

**BEFORE THE PANEL**

**IN THE MATTER** of the Fast-track Approvals Act 2024

**AND**

**IN THE MATTER** of an application for marine consent approvals under  
the FTAA for the Taranaki VTM Project

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**COMMENTS OF THE ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED**

06 October 2025

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**Environmental Defence Society Inc**

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**Counsel Acting:**

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Magdalene Chambers

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## INTRODUCTION

1. This is an application by Trans-Tasman Resources Ltd (**TTR**) for marine consent approvals under the Fast-track Approvals Act 2024 (**FTAA**) for the Taranaki VTM Project (**Project**) to mine the seabed for vanadium-rich titanomagnetite concentrate in the South Taranaki Bight.
2. The Project has a lengthy history of prior litigation, including earlier merits and jurisdictional findings. Prior decisions are not binding on the decision-making Panel (**Panel**) convened to consider the Project under the FTAA,<sup>1</sup> but may be treated as persuasive (or, in the case of the Supreme Court decision in *TTR*,<sup>2</sup> highly persuasive), albeit bearing in mind that this is a separate application under a different legislative regime.
3. While the legislative regimes are different, the receiving environment remains the same. The Project faces the same or similar levels of uncertainty in predicting future adverse impacts on indigenous biodiversity and the natural and physical environment that have been the subject of prior Senior Court determinations. The Supreme Court in *TTR* relevantly identified information deficits in terms of impacts to marine mammals and seabirds and regarding the sediment plume.<sup>3</sup>
4. EDS was a party to the first application by TTR in 2013, which was declined, including on appeal to the High Court.<sup>4</sup> EDS submits that the fundamental difficulties with the Project remain, and that consent should be declined under s 85(3) of the FTAA because, taking into account the mandatory relevant considerations in s 81(2) of the FTAA, the Project's adverse impacts are so significant that they are out of proportion to the Project's benefits.
5. EDS submits that:
  - a. The concept of "benefits" in the FTAA is not defined and must be read as including both the pros and cons of a project - its costs and benefits. Further, "benefits" is not limited to 'economic' benefits, thus includes monetary and non-monetary elements.
  - b. TTR has failed to correctly assess the relevant regional or national benefits of the Project. A cost-benefit analysis is required to assess the relevant 'net' benefit arising under s 85(3) of the FTAA. TTR has applied the wrong methodology, undertaking an Economic Impact Assessment.<sup>5</sup> This does not provide a true picture of benefits, including their significance or extent. The Panel is not obliged to accept at face value the benefits assessment undertaken by TTR, and

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<sup>1</sup> With the proviso that Senior Court authority may well be binding where it relates to interpretation of EEZ provisions which are imported as relevant under Schedule 10 FTAA

<sup>2</sup> *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127

<sup>3</sup> *Ibid* at [119]-[121], [271], [274], [294], [328]

<sup>4</sup> *Taranaki-Whanganui Conservation Board v Environmental Protection Authority* [2018] NZHC 2217

<sup>5</sup> TTR substantive application, Attachment 2 – NZIER Economic Impact Assessment

indeed it must independently assess the Project's net regional or national benefit as part of its decision-making duties under the FTAA.

