

Response to the Environmental Protection Authority's Request for Further Information on Application EEZ100019 dated 29 April 2020

1 Introduction

The Environmental Protection Authority (**EPA**) has requested further information from Beach Energy Resources NZ (Holdings) Limited (**Beach**) under section 54(1) of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (**EEZ Act**) relating to Beach's application for marine discharge consent (**application EEZ100019**).

As requested, Beach has reviewed the Court of Appeal decision (**the CoA decision**) on Trans-Tasman Resources Limited (**TTRL**)¹ in respect of its findings on existing interests to determine whether there are any additional persons with existing interests to be identified for application EEZ100019. Further, if Beach identifies any such additional persons with existing interests, the EPA has requested, to the fullest extent that Beach is able to based on the available information, the nature and extent of the effects of the proposed activities on the existing interests of iwi.

The preamble to the EPA's two requests intends to provide some context to the request and states:

This decision [the CoA decision] discusses the scope of existing interests and the information required to be considered by decision makers in respect of those existing interests. For example, customary rights that form the basis of a claim under the Marine and Coastal Area (Takutai Moana) Act 2011, including kaitiakitanga interests, may be relevant existing interests.

The above text provides an example whereby a claim under the Marine and Coastal Area (Takutai Moana) Act 2011 (**MACA Act**) may mean that the claimant qualifies as a person with an existing interest. The above text also suggests that kaitiakitanga interests that stem from such a claim under the MACA Act may be relevant existing interest. Beach notes the CoA decision does not restrict kaitiakitanga interests to being relevant only for such MACA Act claimants – kaitiakitanga relationships between tangata whenua and the marine environment and its resources can exist notwithstanding any claim(s) under the MACA Act having been made.

¹ CA573/2018 [2020] NZCA 86

2 Review of the Court of Appeal Decision

The CoA decision traverses a large number of matters relating to the Decision-making Committee's (DMC) decision to grant various marine consents and marine discharge consents for a proposed iron-sand mining proposal within the South Taranaki Bight. Further, the CoA decision also deals with the subsequent High Court decision which quashed the DMC's decision. The outcome of the CoA decision is that TTRL's application has been referred back to the EPA to (re)consider in light of its judgement.

While many of the matters and findings presented in the CoA decision relate specifically to TTRL's proposal, it also creates the most up to date case law on a number of matters relating to the interpretation and application of certain sections of the EEZ Act. It is noted that TTRL has appealed the CoA decision to the Supreme Court; however, until such time as that Court makes its judgement, the CoA decision represents the current legal position on the matters in that judgement.

In terms of claims under the MACA Act, the CoA decision confirms that those claims that are not yet granted are not naturally seen as 'existing interests' under the definition in paragraph (f) of the section 4 definition of 'existing interest' in the EEZ Act. However, the CoA decision does confirm the MACA Act provides a formal mechanism for recognising certain customary interests in the marine and coastal area and for giving contemporary expression to those interests. More importantly, the CoA decision states that, pending formal recognition of such customary interests, tangata whenua with customary interests continue to have and enjoy those customary interests and they qualify as 'existing interests' under paragraph (a) of the of the section 4 definition of 'existing interest' in the EEZ Act and 'may be relevant' under section 59 of the EEZ Act.

The CoA decision also found that, in order to ensure that section 12 of the EEZ Act (Treaty of Waitangi) achieves the outcomes it expressly identifies (recognising and respecting the Crown's responsibility to give effect to the principles of the Treaty), the references to '*existing interests*' in section 59 of the EEZ Act must be read as including the interests of Māori in relation to all the taonga referred to in the Treaty of Waitangi. The CoA records that the second article of the Treaty of Waitangi contains an unqualified guarantee to the rangatira and hapū of New Zealand of full exclusive undisturbed possession in relation to their, *inter alia*, '*taonga kotoa*' – the CoA found that those guaranteed rights and interests are a '*lawfully established existing activity*' under paragraph (a) of the of the section 4 definition of '*existing interest*' in the EEZ Act. The CoA decision confirmed kaitiakitanga was an integral component of the customary rights and interests of Māori in relation to the taonga referred to in the Treaty of Waitangi. The CoA decision found that kaitiakitanga relationships between affected iwi and the marine environment and its resources is a relevant 'existing interest' and impacts on those relationships need to be considered. The CoA decision notes that the sea and other significant features are not to be viewed as just physical resources but as entities in their own right – as ancestors, gods, whanau – that iwi have an obligation to care for and protect.

