DUPLICATE

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2017-

Under	the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012
In the matter	of an appeal under s 105 of the Act
Between	**THE TARANAKI-WHANGANUI CONSERVATION BOARD**, an independent statutory body Appellant
And	**THE ENVIRONMENTAL PROTECTION AUTHORITY**, a Crown agent with authority over the grant of marine consents under the Act
And	**TRANS TASMAN RESOURCES LIMITED**, a duly incorporated company having its registered office at Wellington Respondents

NOTICE OF APPEAL

30 August 2017

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To The Registrar of the High Court at Wellington

and

To The Respondent

and

To The Applicant

and

To Other submitters

This document notifies you that:

1 The appellant, being the Taranaki-Whanganui Conservation Board (**Conservation Board**), will move the High Court at Wellington by way of appeal against the decision of the majority decision of the decision making committee of the Environmental Protection Authority (**DMC**), dated 3 August 2017, public notice #EEZ000011, in which a marine consent and marine discharge consent was granted to Trans-Tasman Resources Limited (**TTRL**).

The Application and Decision

2 TTRL applied for marine consents and marine discharge consents to enable it to mine iron sands in the South Taranaki Bight, 22-36km offshore (**Application**). Up to 50 million tonnes of seabed material could be mined and processed each year, for up to 35 years.

3 The Environmental Protection Authority (**EPA**) made its decision on the application through its DMC (**Decision**). The DMC's Decision was split. Two of the DMC's members considered that the consents should be refused. They took the view that:

> … overall the localised adverse environmental effects on the Patea Shoals and tangata whenua existing interests are unacceptable, and are not avoided, remedied or mitigated by the conditions imposed. We also have concerns regarding uncertainty and the adequacy of environmental protection within the coastal marine area (CMA).[1]

4 However, the Chair held the casting vote, and exercised it in favour of granting consent. Accordingly, the "majority decision" was to grant consent.

5 The DMC made its Decision on 3 August 2017.

[1] Decision of the Environmental Protection Authority, 3 August 2017 at Part 2: Alternative view, Section 1.1, paragraph 2.

6 The Decision was made publicly available on 10 August 2017.

7 TTRL previously applied, in 2013, for a similar proposal to mine iron sands, on the same site. A differently constituted DMC refused to grant consents in 2014.

The Conservation Board

8 The Conservation Board is an independent statutory body, constituted under section 6L of the Conservation Act 1987 (**Conservation Act**). Conservation Boards are separate to and distinct from the Department of Conservation (**Department**), although the Conservation Boards are supported in their functions by the Department. The Department recognises that each Conservation Board represents the public interest in the work of the Department, and conservation in general, within the area of jurisdiction of that Board.

9 The Conservation Board's functions under section 6M of the Conservation Act include conservation management. Section 6N(2)(a) provides that each Board may advocate its interests at any public forum or in any statutory planning process. Subsection 6N(3) further provides that this includes the right to appeal before courts and tribunals and be heard on matters affecting or relating to the Board's functions. The appropriateness of a Conservation Board participating in the context of an appeal to the Planning Tribunal was confirmed in *Purification Technologies Ltd v Taupo District Council* W10/95 [1995] NZRMA 197.[2]

10 The Conservation Board's area of responsibility covers the Whanganui and Taranaki areas within the greater Central North Island region. It encompasses some 15,000 sq. km of land extending from the Mokau River in the north to the Turakina River in the south and inland to Ohura, Taumarunui and Raetihi. The coastal boundary that extends along the Board's district includes the West Coast North Island Marine Mammal Sanctuary and the Tapuae and Parininihi marine reserves as well as the long-established Nga Motu/Sugar Loaf Islands Sanctuary and Conservation Park. The boundaries of the Conservation Board's region are shown in Appendix A to this appeal.

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[2] *Purification Technologies Ltd v Taupo District Council* W10/95 [1995] NZRMA 197 at p 8.