- c. Clause 6 of Schedule 10 of the FTAA requires that the greatest weight be given to the purpose of the FTAA, with other mandatory considerations including ss 10 and 11 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (**EEZ Act**), and the information principles set out in (inter alia) ss 59 - 67 of the EEZ Act.
- d. In a legislative regime where "benefits" requires comparative assessment of the degree of significance relative to their costs, there is not necessarily conflict or competition between the purpose of the FTAA and other relevant legislative purposes, such as ss 10 and 11 of the EEZ Act. A 'net' "benefits" approach, which allows consideration of all relevant costs and benefits, both monetary and non-monetary, ensures that no relevant adverse impacts to biodiversity, natural character and other values, from a project are overlooked.
- e. Giving the greatest weight to the purpose of the FTAA does not mean that it overrides environmental and biophysical constraints. In contrast to the position advocated by TTR, the FTAA does include relevant environmental bottom lines, albeit in a slightly different sense to *EDS v King Salmon*. These are bottom lines in the context of a discretionary regime, where determinative weight may be attributed by the Panel based on the quality of the evidence, directive language, and wider relevance to s 85(3) of the FTAA. There are at least 3 types of bottom line:
  - i. The s 85(3) FTAA threshold: Where the adverse impacts are sufficiently significant to be out of proportion to the (net) benefits (taking into account the factors identified in s 85(3)(b)(i) and (ii)) then the project may be declined. This is a bottom line or threshold, albeit decline is discretionary not mandatory.
  - ii. Evidence-based bottom lines: Indigenous biodiversity and natural character values, where identified by the evidence, such as habitat requirements for threatened species, may be determinative based on the threshold in s 85(3) of the FTAA.
  - iii. Weighting of directive policies or legislative instruments: Section 85(4) of the FTAA states that a project cannot be declined solely on the basis that it is inconsistent with or contrary to a legislative or policy instrument. This provision does not preclude directive weight being placed upon directive policies. It simply prevents them being determinative in the abstract, prior to the merits assessment being undertaken. The requirement for precaution in the information principles such as ss 59 and 61 of the EEZ Act can still receive substantial and determinative weight.

6. EDS relies on the evidence of other parties, particularly in respect of the adverse impacts on indigenous biodiversity and natural and physical resources. Proposed consent conditions, including those offered by TTR, fail to address those adverse impacts.
7. Expert caucusing followed by a focused hearing is required in this case, to allow for targeted cross-examination of experts relevant to ecosystem, indigenous biodiversity, natural character and economic impacts, and related legal submissions to be presented.
8. EDS defers to mana whenua parties on all questions of tikanga.
9. Finally, EDS observes that TTR may require one or more resource consents under s 12(1)(d) of the Resource Management Act 1991 (**RMA**), where discharged sand migrates from the point of release in the EEZ onto the seabed or foreshore of the coastal marine area, and causes an adverse effect. This was a key issue raised by EDS on TTR's 2013 application that remained unresolved. EDS maintains its position as set out in its submissions on the matter.<sup>6</sup>

#### **EDS INVOLVEMENT**

10. EDS has been invited by the Panel to provide written comments on the Project.<sup>7</sup>
11. EDS is an environmental non-government organisation formed in 1971 focusing on legal advocacy and policy research. It is dedicated to improving environmental outcomes for all New Zealanders and, in this respect, represents a significant aspect of the public interest.
12. EDS has a long history of involvement in resource consent decision making under the RMA and was a listed entity who must be consulted under the COVID-19 Recovery (Fast-track Consenting) Act 2020.<sup>8</sup> EDS has also submitted on marine consents under the EEZ Act.
13. EDS is engaging in FTAA projects and procedures, both in terms of the national policy framework, and in respect of individual projects that have material impacts on regionally and nationally significant values, including indigenous biodiversity, natural character and landscape, and strategic planning considerations.<sup>9</sup> EDS's participation seeks to ensure that the FTAA is lawfully applied and that adverse impacts on the natural and physical environment are appropriately accounted for and managed.

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<sup>6</sup> Submissions of counsel for Environmental Defence Society in response to memorandum of counsel for the Environmental Protection Authority dated 1 April 2014, dated 8 April 2014, available [here](#); and Joint Memorandum of Counsel on behalf of Trans-Tasman Resources Ltd and Environmental Defence Society – Cross-boundary issue, dated 14 April 2014, available [here](#)

<sup>7</sup> Minute 3 of the TTR Expert Panel, 8 September 2025

<sup>8</sup> COVID-19 Recovery (Fast-track Consenting) Act 2020, Sch 6 Cl 17(6)(m)

<sup>9</sup> For example, EDS successfully challenged the EPA's information sharing principles under ss 93 and 92(2) FTAA <https://eds.org.nz/wp-content/uploads/2025/05/EDS-Letter-to-EPA-information-publication-28Apr25-Final79.pdf>

