

**BEFORE THE EPA  
BEACH ENERGY RESOURCES NZ (HOLDINGS) LIMITED APPLICATION FOR  
MARINE DISCHARGE CONSENT TO DISCHARGE OFFSHORE PROCESSING  
DRAINAGE (HARMFUL SUBSTANCES FROM DECK DRAINS)**

**EEZ100019**

**IN THE MATTER** of the Exclusive Economic Zone and Continental Shelf  
(Environmental Effects) Act 2012

**AND**

**IN THE MATTER** of a Decision-making Committee appointed to consider a  
marine discharge consent application made by Beach  
Energy Resources NZ (Holdings) Limited for the  
discharge of trace amounts of harmful substances from  
deck drains in the Canterbury Basin

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**CLOSING LEGAL SUBMISSIONS FOR BEACH ENERGY RESOURCES NZ  
(HOLDINGS) LIMITED**

24 September 2020

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 **Simpson Grierson**  
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## MAY IT PLEASE THE COMMITTEE

1. In its minute dated 23 September 2020, the DMC has identified that it is satisfied with the information before it and does not intend to re-convene the hearing. As such, it has sought that Beach Energy Resources NZ (Holdings) Ltd (**Beach**) prepare and file its right of reply/closing legal submissions.
2. At the outset, we record that there are no matters raised during the course of the hearing, nor following the adjournment of the hearing, that have caused Beach to change its position in any material respect. It continues to rely on its opening legal submissions and evidence, in addition to the further information that it provided to the DMC on 15 September 2020.
3. There are no matters raised by submitters during the course of the hearing that Beach seeks to respond to at this point. It has already provided further information with regard to the submission and evidence presented for Waitaha Taiwhenua o Waitaki Trust and is content that it has appropriately addressed those matters.

### Outstanding issue – consent conditions

4. The sole remaining issue to be addressed in the right of reply relates to proposed conditions. In particular, this relates to the issues raised by Beach regarding the incorporation of an ESRP into the conditions of consent through the EPA's proposed condition 13 (**ESRP condition**).
5. We have considered the EPA's response<sup>1</sup> to the issues raised by Beach regarding the ESRP condition (**EPA response**) and respectfully submit that it does not confront the issues that were raised in opening legal submissions. Instead, the EPA response does not disagree with the interpretation of the EEZ Act and Discharge and Dumping Regulations set out in Beach's opening submissions, but advances other reasons why the authors consider condition 13 to be appropriate. We will provide a more detailed response below.

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<sup>1</sup> Memorandum from Phillipa McKenzie and Tim Roser to DMC, dated 15 September 2020

6. In the meantime however, we confirm that Beach considers that the ESRP condition should be deleted and replaced with an advice note as follows:

Advice note: Under regulation 24 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects – Discharge and Dumping) Regulations 2015, the consent holder ~~must~~ is not able to operate unless it has in place an Emergency Spill Response Plan which has been ~~certified~~ approved by the EPA and complies with the requirements of regulation 24.

7. The minor edits from what was advanced in opening legal submissions are to reflect that an advice note should not be regulatory or directive, and to better reflect the language of Regulation 24 of the Discharge and Dumping Regulations.

### **Reasons why an ESRP condition should not be imposed**

8. A number of reasons were outlined in opening legal submissions for Beach as to why it would be inappropriate for the proposed ESRP condition to be imposed. As noted earlier, the EPA response dated 15 September 2020 does not address the legal issues raised by Beach, but rather seeks to justify the condition on largely parallel and unrelated grounds. As such, it does not assist the DMC in identifying whether the legal position advanced with Beach has merit, because the authors of the EPA response do not respond directly to the issues raised nor the basis for the concerns.
9. The EPA response is also contradictory in that it accepts that there are other methods of enforcing compliance with an ESRP<sup>2</sup>, but then says that an advice note which refers to an ESRP is unenforceable<sup>3</sup>. There is no dispute that there will always need to be an ESRP, and the EPA confirms that it will be enforceable – but the question is does an ESRP need to be transformed into a marine consent through a condition when it is expressly not a marine consent<sup>4</sup>? The EPA response does not address the legal risks of criminal prosecution that this position would create for Beach (based on the EPA's own interpretation), which was clearly stated to be the basis for Beach's concern.

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<sup>2</sup> EPA response, para 24

<sup>3</sup> Ibid, para 27

<sup>4</sup> *Greenpeace* at [93] – [95]

### *Scope issues*

10. While the application is part of the broader EAD Programme, the sole focus of the present application is the potential discharge of trace elements of harmful substances from the deck drainage system of a MODU.
11. In the unlikely event that a harmful substance spill to deck occurs, it would be cleaned up by appropriately trained personnel in accordance with systems and procedures specified in the ESRP.
12. The ESRP would apply generally to all spills in all areas of a MODU, whereas the scope of this application relates only to spills of harmful substances that have the potential to enter the deck drainage system. The proposed ESRP condition requires that the activities authorised by the marine discharge consent, being discharges through deck drains, must be in accordance with an ESRP. It is submitted however that discharges through the deck drains cannot be in accordance with an ESRP. The ESRP outlines what chemicals are used/stored and how they are to be handled to minimise risk of spills. The ESRP does not authorise discharges.
13. As such, requiring compliance with an ESRP as a condition of a deck drainage consent creates a risk that the condition will expand the scope of the present application by addressing matters beyond the potential discharge of harmful substances from the deck drainage system, and create a compliance issue beyond the scope of the discrete activity for which consent is required. This of itself raises validity and improper purpose issues.

