Your Comment on the Taranaki VTM Project

Please include all the contact details listed below with your comments.

1. Contact Details	
Please ensure that you have authority to comment on the application on behalf of those named on this form.	
Organisation name (if relevant)	Royal Forest & Bird Protection Society Inc
First name	[redacted]
Last name	[redacted]
Postal address	[redacted]
Phone number	[redacted]
Email ***(a valid email address enables us to communicate efficiently with you)***	[redacted]

2. We will email you draft conditions of consent for your comment			
☒	I can receive emails and my email address is correct	☐	I cannot receive emails and my postal address is correct

3. Please select the effects (positive or negative) that your comments address:			
☒	Economic Effects	☒	Sedimentation and Optical Water Quality Effects
☒	Effects on Coastal Processes	☒	Benthic Ecology and Primary Productivity Effects
☐	Fished Species	☒	Seabirds
☒	Marine Mammals	☒	Noise Effects
☐	Human Health Effects of the Marine Discharge Activities	☒	Visual, Seascape and Natural Character Effects
☐	Air Quality Effects	☐	Effects on Existing Interests
☒	Other Considerations (please specify): Statutory planning		

Please provide your comments below. You may include additional pages if needed. If you are emailing this form and attaching any supporting documents, please list the names of those files below to help us ensure all materials are received.

- Memorandum of legal comments of counsel for the Royal Forest and Bird Protection Society of New Zealand Inc
- Statement of evidence of Dr Deanna Clement (marine mammals)
- JASCO Applied Sciences "Scientific peer review in relation to underwater noise and marine mammals" (29 August 2025) (referenced in Clement's evidence)
- Statement of evidence of Professor Glenn Adrian Bank (economics)
- Statement of evidence of Natasha Sitarz (planning) (including Appendix 3 – JWS planning 27 February 2024 separately attached)

Thank you for your comments

BEFORE AN EXPERT PANEL **FTAA-2503-1035**
TARANAKI VTM

UNDER THE	**FAST-TRACK APPROVALS ACT 2024**
IN THE MATTER OF	an application by Trans-Tasman Resources Limited for marine consents

---

MEMORANDUM OF LEGAL COMMENTS OF COUNSEL FOR THE ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED

6 October 2025

Royal Forest and Bird Protection Society of New Zealand
Solicitor Acting: [redacted]
Emai[redacted]
Phone: [redacted]

Counsel: [redacted]
Email[redacted]
Phone: [redacted]

INTRODUCTION

1. The South Taranaki Bight ("STB") is an ecologically significant marine environment, recognised for its high biodiversity and habitat values. It supports a range of vulnerable and threatened marine mammals, including pygmy blue whales, Māui and Hector's dolphins, and contains significant ecological features, such as the Pātea Shoals, the Crack, and the Traps. The seabed mining activity proposed by Trans-Tasman Resources Ltd ("TTR" or "TTRL") will materially harm these values, particularly through the generation of a persistent sediment plume and underwater noise. These adverse effects are not justified by the modest economic benefits claimed by TTR, which are overstated and will not be regionally or nationally significant.

2. The Royal Forest and Bird Protection Society of New Zealand Incorporated ("Forest & Bird") regularly participates in consenting and approval processes for mining across Aotearoa New Zealand. Forest & Bird participated in TTRs 2016 application before a Decision-making Committee ("DMC") appointed by the Environmental Protection Authority, and subsequent appeals culminating in the Supreme Court's decision in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*[1] *("TTR").* It also participated in the reconsideration hearing before a reconstituted DMC, prior to the Applicant's withdrawal.

3. Forest & Bird seeks consent is declined. The Panel may decline consent under section 85(3) of the Fast-track Approvals Act 2024 ("FTAA") if it is satisfied that the adverse impacts of approving are out of proportion with the extent of the project's regional or national benefits.

4. The adverse impacts of the mining proposal are significant and enduring. The sediment plume will cause material adverse harm to primary production and benthic ecology. The noise of the operation will have significant adverse impacts on marine mammals.

5. The economic evidence indicates that the proposal will not have national or regional benefits. The modelling used by TTR is flawed, as it fails to account for sector volatility and offshore leakage, and does not demonstrate regional or national significance. In the absence of evidence of regional or national benefit. On that basis, the statutory threshold for declining consent under section 85(3) is met, and the application should be declined.

