Legal memorandum

To:	Beach Energy Decision-making Committee (the DMC)
From:	Celia Haden, Principal Solicitor; Phillipa McKenzie, Senior Solicitor
Date:	12 August 2020
Subject:	Legal advice on report received from Ngā Kaihautū by the DMC on 7 July 2020
Ref no:	EEZ100019

Purpose

1. To set out the key points for consideration from the report provided to you by Ngā Kaihautū Tikanga Taiao (Ngā Kaihautū) and provide a legal context for that consideration. This advice also addresses the update from Ngā Kaihautū provided to the DMC dated 7 August 2020.

Background

2. Under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZA) you may seek advice from Ngā Kaihautu under section 56. Ngā Kaihautū are the Māori Advisory Committee established under the Environmental Protection Authority Act 2011 (EPA Act) to provide advice on policy, process and decisions. Section 19(1)(b) EPA Act specifically sets out that the Māori Advisory Committee are to provide advice to a marine consent authority when sought pursuant to s56(1)(b) EEZA. Section 12 of the EEZA then reiterates that the Māori Advisory Committee is to provide advice to the EPA in accordance with the EPA Act and s56 EEZA so that decisions may be informed by a Māori perspective.

3. The Ngā Kaihautū terms of reference (dated 3 April 2020) set out the deliverables upon which their advice should be provided. These state that:

    a. When providing advice and assistance to the EPA, the advice must be:

        i. Given from the Māori perspective;

        ii. Within the scope of these terms of reference;

        iii. Factually correct, evidence-based and accurate;

        iv. Clear and concise;

        v. Delivered to the EPA by the due date;

        vi. The result of careful consideration of all relevant information;

        vii. In accordance with the relevant legal framework under which the advice is sought; and

viii. Identify any conflicts of interest and how they have been managed, if they could not be avoided.

4. Point vii above is of importance in this case, and this legal advice is intended to assist you as the DMC by setting out how to apply the considerations raised in the Ngā Kaihautū report to the legal framework (including the case law) in the context of your decision on this application.

DMC Request for advice from Ngā Kaihautū

5. You requested that Ngā Kaihautū provide advice on the following:

a. Advice from a Māori perspective to assist the DMC to understand a Māori world perspective on Beach Energy's OPD application. The report should provide advice and recommendations on:

i. Beach Energy has identified existing (and cultural) interests in Section 5 of the Impact Assessment, and in its response to a further information request under section 56 of the EEZ Act in relation to recent case law. Is there anything else that the DMC should inquire about with respect to Māori existing interests? Please provide commentary as to the cultural or tikanga context of the existing interests identified by Beach Energy and any other that are identified by Ngā Kaihautū.

ii. The key effects of the proposed activity that could be expected to be of concern to Māori/iwi and which the DMC should explore when considering the application. Please provide commentary as to the cultural and/or tikanga context of the key effects. This information will assist the DMC in respect of how to consider submissions, and other evidence received.

iii. Beach Energy has proffered conditions of consent (Section 8 of the Impact Assessment and Appendix B) but, given their assessed limited extent of adverse effects, have not included any conditions specifically targeted at Māori/iwi. Please review the conditions and provide advice on:

1. What, if any, additional conditions (including reporting) might be appropriate to manage relevant effects of the proposed activities from a Māori/iwi perspective. Please provide reasoning for such conditions and how they relate to the key effects identified.

b. You also noted that this advice would be reviewed once submissions had been received on the basis that submissions could impact on Ngā Kaihautū's thinking. In Minute 1 dated 21 July 2020 you requested Ngā Kaihautū review the submissions on this application and make any necessary additions or changes based on these. In that Minute you also requested the EPA to provide legal advice in respect of how to consider the content of the Ngā Kaihautū report within the legal framework, for the purposes of the DMC decision making process. Ngā Kaihautū provided that additional advice on 7 August 2020.

Legal advice on approach to Ngā Kaihautū report

6. If you seek and receive advice from Ngā Kaihautū then, under section 59, you must have regard to any advice received.

7. This has been recently discussed by the High Court in *Klink v Environmental Protection Authority & Coastal Resources Limited* [2019] NZHC 3161 (**CRL**).

8. The High Court in CRL found that the DMC had erred in law by failing to take into account the Ngā Kaihautū report, which ultimately resulted in a failure to meaningfully engage with and consider affected iwi and the existing interests identified by Ngā Kaihautū.

9. The High Court was critical of the lack of consideration by the DMC of the Ngā Kaihautū report. The judgment highlights that under s59(3) a DMC must not take lightly or ignore matters raised in the Ngā Kaihautū report. Should a DMC choose not to take the advice of Ngā Kaihautū, it needs to carefully explain the reasons why.