14. EDS has a material interest in TTR's application that is greater than the public generally. EDS was a participant in the original TTR application in 2013 (subsequently declined) and the following High Court proceedings and has maintained a watching brief ever since.<sup>10</sup>

#### STATUTORY FRAMEWORK

15. Under the FTAA, a panel must decide whether to grant (with or without conditions) or decline each approval sought in a substantive application.<sup>11</sup> Section 81(2) of the FTAA steps through that decision-making process. These legal submissions focus on the statutory requirements of s 81(2)(b) and (f) of the FTAA, namely:
- a. When making a decision, a panel must apply the applicable clauses set out in s 81(3) of the FTAA. For the purposes of TTR's substantive application, that is Clauses 6 and 7 of Schedule 10 of the FTAA (relating to approvals for a marine consent that would otherwise be applied for under the EEZ Act);<sup>12</sup> and
  - b. A panel may decline an approval only in accordance with s 85 of the FTAA.<sup>13</sup>

#### *Clause 6 of Schedule 10 of the FTAA*<sup>14</sup>

16. Under Clause 6 of Schedule 10 of the FTAA, when considering an application for a marine consent, a panel must "take into account":
- a. The purpose of the FTAA to "facilitate the delivery of infrastructure and development projects with significant regional or national benefits" (section 3 of the FTAA);
  - b. The "sustainable management" purpose of the EEZ Act (section 10 of the EEZ Act) and recognition that the EEZ Act continues or enables the implementation of several of New Zealand's international obligations relating to the marine environment (section 11 of the EEZ Act);
  - c. Any relevant policy statements issued under the EEZ Act; and
  - d. Various sections of the EEZ Act relating to the determination of a marine consent, including its environmental effects, adverse effects

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<sup>10</sup> Submission dated 28 January 2014, available [here](#), and evidence dated 24 February 2014, available [here](#)

<sup>11</sup> FTAA, s 81(1)

<sup>12</sup> FTAA, s 81(2)(b) and s 81(3)(l)

<sup>13</sup> FTAA, s 81(2)(f)

<sup>14</sup> Clause 7 of Schedule 10 of the FTAA simply states that for the purposes of applying conditions to a marine consent, references to a marine consent authority in the EEZ Act should be read as references to a panel under the FTAA

on existing users, information principles, conditions, adaptive management, bonds, monitoring conditions and observers.

17. When taking the above matters into account, a panel must give the “greatest weight” to the purpose of the FTAA.<sup>15</sup> When doing so, a panel must consider the “extent” of the project’s regional or national benefits.<sup>16</sup>

*Section 85 of the FTAA*

18. Sections 85(1) and 85(2) of the FTAA set out when an approval must be declined. These submissions focus on the discretionary ability to decline an approval under s 85(3) of the FTAA:

*A panel may decline an approval if, in complying with section 81(2), the panel forms the view that—*

- (a) there are 1 or more adverse impacts in relation to the approval sought; and*
- (b) those adverse impacts are sufficiently significant to be out of proportion to the project’s regional or national benefits that the panel has considered under section 81(4), even after taking into account—*
  - (i) any conditions that the panel may set in relation to those adverse impacts; and*
  - (ii) any conditions or modifications that the applicant may agree to or propose to avoid, remedy, mitigate, offset, or compensate for those adverse impacts.*

19. A panel’s discretion to decline is not a standalone consideration of adverse impacts proportionate to benefits. Rather, import of the words “in complying with section 81(2)” means that the discretion must be exercised in the context of a panel’s compliance with s 81(2) of the FTAA.

20. This is confirmed by:

- a. Section 85(5) of the FTAA, which states that “adverse impact” means any matter considered by a panel in complying with s 81(2) that weighs against granting the approval. Thus, relevant to these submissions, adverse impacts are identified from the matters listed in Clause 6 of Schedule 10 (via s 81(2)(b) of the FTAA); and
- b. Section 85(4) of the FTAA, which states that a panel may not form the view that an adverse impact meets the threshold in s 85(3)(b) solely on the basis that the adverse impact is inconsistent with or contrary to a provision of a specified Act or any other document that a panel must take into account or otherwise consider in complying with section 81(2).

