BEFORE THE ENVIRONMENTAL PROTECTION AUTHORITY

IN THE MATTER	of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2011 (EEZ Act)
AND	
IN THE MATTER	of an application for marine consent under section 38 of the EEZ Act by Trans-Tasman Resources Limited to undertake iron ore and processing operations offshore in the South Taranaki Bight
BETWEEN	**Trans-Tasman Resources Limited** Applicant
AND	**Environmental Protection Authority** EPA
AND	**Fisheries Inshore New Zealand Limited, New Zealand Federation of Commercial Fishermen Inc, Talley's Group Limited, Southern Inshore Fisheries Management Company Limited and Cloudy Bay Clams Limited** Fisheries Submitters

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CLOSING LEGAL SUBMISSIONS FOR THE FISHERIES SUBMITTERS

Dated: 25th May 2017

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MAY IT PLEASE THE DECISION-MAKING COMMITTEE:

INTRODUCTION

1. I appear today to present the Fisheries Submitters' closing submission on Trans-Tasman Resources Limited's (**TTR** or **Applicant**) application for marine and marine discharge consents under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (**EEZ Act** or **Act**).

2. It is no secret that the Fisheries Submitters have been unhappy with the way in which these proceedings have unfolded. There have been some blunt exchanges of view between counsel and the DMC in this respect.

3. That said, the DMC is required to consider volumes of complex information. Public interest in our marine space means opportunities need to be provided for a large number of submitters to be heard. All this must be achieved within very tight statutory timeframes.

4. I wish to thank the DMC, in that context, for taking the time to address procedural matters as they have arisen. Irrespective of whether I have agreed with the answer, it is important to acknowledge that an answer has been provided.

5. Turning to TTR's application, it will be of little surprise that the Fisheries Submitters' principal concern continues to be the potential extent and effects of the proposal's plume. Accordingly, my submissions focus on TTR's application for a marine discharge consent.

BACKGROUND

Purpose of background submissions

6. The purpose of my background submissions is to set out the Fisheries Submitters' concerns:

   (a) Regarding the inadequacy of information provided by TTR in support of its most recent application;

   (b) The attempts to address those inadequacies during these proceedings; and

   (c) TTR's inability to address those inadequacies despite numerous opportunities to do so.

7. The background to these concerns is central to the Fisheries Submitters' views on:

   (a) Procedural issues concerning the way in which these proceedings have been conducted; and

   (b) Legal issues that should inform DMC's exercise of decision-making power moving forward.

8. As discussed, my submissions primarily focus on TTR's application for marine discharge consent.

Evidential findings in *TTR decision 2014*

9. TTR's present application represents its second attempt to seek marine and marine discharge consents under the EEZ Act to mine 50 million tonnes of iron sands per annum from the seabed of the South Taranaki Bight (**STB**) for a term of 35 years.

10. TTR's first application was refused by the DMC (as it was composed at that time) in its decision dated June 2014 (***TTR decision 2014***).[1]

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[1] *Trans-Tasman Resources Ltd Marine Consent Decision*, Environmental Protection Authority, dated 17 June 2014.

11. The Fisheries Submitters were submitters on TTR's first application and presented evidence during the hearing. Inadequacy of information and uncertainty concerning TTR's plume modelling and effects were central to the fishing industry's opposition to that application.[2] One of the DMC's key reasons for refusing consent was uncertainty as to the potential effects of the plume and changes to the seafloor bathymetry on existing fishing interests.[3]

12. Furthermore, the DMC states, in the executive summary of the *TTR decision 2014*, that considerable uncertainty existed with respect to the scale of effects of the proposal on the environment, especially in relation to:[4]

    (a) Primary productivity and benthic effects and consequent ecosystem effects;

    (b) Impacts on existing interests, notably iwi and fishing interests;

    (c) Impacts on marine mammals and importance of protecting rare and vulnerable ecosystems and habitats of threatened species.

13. Overall, the DMC found that the application was premature and that more time should have been spent better understanding the proposed operation in the relevant environment, while engaging more constructively with existing interests. The information provided by TTR, while voluminous, was too uncertain and inadequate. For those reasons the application presented did not meet the sustainable management purpose of the EEZ Act.[5]

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2 *Trans-Tasman Resources Ltd Marine Consent Decision*, Environmental Protection Authority, dated 17 June 2014, at paragraph [652].

3 *Trans-Tasman Resources Ltd Marine Consent Decision*, Environmental Protection Authority, dated 17 June 2014. The DMC states at paragraph [846] that:

"We accept that, if the mining ceased, the **plume and changes to the seafloor bathymetry** would stop. However, we do not know if the effects on the receiving environment that would have already been created would be irreversible, i.e. they may have already caused irreversible damage such as to biogenic areas, **permanently affected commercial and recreational fishing interests**, affected iwi's existing interests and relationship to Tangaroa and affected marine mammals." **[Emphasis added]**

4 *Trans-Tasman Resources Ltd Marine Consent Decision*, Environmental Protection Authority, dated 17 June 2014, Executive Summary, paragraph [9]

5 *Trans-Tasman Resources Ltd Marine Consent Decision*, Environmental Protection Authority, dated 17 June 2014. The DMC states at paragraph [15] that:

"Overall, we think this application was **premature**. More time to have better understood the proposed operation and the receiving environment and engage more constructively with

14. In simple terms, the *TTR decision 2014* placed TTR on notice as to the matters it would need to evidentially address prior to filing any new application with the Environmental Protection Authority (**EPA**) to mine iron-sand in the STB.

TTR's application to withhold plume information in 2016

15. TTR's latest application was filed with the EPA on 23 August 2016. At the time of filing, TTR made an application under s 158 of the EEZ Act to restrict publication of plume information that had been redacted from the application.

16. On 14 September 2016, the DMC issued a direction under Minute 3 restricting the information to (amongst others) submitters who agreed to enter into a confidentiality agreement with TTR. In reaching its decision under Minute 3 the DMC agreed with TTR that the publicly available part of TTR's application *"contains enough information to allow people to understand the nature of the proposed activities and their effects on the environment and existing interests".*[6]

17. Talley's Group Limited (on behalf of the Fisheries Submitters) joined KASM, Greenpeace and Ngati Ruanui seeking orders to have the DMC's direction set aside given the importance of the plume information to the application. Ruling against the EPA and TTR, Judge Dwyer found that:[7]

> … we conclude that the crucial nature of the [plume information] in informing the conclusions in the Impact Assessment, when combined with the public's right to participate effectively in the consent process, outweigh any trade secret or business interest of Trans-Tasman by a considerable margin.