11 The Conservation Board lodged a submission dated 10 October 2016 on TTRL's Application. The submission sought the Application be declined for three main reasons:

11.1 the concerns raised in the EPA's "Key Issues report", which were shared by the Board;

11.2 iwi concerns; and

11.3 the lack of access to key information as a result of significant redacted material.

12 The Conservation Board's submission further summarised its concerns as follows:[3]

> In summary, the Board is not confident that there is sufficient knowledge about the impacts seabed excavation on marine wildlife and ecosystems in the dynamic environment of the STB. We understand that seabed excavation has not been done elsewhere in the world previously other than for diamond excavation in Namibia. The Board is concerned about the impacts on marine mammals (in particular, dolphins and whales) and seabirds which are present in the project area.

13 The Conservation Board appeared before the DMC on 8 March 2017.

14 The Department did not submit on the application, but did make one of its technical advisors, Dr Longdill, available to the DMC (at its request). As recorded above, the Conservation Board is an independent statutory entity to the Department, with its own specific functions and powers. The Conservation Board reached its decision to submit independently of the Department. In fact, it was not aware of the Department's decision not to submit until that became public knowledge.

15 The Conservation Board understands that the Department acknowledges the Board's duty to reach its own independent decision in respect of its position in respect of the Application and Decision, including in respect of any appeals.

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[3] Conservation Board submission, 10 October 2016 at pp 3-4.

16 The Conservation Board has carefully considered the Decision. In making its decision to appeal, the Conservation Board has had particular regard to the following considerations:

16.1 the Board's function in advocating for conservation management and conservation benefits – and reflecting its understanding of the public / its community's views and the extent to which it is appropriate for the Board to take an advocacy role on these issues;

16.2 the extent to which the Board can responsibly promote that function / role through an appeal to the High Court;

16.3 the additional value that the Board may bring to the appeals process, including guarding against the risk that other appellants who might raise some of the same (or similar) questions of law as the Board might settle or have limited means to pursue those issues fully;

16.4 the importance of the Board in maintaining its independence, and acting reasonably in any process;

16.5 the appropriateness of the Board seeking to clarify the legal tests and decision making process, so as to assist decisions in how to participate in other applications that might be made in the future; and

16.6 the fact that the Board had made a submission in opposition, and the extent to which it should support that position in any appeal.

Scope of Appeal

17 The Conservation Board appeals against the whole of the Decision.

The errors of law / grounds of appeal

Information principles

18 Section 87E of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (**EEZ Act**) required the EPA to:

18.1 make "full use of its powers" to obtain information, advice and/or reports; and

18.2 base its decisions on the "best available information"; and

18.3 take into account any uncertainty or inadequacy in the information available.

19 "Best available information" under section 87E(3) of the EEZ Act means "the best information that, in the particular circumstances, is available without unreasonable cost, effort, or time".

20 The majority of the DMC erred in the discharge and application of their statutory duties under section 87E, including in:

20.1 downplaying the extent of the uncertainty and/or inadequacy in the information available (when the levels of uncertainty and/or inadequacy in information should have heightened the DMC's focus on making full use of its powers to obtain and base its decisions on the best available information);

20.2 failing to make "full use of its powers" to obtain further information, advice, and/or reports to address the uncertainties and/or inadequacies in the information, including in respect of:

20.2.1 the sediment plume modelling, such as sensitivity analysis in respect of the various inputs into the model;

20.2.2 background suspended sediment concentrations (**SSC**) at monitoring locations;

20.2.3 additional information (including baseline information) on specifically affected sites, such as Graham Bank, The Crack, and The "Project Reef";

20.2.4 additional survey work to map any currently unidentified reef habitats in the Patea Shoals affected by the plume sediment;

20.2.5 ambient noise levels to better assist in understanding the sensitivity of the receiving environment in respect of likely impacts on marine mammals; and

in circumstances where much of that information could have been obtained without unreasonable cost, effort, or time and despite giving TTRL opportunities to fill various information gaps and inadequacies in the

Application. In other words, the DMC also did not exercise its powers in an even handed manner;

20.3 failing to apply a precautionary approach to the exercise of its powers to obtain information, advice and/or reports; and

20.4 failing to base its decisions on the "best available information".