The MACA Act and kaitiakitanga relationships of relevant iwi with the marine environment of the Canterbury Basin are discussed in the following sections.

3 Claims under the Marine and Coastal Area (Takutai Moana) Act 2011

Applications for recognition of protected customary rights and customary marine title under the MACA Act can only be made in respect of the marine and coastal area of New Zealand, also known as the coastal marine area (**CMA**), being the area 12 NM seaward of the line of mean high water springs around the coast of New Zealand.

The CoA's finding in respect of tangata whenua with customary interests that are the subject of claims under the MACA Act qualifying as 'existing interests' was particularly relevant to the TTRL application because the area where seabed mining was proposed within the EEZ was immediately adjacent to (seaward of) the CMA boundary. The potential effects of TTRL's proposal included increased suspended sediment concentrations within the water column (i.e. a 'sediment plume') that extended to areas within the CMA and for which there were existing MACA Act claims. That is not the case for Beach's application as none of the discharges of harmful substances from deck drains will impact waters within the CMA because of the significant distance between the proposed wells and the CMA.

Section 2.4.6 of the Impact Assessment (**IA**) for application EEZ100019 discusses the MACA Act and notes that various applications² have been made under the MACA Act for recognition of protected customary rights and customary marine title. The IA notes that the closest distance between any of the potential well locations and the seaward boundary of the CMA is ~33 NM (~66 km) and, as such, any discharges of harmful substances from deck drains of the Mobile Offshore Drilling Unit (**MODU**) will not affect the coastal waters or the seabed of the areas that are subject to claims under the MACA Act. Therefore, the three claimants are not considered to be persons with existing interests that may be affected by the activities for which a marine discharge consent has been sought by Beach.

² Three applications have been made that relate to the eastern coast of the South Island inshore of the two IAAs identified in the IA. The three applications having been lodged by: 1) Robert and Natalie Karaitiana (Application MAC-01-13-05); 2) Te Maiharoa Whanau (Application MAC-01-13-09); and 3) Te Rūnanga o Ngāi Tahu on behalf of Ngāi Tahu Whānui (Application MAC-01-13-02).

4 Kaitiakitanga Interests

4.1 What is kaitiakitanga?

Ngā Kaihautū Tikanga Taiao (**NKTT**), the statutory Māori Advisory Committee of the EPA, has published a protocol entitled '*Incorporating Māori Perspectives into Decision Making*'³. This protocol includes a description of key Māori concepts and practices to guide decision makers in considering Māori perspectives as they relate to EPA matters. The protocol provides the following useful description of the principle of kaitiakitanga (noting the protocol states that various iwi and hapū groups may have different interpretations):

Kaitiakitanga is a guiding principle for decision makers and a valuable navigational tool for the EPA in making sound judgements and decisions when taking into account mātauranga Māori. Kaitiakitanga is defined in the Resource Management Act 1991 as guardianship or stewardship, though it was used by Māori to define conservation customs and traditions. It is intimately linked to rangatiratanga, the power and authority of tangata whenua to control and manage the resources within their territory, as guaranteed in the preamble and Article II of Te Tiriti o Waitangi (The Treaty of Waitangi).

All resources and forms of life were birthed from Papatūānuku, the earth mother who is the personification of the Whenua (Earth). Through her union with Ranginui (sky father), all things were created – meaning that all animate and inanimate things are related through whakapapa.

According to Māori tradition, the resources or children of Papatūānuku do not belong to tangata (people), but rather tangata are one of the many children who belong to Papatūānuku. People, animals, birds and fish all harvest the bounties of Papatūānuku but do not own them.