[1] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 ("*TTR*")

6. These comments start by addressing the statutory framework under the FTAA, including the Panel's obligations under section 81 and clause 6 of Schedule 10, and the requirement to give greatest weight to the purpose of the FTAA while also taking into account relevant provisions of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 ("EEZ Act"). They also summarise the expert evidence presented by Forest & Bird on economics, marine mammals, and planning, and highlight key concerns regarding the adequacy of the application, the significance of adverse effects, and the reliability of claimed benefits.

EVIDENCE

7. Forest & Bird presents evidence from three experts:[2]

   a. Professor Glenn Banks on economics; and

   b. Dr Deanna Clement on marine mammals; and

   c. Natasha Sitarz on planning.

Professor Glenn Banks

8. Professor Glenn Banks from Massey University concludes that the proposal will have limited and unstable economic benefit to New Zealand that is not regionally or nationally significant.

9. Professor Banks disagrees with the NZIER report's use of Input/Output modelling, noting it exaggerates economic impacts and fails to account for environmental costs or sector volatility. Professor Banks highlights that only a small portion of the proposed $1 billion capital spend would occur in New Zealand, with most equipment sourced offshore and tax deductions further eroding domestic returns.

10. Professor Banks also questions the stability of projected fiscal benefits, citing examples from OceanaGold and Papua New Guinea to show how mining revenues can fluctuate dramatically. Employment gains are expected to be modest and largely inaccessible to local workers due to the project's capital-intensive nature and specialised skill requirements.

11. Professor Banks also notes that the economic analysis excludes titanium dioxide, a valuable byproduct, potentially understating offshore profit flows and diminishing New Zealand's share of the resource's value.

[2] Forest & Bird has also worked with Greenpeace and KASM

Dr Deanna Clement

12. Dr Deanna Clement, a senior marine mammal ecologist at the Cawthron Institute, provides expert evidence on the effects of the proposal on marine mammals. She identifies significant deficiencies in the application, particularly the absence of baseline data on ambient underwater sound and the lack of robust modelling for cumulative noise effects. The proposal involves continuous low-frequency noise generation over 20 years, yet TTR has not demonstrated how it would manage exceedances of its proposed noise limits or mitigate impacts on species that rely on sound for survival.

13. Dr Clement emphasises that several threatened marine mammal species, including pygmy blue whales and Māui and Hector's dolphins, may be present in or near the project area. She endorses a precautionary approach, noting that the proposal's predicted noise levels are likely understated and do not account for multiple vessel operations. Without adequate baseline acoustic data or a cumulative effects framework, the application fails to meet best practice standards and poses a material risk to marine mammals. She concludes that the proposed conditions are insufficient to protect these species from behavioural disturbance, auditory stress, or injury.

Natasha Sitarz

14. Natasha Sitarz provides a statutory planning assessment of the TTR application under section 81 and clause 6 of Schedule 10 of the FTAA, drawing on her prior involvement in the 2016 application and reconsideration. Ms Sitarz undertakes an effects assessment and then evaluates the application against the matters that must be taken into account, including the purpose of the FTAA, relevant provisions of the EEZ Act, and the adequacy of the proposed conditions.

15. Ms Sitarz concludes that the proposal has potentially adverse effects from the sediment plume and noise and that these effects may impact primary production, marine mammals, seabirds, benthic ecology, and sediment dynamics, and that TTR has not demonstrated that these effects can be avoided, remedied, or mitigated to a level that is no longer material. Ms Sitarz is concerned that the proposed conditions lack enforceability and fail to provide credible mechanisms for managing key risks, particularly in relation to underwater noise and sediment plume variability.

16. Ms Sitarz concludes the adverse effects are sufficiently significant to be out of proportion to the projects regional and national benefits and that the Panel may decline the approval under s85(3) of the FTA Act.