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existing interests and other parties may have overcome many of the concerns we have set out in this decision. It is conceivable that at least some of these matters could have been addressed contemporaneously with the other investigative work the applicant undertook prior to lodging the application for consents. Ultimately, the information upon which we had to make our decision, while voluminous, was **too uncertain and inadequate**, and we did not have sufficient confidence in the adaptive management approach proposed to address that uncertainty and inadequacy to enable the activity to be undertaken. For all of these reasons, the application as presented to us does not meet the sustainable management purpose of the EEZ Act." **[Emphasis added]**

6 M3 – Minute and direction of the Decision-making Committee – 14 September 2016, at paragraph [7].

7 *Kiwis Against Seabed Mining Incorporated v Environmental Protection Authority* [2016] NZEnvC 217, at paragraph [68].

Adequacy of information in support of application in 2016

18. Counsel for TTR stated in opening submissions that *"TTR has undertaken significant new work to substantially improve knowledge of both the existing environment and the extent of the potential effects arising from the sand dredging operations"*.[8] This is an acknowledgement of my contention at paragraph [14] of these submissions that TTR had to address the information gaps identified in the *TTR decision 2014*.

19. However, Ms Anderson observes in her final statement of environmental planning evidence for the Fisheries Submitters that she is *"not aware that any additional baseline environmental monitoring has been undertaken by TTR since the 2014 decision"*.[9]

20. The views of the Fisheries Submitters' different experts concerning the absence of baseline information is summarised in Ms Anderson's primary statement of evidence, [10] and her final statement of evidence.[11] It is also summarised in my opening submissions for the Fisheries Submitters.[12]

21. From the time that the Environment Court ordered TTR's plume information be made publicly available, the Fisheries Submitters' experts have raised continuing concerns that (while the model itself has been improved):

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8 Opening legal representations on behalf of Trans-Tasman Resources Limited, dated 15 February 2017. TTR's counsel states at paragraph [14]:

"TTR has undertaken significant new work to substantially improve knowledge of both the existing environment and the extent of the potential effects arising from the sand dredging operations. This work has resulted in an improved understanding of the levels of effects and better more focused management strategies, monitoring and conditions."

9 Supplementary statement of evidence of Helen Margaret Anderson for Fisheries Submitters, In response to DMC Minute 43, 22 May 2017, at paragraph [56].

10 Primary Expert Evidence of Helen Margaret Anderson on Environmental Planning for the Fisheries Submitters, dated 23 January 2017.

11 Supplementary statement of evidence of Helen Margaret Anderson for Fisheries Submitters, in response to DMC Minute 43, 22 May 2017, at paragraphs [26] to [36], [42] to [46] and [51] to [57].

12 Opening submissions of legal counsel for the Fisheries Submitters, with hand written amendments addressed at hearing before the DMC, 16 February 2017, at paragraphs [86] to [92].

(a) TTR's inputs to the model have not been independently verified, which casts doubt as to the veracity of TTR's claims as to the extent of the plume or a worst-case scenario;[13] and

(b) TTR has failed to provide any additional information since the *TTR decision 2014* concerning the receiving environment, including existing interests, in order to adequately assess the potential effects of the proposed mining actives plume.[14]

22. TTR's application was publicly notified on 17 September 2016 despite the absence of new baseline information or independently verified modelling inputs. This was three days after the decision was made to withhold the plume information in support of the application (i.e. 14 September 2017). Although, the EPA had sought further information concerning the plume model under s 42 of the Act on 13 October 2016, that request does not appear to have addressed the absence of additional baseline information or the veracity (independent review process) of TTR's modelling inputs.

DMC hearing and timetable directions

23. The DMC issued revised timetable directions under Minute 11 on 15 December 2016,[15] which directed that the hearing of TTR's application would commence on 16 February and close on 12 April 2017. The TTR hearing schedule (Version Date: 8 February 2017) set the hearing down for 15 working days with closing submissions on 17 and 20 March 2017.

24. The date for filing TTR's evidence remained 19 December 2017, but the date for filing submitter evidence was shifted to 24 January 2017 *"in order to ensure that work is not required on non-statutory days"*.[16] The DMC issued Minute 19 allowing TTR's witnesses to submit brief statements in reply to submitter evidence on 3 February 2017.[17]

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13 Joint Witness Statement of Experts in the field of sediment plume modelling – Setting Worst Case Parametres, dated 23 February 2017, at paragraphs [8], [12] and [15].

14 Primary Expert Evidence of Helen Anderson on Environmental Planning, dated 23 January 2017, at paragraphs [87] to [94].

15 M11 – Minute of the Decision-making Committee (DMC) – 15 December 2016

16 M11 – Minute of the Decision-making Committee (DMC) – 15 December 2016, at paragraph [15].

17 M19 – Minute of the Decision-Making Committee – 3 February 2017.

First expert conference on Sediment Plume Modelling

25. The first expert conference on Sediment Plume Modelling took place on 13 February 2017. The Joint Witness Statement[18] raised numerous concerns regarding the adequacy of the TTR's plume modelling, including:[19]

    (a) The plume modelling undertaken by TTR has not considered temporal variability;

    (b) Insufficient information was provided by TTR to validate the assumptions made in the modelling regarding the average particle size distribution; and

    (c) Insufficient information was provided by TTR to assess whether or not the predicted discharge rates provide a reliable estimate of the discharge rates.

Second expert conference on Sediment Plume Modelling

26. This DMC issued Minute 29, on 22 February 2017, directing the plume experts to undertake further conferencing focused on establishing appropriate worst-case scenario parameters to apply to a re-run of the sediment plume model.[20]

27. The second expert conference on Sediment Plume Modelling – Setting Worst Case Parameters - took place on 23 February 2017. The second Joint Witness Statement[21] raised further concerns concerning adequacy of the TTR's approach to establishing worst-case scenario parameters, including:[22]

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18 Joint Statement of Experts in the Field of Sediment Plume Modelling, dated Monday, 13 February 2017.