10. In order to have regard to the Ngā Kaihautū report, the DMC needed to have understood the matters it raised. The errors, particularly in identifying iwi or hapu with existing interests in that case, meant the High Court decided the DMC did not sufficiently understand those matters so could not properly have had regard to the report.

11. These points raised in CRL highlight how critically important it is for you, as the DMC, to have regard to the advice provided by Ngā Kaihautū, and address all of the concerns raised in that report in a meaningful way. Even if you do not agree with a finding of Ngā Kaihautū, you need to specifically note that in the decision in order to have adequately addressed it.

12. It is important in that respect that you can understand and engage with the information provided by Ngā Kaihautū in its report, and that any matters requiring clarification and further discussion are addressed.

Legal advice on approach to matters raised in Ngā Kaihautū report

13. We have attached as Appendix 1 a table of the matters raised in the Ngā Kaihautū report. This identifies all matters and highlights key points for which we consider a further explanation of the legal framework would assist you in having regard to the matters in the Ngā Kaihautū report. We will address each of these key points in our legal advice below.

14. As noted above, it is important that you understand and engage with all the information provided in the Ngā Kaihautū report, so if any matters remain unclear, it is recommended that these be followed up with Ngā Kaihautū before you address them in your decision.

The Court of Appeal decision on Trans-Tasman Resources Limited application

15. While the Ngā Kaihautū report cites *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board and Others* [2020] NZCA 86 (**the Court of Appeal decision**) as authority for needing to include Māori relationships with the environment when describing the

environment (and the legal advice addresses this below), it also acknowledges that decision related to the scope of existing interests and the information required for consideration by the DMC.

16. To clarify, the Court of Appeal decision was focused on the interrelationship between section 12 Treaty considerations, existing interests, and how section 59 relates to existing interests. The focus was on the relationships between relevant iwi and the marine environment.

17. Arising from the Court of Appeal decision, it is clear that decision makers under the EEZA must follow three steps in respect of existing interests.

    i. All relevant existing interests must be identified.

    ii. Once identified, the persons with these existing interests must be made aware of the application and have a chance to provide views.

    iii. Any views expressed must be engaged with meaningfully by the decision maker, and the approach recorded in the decision.

Identification of interests

18. In order to identify relevant existing interests, the scope of those interests must be understood. The Court of Appeal decision confirmed that a full range of customary rights, interests and activities identified by Māori, including kaitiakitanga and whanaunatanga, are relevant as the basis for existing interests under the EEZA. The Ngā Kaihautū report provides some detail as to the nature of these concepts.

19. Reference is made, in the Ngā Kaihautū report, to case law from the Environment Court to the effect that ownership over a resource is not a necessary precondition to taking into account kaitiakitanga under the RMA. This would be true under the EEZA but based on the Court of Appeal decision and the definition of existing interests rather than the approach taken in the Environment Court. Given the very clear statements by the Court of Appeal under the EEZA, and given the differences in the way these interests are recognised under the RMA, it would be preferable to rely on the Court of Appeal decision. Indeed, it is more likely that the Court of Appeal decision will now be cited in the RMA context as the basis for relevance of kaitiakitanga and whanaunatanga, particularly in the context of taking into account the principles of the Treaty.

20. You will need to have information that gives a reasonable basis for a finding that all relevant existing interests have been identified. This information would come from the applicant in the first instance, as required by section 39(1)(c) of the EEZA.

21. In addition, further information can be requested on this aspect from the EPA or Ngā Kaihautū as to whether there is any reason to think not all relevant existing interests have yet been identified. In this case, no other group has been identified or gap signalled.

Chance to provide views

22. This is a purely procedural step but is important in order to ensure the next substantive step can be carried out adequately. Indeed, section 46, being the obligation to notify affected Māori groups directly, is expressly referred to in section 12 as a means of recognising and respecting the Crown's responsibility to give effect to the principles of the Treaty of Waitangi. Even for a non-notified application, there is still an obligation under section 45, to provide a copy of the application to iwi authorities, customary marine title groups, and protected customary title groups, with a discretion to provide a copy to those with existing interests.

23. It should be noted that this is not an obligation to consult, on either the applicant or the EPA. But it is an important opportunity for affected persons to understand the application and provide views if they wish to do so.

24. In this case, the application was sent to all persons identified as having existing interests, as well as being publicly notified. Unless there is reason to consider there was a gap in step 1, it is reasonable for you to be confident this second step has been completed.