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<sup>15</sup> FTAA, Clauses 6(1) and 6(1)(a) of Schedule 10

<sup>16</sup> FTAA, s 81(4)

21. In practice, this means that when making a decision a panel must:<sup>17</sup>
- a. Take into account all the matters listed in Clause 6 of Schedule 10 of the FTAA;
  - b. When taking into account Clause 6(1)(a) (i.e. the purpose of the FTAA), consider the extent of the project's benefits;
  - c. Give the greatest weight to Clause 6(1)(a) (i.e. the purpose of the FTAA) when taking the matters into account;
  - d. Step back and consider all the adverse impacts raised by the matters listed in s 81(2), which, for the purpose of these submissions, relevantly includes the matters listed in Clause 6 of Schedule 10;
  - e. Form a view on whether those global adverse impacts are sufficiently significant to be out of proportion to the extent of the project's benefits (after taking into account any conditions). Noting that inconsistency with a provision of a specified Act or other document is not enough on its own to qualify.

#### **ISSUES ARISING**

22. The following issues arise from the above statutory framework:
- a. How should a panel measure a project's regional or national "benefits"?
  - b. What does giving the "greatest weight" require and how does that relate to environmental bottom lines?
  - c. What does out of proportion mean in the context of s 85(3) of the FTAA?

#### *Measuring benefits*

23. One arm of the s 85(3) FTAA proportionality assessment requires an understanding of the extent of a project's regional or national "benefits". The question then arises, how should those benefits be measured?
24. "Benefits" is not defined in the FTAA. EDS submits that "benefits" should be assessed on a 'net' basis, so that a project's "benefits" are its positives minus its negatives. This approach is required because:
- a. Adopting a 'gross' benefits approach, whereby only a project's pros are considered and the cons ignored, would result in perverse outcomes. For example, projects that may deliver significant positive outputs but impose costs that outweigh those outputs could

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<sup>17</sup> This list only includes the matters relevant to these submissions i.e. s 81(2)(b) and (f) of the FTAA. Other parts of s 81 are also relevant to a panel's decision i.e. effect of Treaty settlements and other obligations as per s 81(2)(c) and s 82 of the FTAA

nonetheless be elevated under the FTAA's purpose. This could result in:

- i. The FTAA facilitating the delivery of projects that are a *disservice* to society; and
    - ii. The inefficient use of natural and physical resources i.e., using resources for projects that do not deliver the greatest benefit to society.
  - b. The purpose of the FTAA is to facilitate the delivery of projects with "significant" benefit. When taking that purpose into account when considering an approval, a panel must consider the "extent" of benefits. These terms, "significant" and "extent", necessitate a quantitative and qualitative assessment of benefits; how great are the benefits when considering both positive and negative outputs?
  - c. "Benefits" is not qualified by the term "economic".<sup>18</sup> Thus, benefits is not a purely economic assessment, where the financial benefits (including disbenefits) of a project are considered in isolation from non-financial benefits (including disbenefits).
25. A 'net' benefits approach necessitates a detailed cost benefit analysis. This reflects comments of the Parliamentary Commissioner for the Environment provided to the panel on the Waihi North fast-track project that "... the panel needs a robust and reliable assessment of both the benefits and costs of the proposed project. In other words, a suitably independent cost-benefit analysis, that establishes both the significance of the benefits and the significance of the costs of the project, is required."<sup>19</sup>
26. The panel for the Delmore fast-track project recently adopted this approach. It upheld economist Dr Tim Denne's assessment that an Economic Impact Analysis is not sufficient for measuring the costs and benefits to society, and that a detailed cost-benefit analysis is required.
27. In support of its substantive application TTR has commissioned an Economic Impact Assessment by the New Zealand Institute of Economic Research.<sup>20</sup> The significant regional or national benefits asserted therein are principally economic.<sup>21</sup> TTR has not commissioned a cost-benefit analysis of its project to properly assess its 'net' "benefits".
28. Without one, the "extent" of "benefits" of TTR's project cannot properly be assessed, because only one side of the story, that of gross benefits, is being told. Moreover, the extent of benefits that accrue within New Zealand, as opposed to those flowing offshore, cannot be accurately assessed.

