BEFORE THE FAST TRACK PANEL
AT WELLINGTON

I MUA I TE KŌTI TAIAO O AOTEAROA
TE WHANGANUI-A-TARA ROHE

UNDER	the Fast Track Approvals Act 2024 (the "**Act**")
IN THE MATTER	of an application by Trans-Tasman Resources Limited (TTRL) for marine and discharge consents to undertake iron sand extraction in the South Taranaki Bight
BETWEEN	**TRANS-TASMAN RESOURCES LIMITED (TTRL)**
	Applicant
AND	**THE ENVIRONMENTAL PROTECTION AUTHORITY (EPA)**

LEGAL SUBMISSIONS AND ANSWERS OF KASM AND GREENPEACE

Dated 14 November 2025

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INTRODUCTION

1. These legal submissions are filed on behalf of Kiwis Against Seabed Mining Incorporated (KASM) and Greenpeace Aotearoa Incorporated in relation to the Taranaki VTM Project (Project). They are provided in accordance with paragraph [6] of the Notice of Hearing dated 11 November 2025 and respond to the legal issues identified in Appendix A of that Notice. These submissions should be read alongside KASM and Greenpeace comments on the application, dated 06 October 2025.

Jurisdiction and statutory framework

1. **What is the relevance, if any, of factual findings by Decision-Making Committees on previous applications by the Applicant (TTR)?**

Both the 2014 and 2017 DMC decisions are relevant, and the 2017 DMC decision is highly relevant and persuasive. Both decisions represent the results of deliberation of expert decision-making committees (DMCs) on many months of evidence and submissions on substantially the same project and evidence as is presented to this Panel.

It is not in dispute that the application has only been updated in the limited respects identified in the table at paragraph [27] of TTR's legal memorandum dated 4 August 2025. Apart from those updates, the application remains unchanged from the 2016 application and the 2023 evidential updates. In these circumstances, substantial weight may and should be placed on the 2017 Decision, including the factual findings and reasoning of both the majority and minority. The majority decision must be assessed in light of the Supreme Court's subsequent decision.

(a) Is the Panel required to determine whether TTRM's proposal requires approval under the Resource Management Act 1991 ("RMA")?

The matter of whether or not RMA consents are required is within scope and relevant to the consideration of the application for marine consents against the purpose of the Act.

The Fast Track Act is a one-stop shop to "facilitate the delivery of development" i.e to determine all of the relevant applications for a consent to be lawful. Applicants may apply for a range consents needed to undertake their proposal, however, s81(1) limits Panels to only granting approvals that have been applied for.

TTRM has not applied for RMA consents: their application states that "Approval is being sought for marine consents under the Exclusive Economic Zone and Continental Shelf (Environmental

Effects) Act 2012 (EEZ Act)" and that ".....No approvals are required under the Resource Management Act for the Project."

The Panel must consider all matters raised in comments, advice and reports before the panel (s81(2)). Issues raised before the Panel include the potential need for approvals under s 12 of the RMA (for structures, disturbance, or deposition in the CMA) and s15 of the RMA in relation to the sediment discharge and potential for future upgrades of Ports in Whanganui or New Plymouth. Each of these matters raises the possibility of additional approvals being required for the activity before mining activities can commence.

There is nothing explicit in the FTAA that excludes partial authorisations from being granted but a requirement for further consents post the Fast Track process and any condition requiring that, is inconsistent with the purpose of the FTAA, which is to provide an integrated pathway for all necessary approvals, not to issue partial authorisations that require further consenting processes. In addition, the Panel could not make a finding of significant benefits if there are further authorisations needed as they would be contingent or speculative at best.

2. (b) If so, does TTRM's proposal require approval under the RMA, and is s 5(1)(l) of the Fast-track Approvals Act 2024 ("FTAA") relevant?