Kaitiakitanga is therefore the undertaking of duties and obligations inherited from the atua (spiritual guardians and first children of Papatūānuku) over the realms of those atua. They include but are not limited to:

- *Tāne Mahuta – kaitiaki of the resources of the forests*
- *Tangaroa – kaitiaki of the resources of the oceans*
- *Rongo-mā-tāne – kaitiaki of the resources of cultivated foods*
- *Haumietiketike – kaitiaki of uncultivated foods*
- *Tūmataurangi – kaitiaki of people and tribal conflicts*
- *Tāwhirimātea – kaitiaki of the elements*
- *Rūaumoko – kaitiaki of volcanoes and earthquakes*

It is the responsibility of people as kaitiaki to ensure the protection of the cultural and spiritual health and well-being both of themselves and of the resources which it is their duty to protect. This is achieved by performing kawa or ceremonial rituals according to the tikanga or laws/rules of those rituals. There are three key spiritual elements (taha wairua) of kaitiakitanga which define health and well-being for Māori. They are mauri, mana and tapu.

³ <https://www.epa.govt.nz/assets/Uploads/Documents/Te-Hautu/293bdc5edc/EPA-Maori-Perspectives.pdf>

4.2 Who are the relevant kaitiaki of the Canterbury Basin?

Ngāi Tahu Whānui are the kaitiaki of the coastal waters around much of the South Island, including the Canterbury Basin. This includes the area encompassed by the two Impact Assessment Areas (IAAs) defined in the IA (the Wherry IAA and Gondola IAA) within which Beach has applied for a marine discharge consent.

Section 8 of the Ngāi Tahu Claims Settlement Act 1998 (NTCSA) statutorily defines the Ngāi Tahu claim area as being:

the area shown on allocation plan NT 504 (SO 1990), being—

- (a) the takiwā of Ngāi Tahu Whānui; and*
- (b) the coastal marine area adjacent to the coastal boundary of the takiwā of Ngāi Tahu Whānui; and*
- (c) the New Zealand fisheries waters within the coastal marine area and exclusive economic zone adjacent to the seaward boundary of that coastal marine area;—*

and, for the purposes of this definition, the northern sea boundaries of the coastal marine area have been determined using the equidistance principle, and the northern sea boundaries of the exclusive economic zone have been determined using the perpendicular to the meridian principle from the seaward boundary of the coastal marine area (with provision to exclude part of the New Zealand fisheries waters around the Chatham Islands).

Clause (c) of the Ngāi Tahu claim area definition above covers the EEZ and, as such, includes both the Wherry and Gondola IAAs. In 1992 the Waitangi Tribunal released a report on the Ngāi Tahu claim (Wai 27) regarding sea fisheries – this report being entitled ‘Ngāi Tahu Sea Fisheries Report 1992’⁴. The key findings of that report were (emphasis added):

In legislating to protect and conserve the sea fishery resource the Crown failed to recognise Ngai Tahu rangatiratanga over their sea fisheries and in particular their tribal rights of self-regulation or self-management of their resource, this being an inherent element in rangatiratanga. Their rights were usurped by the Crown without any consultation with Maori and without any recognition of their Treaty rights in their sea fisheries. This denial of Ngai Tahu rangatiratanga over their sea fisheries was in breach of article 2 of the Treaty.

Over time the various statutory regimes intended to protect and conserve the sea fisheries failed to prevent serious depletion of the resource to the detriment not only of Ngai Tahu but Maori generally. The resulting material and cultural deprivation undermined Ngai Tahu mana moana and was the consequence of the Crown’s breach of its Treaty duty to protect and sustain Ngai Tahu tino rangatiratanga.

Further, the Ngāi Tahu Sea Fisheries Report 1992 concluded that Ngāi Tahu have (emphasis added):

- b) a Treaty development right to a reasonable share of the sea fisheries off their rohe extending beyond the 12 miles out to and beyond the continental shelf into the deepwater fisheries within the 200 mile exclusive economic zone such right being exclusive to Ngai Tahu.*

⁴ https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68472628/NT%20Sea%20Fisheries%20W.pdf

The above confirms that Ngāi Tahu Whānui are the kaitiaki of the coastal waters of the Wherry IAA and Gondola IAA.