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<sup>18</sup> As it is in s 59(2)(f) of the EEZ Act

<sup>19</sup> Parliamentary Commissioner for the Environment comments, available [here](#), at p 1

<sup>20</sup> TTR substantive application, Attachment 2 – NZIER Economic Impact Assessment

<sup>21</sup> Taranaki VTM application at xv

29. EDS respectfully recommends that the panel commission its own cost benefit analysis of TTR's project so that it can properly assess the regional or national benefits of TTR's project.
30. Finally, a note on s 59(2)(f) of the EEZ Act, which requires that the "economic benefit" to New Zealand of allowing a marine consent be taken into account when considering an application. The Supreme Court (in relation to TTR's earlier application) held "benefit" in the context of s 59(2)(f):
  - a. Required consideration of economic benefits and economic costs i.e., a net benefits approach; and
  - b. A cost benefit analysis quantifying environmental, social and cultural costs was not required as long as they were had regard to in a qualitative way.
31. Whilst EEZ Act jurisprudence should be applied and followed by panels when taking into account EEZ Act matters listed in Clause 6 of Schedule 10, its application to the term "benefits" under the FTAA is of minimal assistance because the two Acts' use of "benefits" is materially different:
  - a. Section 59(2)(f) of the EEZ Act qualifies benefits as "economic benefits", whereas the FTAA does not; and
  - b. Under 59(2)(f) of the EEZ Act, "economic benefits" is only one of 13 matters that must be equally taken into account by a marine consent authority when considering an application for a marine consent. Whereas "benefits" under the FTAA is:
    - i. A core component of the purpose of the FTAA;
    - ii. Given the greatest weight when considering a marine application; and
    - iii. A key component of the s 85(3) proportionality assessment, upon which consent may be declined.
32. Accordingly, EDS submits that under the FTAA, a detailed cost benefit analysis is required to properly assess a projects regional or national "benefits".

*Giving the greatest weight and environmental bottom lines*

33. The direction to "take into account" the matters listed in Clause 6 of Schedule 10 requires the Panel to directly consider the matters identified and give them genuine consideration.<sup>22</sup>

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<sup>22</sup> Bledisloe FTAA panel decision, at [119]; *Royal Forest and Bird Protection Society Inc v New Zealand Transport Agency* [2024] NZSC 26 at [169] and [224]; *Dye v Auckland Regional Council* CA86/01, 11 September 2001; and *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 at [73]

34. While the “greatest weight” is to be given to the purpose of the FTAA, the Panel must:
- a. Be careful not to rely solely on the purpose of the FTAA at the expense of due consideration of the other matters;<sup>23</sup> and
  - b. Separately assess those other matters from the purpose of the FTAA without necessarily assuming inherent conflict or competing focus.<sup>24</sup>
35. EDS submits that the direction to give ‘greatest weight’ to the purpose of the FTAA:
- a. Does not preclude or override the other mandatory relevant considerations set out in Clauses 6 and 7 of Schedule 10, and ss 81 and 85 of the FTAA.
  - b. Does not necessarily result in a conflict between the purpose of the FTAA and the other mandatory relevant matters of consideration. Those matters are directed at providing for projects that can address their costs and benefits. A ‘net’ “benefits” approach under the FTAA, which allows for consideration of a project’s pros and cons (both monetary and non-monetary) similarly ensures that no relevant adverse impact is overlooked.
  - c. Does not preclude environmental bottom lines being applied. Indeed, the “greatest weight” direction is essentially consistent with the application of policy and environmental bottom lines confirmed by *EDS v King Salmon*, and subsequent case law such as *East-West Link* and *Port Otago*,<sup>25</sup> that a reconciliation exercise or structured analysis is required. Where there are competing policies, those that are directive will receive the greatest weight and may be determinative, depending on context. Sections 81 and 85 of the FTAA create three environmental bottom lines:
    - i. The s 85(3) FTAA threshold: Where the adverse impacts are sufficiently significant to be out of proportion to the (net) benefits (taking into account the factors identified in s 85(3)(b)(i) and (ii)) then the project may be declined. This is a bottom line or threshold, albeit decline is discretionary not mandatory.
    - ii. Evidence-based bottom lines: Indigenous biodiversity and natural character values, where identified by the evidence, such as habitat requirements for threatened species, may be determinative based on the threshold in s 85(3) of the FTAA.