Precautionary approach

21 The majority of the DMC erred the Decision in rejecting the need to apply a precautionary approach or principle to its wider consideration of the Application (not just in considering the requirement to "favour caution and the environment" under section 61(2)), including:

21.1 its finding at [40] of the Decision that: "[t]here is no requirement on the DMC to apply a precautionary approach";

21.2 its adoption of the advice of counsel assisting it [41] of the Decision that:

> … in our view there is no requirement on the DMC to apply a precautionary approach, in addition to the requirement to favour caution under section 61(2). Nor is it clear to us what distinction there is in practice between the section 61(2) requirement and the precautionary principle or approach as it is generally understood.

21.3 its distinguishing of the precautionary principle at [1023] of the Decision:

> We were mindful of avoiding duplication related to the Act's requirement for caution, as opposed to the NZCPS direction on the 'precautionary principle';

21.4 in the context where an adaptive management approach was not available in respect of the marine discharge consent, and so could not be used as a tool in the implementation of a precautionary approach; and

21.5 in light of the explicit requirement under section 87E(2) of the EEZ Act that required the EPA to favour caution:

> If, in relation to making a decision on the application, the information available is uncertain or inadequate, the EPA must favour caution and environmental protection

and the uncertain and inadequate information available to the EPA such as that identified in paragraph [20.2] above;

21.6 in light of the other provisions of the EEZ Act that demonstrate the precautionary “scheme” of the Act, including:

21.6.1 the section 87E(1) requirements in respect of information; and

21.6.2 the explicit prohibition under section 87F(3) preventing granting a marine discharge consent subject to an adaptive management approach.

21.7 in light of the previous decision of the EPA in respect of TTRL’s proposed iron sands project, which found at [139] of the previous decision, when referring to the requirement to “favour caution and environmental protection”[4]

> This provision 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 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 s 10(3), which makes it clear that applying the information principles in s 61 is one of the ways the purpose of the EEZ Act is achieved.

21.8 in light of longstanding authority that even where there is no reference to the precautionary approach in legislation, that it can be “necessary” to import a precautionary approach “where sound sense dictates that in the circumstances of a particular case”: eg refer

[4] Decision of the Environmental Protection Authority, June 2014 at [139].

Rotorua Bore Users Association Inc v Bay of Plenty Regional Council;[5] and

21.9 in light of the adoption of the precautionary approach in Policy 3(1) of the New Zealand Coastal Policy Statement (**NZCPS**), as follows:[6]

> Adopt a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse.

21.10 in light of the requirements to adopt a precautionary approach in international environmental law; and

21.11 given the significant effects of the proposal over its long term of 35 years.

22 The majority of the DMC also erred in failing to discharge its statutory duty to "favour caution and the environment" under section 87E(2) of the EEZ, including because of:

22.1 The information uncertainties and inadequacies including those identified in paragraph [20.2] above; and

22.2 The matters identified in paragraphs [20], [21.4], [21.8], [21.9], [21.1] and [21.11] above.

Adaptive management

23 In the context of a marine discharge consent, s87F(4) specifically prohibits the EPA issuing a consent subject to an adaptive management approach.

24 Section 64(2) defines adaptive management as *including*:

> (a) allowing an activity to commence on a small scale or for a short period so that its effects on the environment and existing interests can be monitored:

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[5] *Rotorua Bore Users Association Inc v Bay of Plenty Regional Council* A138/98, Environment Court, Rotorua, 27 November 1998 at page 49.
[6] Department of Conservation *New Zealand Coastal Policy Statement 2010* Policy 3(1) – Precautionary Approach, page 12 (November 2010).

(b) any other approach that allows an activity to be undertaken so that its effects can be assessed and the activity discontinued, or continued with or without amendment, on the basis of those effects.