Te Rūnanga o Ngāi Tahu (**TRONT**) is statutorily recognised as the representative tribal body of Ngāi Tahu Whānui and was established as a body corporate on 24th April 1996 under section 6 of Te Rūnanga o Ngāi Tahu Act 1996. Ngāi Tahu is comprised of 18 Papatipu Rūnanga within Te Waipounamu. Each of these Papatipu Rūnanga exist to uphold the mana of their people over the land, the sea and the natural resources. Each of the 18 Papatipu Rūnanga appoints a tribal member to represent its interests at TRONT.

4.3 What are the relevant kaitiakitanga interests?

Healthy marine and coastal resources are central to Ngāi Tahu's cultural identity and wellbeing. Access to kaimoana, treasured places, and mahinga kai⁵ are all intricately linked to cultural identity. Cultural practices represent both links to ancestors (tipuna) and contemporary whānau wellbeing.

TRONT lodged a submission⁶ on the 2014 application for marine consent to mine phosphate from the Chatham Rise lodged with the EPA by Chatham Rock Phosphate Limited (**CRPL**). The area which was the subject of the CRPL application is located ~300 NM to the northeast of where the Beach's potential wells would be drilled, and that proposed mining was also beyond the northern boundary of Ngāi Tahu's takiwā. Despite this, the submission provides useful information regarding Ngāi Tahu's rangatiratanga and kaitiakitanga in relation to the offshore coastal waters within its takiwā, which include the Wherry IAA and Gondola IAA. Relevant excerpts of the submission are provided below.

1.4 We point to the association of Ngāi Tahu to Te Moana nui a Kiwa... Kōrero tuku iho, the stories of the past, tikanga, the lessons that flow from tūpuna, the voyages, fishing practices, all make up a wealth of mātauranga connected to this area, and it is from this pātaka that we offer our response.

1.6 The foundations of this response are rangatiratanga, tribal authority, and kaitiakitanga, tribal responsibility. Te Rūnanga is guided in its responsibilities by the whakatauki "Mō tātou, ā, mō kā uri, ā muri ake nei" (for us, and our descendants after us), which is an expression of kaitiakitanga, the need to be sustained and to sustain.

1.8 Te Rūnanga has a strong interest in the protection of mahinga kai resources, treasured fishing and spawning grounds, which have sustained Ngāi Tahu whānui for generations.

1.9 Te Rūnanga cannot ignore potential impacts on seabirds and marine mammals, taonga species that rely on the area proposed to be mined for their sustenance and life-cycle. They are a part of tribal whakapapa, their health and the cultural well-being of the people are linked. The bones of their tupuna rest there, as taonga, and enrich the spawning grounds.

3.3...

d. Kaitiakitanga – In keeping with the kaitiaki responsibilities of Ngāi Tahu whānui, Te Rūnanga has an enduring interest in ensuring sustainable management of natural resources, protecting taonga species and mahinga kai resources for future generations. Ngāi Tahu whānui are both beneficiaries of natural resources, and stewards of those resources.

⁵ the customary gathering of food and natural materials and the places where those resources are gathered.

⁶ <https://www.epa.govt.nz/assets/FileAPI/proposal/EEZ000006/Submissions-and-or-comments/98611d5462/Te-Runanga-o-Nga-Tahu-110221.pdf>

...

Ngāi Tahu is a seafaring iwi and in the traditions and histories of Ngāi Tahu the takiwā of Ngāi Tahu Whānui extends southwards “until the land turns white.” Ngāi Tahu takiwā encompasses approximately half of the entire EEZ and continental shelf as covered by the EEZ Act.

The traditional and statutorily recognised rights and interests of Ngāi Tahu within this area are significant.

...

Section 288 [of the NTCSA], in reference to taonga species recorded in Schedule 97 of the NTCSA, includes the Crown’s acknowledgement of the cultural, spiritual, historic, and traditional association of Ngāi Tahu with taonga species. Te Rūnanga notes that not all species valued by Ngāi Tahu were able to be recorded as taonga species in Schedule 97, so those listed are representative but not exhaustive.

Evidence was presented at the CRPL hearing by Ms Maria Bartlett⁷, a Senior Policy Advisor within the Strategy & Influence unit of TRONT. Her evidence provides additional useful information in relation to kaitiakitanga interests of Ngāi Tahu within the coastal environment.

