through the present process) can be 'hard-wired' into the consent.

[57] At [390].
[58] At [379].

199. This means the limits are not subject to further change unless the consent itself is changed in the future. They do not "evolve" based on data gathered through further monitoring. Nor are they able to be adjusted by some backdoor method of certification of management plans. They simply apply; and the monitoring confirms whether CRL is complying with them or not.

200. The upshot of this approach is that the monitoring and review that is to be undertaken is not for 'identifying potential operational responses' as the High Court found to be the case in the TTR scenario[59] and nor is it being put forward as part of a regime designed to address inadequate information.

201. In order to avoid the conditions resembling an adaptive management approach (on the current TTR precedent), it is crucial that the proposed conditions **do not** specify what the consequences are if CRL's assessments prove to be wrong; whether that takes the form of an operational requirement on CRL to change the activity, or triggers a review of the consent or the condition. An "if this – then that" condition of either of those sorts, will too closely resemble the type of provisions that the High Court has said amount to adaptive management.

202. However, this need not be of concern to the DMC. CRL is legally required to comply with any conditions imposed on its consent. If it were to learn, through monitoring, that it was not complying, then it would have to make alterations to bring the activity back in line with the consent limits. The non-compliance could be the subject of enforcement action by the EPA under the Act. All of these consequences arise whether or not the consent conditions address the matter. In other words, it is simply not necessary for the conditions to include a requirement for CRL to undertake a particular operational response in the event that it learns that its activity is non-compliant in some respect.

203. Likewise, it is not necessary for the conditions to provide for review. The Act incorporates generous and broad review provisions that enable the EPA to initiate a review if:

[59] Above n 19 at [379]

(a) The effects of the activity are not what was anticipated when the consent was granted, or are of a scale or intensity that was not anticipated when the consent was granted;[60]

(b) The information on which the DMC has relied from the applicant contains inaccuracies that have materially influenced the decision to grant the consent such that it is necessary to apply more appropriate conditions;[61] and

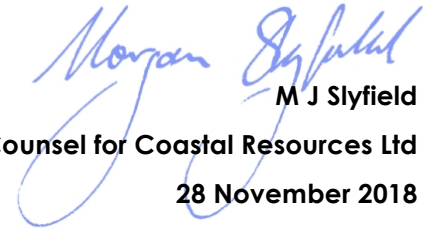
(c) Information becomes available that was not available when the consent was granted and the information shows that more appropriate conditions are necessary to deal with the effects of the exercise of the consent.[62]

204. These are extremely wide review powers and none of them is dependent on the consent conditions stating that a review is available. Further, built into CRL's proposed conditions are a number of instances for CRL to provide information to the EPA. This includes the characterisation of source sites and the regular monitoring of dumping effects at the NDA. Such information would enable the EPA to trigger a review in any of the circumstances in which a review might conceivably be desirable, without the conditions of consent saying so.

205. Added to this, the EPA has broad powers to do anything reasonably necessary to enable it to enforce consents;[63] and has specific powers of entry and inspection that would enable it to pursue additional information to assist it in taking enforcement action.[64]

206. Furthermore, a review can be a comprehensive and robust process. Public notice can be given,[65] further information can be sought, advice can be sought and submissions received, and a hearing may be held.[66] The EPA is authorised to cancel the consent in its entirety if the review has been triggered by any of the factors described above.

[60] Section 76(1)(c).
[61] Section 76(1)(d).
[62] Section 76(1)(e).
[63] Sections 13 and 15.
[64] Section 141.
[65] Section 78.
[66] Section 79.



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