25 The majority of the DMC erred in its Decision by applying a narrow definition of "adaptive management approach" as one needing to involve the potential discontinuance of the activity as follows (at [54]):

25.1 allowing an activity to commence on a small scale or for a short period, or in stages otherwise contemplated by subsection 64(4), with its effects monitored, and where a possible conditioned outcome is the activity being discontinued on the basis of the observed effects; or

25.2 any other approach reflecting, through conditions, that an appropriate possible response to the activity's effects, following ongoing assessment, is the consented activity being discontinued altogether; when the proper definition of an adaptive management approach can include something less than including the potential discontinuance of the activity.

26 The majority of the DMC erred by in fact applying an adaptive management approach to the conditions, that included "adaptive management approaches" in some cases, even on the DMC's erroneous definition of the concept, such as:

26.1 cessation of operations to enable benthic recovery to get "back on track";

26.2 a "broader range of responses" as opposed to immediate and short term operational responses such as stopping the crawler;

26.3 limiting operations in particular sea conditions and the removal of the crawler to another part of the mining site; and

26.4 putting day to day operations on hold for a period of time.

27 More specifically, the majority of the DMC erred in its Decision in adopting conditions which individually and/or together amount to an adaptive

management approach, (even, in some cases, on the DMC's erroneous definition of the concept) including:

27.1 Condition 5(b), which provides for changes to the SCC compliance limits specified in the consent, following completion of pre-commencement environmental monitoring;

27.2 In Condition 5, a requirement that "extraction activities shall cease until the Consent Holder can demonstrate compliance with those conditions, to the satisfaction of the EPA";

27.3 In Condition 8, a requirement that the Consent Holder demonstrate that the recovery of the macroinfauna benthic community has occurred or is "on track" to be achieved within 5 years of extraction, and, if the annual monitoring shows that recovery is not on track, to "explain" how the Consent Holder will comply with the obligation to demonstrate that recovery will occur.

27.4 In Conditions 9 and 10, an undefined obligation to mitigate "and where practicable" avoid adverse effects on seabirds and marine mammals (respectively); with the detail of how compliance with those conditions is to be achieved provided for in the Management Plans required under Conditions 66 and 67.

27.5 In Condition 19, a global requirement to ensure that there are no adverse effects that were not anticipated at the time of granting the consents.

27.6 In Condition 55(g), a requirement to identify "the operational responses to be undertaken if unanticipated adverse effects are identified".

27.7 In Condition 106, a wide ability to review the conditions of consent for the purpose of (among other things) amending any discharge and environmental limits, and/or operational controls.

Failure to consider the effect of the NZCPS

28 The DMC was required under s59(2)(h) of the EEZ Act to take into account the nature and effect of other marine management regimes (**MMRs**). This

includes the Resource Management Act 1991 (**RMA**) and planning instruments adopted under the RMA.

29 The NZCPS is a mandatory document under the RMA. Its purpose under s 56 of the RMA is to state policies in order to achieve the purpose of the RMA in relation to the coastal environment.

30 The majority of the DMC failed to give genuine thought and attention to the effect of the NZCPS and in particular its directives against the grant of resource consent to the Application, had it required resource consent under the RMA. In particular, the majority of the DMC failed to consider:

30.1 The findings of the Supreme Court in *Environmental Defence Society Incorporated v New Zealand King Salmon*[7] that:

30.1.1 A "policy" may have the effect of what in ordinary speech would be a rule [116].

30.1.2 Policies can also provide "something in the nature of a bottom line" and can contemplate the prohibition of particular activities in certain localities [132]; they can give primacy to protection in particular circumstances [149].

30.1.3 "Avoid" means "to not allow" or "prevent the occurrence of" [96].

30.1.4 "Inappropriateness" should be assessed by reference to what it is that is sought to be protected [101], [105].

30.1.5 By giving effect to the NZCPS, a Council is necessarily acting "in accordance with" Part 2 of the RMA; there is no need to refer back to it [85], [90].