To the extent that the sediment plume settles wholly or partly within the Coastal Marine Area (CMA), which the evidence shows it clearly will, a resource consent is required under section 12(1)(d) of the RMA, which prohibits "deposit in, on, or under any foreshore or seabed any substance in a manner that has or is likely to have an adverse effect on the foreshore or seabed." Situating the seabed mine just outside the Coastal Marine Area does not obviate this provision.

Deposit "probably means "..."reasonably directly and actively to place or empty a substance (not being a contaminant) onto a lake or river bed or into the water above the bed." [1]. The question of how direct and active the action must be is a question of fact and degree to be resolved in the circumstances of each case as opposed to being too indirect or passive, *Re Contact Energy* [2].

TTR is manipulating through the processing of the STB seabed (including the extraction of minerals and addition of chemicals to enhance flocculation) the sediment involved and discharging it to the environment.

It is artificial to say that because the sediment is impacted by natural processes such as winds and currents that TTR is not responsible for the deposit in the CMA. They chose to situate the proposed mine just hundreds of metres outside the CMA. Wind and currents will also impact those sediments which deposit in the EEZ.

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[1] *Re Contact Energy* [2009] NZRMA 97 at [48]-[49].
[2] [2009] NZRMA 97 at [48]-[49].

2. (a) Do other participants agree with the Applicant's position on the consents it requires under the EEZ Act?

As well as requiring RMA and EEZ Act approvals, KASM and Greenpeace submit that the TTRM proposal does not comply with the conditions of Mining Permit 55581 issued under the Crown Minerals Act 1991 (CMA). Under s 30(3) CMA, the rights of a permit holder are expressly **"**subject to the conditions stated in the permit**."** A permit holder has no lawful right to undertake mining activities that depart from the operational parameters set out in the permit conditions.

Schedule 3 sets out the Minimum Work Programme. Clause 4 of schedule 3 states: "Within 60 months of the commencement date of the permit, the permit holders shall(to the satisfaction of the Chief Executive): (a) 4 (b) commence mining of the offshore titano-magnetite bearing sands for the production of titano-magnetite concentrate at a minimum rate of 2 million tonnes per annum of titano-magnetite concentrate, (or such other rate as may be approved in writing by the Chief Executive)". 60 months is 5 years, 5 years since the date of the mining permit in 2014 is 2019. Under heading: General Requirements of the Mining Permit, clause 3 states: "Work Programme Commitments: the permit holder is required to commit to work pursuant to the permit, the permit holder must establish to the satisfaction of the Chief Executive that the permit holder can fulfil that commitment."

No mining has commenced.

3. (b) If not, identify the points of disagreement and reasons?

TTR claims that it does not need RMA consents for deposits of sediment inside the CMA. Greenpeace and KASM say that it does.

KASM and Greenpeace says that TTRL needs new mining permits under the Crown Minerals Act for mining in the South Taranaki Bight.

<u>Benefits and economic assessment</u>

4. Is the project's feasibility a relevant consideration?

Yes, if a project is not feasible then it will not have national or regional benefits. The meaning of "benefit" must include the element of feasibility. A project is highly unlikely to have national or regional benefits if it is unlikely to be feasible. The feasibility, or viability, of the project is a matter to take into account under s81 and 85 FTAA.

In the case of *Remediation (NZ) Ltd v Taranaki Regional Council*[3], the Court considered whether or not an application was feasible as relevant to the consideration of environmental effects with the burden being on the applicant to demonstrate this.

[3] *Remediation (NZ) Ltd v Taranaki Regional Council* [2024] NZEnvC 213, at [331], subject to appeal.

5. How should "benefits" be interpreted under the FTAA when considering the extent of the project's regional or national benefits and the purpose of the FTAA, including:

(a) Whether a gross benefit approach is required?