19 Statement of evidence of Joris Jorissen in reply to Alison Undorf-Lay, Re: Summary of Expert Conferencing on Sediment Plume Modelling, dated 16 March 2017, first expert conferencing session, paragraphs [1] to [3].

20 M29 – Minute of the Decision-Making Committee – 22 February 2017.

21 Joint Statement of Experts in the Field of Sediment Plume Modelling – Setting Worst Case Parameters, dated Thursday, 23rd February 2017.

22 Statement of evidence of Joris Jorissen in reply to Alison Undorf-Lay, Re: Summary of Expert Conferencing on Sediment Plume Modelling, dated 16 March 2017, Second expert conferencing session, paragraphs [1] to [8].

(a) All experts agreed that TTR have not modelled the worst case fine sediment release rates or the worst-case effects across the footprint that can be affected by the sediment plume;

(b) The experts considered the information regarding the mining process and their inter-relation with the "run of mine" was not concisely collated in the application documentation and insufficient information has been made available to assess their effects on the sediment releases;

(c) Insufficient evidence was provided by TTR to validate the sediment fractions that have been used in the modelling; and

(d) Based on the lack of evidence, it was not possible to accurately define the worst-case parameters for fines discharge.

Transcript of the closing remarks 9 March 2017

28. An email from the EPA, dated 14 March 2017, directed submitters to an excerpt from the transcript of the closing remarks of the Chair at the end of hearing day 13, 9 March 2017. Despite significant evidential concerns raised during plume conferencing at time, and acknowledgement that TTR had not undertaken appropriate consultation on its application, the Chair encouraged parties to talk because *" … we will get to the point where a decision is made, conditions are formulated …".*[23] This statement overlooked the point that, at least in respect of the plume of the proposed activity, there was insufficient evidence to support conditions being formulated.

[23] Excerpt from Transcript of Proceedings, Day 13, 9 March 2017:

…. it's clear that for whatever the reasons – and truthfully, I don't know that those of us who observe from the outside in whatever role; for whatever reasons – there has not been the engagement that should accompany an application of this sort. And I think that would be acknowledged by everybody. Everybody said they would prefer to have seen greater engagement.

And I would simply say to the parties that you owe it to yourselves to make sure that you don't say, "It's too late". Because too late will come. Too late in the process will come because **we will get to the point where a decision is made, conditions are formulated** and talking will be on an entirely different basis after that. **[Emphasis added]**

DMC Minute 35 – proposed extension to hearing

29. The DMC then issued Minute 35, on 15 March 2017, proposing to extend the hearing schedule and close the hearing on 8 May 2017.[24] Minute 35 states that this additional time is required to address evidential matters and the development of proposed conditions (see paragraphs [1] and [4]). Appendix 1 setting out the proposed timetable indicates the DMC *inter alia*:

    (a) Expected to receive further modelling information on 16 March;

    (b) Would consider whether to reconvene expert conferencing to discuss modelling information, or recall any of these witnesses; and

    (c) Asked relevant expert witnesses to provide comment on any impact arising from further modelling information on evidence by 24 March 2017.

30. It is apparent from Appendix 1 that the proposed timetable extension was intended to address the inadequate information and uncertainty identified in expert evidence and conferencing on the plume model.

31. The Fisheries Submitters and Ngati Ruanui filed a joint memorandum in response to Minute 35, on 16 March 2017, raising procedural concerns including:[25]

    (a) The ongoing attempts to address information gaps in TTR's plume modelling;[26]

    (b) The best available information is that TTR's impact assessment of plume effects is inadequate and uncertain;[27]

    (c) It would cause *"unreasonable cost, effort and time"* to the Fisheries Submitters to require them to produce further evidence on TTR's plume assessment;[28] and

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24 M35 – Minute of the Decision-Making Committee – 15 March 2017.

25 Memorandum of counsel for the Fisheries Submitters and Ngati Ruanui, regarding Minute 35 and further proposed changes to the hearing schedule, dated 16 March 2017.

26 Ibid, at paragraphs [10] and [11].

27 Ibid, at paragraphs [12] and [20].

28 Ibid, at paragraphs [21] and [28].

(d) That the Fisheries Submitters and Ngati Ruanui were unable to meet the additional cost, time and effort over and above that already committed.[29]

DMC's direction that TTR hearing is an inquiry

32. The DMC gave some preliminary comments on the submitters' joint memorandum on 17 March 2017. This included clarification that the DMC *"made it clear that it intended to run this as an inquiry and that [it] would be continuing inquiries until [it] had got all the information that [it] required*". The DMC emphasised that "*this is an inquiry. And that means by definition that the process is iterative."* [30]

DMC Minutes 36, 37 and 38 – plume conferencing and hearing extension

33. The DMC then issued Minutes 36, 37 and 38 providing directions for:

(a) Further expert conferencing on the sediment plume modelling, and the subsequent request for expert statements addressing the materiality of further modelling information;[31]

(b) A revised and extended hearing timetable, with the hearing closing on 31 May 2017 (i.e. an additional 7 weeks beyond the closing date under Minute 11);[32] and

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29 Ibid, at paragraphs [29] and [33].

30 Transcript of proceedings, 17 March 2017. See Chair's comments at page 1902 to 1903:

".. I want to make the more broad point before we do get into the detail of the scheduling, that at the outset t**he Committee made it clear that it intended to run this as an inquiry and that we would be continuing inquiries until we had got all the information that we required**. And it was very clear, I think, from most submitters who were active participants that whenever new material became available they quite properly were interested in having the opportunity to comment on that. And whether we like it or not, that does require the recall of people in order to do that effectively. We're not going to stop doing that. We are well within the statutory timeframes for conducting this hearing and should we find ourselves in a situation where we are going to exceed the timeframe set out in the legislation, we will seek permission from those people we need to seek permission from, otherwise we are going to continue to look at the means by which we get the best possible available information or the best available information in front of us. This is not an RMA exercise; this is not any other courtroom exercise; **this is an inquiry. And that means by definition that the process is iterative**." **[Emphasis added]**

31 M36 – Minute of the Decision-Making Committee – 22 March 2017, Further Expert Conferencing – Sediment plume modelling.