Engagement with views expressed

25. This step was a particular focus for the Court of Appeal decision and was the heart of the failure found in the approach taken by the DMC for TTRL. As stated in para 170 of the Court of Appeal decision:

In particular, in the context of this application, it was necessary for the DMC to address the impact of the TTR proposal on the kaitiakitanga relationship between the relevant iwi and the marine environment. Kaitiakitanga is an integral component of the customary rights and interests of Māori in relation to the taonga referred to in the Treaty.

26. This was further explained at paras 174 and 175:

In this case the DMC needed to engage meaningfully with the impact of the TTR proposal on the whanaungatanga and kaitiakitanga relationships between affected iwi and the natural environment, with the sea and other significant features of the marine environment seen not just as physical resources but as entities in their own right — as ancestors, gods, whānau — that iwi have an obligation to care for and protect.

The DMC decision contains references to the concepts of kaitiakitanga and the mauri of the ocean. But there is no analysis of the nature and significance of the kaitiaki relationship, or of the nature and extent of the effects of the proposed activities on the existing interests of iwi as kaitiaki. The evidence and submissions of affected iwi and the NKTT report explained why the TTRL proposal would have an adverse impact on the existing interests of those iwi and would be inconsistent with their kaitiakitanga responsibilities in relation to the affected areas. The DMC decision does not engage with the nature and extent of the adverse effects on the existing interests of affected iwi and does not explain why the DMC considered that those adverse effects were outweighed by other factors.

27. From these paragraphs, the key obligation on you as DMC comes from the last sentence. You must engage with the nature and extent of any adverse effects on the existing interests of affected iwi, and if you wish to conclude that any adverse effects were outweighed by other

factors you must explain why. You should also bear in mind that as stated by the Court of Appeal at para 171:

Those Treaty principles require at the very least that reasons be given to justify a decision to override existing interests of this kind, absent the free and informed consent of affected iwi. The adequacy of those reasons can then be assessed by reference to the assurances given by the Crown to Māori under the Treaty, and the express statement in s 12 of the EEZ Act that s 59 is intended to recognise and respect the Crown's responsibility to give effect to the principles of the Treaty.

28. However, these findings in the Court of Appeal decision are prefaced on the fact that in the TTRL example, there was the evidence and submissions of affected iwi and the Ngā Kaihautū report explaining the adverse effects in that case. In this case, the Ngā Kaihautū report has expressly stated that it should not be regarded as superseding or replacing the views of the relevant iwi/rūnanga, hapū/papatipu rūnanga. This is also the approach taken in the Court of Appeal decision, which stated (in respect of tikanga Māori, at para 178):

That analysis needed to engage with those concepts as they are understood and applied by Māori: that is the only perspective from which tikanga concepts can be meaningfully described and understood.

29. Related to this point, and highlighted by the more recent advice from Ngā Kaihautū dated 7 August 2020, is the need for the affected iwi/rūnanga or hapū/papatipu rūnanga to give their views on any general or academic assessment of impacts on their existing interests in order to verify the accuracy or relevance of that assessment.

30. We understand that in this case there has been one submission received from a Māori organisation who have taken a neutral stance to the application. We would note that it is not for the DMC to make assumptions about the reasons for the stance taken by the submitter. Rather, the submission (along with all submissions as mandatory considerations) should be had regard to and addressed in the decision.

The definition of environment in the context of the EEZA

31. As referred to above, the Ngā Kaihautū report references the Court of Appeal decision in respect of the description of the area and surrounding environment where the proposed activities will take place. Receiving information to assist in understanding the environment from a Māori perspective will fit within the statutory framework, and we return to this in the legal advice below. However, care must be taken when combining the consideration of the environment and existing interests.

32. The concepts of whanaunatanga and kaitiakitanga clearly fall within the concept of existing interests. This was a key matter determined by the Court of Appeal decision as noted above. However, the Court of Appeal decision did not refer to these concepts in the context of the definition of environment.

33. The definition of environment under the EEZA does not include elements that are included in the definition of environment under the RMA. Most notably absent are the words "including

people and communities", "amenity values" and "the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters".

34. The absence of these elements in the definition does not mean there is a gap in the legislation because, at least in respect of cultural values and interests, these are clearly provided for in existing interests, which is a term not used under the RMA.

35. It is worth noting that using a structure for an Impact Assessment that reflects the RMA rather than the EEZA is unhelpful, not just for Ngā Kaihautū who were trying to understand the proposal, but also for decision makers. While Section 4.4 of the Impact Assessment is headed Cultural Environment it is in fact primarily addressing existing interests. Similarly Section 4.5 of the Impact Assessment is headed Socio-Economic Environment, and again this is entirely addressing existing interests.