Yes. See KASM submissions [78-93]: a net benefit approach is required, and a benefit cost analysis should be carried out. Section 22 of the FTAA requires accounting of environmental, social and economic factors and other impacts. The Supreme Court agreed that "economic benefits" under s 59(2)(f) of the EEZ Act required a consideration of economic cost and benefits.[4]

(b) whether disbenefits or other costs are relevant; and

They are. S 3 FTAA provides that the purpose of the Act is to facilitate the delivery of infrastructure and development projects with significant regional or national benefits. In response to the similar language of s 59 EEZ Act, the Supreme Court said that the DMC has to satisfy itself that there was an economic benefit so that, if there were material economic costs, the DMC would be obliged to take those into account**.** Such an approach would also be consistent with the RMA, s 1, whereby benefits and costs "includes benefits and costs of any kind, whether monetary or non-monetary". It would be consistent with the FTAA for the Panel to take such an approach here.

(c) whether a net benefit or cost-benefit approach is required?

While the Supreme Court did not make the finding that the DMC did not commit an error of law on not applying a cost benefit approach, it would clearly be advantageous, as the evidence shows, and should be adopted in the Panel's discretion, following the economic evidence. The Panel should follow the *Delmore* draft decision that "a cost benefit analysis would also identify the opportunity costs of land and labour, as well as infrastructure costs and environmental effects." [498]

5. (a) Does the same approach apply when the Panel takes into account "the economic benefit to New Zealand of allowing the application" under s 59(2)(f) EEZ Act?

- Yes . See above answers to Q 4.

(b) If not are two separate economic assessments needed?

Following the *Delmore* draft decision, a cost benefit analysis should be undertaken: just one assessment relevant to the proportionality assessment under s 85(3) and the weighing under Schedule 10 clause 6.

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[4] *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, at [189].

Climate change

6. (a) Are international climate conventions relevant under s 11 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 ("EEZ Act")?

Yes. S 11 of the EEZ Act provides that "This Act continues or enables the implementation of New Zealand's obligations under various international conventions relating to the marine environment." While it does not list the UN Framework Convention on Climate Change (UNFCCC) or Paris Agreement, it does state "including", and the Climate Change Advisory Opinion of ITLOS (referred to in KASM/GP para. 101) emphasised the Paris Agreement numerous times, and concluded in its answer to the questions that:

> "The obligation under article 192 of the Convention to protect and preserve the marine environment has a broad scope, encompassing any type of harm or threat to the marine environment. Under this provision, States Parties have the specific obligation to protect and preserve the marine environment from climate change impacts and ocean acidification. Where the marine environment has been degraded, this obligation may call for measures to restore marine habitats and ecosystems." And the linkage to the Paris Agreement is clear:
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> "222. In the view of the Tribunal, the UNFCCC and the Paris Agreement, as the primary legal instruments addressing the global problem of climate change, are relevant in interpreting and applying the Convention with respect to marine pollution from anthropogenic GHG emissions."

How it does so is also stated:

> "[390] The ocean is the world's largest sink. Coastal "blue carbon" ecosystems, such as mangroves, tidal marshes, and seagrass meadows, are also important sinks and can contribute to ecosystem-based adaptation (see para. 56 above). The obligation to protect and preserve the marine environment is therefore of dual significance in that it promotes the conservation and resilience of living marine resources, while also mitigating anthropogenic GHG emissions by enhancing carbon sequestration through measures to restore the marine environment."

While under s 59(5)(b) the marine consent authority must not have regard to "the effects on climate change of discharging greenhouse gases into the Air", that does not prevent it taking account on the effects for example of the plume on phytoplankton, zooplankton or other carbon sinks or processes, or the release of carbon from seabed sediments caused by the mining. Nor does it prevent the Panel from taking account of any adverse impacts to offshore wind projects, taking note that renewable energy addresses climate change concerns. There is no issue of discharging greenhouse gases into the air.

As the KASM/GP submissions noted at [104], the international legal obligations should inform the interpretation of legislation, just as the LOSC and CBD provide support for the proposition that " 10(1)(b) [of the EEZ Act] imposes a heightened threshold in favour of environmental protection" (GP/KASM [105])

(b) If so, how?

Please see the answer above.

7. (a) Is the effect on the climate of releasing seabed-stored carbon or reducing carbon flux to the seabed a relevant consideration?

