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 by Coastal Resources Limited for a marine dumping consent to dump dredged material at a location offshore from Great Barrier Island.

OPENING REPRESENTATIONS ON BEHALF OF THE DIRECTOR-GENERAL OF CONSERVATION

3 December 2018

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May it please the Committee

PURPOSE OF SUBMISSION

1. The Director-General of Conservation (Director-General) filed a submission which sought the refusal of the application by Coastal Resources Limited (CRL) for a marine dumping consent of dredged material at a site east of Great Barrier Island within the Exclusive Economic Zone. This application (EEZ100015) was made under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (the EEZ Act).

2. The Director-General's submission was concerned about the adverse effects of the proposed activity on biological diversity, marine species, ecosystems and processes. This included the effects on marine mammals, seabirds and benthic habitat. Particular issues were the spread of non-indigenous species and the impact of sediment on water quality.

3. The Director-General stated that unless adequate conditions can be imposed the application should be rejected. The Director-General also noted that the concerns raised related to the Director-General's particular areas of interest and that there may be matters raised by other submitters which could also justify the rejection of CRL's application.

4. Neither the Director-General nor the Minister of Conservation have a statutory role under the EEZ Act. Under section 6(b) of the Conservation Act 1987 one of the functions of the Department of Conservation is "to advocate the conservation of natural and historic resources generally". It is in accordance with this function that the Director-General has appeared, and not as a person with an "existing interest", as that term is defined in the EEZ Act. The submission and evidence presented is, therefore, concerned with the effects on the environment.

5. The Director-General is, therefore, a person making a submission with a particular interest in natural resources and the effect on the environment. Under section 59(3)(a) of the EEZ Act the submission and evidence must be had regard to by you as the marine consent authority.

ADVANCES MADE

6. It is acknowledged that CRL has met with submitters and has taken on board many of the concerns expressed about the wording of the proposed conditions. In many cases the initial proposed conditions were nothing more than an updating of the conditions imposed on deemed marine dumping consent EEZ900012, without much consideration to a change in circumstances, including the legislation.

7. The process leading up to the hearing, including this Committee seeking information from other persons (including the Department of Conservation) and obtaining expert reports has assisted in narrowing the areas of concern. It is also acknowledged that there has been further refinement of the proposed conditions through the meeting of the experts and discussions during the hearing process. That work has been useful.

8. There are, however, still some outstanding issues that the Director-General has concerns about. Unless these are satisfactorily resolved through conditions, the Director-General still has some concerns about the granting of this application. It is, however, noted that there is still an opportunity for further refinement before the end of this hearing process.

WITNESSES

9. The Director-General will call three witnesses. Dr Peter Longdill will join the hearing by Skype as he is presently based in Qatar. His expertise is in oceanography including marine physical process and their interaction with ecological process and water quality. In relation to this application he has considered the sediment plume and its effects at the site and beyond along with the fate of the disposed material both in the water column and on the seabed.

10. Mr Clinton Duffy is an employee of the Department of Conservation and is a technical advisor to the marine ecosystems team. His concerns are focused on marine biodiversity. In particular he addresses the marine life at the proposed dump site and the need for appropriate monitoring.

11. The third witness is Mr Andrew Riddell who is a resource management planner. He has considered the proposed conditions, taking into account that this is a different legislative regime than what he normally deals with. He is concerned about the certainty and enforceability of some of the conditions proposed. He draws on the evidence of the other two expert witness for the Director-General and addresses some of the other issues of concern where better wording of the conditions would meet the reservations of the Director-General.

OUTSTANDING CONDITIONS

12. I do not intend to go through the conditions one by one or even all of the conditions that the Director-General has concerns about. I wish only to discuss those conditions which, at this stage, there is still disagreement on and where you have a decision role on which can be informed by the legislation.

Amount

13. The first such condition is the amount of dredged material that may be dumped at the Northern Disposal Area (NDA) in any year. During the hearing the need for 250,000 cubic metres per annum has been explored. The evidence has confirmed that the present level of 50,000 cubic metres is at capacity and an increase may be justified. There remains, however, a level of contingency including providing for Ports of Auckland if it does not obtain approval for dumping in a certified site.

14. Section 59(2B) of the EEZ Act requires that when considering a marine dumping consent application, alternative methods of disposal and practicable opportunities for reuse and recycling must be taken into account. CRL has presented its case on the basis that consideration of alternatives and reuse/recycling is a matter for those that want the dredging to be done (the marina operators) and those doing the dredging. As such, it cannot consider alternatives as CRL is at the end of the line providing a service of removal and a form of disposal, which happens to be cost effective.

15. At one level this is correct (even taking into account the company links between the marinas, and those operating the dredges and the dumpers). It is, however, relevant to note that it is the EPA which must take into account the alternatives. By granting a consent to one person to dump most (if not all) of the anticipated dredged material from Auckland and its environs, this may create a perverse incentive to dump dredged material instead of looking for other alternatives. It may also create a monopoly situation so that no other person is able to apply to dump dredged material in the NDA as all capacity it taken by one consent. As a hypothetical, if Ports of Auckland is not granted its consent for dumping at an approved site, then it may have difficulties seeking consent to dump at this site even if CRL is not using all of the amount it is able to dump.

16. The Director-General therefore seeks that as decision makers you take into account the realistic annual amount of dredged material that CRL can dump without creating a situation where dumping of dredged material by CRL becomes the only option as the cubic metres of dredged material that can be dumped provides no incentive for anyone to look for other alternatives.