36. Using language that does not match the statutory framework the DMC is required to apply under the EEZA can be distracting but the information contained in those sections of the Impact Assessment can be regarded as relevant to the DMC consideration of existing interests.

The Māori perspective of the environment

37. As noted above, the concepts of whanaunatanga and kaitiakitanga are relevant as a basis for the Māori perspective of the environment, for example in respect of mauri. As noted by the Ngā Kaihautū report, those with whanaunatanga and kaitiakitanga relationships are best placed to describe many aspects of the environment, such as taonga species, or the mauri of the relevant area, and any impact the proposed activity would have on these aspects. The Ngā Kaihautū report makes mention of the need to obtain this information from the most appropriate source on a number of occasions.

38. Information about the environment and effects on the environment from a cultural perspective, such as matauranga evidence is to be considered, tested and weighed alongside any scientific or technical information. This would include information about the values that Māori hold in the natural environment, such as values in taonga species or in the mauri of the ocean.

Further matters raised in the Ngā Kaihautū report

A Māori perspective on the holistic approach to marine consent applications

39. The Ngā Kaihautū report raises the issue of the ability to assess effects from a Māori perspective when applications are made for only certain aspects of a proposed activity. It is acknowledged by Ngā Kaihautū that the approach taken by the applicant in applying for the discharge marine consent prior to applying for other consents required for the full EAD programme is provided for in the EEZA.

40. This issue regarding the approach was considered by the High Court in *Greenpeace New Zealand Incorporated v Environmental Protection Authority & Another* [2019] NZHC 3285. This case involved a similar fact situation of a notified application for a discharge marine consent lodged and processed in advance of the remaining consents which were non-notified. The

Court recognised that the EPA does not have the power to require all related applications to be made at the same time, or to defer consideration of one pending receipt of others.

41. The Court did note that the EPA could decide that all related applications should be processed and determined by the same DMC and this would provide for continuity in the assessment.

Assumption regarding regulations

42. This was raised by Ngā Kaihautū but it does not appear to have materially influenced their report. For the sake of completeness, we note that there is not a useful assumption to be made on the basis suggested, and that applications should be assessed on their own facts.

Lasting effects on mauri

43. The Ngā Kaihautū report, at paragraphs 3.20 to 3.24 refers to the potential for the discharged harmful substances to have long lasting effects on mauri. As Ngā Kaihautū have pointed out, those best placed to describe the impact on the mauri of the area are the iwi/rūnanga, hapū/papatipu rūnanga.

44. The only legal consideration is the relevance of the example used relating to dioxins and PCB. The parameters of bioaccumulation and persistence in the environment, as well as toxicity, may be matters for the DMC to raise with the applicant.

Conditions

45. Again for the sake of completeness, the Ngā Kaihautū report notes the lack of conditions aimed at addressing issues for existing interests, but also notes it would be more appropriate to reference any submissions on this matter. You asked Ngā Kaihautū to follow this point up once submissions were available. In that further advice dated 7 August 2020, they have noted that it may be appropriate to impose a condition that required the applicant to provide Maori with existing interests in the area with regular updates (for example twice a year) on substances that have been discharged and estimated amounts. You will need to expressly deal with this suggested condition, alongside the overall suite of conditions, if the application were to be granted.

Key matters raised by Ngā Kaihautū report on Beach Energy (EEZ100019)

Ngā Kaihautū Assessment and advice	*Ngā Kaihautū report reference*	*Heading where addressed in Legal advice dated 12 August 2020*
Ngā Kaihautū reiterate that there is no uniform, single Māori perspective. In particular, the perspectives provided by Ngā Kaihautū are not intended to supercede or replace the distinct perspectives of whanau, hapu iwi.	Introduction and main body paras 1.7 and 3.1	The Court of Appeal decision. The Māori perspective of the environment
From a Māori perspective, the applicant's Impact Assessment does not fully describe the current state of the area and its surrounding on how to describe the environment because it focuses on the bio-physical descriptions and does not provide for or consider whanaunatanga and kaitiakitanga, or broadly the holistic and integrated Māori/iwi worldview and the role and practices of kaitiaki, the area and surrounding environment. Until a full description of the area is undertaken the proposal has failed to address the effects on kaitiakitanga.	Executive Summary box 1, main report paragraphs 3.5, 3.12 – 3.14 Final para of Executive summary	Definition of environment in the context of the EEZA. The Māori perspective of the environment
Reference to the Court of Appeal decision on the TTRL application as supporting the requirement to provide for and consider whanaunatanga and kaitiakitanga within the description of the environment, while also acknowledging this case was about the scope of existing interests and the information required for consideration by the DMC.	Executive Summary box 1.	The Court of Appeal decision.
Suggestion that the DMC inquire of the applicant to demonstrate and articulate the activities and expertise used to gather, understand and apply information regarding the kaitiakitanga and whanaungatanga relationship between affected iwi/rūnanga, hapū/papatipu rūnanga or a Māori organisation and the natural environment	Executive Summary box 1	The Court of Appeal decision – chance to provide views