Yes, see above: changes to benthic primary production and carbon flux (from plume shading/smothering) and releasing carbon from the sediments are effects on the marine environment that must be taken into account. To be clear, these are not "the effects on climate change of discharging greenhouse gases into the Air" under s 59(5)(b) EEZ Act so the Panel can have regard to them under the EEZ Act..

Furthermore, as discussed below, impacts under FTAA are not defined and therefore broader than the consideration of effects under the EEZ Act. Any referral application is required under s13(4)(b) an explanation of how the project meets the criteria in s22. Section 22 criteria include: whether the project "will support climate change mitigation, including the reduction or removal of greenhouse gas emissions"[5] or " will support climate change adaptation, reduce risks arising from natural hazards, or support recovery from events caused by natural hazards"[6]. The reverse must also be relevant to whether or not an application will have national or regional benefits by considering the cost of undermining climate change mitigation, resilience and increase risks from natural hazards."

(b) If so, to which aspects of the assessment?

These form part of the weighing exercise under Schedule 10 Clause 6 and section 85(3) FTAA.

8. Given the asserted climate-related benefits, should a net approach to climate effects be adopted?

It would be within the discretion of the Panel to do so (subject to s 59(5)(b)), and in principle yes, but there is no evidence of a positive effect on climate change. We submit that the proper approach is to weigh these matters as stated above.

Treaty, cultural and planning instruments

[5] s22(2)(vii) FTAA.
[6] s22(2)(viii) FTAA.

9. What is the relevance of Treaty principles cultural values and kaitiakitanga to the Panel's considerations and where do they fit within the assessment framework? In particular, what is the correct legal test to distinguish an effect on an "existing interest" (as defined and used in the EEZ Act) from an effect on an "obligation arising under a Treaty settlement" (FTAA s 7(1)(a))?

We adopt Māori Parties' submissions.

10. What if any, is the significance of the High Court's judgment in Te Ohu Court Trustee Ltd v Attorney General [2025] NZHC 657?

We refer to and adopt Māori Parties submissions.

11 (a) Are Iwi Environmental Management Plans relevant considerations?

We refer to and adopt Māori Parties submissions.

(b) If so, how they should be taken into account?

We refer to and adopt Māori Parties submissions.

12. When considering national or regional planning instruments prepared under the RMA under s 59(2)(h) EEZ Acts to what extent, if any, should the Panel be guided by the Supreme Court's decision in *Royal Forest & Bird Protection Society v New Zealand Transport Agency [2024] NZSC* 26?

In our submission:

1. The Panel should give effect to the NZCPS [240].

2. *The Forest and Bird* Supreme Court noted that *King Salmon* held that the overall judgment approach is no longer valid where there are directive avoidance policies - which operate as environmental bottom lines.[7]

3. Harm (to bird species) cannot be traded off general environmental measures, which while providing environmental benefits of another kind, cannot operate to bring harm down to less than material or significant in line with the avoidance policies [308] This is highly relevant to the EEZ context, when the Supreme Court laid down the material harm test and stated that achievement of the s 10(1)(b) purpose is an environmental bottom line.

[7] *Royal Forest & Bird Protection Society v New Zealand Transport Agency [2024] NZSC* 26 at [305].

4. As was seen with our discussion of article 192, which requires protection of the marine environment, and which is tied to s 10(1)(b) of the EEZ Act, (KASM/GP [100-101] these are stringent obligations to be given effect to: not matters to be weighed against national or regional benefits.

5. We otherwise adopt the submissions of the Royal Forest & Bird Protection Society on this topic.

13. (a) Must "habitats of particular significance to fisheries management" be formally identified to be relevant under s 59(2)(h) EEZ Act?

No: habitats of particular significance to fisheries management should be taken into account under s 59(2)(h) EEZ but they don't need to be formally identified. They are also relevant under s 59(2)(a) as "any effects on the environment or existing interests".