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<sup>23</sup> *Enterprise Miramar Peninsula Inc v Wellington City Council* [2018] NZCA 541; Bledisloe FTAA panel decision, at [121(a)]

<sup>24</sup> *Enterprise Miramar Peninsula Inc v Wellington City Council* [2018] NZCA 541 at [53]

<sup>25</sup> *Port Otago Ltd v Environmental Defence Society Inc* [2023] NZSC 112 and *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26

- iii. Directive policies or legislative instruments: Section 85(4) of the FTAA is directed at projects that are inconsistent with, or contrary to, legislative and policy instruments. It is intended to confirm that being inconsistent with, or contrary to, legislative or policy wording is not *per se* determinative. However, that does not preclude substantial weight being applied to the instrument wording and influencing the s 85(3) FTAA determination, particularly where the language used is directive, such as the requirement to apply precaution where an assessment is incomplete and there are significant risks to high biodiversity values. Further, s 85(4) of the FTAA does not preclude the breach of the instrument's wording from tipping the s 85(3) proportionality balance.
- d. Is embedded in the s 85(3) FTAA proportionality test. Section 85(3) is essentially a 'grant unless' clause; an approval sought should be granted unless the adverse impacts are out of proportion to the extent of the project's benefits.<sup>26</sup> This incorporates the requirement to give the greatest weight to the purpose of the FTAA, i.e., facilitating delivery of projects with significant net benefits, *unless* the adverse impacts are out of proportion to those benefits.

#### *Proportionality*

- 36. Proportionality requires a comparative assessment and supports the net benefit approach required. This does not mean that the adverse impacts must be larger than the benefits, nor must they outweigh the benefits.
- 37. Principally, EDS's position is that where any benefits are rendered not significant after discounting the impacts, the impacts can fairly be treated as being so significant that they are out of proportion to the benefits. Such a conclusion would be consistent with the purpose of the FTAA which, in EDS's submission, is to facilitate the delivery of infrastructure and development projects with significant regional or national *net* benefits.
- 38. The output of a cost benefit analysis would support the Panel to assess whether any net benefit is significant, and therefore whether the impacts are proportionate. A positive cost benefit analysis output will not always constitute a *significant* regional or national net benefit. Unless the *net* benefit is significant, the impacts should be considered out of proportion for the purposes of s 85(3) of the FTAA.

#### **PROCEDURAL STEPS**

- 39. EDS submits that directions will be required for expert caucusing, and that a targeted hearing is required, with scope for topic-based cross examination of experts, and presentation of legal submissions. This will assist the Panel to explore novel issues of law arising under the FTAA regime in a way that best achieves the procedural principles in s 10 of the FTAA i.e., in the most timely, efficient, consistent and cost-effective way.

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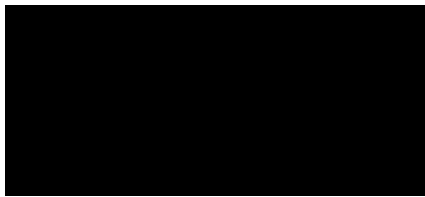
<sup>26</sup> So long as ss 85(1) and (2) mandatory decline clauses are not triggered

## **RELIEF SOUGHT**

40. EDS seeks the following relief:

- a. That the Panel commission its own cost benefit analysis of TTR's project.
- b. That a hearing be scheduled, with targeted cross examination and further legal submissions allowed.
- c. That TTR's Project be declined under s 85(3) because the adverse impacts are out of proportion to the extent of the project's regional or national benefits.

**Dated** this 6<sup>th</sup> day of October 2025



**Counsel for Environmental Defence Society Inc**