32 M37 – Minute of the Decision-Making Committee – 22 March 2017,

(c) Extending the hearing timeframe[33]

34. The DMC noted in making these directions that it had ***"taken into account the interests of the parties to the hearing, including the potential additional time and cost implications.***" However, it was conscious of its obligation under the Act *"to base its decision on the best available information"*. The DMC went on to reason that, *"[i]n the interests of exploring the possibility of reducing additional time and cost"*, it was appropriate to require a further *"joint witness statement about the materiality of the further modelling information"*.[34]

35. The DMC did not address the submitters' legal point that the DMC already had the best available information before it, and that this information indicated consent should be refused. The DMC did not explain why it was in the interests of submitters for the DMC to require further conferencing or evidence on plume modelling, or how the requirement for further conferencing or evidence on the plume model would reduce additional time and cost.

36. The DMC's view that further plume conferencing would reduce time and cost appears counter-intuitive, given the submitters opposed the production of additional evidence on TTR's plume model on the basis that it would cause them *"unreasonable cost, effort and time"*.[35] This was clearly

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33 M38 – Minute of the Decision-making Committee – 22 March 2017, Extension of hearing.

34 M37 – Minute of the Decision-Making Committee – 22 March 2017, Timetable for next steps. The DMC states at paragraphs [8] and [9] that:

"The decision to require further modelling at the point it was requested was not taken lightly. The DMC acknowledges the resources needed to participate in a process such as this application can be significant given the complexity of both the proposal and the environment. In proposing an extended timetable, t**he DMC has taken into account the interests of the parties to the hearing, including the potential additional time and cost implications**. However, the DMC is conscious of its obligation under sections 61 and 87E of the Act **to base its decision on the best available information**.

The ability for other experts to have time to comment on the results was at the request of parties but also is a necessary part of the process to ensure natural justice for parties as well as meeting the obligation to obtain the best available information. **In the interests of exploring the possibility of reducing additional time and cost, the DMC considers it appropriate to require the sediment plume modelling experts reconvene and provide a joint witness statement about the materiality of the further modelling information before any other expert conferencing is directed.** A Minute to this effect will be issued concurrently. If further expert conferencing is required then it will be directed by Minute once the joint witness statement is received. This process does not prevent any party filing further comment by expert witnesses on this information as signaled in the hearing." **[Emphasis added]**

35 Memorandum of counsel for the Fisheries Submitters and Ngati Ruanui, regarding Minute 35 and further proposed changes to the hearing schedule, dated 16 March 2017.

evidenced in a report from Jacobs annexed to the submitters' joint memorandum dated 16 March 2017, which advised Jacobs had already expended some 600 hours of expert time producing evidence to that point in the proceedings, and that Jacobs envisaged the proposed timetable may require an additional 200 to 250 hours of expert time.[36] Jacobs' report concluded that:[37]

> New information is now being introduced in to the hearing. In our opinion sufficient information should have been provided in the application in the first instance. The level of uncertainty and information gaps and insufficient information with the current application lead to a conclusion that the application should either be withdrawn or declined by the DMC.

37. In light of Jacobs' report, the only party that might reasonably be seen as benefiting from directions to extend the hearing timeframe and produce further plume information is TTR. It was clear by this time that the information provided by TTR in support of its application was from the very outset inadequate and uncertain. Had the Environment Court not overturned the DMC's initial directions under Minute 3 it is very unlikely that point would have been evidentially established in the first and second expert conference on the plume model.

38. Despite the cost and time expended, the Fisheries Submitters considered that they had little choice other than to produce further evidence on the *"materiality"* of the plume model, notwithstanding that information had been sufficiently addressed in primary evidence and the first and second Joint Witness Statements. Not to have answered the DMC's request for further information on the plume model would have placed the Fisheries Submitters at a significant disadvantage.

39. Accordingly, the Fisheries Submitters filed a further memorandum, on 29 March 2017, advising that they would reallocate resources *"earmarked for attending further expert conferencing on fisheries"* to provide further written

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36 Ibid, Annexure "A", Jacobs response to DMC Minute 35, dated 16 March 2017, at paragraph [10]

37 Ibid, Annexure "A", at paragraph [11].

statements addressing the question of *"materiality"* under Minute 36.[38] The memorandum went on to advise that:

> It is the Fisheries Submitters' view that Minutes 37 and 38 are contrary to the administration of natural justice in these proceedings. This is because, *inter alia*, those minutes provide significant further time and opportunity for TTR to iteratively address information gaps in its application at the *"cost, effort and time"* of submitters.

40. The Fisheries Submitters filed two further expert statements of evidence on the materiality of plume modelling on 7 and 10 April 2017.[39] Both statements reiterate points made in primary evidence and the Joint Witness Statements that TTR's proposed approach to modelling is not supported by adequate or independently verified information. Both statements advised that this approach is contrary to industry best practice (citing The Australian National Assessment Guidelines for Dredging (Australian Government, 2009)). Dr Barbara further points out that:[40]

> **As stated in my primary evidence**, the sediment plume is a fundamental component of the proposal. The majority of TTR's impact assessment is based on the assumption that the SSC will be low …These assumptions to date have not been backed by any independently verified data or written information on the TTR mining processes. The ramifications to TTR's impact assessment if the plume modelling parameters do not capture the worst case scenarios are wide reaching in terms of significant potential adverse effects. E.g. muds and clays can travel further than sand in the water column and once settled form anaerobic barriers in even thin layers (<2cm).

DMC Minute 41 – further questions on plume modelling

41. The DMC issued Minute 41, on 10 April 2017, indicating that it had a list of further questions for the TTR and the submitters' expert witnesses. Notwithstanding the deficiencies identified with the TTR's approach to

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38 Memorandum of counsel for the Fisheries Submitters, regarding DMC Minutes 36, 37 and 38, dated 29 March 2017, at paragraphs [5] and [6].

39 Supplementary statement of evidence of Mr Joris Gerard Leonard Jorissen For Fisheries Submitters, dated 7 April 2017; and Supplementary statement of evidence of Dr Gregory Matthew Barbara for Fisheries Submitters, dated 10 April 2017.