### *Precedent for ESRP condition*

14. The ESRP condition was proffered by Beach based on a condition which was imposed by the EPA on the deck drainage consent granted to OMV GSB Limited (**OMV**). The opening legal submissions for Beach explained that this was proffered before the EPA's interpretation, in terms of non-compliance with an ESRP creating an offence against the EEZ Act, was known. Up to that point, the ESRP condition, whilst unnecessary, was considered by Beach to be innocuous in that it simply recorded the fact that there would need to be an approved ESRP in order for exploration drilling to proceed.

15. The EPA Conditions Report sought, in part, to justify the proposed condition in this instance on the basis that there was a precedent from the OMV conditions.
16. When however the basis for the ESRP condition imposed on the OMV deck drainage consent is carefully considered, what in fact happened was that OMV proffered an advice note recording the need for an ESRP to be approved.<sup>5</sup> The EPA Conditions Report for OMV agreed that the reference to an ESRP should be in an advice note and noted this was consistent with the EPA's standard practice.<sup>6</sup>
17. Without any discussion, debate or forewarning in terms of engagement with OMV witnesses or legal counsel during or after the hearing, the DMC unilaterally redrafted the Advice Note as a condition and issued its decision.<sup>7</sup> There was no evidence before the DMC to suggest that the suggested advice note should be a condition. There is no discussion of this nor were any reasons identified in the DMC decision for imposing a condition rather than an Advice Note.
18. OMV did not appeal against the condition (presumably on the basis that it did not identify that the condition would create a significant legal risk), but subsequent events, including the unexpected legal interpretation adopted by the EPA about the offence provisions under the EEZ Act, have identified that it does in fact create a significant legal risk. That risk has been clearly expressed as the basis for Beach's concerns, yet has been avoided by the EPA response.
19. With respect, reliance on the "precedent" of the OMV condition for its Great South Basin deck drainage consent is of very limited value when the facts and circumstances are better understood. The condition was neither discussed nor justified by that DMC. The EPA Conditions Report for Beach now states a preference for a condition, which is quite different from the EPA officers' position on the adequacy of an advice note for the OMV

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<sup>5</sup> OMV GSB Limited Marine Discharge Consent Application – Deck Drainage – GSB-EEZ100018 Appendix A Proffered Conditions page 2

<sup>6</sup> OMV GSB Limited Marine Discharge Consent Application - Conditions Report, June 2019, page 15.

<sup>7</sup> Decision on marine discharge consent application OMV GSB Limited EEZ100018, September 2019, page vii.

matter. Reliance on a precedent in the present circumstances cannot be a valid nor appropriate basis for imposing the ESRP condition.

*Validity issues*

20. It is clear, based on the EPA's interpretation, that incorporation of an ESRP into a discharge consent by including an ESRP condition (and requiring compliance with the ESRP as an express condition) would result in the ESRP becoming part of a marine discharge consent. It is submitted that this would raise validity and improper purpose issues in this instance.
21. In response to paragraph 21 of the EPA response, it is entirely reasonable to assume from reading the EEZ Act and Discharge and Dumping Regulations on their face, that it was a deliberate choice for the ESRP process to be separate from the discharge consent process, for an ESRP to not be classified as a marine consent, and for compliance with an ESRP to not be subject to the EEZ Act's offence provisions.
22. In those circumstances, transforming an ESRP into something that it is not<sup>8</sup>, and creating legal compliance issues that the primary legislation does not contemplate, makes the EPA's approach doubtful in terms of its validity. It remains Beach's position that the EPA approach can be characterised as inappropriate "gap filling".
23. The EPA response at paragraph 21 accepts that conditions cannot be inconsistent with the Act or regulations, however the proposed condition would be inconsistent with and potentially override the separate regulatory approach to ESRPs in the Discharge and Dumping Regulations.

**ALTERNATIVE POSITION**

24. Without resiling from the foregoing or the matters identified in opening legal submissions, the DMC could impose a condition in this instance that does not create the legal risk, improper purpose and validity issues that the wording of the EPA's condition would create.

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<sup>8</sup> The ESRP process is separate to and distinct from the requirement to obtain a marine discharge consent and it is clear that an ESRP is not a marine consent.

- 25.** It remains the very strong preference of Beach that an advice note should be imposed regarding the ESRP.
- 26.** It could however accept a condition which simply records the legal position that it could not exercise the present consent (if granted) unless and until it had an approved ESRP for the exploration drilling activity. Such a condition could state:

This consent must not be exercised unless the Consent Holder has an approved ESRP for an offshore installation as required under regulation 24 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects—Discharge and Dumping) Regulations 2015.

**Dated** 24 September 2020

Two handwritten signatures in blue ink are positioned above a horizontal line. The signature on the left is a cursive 'JGA', and the signature on the right is a cursive 'HPH'.

J G A Winchester / H P Harwood  
Counsel for the applicant