THE SOUTH TARANAKI BIGHT AND THE PROPOSAL

The South Taranaki Bight

17. The South Taranaki Bight (STB) is a region of significant ecological importance.

18. The STB to a diverse range of marine mammals, including blue whales, humpback whales, southern right whales, and common dolphins, many of which use the area for feeding, migration, and calving.[3] Of particular concern was the presence of pygmy blue whales, with the STB described as an important feeding area.[4] Since then, the pygmy blue whale population has been confirmed as a genetically distinct population that relies on the STB as its only known feeding and nursing habitat in New Zealand.[5] Māui dolphins, a critically endangered species are also present in the STB.[6]

19. The STB also includes geomorphological features that were central to the DMC's assessment of environmental effects arising from the proposed seabed mining activity. This includes areas known the Crack, the Traps, and Pātea Shoals.

20. The minority of the DMC described the Pātea Shoals as a unique shallow geological feature on the west coast of the North Island that contributes significantly to benthic primary production in the STB. Primary production in the STB is among the highest recorded in NZ. This in turn supports higher trophic levels and a significant number of marine mammals. [7]

The proposal

21. The current proposal is very similar to that which was applied for in 2016, with the main difference that mining is only expected to be undertaken for 20 years as opposed to the 35 years in the 2016 application.

22. The DMC granted TTR marine consents to extract up to 50 million tonnes of seabed material per year from a 66 km² area STB.[8] The decision was a split vote among the four committee members, with the Chair casting the deciding vote in favour of granting consent.[9]

---

[3] Decision on marine consents and marine discharge consents application dated 3 August 2017 ("DMC Decision"), Section 14, from [442]
[4] DMC Decision at [471]
[5] Evidence of Dr Leigh Torres at [7]
[6] DMC Decision, Section 14.3 from [476]
[7] DMC Decision, Part 2 at [120]
[8] DMC Decision, Summary of Decision at [2]
[9] DMC Decision, Summary of Decision at [5]-[7]

23. Key concerns related to the sediment plume generated by seabed mining, which was predicted to reduce light penetration and adversely affect benthic ecosystems, primary productivity, and foraging habitats for marine mammals and seabirds.

24. Subsequent appeals led to the Supreme Court's decision in *TTR*, which held that, under the EEZ Act, decision-makers must be satisfied that harm can be avoided, remedied, or mitigated to a level that the harm is no longer material. The Court concluded that the sediment plume would not avoid material harm, and the consents were quashed.[10]

25. The conditions imposed by the DMC were also challenged. The High Court, Court of Appeal, and ultimately the Supreme Court found that the DMC had erred in law by relying on uncertain and unenforceable conditions to mitigate potentially material harm.[11]

FAST-TRACK APPROVALS ACT

26. This section addresses the decision-making framework under the FTAA. It also addresses other matters derived from case law relevant to the Panel's consideration under the Resource Management Act 1991 ("RMA") and the EEZ Act – most notably *TTR*.

27. The FTAA sets out the legal framework for obtaining approval of both listed and referred projects. The Taranaki VTM is a listed project and is described in Schedule 2 of the FTAA as follows:

Authorised person	**Project name**	**Project description**	**Approximate geographical location**
Trans-Tasman Resources Limited	Taranaki VTM	Extract up to approximately 50 million tonnes of seabed material per year, over 20 years, recover up to approximately 5 million tonnes of vanadium-rich titanomagnetite concentrate, return the de-ored material to the seabed, and monitor environmental recovery for up to 5 years post-extraction	65.76 square kilometres located between 22 kilometres and 36 kilometres from the coastline of South Taranaki

28. Subpart 3 of Part 2 of the FTAA ("Panel consideration of substantive application") deals with a Panel's consideration of a substantive application for an approval.

[10] *TTR* at [168]–[170]
[11] *TTR* at [168]–[170]

Panel's functions under the FTAA

29. The purpose of the FTAA "is to facilitate the delivery of infrastructure and development projects with significant regional or national benefits".[12]

30. The Panel must, for each approval sought in a substantive application, decide under s 81(1) whether to:[13]

    a. grant the approval and set any conditions to be imposed on the approval; or

    b. decline the approval.