We otherwise adopt the submissions of the Royal Forest & Bird Protection Society on this topic.

(b) If so, what form must such identification take?
N/A

Existing interests and infrastructure

14. (a) To what extents if any, is the potential for offshore wind energy generation in or near the project area relevant, whether as an "existing interest" under s 59(2)(a) or (b) or under s 59(2)(g) EEZ Acts or otherwise?

As noted above, it is relevant to climate change considerations and as a potential alternative with economic benefits recognised by both local and regional councils under s 59(2)(f), i.e an opportunity cost of the application and efficient use of natural resources under s 59(2)(g).

We make no comment on whether or not the wind energy is an "existing interest" and leave the issue to the wind industry commenters..

(b) If the potential for offshore wind energy generation is relevant, how should it be taken into account.

See above.

15. How are the potential effects on oil and gas permit infrastructure and associated safety regimes weighed within the FTAA and EEZ Act decision frameworks?

The JERA Nex bp *Comments on the Taranaki VTM Project* and their October presentation identified the risk of downhill impacts from an underwater landslide of mining tailings onto existing oil and gas infrastructure and any future adjacent offshore wind infrastructure. Such a failure pathway could generate significant consequential impacts arising directly from the proposed seabed mining activity.

The safety and integrity of existing oil and gas infrastructure are governed by specialist safety regimes that apply to the *operation of that infrastructure*. Those regimes do not regulate, or provide safeguards for, the conduct of seabed mining activities. Seabed mining is instead subject to the EEZ Act. Accordingly, the Panel cannot rely on oil and gas safety legislation to mitigate or manage the risks created by TTRL's proposal: those risks must be fully assessed and addressed within the EEZ Act framework, including under ss 59–61 and the information and precautionary obligations in s 61.

Risk refers to probability and consequence.[8] Probability is the likelihood of an event occurring where consequences involves an understanding of the sensitivity of the receiving environment (both qualitative and quantitative assessment). Low probability but high consequence risk is captured within the scope of "effects" and will continue after commercial incentives to remedy such risk post mining have expired.

Conditions, adaptive management and monitoring

16. Which, if any, of the conditions proposed by the applicant constitute adaptive management within ss 62(3) and s 64(2) EEZ Act?

S 64 does not apply to a marine discharge consent. See discussion below on adaptive management.

17. Are proposed conditions requiring pre-commencement monitoring lawful?

The proposed conditions on pre-commencement monitoring are not lawful as they are inconsistent with s61 and s10 EEZ Act. The proposed conditions on pre-commencement monitoring represent an acknowledgement that there is insufficient baseline information to set reliable thresholds and indicators and other conditions.

In the Supreme Court, Winkelmann CJ, Glazebrook and Williams JJ made the point that the attempt to rectify information deficits by imposing conditions requiring pre-commencement monitoring which would subsequently inform the creation of management plans inappropriately deprived the public of the right to be heard on a fundamental aspect of the application. [125]

[8] *Taranaki Energy Watch v South Taranaki District Council [2018] NZEnvC 227.*

The Court noted that “It is plain that the information available about the environmental effects on seabirds and on marine mammals was uncertain. It is sufficient to quote the DMC’s conclusion in relation to seabirds that, because of the lack of detailed knowledge about habitats and behaviour of seabirds in the South Taranaki Bight, it was “difficult to confidently assess the risks or effects at the scale of the Patea Shoals or the mining site itself”. The obligation to favour caution and environmental protection was accordingly triggered.” [125] The Court’s touchstone was that the cautious approach must mean that harm can be avoided, remedied or mitigated. [128]

This Panel is faced with the same difficulty as the Supreme Court: “[129] The difficulty with the conditions imposed in terms of the requirement to favour caution and environmental protection in this case is twofold. First, given the uncertainty of the information, it was not possible to be confident that the conditions would remedy, mitigate or avoid the effects. Second, the physical environment in the South Taranaki Bight is, as the DMC said, “challenging, dynamic and complex. The margins involved in relation to seabirds and marine mammals in the area may be extremely fine, with the outcomes turning on those margins extreme.” There are similar problems in terms of the uncertainty as to the effects caused by the sediment plume and the associated conditions dealing with suspended sediment levels [131].