40 Supplementary statement of evidence of Dr Gregory Matthew Barbara for Fisheries Submitters, dated 10 April 2017, at paragraph [23].

plume modelling, the DMC requested TTR to produce further worst case sediment plume modelling.[41]

42. The Fisheries Submitters received an email from the EPA, on 2 May 2017, inquiring as to the availability of the Fisheries Submitters' experts to address nine additional evidential documents filed by TTR. The Fisheries Submitters again advised that the costs to submitters in these proceedings had become unreasonable and an impediment to meaningful participation.[42] However, out of the necessity to protect their position, in the face of new information, they agreed to produce four additional written statements, including two further expert statements in respect of TTR's plume modelling.[43]

TTR's new information abandons predictive modelling

43. The new information provided by TTR, on 2 May 2017, includes a new set of proposed conditions.[44] It is clear from TTR's newly proposed conditions 5 and 6 that it has now abandoned the use of its plume model to predict the sediment plume. Instead TTR now relies on discharge limits at "end of pipe" and suspended sediment concentration limits at seven monitoring sites to control the extent and impact of the proposed plume. This is a clear statement that TTR concedes that it has not provided adequate information, and that evidential uncertainty remains concerning the reliability of its worst-case modelling.

44. The Fisheries Submitters' final statements of expert evidence in respect of TTR's proposed plume conditions indicate that there is inadequate information concerning TTR's technical and operational ability to comply with the proposed conditions.[45] Mr Clarke's evidence raises serious

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41 M41 – Minute of the Decision-Making Committee – 10 April 2017, Additional questions, at paragraphs [5] and [6]; Appendix 1 sediment plume modelling and ecology; and Appendix 2 Questions for other expert following additional information being provided.

42 Memorandum on Behalf of Fisheries Submitters, regarding further evidence from the Applicant notified on 2 May 2017, dated 5 May 2017.

43 Memorandum on Behalf of Fisheries Submitters, regarding further evidence for the Fisheries Submitters, dated 9 May 2017.

44 Attached to the Dr Mitchell's expert supplementary evidence dated 2 May 2017.

45 Supplementary Statement of Evidence of Mr Joris Jorissen in response to DMC Minute 41, dated 18 May 2017; Supplementary Statement of Evidence of Dr Greg Barbara in response to DMC Minute 41, dated 19 May 2017; Supplementary Statement of Evidence of Mr Bruce Clarke in response to DMC Minute 41, dated 19 May 2017; and Supplementary statement of

concerns about the paucity of information concerning the proposed operation and operation risk in reports prepared by TTR on those matters.[46] TTR has refused to release those reports for the purposes of this hearing, despite the fact those reports are relied on the evidence of Mr Thompson.[47] The DMC has directed in Minute 45, dated 18 May 2017, that *"[t]hese reports do not form part of the application and the DMC does not consider it necessary to direct the applicant to provide these reports or rely on them for evidential purposes".* The DMC's direction means that there are no technical reports supporting TTR's application on operational matters or operational risk. Ms Anderson concludes in her evidence that:[48]

> I do not consider given the inadequate baseline information on the environment, the uncertainty as to the extent of effects of the sediment plume and extent of adverse effects to be mitigated, consent conditions can be prepared to appropriately control and manage the adverse effects of TTR's proposal.

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evidence of Helen Margaret Anderson for Fisheries Submitters, in response to DMC Minute 43, 22 May 2017.

46 Supplementary Statement of Evidence of Mr Bruce Clarke in response to DMC Minute 41, dated 19 May 2017; and Supplementary statement of evidence of Helen Margaret Anderson for Fisheries Submitters, in response to DMC Minute 43, 22 May 2017, at paragraphs [31] to [36].

47 Memorandum on behalf of Fisheries Submitters, regarding minute 43, dated 12 May 2017, at paragraphs [27] to [32].

48 Supplementary statement of evidence of Helen Margaret Anderson for Fisheries Submitters, in response to DMC Minute 43, 22 May 2017, at paragraph [62].

PROCEDURAL ISSUES

45. The memoranda filed on behalf of the Fisheries Submitters raised a number of concerns with the fairness of the procedure being followed throughout the course of the hearing. The following section responds to matters addressed in the DMC's minutes, and in closing statements.

The role of the DMC under the EEZ Act

46. The DMC has characterised this hearing as an *"inquiry"*, and observed *"that means by definition that the process is iterative"*. In my respectful submission the DMC has misdirected itself as to the nature of this hearing. I submit that the DMC is not a Commission of Inquiry nor is this hearing an inquiry.

47. In these proceedings the DMC is exercising the functions and powers of the EPA to consider and determine an application for marine and marine discharge consents. In this respect the EEZ Act mandates a quasi-judicial process incorporating specified sections of the Commissions of Inquiry Act 1908 (**COI**).

48. The EPA (and DMC acting under delegation) is not constituted as a Commission of Inquiry.[49] Instead s 55 of the EEZ Act provides that specified provisions of the COI apply to *"every hearing"* – including the discretion to receive evidence and the power to summons witnesses (ss 4, 4B and 4D of the COI).

49. With respect to evidence s 4B of the COI provides:

> **4B Evidence**
>
> (1) The Commission may receive as evidence any statement, document, information, or matter that in its opinion may assist it to deal effectively with the subject of the inquiry, whether or not it would be admissible in a Court of law.

[49] Contrast s 138(1) of the Local Government (Auckland Transitional Provisions) Act 2010 in which the Hearing Panel for the Auckland Unitary Plan is deemed to be a Commission *inter alia* "The following provisions of the Commissions of Inquiry Act 1908 apply to each hearing session as if the Hearings Panel **were a Commission**, and the Hearing **were an inquiry**, under that Act".

50. That provision is similar to that which applies to the Environment Court, pursuant to s 276 of the Resource Management Act 1991.

51. Notably s 55 of the EEZ Act does not list s 4C as one of the applicable provisions of the COI. That section confers on a Commission generic powers of investigation:

> **4C Powers of investigation**
>
> (1) For the purposes of the inquiry the Commission or any person authorised by it in writing to do so may—
>
> (a) inspect and examine any papers, documents, records, or things:
>
> (b) require any person to produce for examination any papers, documents, records, or things in that person's possession or under that person's control, and to allow copies of or extracts from any such papers, documents, or records to be made:
>
> (c) require any person to furnish, in a form approved by or acceptable to the Commission, any information or particulars that may be required by it, and any copies of or extracts from any such papers, documents, or records as aforesaid.

52. I submit that the powers of investigation are one of the key markers of the inquisitorial process. Taken together with the absence of any provision deeming the EPA to be a Commission of Inquiry, or the hearing an inquiry, I submit that the EPA's hearing process under the EEZ Act is quasi-judicial rather than inquisitorial.