31. In making its s 81(1) decision, the Panel:[14]

    a. must consider the substantive application and any advice, report, comment, or other information received by the Panel;[15]

    b. must apply the applicable clause for the approval type, as set out in s 81(3), which in the case of the Taranaki VTM is section 81(3)(l) (marine consent) (addressed below under "**Assessment of marine consent application"**);

    c. must comply with s 82 (relating to treaty settlements, the Marine and Coastal Area (Takutai Moana) Act 2011, or the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019);

    d. must comply with s 83 in setting conditions (addressed further under "**Conditions of consent"**);

    e. may impose conditions under s 84 (to recognise or protect a relevant Treaty settlement and any obligations arising under the Marine and Coastal Area (Takutai Moana) Act 2011 or the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019);

    f. may decline the approval only in accordance with s 85 (addressed below under "**Power to decline consent**").

32. When taking the purpose of the FTAA into account, the Panel must consider the extent of the project's regional or national benefits.[16]

Assessment of marine consent application

---

[12] Section 3 FTAA
[13] Section 81(1) FTAA
[14] Section 81(2)(b) FTAA
[15] Under sections 51, 52, 53, 55, 58, 67, 68, 69, 70, 72, or 90 FTAA, per s 81(2)(a) FTAA
[16] Section 81(4) FTAA

33. Section 40(a) of the FTAA states the process for obtaining approval under the FTAA "applies instead of the process for obtaining any corresponding approval under a specified Act."

34. The EEZ Act is a "specified Act" relevant to this Application.

35. Pursuant to section 42(4)(k) of the FTAA, the applicant seeks an approval for a marine consent that would otherwise be applied for under the EEZ Act.

36. When considering the Applicant's marine consent application under section 42(4)(k), the Panel is required by sections 81(2)(b) and 81(3)(l) to apply clause 6 of Schedule 10 of the FTAA.

Clause 6 of Schedule 10: Criteria for assessing the marine consent application

37. Clause 6(1) of Schedule 10 requires the Panel, for the purposes of section 81, when considering a marine consent application and setting any conditions in accordance with clause 7, to take into account the following, giving the greatest weight to (a):

    a. The purpose of the FTAA; and

    b. sections 10 and 11 of the EEZ Act; and

    c. any relevant policy statements issued under the EEZ Act; and

    d. sections 59, 60, 61(1)(b) and (c) and (2) to (5), 62(1A) and (2), 63, and 64 to 67 of the EEZ Act.

38. Clause 6(2) of Schedule 10 states that:

> For the purposes of subclause (1)(d), the panel must take into account that section 62(1A) of the EEZ Act would normally require an application to be declined, but must not treat that provision as requiring the panel to decline the approval the panel is considering.

"Take into account"

39. The interpretation of "take into account" used by the panel in the Bledisloe North Wharf and Fergusson North Berth Extension application ("Bledisloe application") was:[17]

> [119] We understand the phrase "take into account" as requiring us to directly consider the matters so identified and give them genuine consideration; rather than mere lip service, such as by listing them and setting them aside: *Royal Forest and Bird*

[17] Record of Decisions of the Expert Panel considering the Bledisloe North Wharf and Fergusson North Berth Extension dated 21 August 2025 at [119] ("Bledisloe decision")

Protection Society Inc v New Zealand Transport Agency [2024] NZSC 26 *[East West Link]*.

40. While the *East West Link* case cited in the Bledisloe decision concerned the phrase "have regard to" rather than "take into account", the approach adopted by the panel is correct. The Court in *East West Link* said that the duty to have regard to relevant provisions of planning instruments in s 104 does not invest consent authorities with a broad discretion to "give genuine attention and thought" to directive policies, only to then refuse to apply them.[18] A relevant plan provision is not properly had regard to if it is simply considered for the purpose of putting it to one side.[19]

Weighting

41. Clause 6(1)(a) of the FTAA expressly requires the greatest weight be given to the purpose of the FTAA.

42. The weighting to be accorded to relevant considerations by a statutory decision maker is normally for that decision maker to determine[20] (subject to unreasonableness). However, where a statute directs the weight to be given to a matter, that direction must be followed.[21]

43. A legislative direction to require greater weight be given to certain matters was used in section 34 of the now-repealed Housing Accords and Special Housing Areas Act 2013 ("HASHAA"). That provision was examined by the Court of Appeal in *Enterprise Miramar Peninsular Inc v Wellington City Council* [2018] NZCA 541.