The litmus test for adaptive management, according to the Supreme Court, is that the consenting envelope does not change [212]. (per William Young and Ellen France JJ). Glazebrook J said that “The pre-commencement monitoring and the management plans for seabirds and marine mammals were designed to gather baseline information that should have been provided by TTR in its application and were to be used, in effect, to set the consent envelope before mining began. It was not, however, a case of starting mining and then adjusting the consent envelope prospectively and, thus, does not amount to adaptive management.” But Glazebrook J still found the conditions wanting, falling within the spirit of the prohibition of adaptive management: “Having said that, even if not strictly adaptive management, what occurred here seems to me to fall within the spirit of the prohibition against adaptive management. It also reinforces the conclusion that the baseline information gathering conditions were not appropriate and that, on the basis of the information before the DMC, the discharge consent should have been refused” [284]

In summary, the conditions fail to favour caution and environmental protection, and failed the test of preventing material harm.

Decision tests, inconsistency and discretion

18. **To what extent if any, is the decision of the Supreme Court in Trans-Tasman Resources v Taranaki Whanganui Conservation Board [2022] NZSC 227 binding on the Panel or of highly persuasive significance**?

The decision is binding on the interpretation and application of the EEZ Act, particularly on the 'material harm' test, and to the extent that the FTAA is involved, highly persuasive on the EEZ Act aspects.

19. Is s 62 EEZ Act a standalone ground for declining a marine consent in this process or are the Panel's power to decline confined to s 85 FTAA?

S 62 EEZ is not a standalone basis for decline except where the threshold under s85(4) is met. The threshold in s 85(4) is a minimum threshold: an application cannot be declined *solely* for inconsistency with "a" provision of "other document". This application sits well above that minimum. It is inconsistent with multiple mandatory considerations under the EEZ Act, including those in ss 59–61. Once the s 85(4) threshold is met, the Panel must then give full effect to the substantive requirements of the EEZ Act, including the obligation under s 62. On a proper application of those provisions, the only lawful outcome is that the application must be declined.

Giving "greatest weight" to the purpose of the FTAA does not mean that the entire EEZ Act is to be treated the same way. For example, the Information Principles in s 61 are mandatory for the Panel to apply. Likewise, prohibitions in s 62 and the environmental bottom lines are still in effect and must be given effect to. So to the extent that weighing of the purpose of the FTAA is involved under Clause 6, the purpose of the FTAA must be given greatest weight, but otherwise the EEZ Act and its provisions must be applied, including prohibitions, the Information Principles in s 61 provisions of s 62, as well as environmental bottom lines. These must be given effect to - as was emphasised by the Supreme Court in *Forest and Bird* (see Q 12).

20. In relation to s 85 (1)(b) FTAA and the obligation under s 7(2) FTAA to act in a manner consistent with the obligations arising under existing Treaty settlements and customary rights.

(a) Are the members of the Panel "exercising a judicial power or performing a judicial function or duty" in terms of 7(2) FTAA?

We refer to and adopt Māori Parties' submissions.

(b) If adverse effects on fish stocks or aquaculture stocks are found to exists would granting the application be inconsistent with obligations under the Maori Fisheries Settlement or the Maori Commercial Aquaculture Claims Settlement Act 2004?

We refer to and adopt Māori Parties' submissions.

21. In cl 6(1)(a) of Schedule 10 FTAA, is "the purpose" of the Act limited to the purpose specified in s 3 of the Act?

Yes - see our answer to question 19. The purpose of the Act is limited to the purpose of the FTAA specified in section 3 of the FTAA, so it is only the purpose of the FTAA that must be given the greatest weight.