62. The Mahaanui Iwi Management Plan, articulating the positions of six Papatipu Rūnanga⁸ representing mana whenua from Hurunui to Hakatere/Ashburton, includes the following description of kaitiakitanga:

“Kaitiakitanga is fundamental to the relationship of Ngāi Tahu and the environment. The responsibility of kaitiakitanga is twofold: first, there is the ultimate aim of protecting mauri and, second, there is the duty to pass the environment to future generations in a state which is as good as, or better than, the current state. To Ngāi Tahu, kaitiakitanga is not a passive custodianship, nor is it simply the exercise of traditional property rights, but entails an active exercise of responsibility in a manner beneficial to the resource.”⁹

63. Kaitiaki act as guardians over fisheries resources, in freshwater, coastal and deep water environments....

⁷ <https://www.epa.govt.nz/assets/FileAPI/proposal/EEZ000006/Evidence/a4baac6aa5/EEZ000006-01SubNonExpert-Bartlett-Maria-Ngai-Tahu-120914.pdf>

⁸ Ngāi Tūāhuriri Rūnanga, Te Hapū o Ngāti Wheke (Rāpaki), Te Rūnanga o Koukourārata, Ōnuku Rūnanga, Wairewa Rūnanga, Te Taumutu Rūnanga

⁹ Mahaanui Iwi Management Plan, page 51. <https://mahaanuiurataiao.co.nz/wp-content/uploads/2019/08/Full-Plan.pdf>

The Mahaanui Iwi Management Plan includes a section which specifically deals with ‘Offshore Exploration and Mining’ which states¹⁰:

Tāngata whenua have concerns that national and regional government do not have appropriate environmental policy in place to protect the realm of Tangaroa from offshore oil mining and exploration. These activities have the potential to affect Ngāi Tahu values and interests, including traditional fishing grounds, marine mammal habitat and cultural heritage sites.

Rohe moana are able to be established under the Fisheries (Kaimoana Customary Fishing) Regulations 1998 as recognised traditional food gathering areas for which kaitiaki can be appointed to manage the collection of kaimoana in accordance with traditional Māori principles. The intention of a rohe moana is for the better provision for the recognition of rangatiratanga and of the right secured in relation to fisheries by the second article of the Treaty of Waitangi. TRONT has a rohe moana which extends over the both the Wherry and Gondola IAAs. Te Rūnanga o Moeraki has a rohe moana which extends over the Wherry IAA. These are shown in Figure 17 of the IA.

In 2019, OMV GSB Limited applied for a marine discharge consent for harmful substances from deck drains for an exploration and appraisal programme located with the Great South Basin (south of the Canterbury Basin) – that application is essentially the same as what Beach has applied for. Aukaha, lodged a submission¹¹ on the OMV GSB Limited application which contains material that is most likely equally relevant to Beach’s application. Aukaha’s submission was on behalf of Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou, and Te Rūnanga o Moeraki (**Ngā Rūnanga**), being three of the kaitiaki Papatipu Rūnanga of Ngāi Tahu whose takiwā includes the Great South Basin, the latter having a rohe moana over the Wherry IAA. The Aukaha submission stated the following, which is likely to be equally applicable to the offshore waters of the Canterbury Basin:

Ngā Rūnanga recognise the whakapapa of this area and its relationship with our creation stories. The resource of interest in this area has been created over millions of years by the united processes of Takaroa (the ocean) and Papatūānuku (the land). We in turn have a whakapapa relationship with the area, which comes with duties of care and kaitiaki responsibilities to the place and the species that inhabit it and use it.

The Aukaha submission confirmed that the primary concern of Ngā Rūnanga in relation to OMV GSB Limited’s application to discharge harmful substances from deck drains into the sea was ‘...the health and well-being of Takaroa and the future we leave our descendants, mō tātou, ā, mō kā uri a muri ake nei’.

