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To
The Decision-Making Committee

Copy to
Phillipa Mckenzie

From
David Allen
Mark Mulholland

By Email
Phillipa.Mckenzie@epa.govt.nz

Dear Committee members

Approach to uncertainty in the context of the Beach Energy marine discharge consent application

1. Thank you for seeking our advice in relation to approaching matters of uncertainty in the context of the application by Beach Energy Resources NZ (Holdings) Limited for a marine discharge consent under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (the "**EEZ Act**").
2. This advice relates to marine discharge consents and, in particular, applies the Court of Appeal decision of *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* [2020] NZCA 86 (the "**TTRL decision**"). We note that the EEZ Act has been amended¹ since the version addressed in the *TTRL* decision. However, the *TTRL* decision remains the leading authority on the law relating to the matters addressed below.
3. We have also considered the July 2018 Stantec report which you provided.

Executive summary

4. The EEZ Act recognises that there will be uncertainty and does not require complete information. It is the role of the Environmental Protection Authority ("**EPA**") and the Decision-Making Committee ("**DMC**") to exercise judgement on what additional information may be required (s61(1)).
5. The Court of Appeal in the *TTRL* decision emphasised the pivotal role of s10(1)(b) in the consideration of marine discharge consents. If the DMC is left uncertain (or not 'satisfied') that s10(1)(b) will be met then it must decline consent or grant it subject to conditions that will ensure that the environment is protected from pollution (this must be before the pollution occurs not after the fact). The Court of Appeal comments on several occasions that it is avoidance of 'material' pollution that is required by s10(1)(b).²

¹ By the Resource Legislation Amendment Act 2017.

² At [86], [89] and [106].

6. Practical guidance for the DMC to address issues of uncertainty are provided in the body of the advice.

Approach to uncertainty under the EEZ Act - the law

7. Applications relating to activities in the EEZ will often involve a degree of uncertainty and incomplete information. Section 61 of the EEZ Act provides the primary statutory direction for approaching matters of uncertainty and incomplete information in a marine consent application by setting out the 'information principles' a marine consent authority must apply when considering an application.
8. Section 61(1) provides that, when considering an application for a marine consent, a marine consent authority must:
 - (a) **"make full use of its powers to request information from the applicant, obtain advice, and commission a review or a report"**. This places an active and positive obligation the DMC to seek out further information;
 - (b) **"base decisions on the best available information"**. Section 61(5) goes on to define 'best available information' as meaning *"the best information that, in the particular circumstances, is available without unreasonable cost, effort, or time."*; and
 - (c) **"take into account any uncertainty or inadequacy in the information available."**
9. Section 61(2) requires that *"where the information available is uncertain or inadequate, the marine consent authority must favour caution and environmental protection. (emphasis added)"*. The Court of Appeal in the *TTRL* decision found that this requirement is the means by which Parliament has sought to comply with relevant international obligations, finding that *"This language is in our view a statutory implementation of the "precautionary approach" or "precautionary principle" contemplated by Principle 15 of the Rio Declaration on Environment and Development..."*³
10. As the DMC will be aware, s61(4), together with s64, confirm that an adaptive management approach may not be incorporated in a marine discharge consent. An adaptive management approach is therefore not an option for managing uncertainty in the context of a marine discharge consent.
11. As set out above, s61(5) defines 'best available information'. In the *TTRL* decision the Court of Appeal makes it clear that this did not:⁴

"require the EPA to obtain complete information relevant to TTR's application. The EEZ Act is framed on the assumption that information about the marine environment may be limited, and the decision-making may therefore take place against the backdrop of incomplete information. ... For present purposes, however, the key point is that the EPA will necessarily exercise judgement in deciding what

³ At [114]. Principle 15 reads *"In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."*

⁴ At [75].

additional information to obtain from the applicant and others, and what reviews and reports to commission. The obligation to make full use of those powers must be understood against the backdrop of the provisions in the EEZ Act expressly recognising the prospect that there will be uncertainty or inadequacy in available information, and the obligation of the EPA under s40 to deal with the application as promptly as is reasonable in the circumstances." (Emphasis added.)

12. On this matter, an important aspect of the *TTRL* decision was the DMC's requests for additional information during the hearing were held not to have been unlawful. The Court of Appeal succinctly rejected the argument that the DMC was effectively filling in the case for the applicant stating that *"seeking further information and requiring conferencing fall squarely within the powers of the EPA (and decision-makers) to seek advice and information from any person and conduct the hearing in a manner that is appropriate and fair in the circumstances"*. While no comment was made by the Court of Appeal, the High Court's comments on the inquisitorial function of the decision-maker remain valid.
13. Section 62(2) confirms that a marine consent authority **may refuse an application for a consent if it considers that it does not have adequate information to determine the application**. This is a critical issue in the *TTRL* decision where the Court of Appeal links this to the requirement in s10(1)(b) that the environment be protected from pollution caused by marine discharges of harmful substances. The Court of Appeal describes the requirement to protect the environment as a *"bottom line"*⁵ which must be achieved. In respect of the information principles, the Court found:

*"[128] ... if the lack of information and resulting uncertainty about the effects of a proposed activity mean that the EPA is left uncertain whether the s10(1) objectives will be met if a consent is granted, then the information principles require that consent to be refused. **One key purpose of the information principles is to ensure that the environmental objectives of the EEZ Act are not undermined by the grant of consents in circumstances where it is uncertain whether those objectives will be achieved.**"*
14. The Court of Appeal expanded on the protection element of s10(1)(b) stating:⁶

"Nor is it consistent with the scheme of the EEZ Act to permit harm to the environment caused by a marine discharge on the basis that this harm will subsequently be remedied or mitigated."
15. A consent may be granted subject to conditions imposed under s63 of the EEZ Act. In the *TTRL* decision the Court of Appeal acknowledged that, even where there is residual uncertainty in the context of a marine discharge consent, an application can be granted where the decision-maker is 'satisfied'⁷ that conditions could be imposed that would ensure that the environment would be protected from (material) pollution. However, where the decision-maker remains uncertain as to

⁵ At [89].