17. The Director-General proposed that the amount be set on a five year rolling average to recognise the variability in demand. This is still proposed as it is apparent that demand will fluctuate, especially if new capital works do come on stream.

18. If you do conclude that the cubic metres of dredged material to be dumped in any one year should be less that 250,000, then you may also wish to consider the monitoring requirements. These are presently set at 125,000 cubic metres of dumped dredged material. If CRL was operating at its maximum proposed, then monitoring would be every six months and dumping would occur at a new location every year, with dumping reoccurring on the first site in year 14.

19. The Director-General is of the opinion that the monitoring for effects on benthic faunal and biosecurity monitoring should occur on an annual basis at about the same time each year, regardless of the amount of material dumped. If monitoring is to be undertaken for these purposes on an annual basis then, from a practical perspective,

it would also make sense to monitor/sample the mound and the sediment at the same time. The Director-General is, therefore, prepared to forgo the monitoring at each 125,000 cubic metres level for an annual monitor regardless of the amount dumped.

Term

20. Linked to the issue of uncertainty of demand and the level of contingency built in to the proposed figure of 250,000 cubic metres is the term of the consent. CRL has proposed 35 years, which is the maximum possible under the EEZ Act. The marina operators supported 2050 to coincide with when their current recently-granted consents expire.

21. The Director-General has suggested 20 years partly because it assists in keeping in mind alternatives given the uncertainties into the future, including the effects of climate change. It is submitted that the structure of section 73 of the EEZ Act is relevant to your consideration of term for this consent. For most consents the duration is 35 years or, if specifically specified, a lesser period. For marine dumping consents the term is 5 years unless the term is specified (and then it must be less than 35 years). Although a term up to 35 years can be granted for a marine dumping consent the change of language between section 73(1) and section 73(1A) of the EEZ Act indicates that Parliament had differing expectations about the terms of different consents.

22. Clearly the term must be relevant to the other information you hear about this application, but the Director-General submits that granting a term for less than 35 years is open to you, and is supported by the EEZ Act.

Compliance

23. Monitoring of the plume and its effects took on some significance as the application did not recognise that sediment was extending beyond the boundary of the NDA. That is no longer the case, and all parties accept that there will be some suspended sediment travelling beyond the boundary, and that some of that will move into the

coastal marine area, which is managed under the Resource Management Act 1991 (RMA).

24. Sediment and sedimentation is a matter which is specifically dealt with in Policy 21 of the New Zealand Coastal Policy Statement (NZCPS) as a discharge of a contaminant and the deposit of a substance. Although the RMA and thus the NZCPS may not be relevant to this application given that the discharge is in the EEZ and any sedimentation is not likely to have an adverse effect within the coastal marine area, it is reasonable to be concerned about the effect of an activity undertaken in the EEZ on the coastal marine area. Section 59(2)(a)(ii) of the EEZ Act specifically requires that effects on the environment of allowing the activity that may occur in New Zealand must be taken into account.

25. The modelling indicates that those effects are probably not significant – but the EEZ Act is not just concerned about significant effects. The definition of effects as set out in section 6 of the EEZ Act is all encompassing and includes temporary effects and cumulative effects. Neither the definition of "effects' or the purpose of the EEZ Act refers to "significant effects" or "significant impact", which was a term used in the applicant's submissions.

26. Although it may not be easy to monitor the plume at the NDA boundary to assess what sediment goes beyond the site, the Director-General considers that such monitoring is needed partly to reflect the acknowledged position that there will be an impact beyond the NDA site, including on the coastal marine area. The modelling prediction that is being relied on for this hearing indicates that it will be low. However, in the absence of any quantitative monitoring to date, and if not required by the consent conditions, it cannot be known if there is a breach of the level that was modelled. The monitoring sought is not excessive – on a five yearly basis. Dr Longdill will discuss this further. Such monitoring (and if necessary compliance action) will, however, ensure that concerns as expressed on behalf of the aquaculture industry on Friday can be largely addressed.

27. The monitoring on the benthic environment and for biosecurity risk is likewise to ensure that unanticipated effects do not occur and that, if they do, compliance action can be taken. How that monitoring occurs has resulted in significant discussion between the experts. The methods used are a matter for them to propose and you to decide and are not the subject of legal submissions.

28. What has been of concern is what happened where a breach of condition arises and whether including certain provisions as conditions amount to adaptive management, which is not possible under the EEZ Act. There has been an element of erring on the side of caution, which has imposed a dampening effect on conditions that may otherwise be readily agreed to in a RMA setting.

29. Further discussion is anticipated on the extent that conditions proposing a short term reaction to a breach (such as notification, stopping dumping and retesting) can be included. It is anticipated that these issues can be resolved through further discussion.

Other

30. Similar concerns about the impact of adaptive management have been raised with conditions relating to review (and building on section 76 of the EEZ Act) and seeking further information (and the extent of section 141 of the EEZ Act). Given the further discussions there is no need to make any legal submissions on these provisions at this stage.

31. Finally, there is the question of whether there is a technical advisory group and/or a stakeholders' group. The Director-General is supportive of any consent holder working with people who consider they may be impacted and the provision of information in a transparent manner. The Director-General would wish to have the opportunity for a representative on any such group and to receive information. Final agreement on wording and appropriate "terms of reference" (if any) is also open to further considerations.

CONCLUSION

32. The significant work by all persons involved in this process has meant that the present proposal is significantly different from that which was applied for and notified. Further refinements are likely. Closing submissions will deal with anything that is outstanding, recognising of course that if an application is granted and what conditions apply is for you. Any agreement the parties may reach must still be decided upon by you.

Bronwyn Arthur

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3 December 2018