53. With respect to the distinctions between judicial and inquisitorial process the Privy Council in *Air New Zealand v Mahon* observed:[50]

> An investigative inquiry into facts by a tribunal of inquiry is in marked contrast to ordinary civil litigation the conduct of which constitutes the regular task of High Court Judges in which their experience of the methodology of decision-making on factual matters has been gained. Where facts are in dispute in civil litigation conducted under the common law system of procedure, the Judge has to decide where, on the balance of probabilities, he thinks that the truth lies as between the evidence which

[50] *Air New Zealand v Mahon* [1983] NZLR 662, at page 666.

> the parties to the litigation have thought it to be in their respective interests to adduce before him. He has no right to travel outside that evidence on an independent search on his own part for the truth; and if the parties' evidence is so inconclusive as to leave him uncertain where the balance between the conflicting probabilities lies, he must decide the case by applying the rules as to the onus of proof in civil litigation.

54. The DMC's function is to consider and determine TTR's application for consents based on the *"best available information"*: ss 61(1)(b) and 87E(1)(b) of the Act.

55. In exercising that function the DMC must *"make full use of its powers to request information from the applicant, obtain advice, and commission a review or a report"*: ss 61(1)(a) and 87E(1)(a).

56. The DMC has interpreted these information principles in ss 61 and 87E as empowering it to continue its *"inquiries"* until it had *"all the information that [it] required"*. With respect the EEZ Act does not mandate the wide ranging inquiry that has been undertaken in these proceedings.

57. Rather it is my submission that the Act provides a quasi-judicial framework for decisions on marine consents. It is the DMC's duty in that framework to consider all the relevant information presented in the application documents and in evidence during the hearing, and to make findings on the matters listed in s 59(2) of the Act based on that information.

The burden of proof under the EEZ Act

58. Relevant to the process followed in this hearing is the question of the party upon whom the burden of proof should fall. The DMC's approach of requesting further modelling and other information from TTR, and directing the submitters to produce supplementary evidence and participate in expert conferencing, has had the effect of applying a shifting burden of proof.

59. It is a fundamental requirement of any judicial system that the person who desires the Court to take action must prove their case. The Court of Appeal confirmed that the applicant for a resource consent has a legal or persuasive burden to persuade the adjudicator to grant the resource

consent.[51] The Environment Court in *Shirley Primary School v Christchurch City Council*[52] held that:

> In all applications for a resource consent there is necessarily a legal persuasive burden of proof on the applicant. The weight of the burden depends on what aspects of Part II of the Act apply.

60. I submit that in these proceedings TTR has the burden of undertaking investigations, and presenting evidence to satisfy the legal tests in ss 59 and 87E. The burden of proof would not shift to the submitters until such time as TTR had provided adequate assessments establishing the effects on the environment and existing interests, and demonstrating that the effects of the discharge can be avoided, remedied and mitigated. In my submission that tipping point was never reached.

61. I have referred to the differences of opinion between the respective experts concerning the adequacy of TTR's plume modelling and the adequacy of TTR's approach to establishing worst-case scenario parameters. The DMC's response to those differences has been to require TTR and the submitters to provide further modelling and assessment, and to direct expert caucusing. The Fisheries Submitters consider that no amount of additional information or caucusing could have resolved the differences of opinion.

62. In such circumstances the DMC is obliged to make a finding on the issues. A parallel can be drawn with the Environment Court's judicial function to make findings on the evidence presented on the balance of probabilities. In *Darroch v Whangarei District Council* the (then) Planning Tribunal observed that the purpose of the hearing was to decide if the consent should be granted, not to resolve technical differences between the respective witnesses.[53]

63. With respect to the obligation to make a finding on the issues the Tribunal stated:

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51 *Ngati Rangi Trust v Genesis Power Ltd* [2009] NZRMA 312 (CA).

52 *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66.

53 *Darroch v Whangarei District Council* A18/93, at page 5.

> The Tribunal does not conduct a scientific inquiry to discover absolute truth, nor is it judging between expert witnesses, and our findings should not be seen in that way. We have to make a finding about the adequacy of the proposed waste water treatment system to reach a decision on these appeals. In that we have been assisted substantially by the evidence of all those witnesses.

64. The DMC has received a considerable volume of information and evidence from all of the parties. It now has the task of weighing all of that information, and determining if TTR has provided sufficient technical data and analysis to demonstrate that the effects on the environment and existing interests of the proposed discharges can be avoided, remedied or mitigated. That decision must be made having regard to the information principles in s 87E which are addressed below.

The correct application of the information principles for marine discharge consents

65. The EEZ Act aims to achieve sustainable management between the protection of the environment and economic development. It adopts a precautionary approach but allows for adaptive management for marine consents (but not for marine discharge consents).

66. The Act's information principles require the DMC when exercising consenting power, to base all decisions on the best available information and to take into account uncertainty and inadequacy of information (s 61(1)). Best available information means the best information available without unreasonable cost, effort or time (s 61(5)).

67. The EEZ Act requires the DMC to favour *"caution and environmental protection"* in circumstances where the information available is uncertain or inadequate (s 61(2)). As noted, uncertainty as to the potential environmental effects was one of the reasons for refusing consent in the *TTR decision 2014*.

68. The EEZ Act has been amended since the issue of the *TTR decision 2014*. One of the key changes was the introduction of a separate consenting regime for marine discharge consents (ss 87A-87J). The information principles in s 87E still require the DMC to favour caution and

environmental protection but remove the option of adopting adaptive management practices to address any gaps or uncertainty.

69. Removing adaptive management practices further strengthens the approach of caution and protection by requiring TTR to demonstrate in advance – supported by sufficient evidence – that the proposed activities will have limited environmental consequences. For the reasons traversed in evidence I submit that TTR have failed to meet that evidentiary hurdle.

LEGAL ISSUES CONCERNING APPLICATION FOR MARINE DISCHARGE CONSENT

Precedent value of *TTR decision 2014*

70. I state in opening submissions that *"I recognise that evidence is being heard de novo, but the legal findings of the TTR decision 2014 are relevant to the DMC's considerations"*.[54]

71. Counsel assisting the DMC have addressed the precedent value of previous EPA decisions in their advice to the DMC.[55]

72. I agree with counsel's view in relation to the Court of Appeal's decision in *Norwood v Upper Hutt City Council*[56] that:[57]

> … the principle that *"consistency of treatment, in the absence of a reason justifying inconsistency, is generally regarded as an important aspect of good public administration"* is equally applicable in relation to decisions made under the Act.