5 Conclusion on Additional Persons with Existing Interests within the Canterbury Basin

Based on the information provided above, Beach has identified Ngāi Tahu Whānui as having an existing interest in the Wherry and Gondola IAAs due to their kaitiakitanga relationships with the marine environment of the Canterbury Basin. Ngāi Tahu Whānui is comprised of 18 Papatipu Rūnanga and are represented by TRONT.

¹⁰ Mahaanui Iwi Management Plan, page 152.

¹¹ https://www.epa.govt.nz/assets/FileAPI/proposal/EEZ100018/Submissions-and-or-comments/8a2ed92ec2/Aukaha_00269_submission.pdf

6 Nature and Extent of the Adverse Effects of the Discharges of Harmful Substances from Deck Drains on Additional Persons with Existing Interests within the Canterbury Basin

Beach's application for marine discharge consent seeks authorisation to discharge small (trace) amounts of harmful substances from deck drains into the sea. Harmful substances are stored and used on the drilling rig and normal use of these harmful substances may conceivably lead to occasional drips and other minor spills on the decks which may then be discharged into the sea from the deck drains, even after clean-up – that is, residual amounts of harmful substances may remain on the decks after clean-up of spills and these may discharge into the sea. Should any residual amounts of harmful substances enter the deck drains, they will be diluted by the water in the settlement tank and, upon entering the sea, the harmful substances will be rapidly diluted with dilution increasing with distance from the point of discharge and over time.

Any discharge of harmful substances that occur will adversely affect the 'mauri' of the receiving water and wider ecosystem within those waters. The NKTT protocol (discussed earlier) provides the following useful description of mauri:

Mauri is the active life-giving principle, or physical life-principle. It is imbued by Io, the Supreme Being, into all things animate and inanimate, making it possible for them to move and exist within the conditions and limits of their own creation and environment. The flesh of a bird is different to that of an animal, a fish, or a tree, and Māori consider that the mauri of each should not be mixed with that of others.

Mauri is a form of energy, and generates, regenerates and upholds creation. The mauri radiates outwards both to the environment and, more specifically, to the species for which it was intended. This provides conditions within the environment that harmonise and balance the processes of the earth's ecosystems and aids the regeneration process. Mauri ora has been described as the human form of mauri, and is of higher genealogical order to the mauri of non-human objects.

Mauri is unable to protect itself against unnatural changes to the environment, though it does have the ability to mend and heal, given appropriate time and conditions. When the mauri is strong, humans, fauna, flora and the landscape flourish. When it is depleted and weak those forms of life become sickly and weak.

As outlined in previous sections of this response, one of the key responsibilities of kaitiakitanga is the ultimate aim to protect mauri. If the mauri of the natural environment is degraded it no longer has the capacity to support cultural uses and values. However, as noted in the NKTT text above, mauri does have the ability to mend and heal, given appropriate time and conditions.

NKTT prepared a report¹² for the DMC which considered the CRPL application (discussed earlier). In that report NKTT stated (emphasis added):

33. Release of contaminants through the dredging and processing, especially uranium, arouses concern for all Māori. It is especially pertinent here to reiterate the relationship between Māori and the environment which has its strength and origins through a direct association with Papatūānuku (the Earth Mother). The natural world is not seen in isolated pockets, but as a whole. Any contamination is an affront on the whole of the environment, especially as there is uncertainty about where that contamination will end up over time (not necessarily in this generation). So any likelihood of contamination, as against resource utility, is considered unacceptable in Te Ao Māori.

Overall, the key effects associated with Beach's application to discharge trace amounts of harmful substances from deck drains to the sea on Ngāi Tahu Whānui's existing kaitiakitanga interests are associated with the denial of rangatiratanga – the ability of Ngāi Tahu Whānui to exercise customary authority and hence the ability for them to exercise kaitiakitanga over the natural resources as well as the spiritual and metaphysical values of the Wherry and Gondola IAAs.

In conclusion, any discharges of harmful substances to the sea from the deck drains of any MODU, should they occur, would be very small, temporary, and result in negligible effects on receiving water quality and the wider ecosystem within those waters.

¹² <https://www.epa.govt.nz/assets/FileAPI/proposal/EEZ000006/Permitted-activities/f35646e2fb/EEZ000006-2014-August-CRP-NKTT-report-FINAL.pdf>