Ngā Kaihautū Assessment and advice	***Ngā Kaihautū report reference***	***Heading where addressed in Legal advice dated 12 August 2020***
Key effects on the environment being adverse effects on marine mammals, taonga species and other sensitive environs, and the introduction of foreign substance to the natural environment. Uncertainty whether the concerns and outcomes sought by the listed Maori groups that the applicant did engage with had been addressed. A recommendation that the DMC inquire of the applicant to provide this information and identify and demonstrate how those concerns and outcomes were considered.	Executive Summary box 2, main report paras 3.15 – 3.19	The Court of Appeal decision – engagement with views expressed The Māori perspective of the environment
The assessment of effects on the cultural environment is taken from a non- Māori perspective. An assessment of adverse effects on mauri (including whether an effect can be considered temporary) should be determined and confirmed by the iwi/rūnanga, hapū/papatipu rūnanga. There is no evidence that these groups participated in this assessment and qualification. Clearly describing the Māori perspective(s) of the marine environment, eg as an ancestor or other form of embodiment, will lead to improved understanding regarding the extent of the effects on iwi/rūnanga, hapū/papatipu rūnanga or any Māori organisation in the area and surrounding environment beyond that of the scope and jurisdiction of statutory acknowledgements and the like currently identified in the Impact Assessment. The assessment of effects on the cultural environment does not appropriately frame or outline the Māori /iwi worldview. There are other cultural practices such as a sense of identity, whakapapa (geneology), matauranga and tikanga Maori not canvassed in the IA.	Executive Summary box 3, main report paras 3.5 – 3.10 and paras 3.20 – 3.26.	The Court of Appeal decision – engagement with views expressed The Māori perspective of the environment
Relevance of kaitiakitanga and whanaungatanga in the context of the EEZA, describing each of these concepts. The DMC needs to understand the nature of those interests and how they can be impacted by the activities proposed by Beach. Reference to the Environment Court decision that ownership was not determinative of how it must have regard to kaitiakitanga.	Main report paras 3.31 – 3.39.	The Court of Appeal decision The Court of Appeal decision – identification of interests.

Ngā Kaihautū Assessment and advice	*Ngā Kaihautū report reference*	*Heading where addressed in Legal advice dated 12 August 2020*
There is uncertainty because not all information is available for consideration of the whole proposal due to the marine discharge consent application being considered separately from other consents required. The specific harmful substances are not yet identified. The effects are associated with the use and introduction of foreign substances to the natural environment (which includes taonga species) irrespective of quantity of the discharge, and the bio-physical methodology and measurement of the impact of discharging harmful substances. There is potential for a variation to the marine discharge consent (should it be granted consent) once the full EAD programme activities are confirmed and lodged via applications for approvals by Beach Energy with the Environmental Protection Authority. This is not a helpful outcome in providing advice from a Māori perspective on a proposal especially if there is a likelihood that the marine discharge consent for the proposal is later varied to potentially address an increase in discharge or actual magnitude of effects. The practice of kaitiakitanga is not compartmentalised between individual process for different types of consent for an activity. From a Maori perspective it is important to understand and participate in the whole proposal.	Executive Summary box 4, paras 3.27 – 3.30	Other matters - Holistic assessment of applications
Assumption that the proposed activity, being a notified application, has a higher probability of significant adverse effect on the environment and existing interests than that of permitted activities.	Main report para 3.4.	Other matters – relevance of regulations
Reference to lasting effects and the nature of the contaminants consideration should be given to the impact on the mauri of the area of introducing a foreign substance at all, as well as any long lasting effects either by persistence in the environment or the nature of the substance.	Main report paras 3.20-3.24	Other matters – lasting effects on mauri
There are no proposed conditions to address cultural effects or conditions to accommodate existing interests of Māori. Conditions focus on bio-physical qualities of the environment and to protect the environment from pollution but do no manage the cultural qualities of the natural environment.	Executive Summary box 5, paras 3.40 – 3.42	Other matters – conditions