30.2 The High Court's decision in *RJ Davidson Family Trust v Marlborough District Council* found that "the reasoning in *Environmental Defence Society Incorporated v New Zealand King Salmon* does apply to s 104(1) [ie resource consents] because the

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[7] *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38.

relevant provisions of the planning documents, which include the NZCPS, have already given substance to the principles in Part 2”.[8]

30.3 That the specific directives of the NZCPS in the following policies weighed significantly against the application:

30.3.1 Policy 3 – Precautionary approach (as stated above at [21.9]).

30.3.2 Policy 11 – Indigenous biological diversity (which includes a directive to “avoid” adverse effects on “threatened indigenous taxa”, as well as on “indigenous ecosystems and vegetation types that are threatened in the coastal environment, or are naturally rare”. “Significant” adverse effects are also to be avoided on certain other areas and habitats.

30.3.3 Policy 22 – Sedimentation, including to “not result” in a significant increase in sedimentation in the coastal marine area.

30.3.4 Policy 23 – Discharge of contaminants, including to “avoid” significant adverse effects on ecosystems and habitats after reasonable mixing.

30.4 Therefore, that the “effect” of the NZCPS (a MMR under the RMA) would be, if a resource consent had been required under the RMA, that any such consent would be declined.

31 The majority of the DMC accordingly erred and/or further erred when it claimed to have “assessed the effects within the CMA in the same way as if the consent were applied for in that area” at [1010].

Questions of law

32 The questions of law are:

Information principles

33 Did the DMC err in its approach to information under s87E, including by:

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[8] *RJ Davidson Family Trust v Marlborough District Council* [2017] NZHC 52 at [76].

33.1 inappropriately downplaying the extent of the uncertainty and/or inadequacy in the information available;

33.2 failing to make “full use of its powers” to obtain information, advice and/or reports in light of the uncertainty and/or inadequacy;

33.3 failing to base its decision on the “best available information”; and

33.4 failing to apply a precautionary approach to the exercise of its information powers and functions under s87E.

Precautionary approach

34 Did the DMC err in failing to apply a precautionary approach or principle to its decisions, including the exercise of its information powers and functions and in circumstances, where:

34.1 the information available was inadequate and uncertain;

34.2 the DMC was required to favour caution and environmental protection, and did it in any event independently fail to discharge that statutory duty;

34.3 the DMC was prohibited from taking an adaptive management approach;

34.4 the importance of adopting an precautionary approach in the coastal environment was underscored by the NZCPS; and

34.5 the proposal was a significant one proposed for a long term of 35 years.

Adaptive management

35 Did the DMC err in:

35.1 adopting an erroneous definition of adaptive management that excluded from the definition management falling short of potentially ceasing activity; and

35.2 adopting conditions that provide for an adaptive management approach, including, in some instances, on the DMC's own erroneous definition of an adaptive management approach, contrary to the prohibition under s87F(4)?

Failure to consider the effect of the RMA instruments

36 Did the DMC err in failing to take into account the effect of the NZCPS, which, if resource consent had been required under the RMA, would have required that consent to be declined?

Relief sought

37 The Appellant seeks the following relief:

37.1 that its appeal be allowed, including by the High Court clarifying the appropriate tests to be applied by a marine consent authority in respect of:

37.1.1 the information principles;

37.1.2 the precautionary approach;

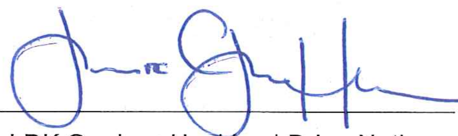
37.1.3 an adaptive management approach, including what qualifies as adaptive management; and

37.1.4 the relevance and relationship of the directives of the NZCPS to a marine consent;

37.2 that the decision of the majority of the DMC be set aside and the matter referred back to the DMC to reconsider in light of the findings of this Honourable Court; and

37.3 costs.

Dated 30 August 2017



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APPENDIX A – THE CONSERVATION BOARD'S REGION