73. I agree with counsels' advice that while the DMC is not bound by earlier decisions on legal matters, it should not lightly adopt an inconsistent approach to matters of statutory interpretation to previous DMCs.[58]

74. I consider this is particularly important in respect of the *TTR decision 2014*. A senior environmental lawyer, Mr Stephen Christensen, sat on that Committee, whereas this Committee does not have a sitting legal practitioner or Judge. Any departure from the statutory interpretation in the *TTR decision 2014* would therefore rely on counsel assisting the DMC. It is not desirable for counsel assisting the DMC to substitute their views on matters of law for those of an earlier DMC without a very good reason.

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54 Opening submissions of legal counsel for the Fisheries Submitters, with hand written amendments addressed at hearing before the DMC, 16 February 2017. See hand written amendment on page 3.

55 Memorandum of counsel assisting the Decision Making Committee – Further response to Minute 40.

56 CA 37/06 4 July 2006.

57 Ibid, at paragraph [103].

58 Ibid, at paragraph [104].

75. I do not agree with counsel that an earlier decision's precedent value is limited to the extent that a previous decision is in evidence before the DMC.[59] Applied rigidly that view could produce a result that is inconsistent with the Court of Appeal's finding of administrative law in *Norwood v Upper Hutt City Council* discussed above in paragraph [72].

76. I agree with counsel that *"the question as to the degree the findings of the previous DMC are relevant to the decision on the current application will turn on the particular facts"*.

77. TTR has filed a second application to undertake a substantially similar activity to that refused in the *TTR decision 2014*. I note in this respect my point, under paragraph [14], that the *"TTR decision 2014 placed TTR on notice as to the matters it would need to evidentially address prior to filing any new application"*. I also note the assertion in TTR's opening submissions, under paragraph [18], that TTR has undertaken to improve knowledge of both the existing environment and the extent of potential effects. Counsel's statement does not exist within a vacuum, and is an obvious reference to the earlier decision.

78. In any event, the Fisheries Submitters' evidence contains extensive references to the earlier TTR decision.[60] Therefore, the decision is not limited to precedent value or the fact it concerns the same applicant and mining proposal currently under consideration.

79. Ms Anderson undertakes a comparison of the information gaps and uncertainties raised in the *TTR decision 2014* with those that have been evidentially identified in these proceedings.[61] In Ms Anderson's opinion:[62]

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59 Ibid, at paragraph [107].

60 Examples of references to the *TTR decision 2014* in the Fisheries Submitters Evidence include: Primary Expert Evidence of Dr Gregory Barbara dated 23 January 2017, at paragraph [14]; Primary Expert Evidence of Helen Anderson dated 23 July 2017, at paragraphs [36] to [40]; Primary Expert Evidence of Andrew Smith dated 23 July 2017; at paragraph [57]; Evidence of Anthony Piper dated 23 July 2017, at paragraph [38]; Supplementary Statement of Evidence of Dr Gregory Barbara dated 10 April 2017, at paragraphs [17] and [19], and References; and Supplementary statement of evidence of Helen Margaret Anderson for Fisheries Submitters, in response to DMC Minute 43, 22 May 2017, at paragraphs [51] to [57].

61 Supplementary statement of evidence of Helen Margaret Anderson for Fisheries Submitters, in response to DMC Minute 43, 22 May 2017, at paragraphs [51] to [57].

62 Supplementary statement of evidence of Helen Margaret Anderson for Fisheries Submitters, in response to DMC Minute 43, 22 May 2017, at paragraph [52].

> … TTR's current application is similar to its 2013 application which was declined by the DMC at the time. The information gaps of the 2013 application, particularly in relation to the effects of the proposal resulting from the sediment plume, and the plumes impacts on primary productivity, still remain unanswered in the 2016 application.

Distinguishing an adaptive management approach from s 87F

80. I agree with Crown Law's opinion that:[63]

    a. section 87F(4) prohibits the application of conditions that together amount or contribute to an adaptive management approach; and

    b. the Augier principle is not appropriate to override an express statutory prohibition in this sense.

81. I agree with Crown Law that s 87F(4):[64]

> … precludes conditions designed to address an absence of adequate information about the effects of dumping or discharges, and the measures to address those effects, by providing for an "adaptive management approach".

82. I do not agree that 87F(4) of the Act:

> … does not preclude conditions that should or could form part of an adaptive management programme but that are not used for that purpose in any specific consent.

83. This is because, as discussed in my opening submissions, the principle of adaptive management is intended to diminish the risks posed by incomplete information and uncertainty.[65]

84. I concur with the view expressed by Ms Anderson in her final statement of evidence that the intent of s 87F(4) is that *"a marine discharge [impact assessment] should describe all potential adverse effects, their scale and*

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63 Memorandum for the Crown regarding adaptive management conditions – response to Minute 28, dated 10 March 2017, at paragraph [3].

64 Ibid, at paragraph [5].

65 Opening submissions of legal counsel for the Fisheries Submitters, with hand written amendments addressed at hearing before the DMC, 16 February 2017, at paragraphs [67] and [69] to [72].

significance, and the steps that will be taken to avoid, remedy or mitigate those effects". I do not consider that view is consistent with Crown Law's view discussed above under paragraph [81].

85. Any purposive interpretation of the meaning of s 87F(4) should be guided first and foremost by the purpose of the EEZ Act. This is set out under s 10(1) as being:

> (a) to promote the sustainable management of the natural resources of the exclusive economic zone and the continental shelf; and
>
> (b) … to **protect the environment from pollution by** regulating or **prohibiting the discharge of harmful substances** …. **[Emphasis added]**

86. I consider that an adaptive management approach would contemplate a level of risk that is inconsistent with protecting the environment from pollution by prohibiting the discharge of harmful substances.

87. I agree, therefore, with Ms Anderson's view that an application should include sufficient information on the potential adverse effects of a marine discharge to avoid, remedy or mitigate those effects. If this cannot be demonstrated, an application for marine discharge consent should be refused.