⁶ At [89].

whether the conditions would protect the marine environment from pollution, then it must decline the consent:

"[116] In the context of an application for a marine discharge consent, if there is uncertainty about whether granting the consent will achieve the purpose of protecting the environment from pollution, the EPA must favour caution and environmental protection and either decline the consent, or grant it subject to conditions that ensure that the environment will be protected from pollution by the discharge."

16. In that application the Court of Appeal found:

"[130] We consider that the High Court erred in failing to find that the incompleteness of information and resulting level of uncertainty in relation to TTR's application required refusal of the marine discharge consent it sought, unless the DMC was satisfied notwithstanding that uncertainty that conditions could be imposed that would protect the environment from pollution caused by the discharge. If the DMC remained unsure whether granting the consent subject to the contemplated conditions would protect the marine environment from pollution caused by the sediment plume, it was required to decline to grant that consent..." (Emphasis added.)

Some practical guidance when applying the information principles

17. In s4 the Stantec report helpfully provides some practical steps for dealing with uncertainties. We have amended and expanded on the comments Stantec report⁸ below to reflect our opinion as to the application of the EEZ Act, case law (in particular the *TTRL* decision) and best processes to apply when dealing with uncertainties.
18. When addressing uncertainties under the EEZ Act the DMC should:
- (a) define the uncertainty - exactly what information/evidence is uncertain?
 - (b) determine how critical/important the uncertain information/evidence is:
 - (i) in relation to the issues to be addressed (is it a primary issue or a minor/non-issue);
and
 - (ii) in determining the significance of the values affected and the magnitude/scale of potential adverse effect(s) on those values - in general, the less significant the value, or the effect, the less uncertain information remains critical (but for a highly significant value a low effect may still necessitate greater certainty);

⁷ Noting that to be satisfied is a relatively high test – to furnish with sufficient proof or information; to assure or set free from doubt or uncertainty ... - see the Supreme Court decision of *Westfield (NZ) Limited v North Shore City Council* [2005] NZRMA 337, at [52]. the definition is taken from the Oxford English Dictionary.

⁸ At paragraph 4.4.

- (c) must, where uncertainty exists in respect of critical/important information having completed (a) and (b) above:
 - (i) make full use of powers (s61(a) to request information, require expert conferencing, obtain advice, commission a review or report and ask questions of the parties and relevant experts (including potentially requesting legal counsel for the DMC to do so in appropriate circumstances); and
 - (ii) the options in (i) must be reasonable (cost, effort, time - s61(5)), fair in the circumstances (Sch 2, cl 2), and reflect the significance of the uncertainty;
 - (d) consider whether it is possible for the potential adverse effect(s) to be assessed on a 'worst case scenario' and, if so, that the information on such a scenario satisfies the above matters; and
 - (e) only rely on imposing conditions to address uncertainty if:
 - (i) satisfied that they will protect (keep it safe from harm⁹) the environment from pollution caused by the discharge (irrespective of whether that harm could be subsequently remedied or mitigated);¹⁰ and
 - (ii) they do not leave specific controls to avoid effects to be determined through management plans¹¹ (limits/controls must be in the conditions and not management plans).
19. Having completed the above process, the DMC must make its decision, taking into account the uncertainty (s61(1)(c)). Mere uncertainty is not generally an issue (there will always be elements of uncertainty) but if after the above steps the DMC remains uncertain (or not 'satisfied') as to whether s10(1) is met, or still considers that the uncertainty is such that there is a *"real prospect of material pollution of the environment"*¹² consent for a marine discharge should not be granted. In such circumstances that outcome is the only one that is consistent with the EEZ Act (and s10(10(b) in particular).
20. For completeness, in our opinion the following matters listed in the Stantec report¹³ cannot be relied on by the DMC to address uncertainty:
- (a) **Monitoring and reporting conditions:** These can be used to monitor compliance with the other conditions of consent but cannot be used as part of an adaptive management approach, or as a means for compensating for a decision-maker being unsure as to the activity will cause harm to the environment.

⁹ At [89].

¹⁰ At [131].

¹¹ At [259].

¹² At [89]. See also [128]

¹³ Paragraph 4.4(7) of the Stantec report.

- (b) **Review conditions:** These may be appropriate to impose for the purpose of dealing with the event of unanticipated adverse effects,¹⁴ but not for any uncertainty which is contemplated at the time a marine discharge consent application is considered.
- (c) **Shortened consent duration:** This term does not address the uncertainty before grant of consent.
- (d) **Imposition of a bond:** Section 65 of the EEZ Act provides that bonds may be imposed, but only to secure the performance of conditions. That is, bonds are a tool that can be used to ensure compliance with conditions, but not a means of addressing uncertainty as to the effects of an activity. imposition of bonds (as they are after the fact);
- (e) **Adaptive management regimes:** As mentioned above such conditions cannot be imposed on a marine discharge consent);

21. We look forward to discussing this draft advice with you and then providing final advice.

Yours sincerely
Buddle Findlay



David Allen
Partner

Direct Dial: 0-4- 462 0423
Email: david.allen@buddlefindlay.com

¹⁴ At [218].