22. What is the meaning of "facilitate" in s 3 FTAA?

The purpose of the Act is to facilitate the delivery of infrastructure and development.
Under the Interpretation Act 1999, the meaning of an enactment must be ascertained from its text and in the light of its purpose. In the context of s 3, “facilitate” must describe the overall purpose of the Act, being to facilitate the delivery of infrastructure and development.
The Australian High Court has adopted the Oxford dictionary definition: “The relevant ordinary meaning of "facilitate" in this case is "[t]o render easier the performance of (an action), the attainment of (a result); to afford facilities for, promote, help forward (an action or process).” *Milne v The Queen [2014] HCA 4; 253 CLR 1*. Facilitate does not mean to guarantee approval, but to create processes that make achieving it easier, quicker, or more likely. It is an enabling procedural direction.

Facilitate is procedural only, not substantive. This is reflected in the Act through its provision for obtaining multiple consents via a single process for one proposal, as well as the efficiency requirements and statutory timeframes imposed on processing an application and issuing a decision.

The substantive component of the purpose provision is found in the latter part of s 3, namely the requirement for “significant regional or national benefits”. If a project does not meet this threshold, it will not be “facilitated” through the FTAA’s one-stop-shop process and must instead proceed through the ordinary legislative pathways to obtain consent.

23. In relation to s 85 (3) - (5) FTAA, how should inconsistency with a provision of the EEZ Act, or with a document that the Panel must take into account or consider in complying with s 81(2), be factored into the Panel's s 85 (3) assessment?

Inconsistency with a provision of the EEZ Act or with “or any other document that a panel must take into account”[9] (with reference to s81(2)) is relevant to your consideration of whether adverse impacts are sufficiently significant to be out of proportion.

Section 85(4) should not be read out of context: “solely” must be given weight. The Panel, when applying a proportionality exercise, is highly unlikely to take a view “solely” on the basis of a provision of an Act. “Any other document” is a curious term: it appears to attempt to cast the net widely.

It is our submission that if an application is inconsistent with two or more provisions or documents, s85(4) is complied with. It is a low bar to meet and TTR’s application must meet it.

[9] s85(4) FTAA.

Where the application is inconsistent with such a provision it is relevant under the s 85(3) proportionality test.

Section 85(1) and (2) provide a list of matters which must lead to decline. They are not necessarily exhaustive. Section 85(3) provides a gateway for declining, but it is not an exclusive gateway: otherwise one must read the word “only” into s 85(3) (so it would have read “A panel may ONLY decline an approval” S 85(3) is permissive but not exhaustive. In this way bottom lines must still be given effect to.

In the alternative, a mandatory consideration or bottom line under the EEZ Act is a compelling or required reason for finding disproportionality under s 85(3): for provisions that are also bottom lines, we say that this would be so significant as to be out of proportion with regional or national benefits.

24. What does “out of proportion” in s 85(3) mean and how should it be applied?

“Out of proportion” would seem to require weighing or balancing adverse impacts against national or regional benefits. “Sufficiently significant” suggests that the adverse effects have to be both significant, and sufficiently significant: the Panel then needs to undertake a proportionality assessment.

The Oxford dictionary defines proportionate as “Corresponding in size or amount to something else; in proper or due proportion; commensurate” or “Appropriate or suitable in its degree, amount, or intensity relative to something else”. In both cases, a weighing exercise, once the significance threshold has been reached, will be needed.

25. (a) Is there, in a substantive sense, any difference between an "impact" and an "environmental effect" under the FTAA?

Since the EEZ Act uses “effect”, including in section 59(2) “any effects on the environment or existing interests of allowing the activity, including— (i) cumulative effects”, this should be the term used for assessing effects under s 59.

Impact is wider category than environmental effects which are given a definition in the EEZ Act. Impact may include “inconsistency with or contrary to a provision of a specified Act or any other document that a panel must take into account or otherwise consider”. “Any other document” is broad. Effects to be considered under s59 is a subset of impacts.

(b) If so, what if any consequence(s) does that difference have for the Panel' s decision on the application?

None