88. I do not consider that monitoring conditions serve the same purpose as adaptive management conditions. Monitoring conditions simply indicate whether the activity complies with conditions of consent imposed to protect the environment. If monitoring conditions indicate the likelihood of non-compliance, the consent holder is in breach of the consent and the activity should stop until compliance can be achieved.

89. I agree with Crown Law that:[66]

> … it would be quite contrary to the purpose of the Act were the restriction in s 87F(4) to be read as precluding any monitoring conditions that could trigger the adjustment of **activities** in certain circumstances. **[Emphasis added]**

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[66] Memorandum for the Crown regarding adaptive management conditions – response to Minute 28, dated 10 March 2017, at paragraph [39].

90. It is quite common for conditions of consent to require steps to be taken if monitoring indicates there is a potential for non-compliance with effects based thresholds. However, this is not the same thing as taking steps to avoid the risk of an adverse effect due to incomplete information, or adjusting conditions as more knowledge is gained about the environment.

91. Accordingly, I disagree with Crown Law's contention that *"such an approach would leave environmental damage* ***unforeseen or underestimated*** *at the time of consent to continue unabated"* **[emphasis added]**.[67] Rather, I consider such an approach would prevent conditions requiring steps to be taken to avoid foreseen environmental damage resulting from non-compliance with effects based thresholds.

Revised conditions do not overcome inadequate information

92. The Environment Court held in *Envirofume Ltd v Bay of Plenty Regional Council*[68] that applications for discharge consents can be refused on the basis of an applicant's inability to demonstrate it can comply with conditions of consent. Reasons for declining the application included the fact that the applicant had not demonstrated how the effects of the discharge would be monitored. The Court concluded that there was no set of conditions in prospect to overcome these difficulties.[69]

93. The Court agreed with the Hearing Commissioner's findings that, *inter alia*, there was no certainty that the applicant could achieve the discharge limits set by the EPA.[70] It did not accept that the proposed conditions would reduce the uncertainty associated with the proposed discharges.[71] The Court also considered that the proposed conditions would be unenforceable and impossible to measure in a practical way on the ground.[72]

94. On the other hand, in *Hokio Trusts v Manawatu-Wanganui Regional Council*,[73] the Court granted applications for discharge consents despite

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67 Ibid.

68 *Envirofume Ltd v Bay of Plenty Regional Council* [2017] NZEnvC 12.

69 Ibid at paragraph [146].

70 *Envirofume Ltd v Bay of Plenty Regional Council* at paragraph [4].

71 Ibid at paragraph [114].

72 Ibid at paragraph [114].

73 *Hokio Trusts v Manawatu-Wanganui Regional Council* [2016] NZEnvC 185

there being uncertainty as to whether the applicant could comply with the conditions of consent. Important points of difference between the *Hokio decision* and TTR's current application include:

(a) The worst-case scenario was evidentially established;[74]

(b) There was adequate baseline information on the receiving environment;[75]

(c) It was established the activities could be postponed if thresholds were triggered;[76]

(d) The construction and operational procedures where set out in the consent conditions;[77] and

(e) The applicant was able to rely on using an adaptive management approach.[78]

95. The Fisheries Submitters' evidence demonstrates, as discussed in paragraph [44] above, TTR's proposed revised conditions do not provide adequate information on how proposed conditions 5 and 6 will be operationally or technically implemented. It is submitted, in the circumstances, that the *Envirofume decision* provides sound authority for refusing an application for a discharge consent where there is uncertainty as to whether the applicant can achieve proposed discharge limits.

Exercise of discretion under s 87F(1)

96. It is submitted that the discretion available to the DMC under s 87F(1) of the Act is much more limited in scope than the discretion available to the DMC under s 62(1).

97. Sections 61(2) and 87E(2) direct the DMC to *"favour caution and environmental protection"* where *"the information available is uncertain or*

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74 Ibid at paragraph [90].
75 Ibid at paragraph [100].
76 Ibid at paragraph [101]
77 Ibid at paragraph [91]
78 Ibid at paragraph [107]

inadequate". The *TTR decision 2014* found that the requirement under s 61(2):[79]

> … is an explicit statement that, within the context of the EEZ Act, the promotion of sustainable management requires a cautious approach. The taking of risks in this environment is not encouraged, and we note that this direction is not to be traded off against the attainment of economic well-being. In other words, **the requirement to favour caution and environmental protection in the face of uncertain or inadequate information is an absolute one**, and we remind ourselves of section 10(3), which makes it clear that applying the information principles in section 61 is one of the ways the purpose of the EEZ Act is achieved. **[Emphasis added]**

98. However, s 61(3) directs a decision-maker to consider an adaptive management approach where favouring caution and environmental protection means an application is likely to be refused. There is no similar provision under s 87E of the Act.

99. This is obviously because conditions amounting to an adaptive management approach are prohibited under s 87F(4) of the Act. As the Crown states, this precludes conditions designed to address an absence of adequate information about the effects of discharges, and the measures to address those effects (see paragraph [81] above).

100. Finally, as discussed in my opening submissions, the rules of purposive legislation require all provisions to be read to promote the Act's purpose.[80] In the case of applications for marine discharge consents this means promoting protection of the environment from pollution by prohibiting the discharge of harmful substances.

101. TTR has not crossed the evidential threshold required to either assess the adverse effects of its proposed discharge, or identify how those affects might be avoided, remedied or mitigated. It is acknowledged that proposed conditions 5 and 6 offer discharge restrictions at the "end of pipe" and

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79 *Trans-Tasman Resources Ltd Marine Consent Decision*, Environmental Protection Authority, dated 17 June 2014 at [139].

80 Opening submissions of legal counsel for the Fisheries Submitters, with hand written amendments addressed at hearing before the DMC, 16 February 2017, at paragraphs [7] to [12].

within the "receiving environment". However, TTR has not provided adequate information as to how it will technically or operationally give effect to those conditions.

102. It is respectfully submitted that, in the circumstances, the requirement to favour caution and environmental protection means that the application for marine discharge consent must be refused.

Dated this 25th day of May 2017

Robert Makgill

Fisheries Inshore New Zealand Limited, New Zealand Federation of Commercial Fishermen Inc, Talley's Group Limited, Southern Inshore Fisheries Management Company Limited and Cloudy Bay Clams Limited