44. Section 34(1) HASHAA framed the hierarchy of matters as follows:

> An authorised agency, when considering an application for a resource consent under this Act and any submissions received on that application, must have regard to the following matters, giving weight to them (greater to lesser) in the order listed:
> (a) the purpose of this Act:
> (b) the matters in Part 2 of the Resource Management Act 1991:
> (c) any relevant proposed plan:
> (d) the other matters that would arise for consideration under—
> (i) sections 104 to 104F of the Resource Management Act 1991, were the application being assessed under that Act:
> (ii) any other relevant enactment (such as the Waitakere Ranges Heritage Area Act 2008):

[18] See *East West Link* at [72], [79], [80], [167] and fn. 157, at [169]
[19] *RJ Davidson Family Trust v Marlborough District Council [2018] NZCA 316* at [73]
[20] *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR (HC) 188 at 223
[21] *Quarantine Waste (New Zealand) Ltd v Waste Resources Ltd* [1994] NZRMA 529 (HC) at 540

(e) the key urban design qualities expressed in the Ministry for the Environment's New Zealand Urban Design Protocol (2005) and any subsequent editions of that document.

45. The difference between s 34(1) of the HASHAA and cl 6 of the FTAA is that the HASHAA creates a hierarchy of criteria, each ascribed descending level of weight – with the greatest level of weight to matter (a), to lesser weight be given to matter (e). The requirement under clause 6(1) of Schedule 10 is for the decision maker to give the greatest weight to criterion (a), with the matters in (b)-(d) on equal footing.

46. The Court of Appeal in *Enterprise Miramar* set out the hierarchy of matters in s 34, and said: [22]

> [41] The plain words indicate, therefore, that greatest weight is to be placed on the purpose of HASHAA, namely enhancing affordable housing supply in certain districts. That said, other considerations have been deliberately included. Decision-makers must be careful not to rely solely on the purpose of HASHAA at the expense of due consideration of the matters listed in (b)—(e).

47. The Court of Appeal held that the decision-maker was required to assess the matters listed in subs (1)(b)—(e) (i.e. the matters other than the Act's purpose) uninfluenced by the purpose of HASHAA, before standing back and conducting an overall balancing.[23] As a result, environmental effects "may be outweighed by the purpose of enhancing affordable housing supply, or they may not."[24]

48. This indicates that a statutory requirement to give an Act's purpose the most weight does not mean that it will always outweigh other considerations (in which case there would be no point in listing those other considerations). The same must be correct in relation to the FTAA. That interpretation is supported by s 85(3) of the Act (addressed below).

49. The HASHAA decision-maker was required to consider Part 2 of the RMA. The Court of Appeal saw the decision-maker's "cursory analysis" of Part 2 RMA matters in *Enterprise Miramar* as an example of the decision-maker having allowed the purpose of HASHAA to neutralise or minimise the other matters that arose for consideration, which resulted in those matters not being given due consideration and weight. Rather than merely treating the purpose of HASHAA as the most important and influential matter to be weighed, the

[22] *Enterprise Miramar Peninsula Incorporated v Wellington City Council* [2018] NZCA 541 at [41] (*"Enterprise Miramar"*)
[23] *Enterprise Miramar* at [53]
[24] *Enterprise Miramar* at [55]

decision-maker used the purpose of HASHAA to eliminate or greatly reduce its consideration and weighing of the other 34(1) factors, and that was a "significant error of law".[25]

50. The Bledisloe panel applied *Enterprise Miramar* in the FTAA context when assessing an approval for a resource consent under clause 17 of Schedule 5 which follows the same formulation as clause 6.[26] It noted: "in the FTAA the criteria in (b)-(c) are to have equal statutory weight".[27]

51. Subject to bearing that in mind, the Bledisloe panel considered that *Enterprise Miramar* provided helpful guidance, which it adapted to apply to the FTAA:[28]

> a. While the greatest weight is to be placed on the purpose of the FTAA, we must be careful not to rely solely on that purpose at the expense of due consideration of the other matters listed in (b) to (c): *Enterprise Miramar*, at [41].
>
> b. Clause 17 requires us to consider the matters listed in clause 17(1)(a)-(c) on an individual basis, prior to standing back and conducting an overall weighting in accordance with the specified direction: *Enterprise Miramar*, at [52] – [53].
>
> c. The purpose of the FTAA is not logically relevant to an assessment of environmental effects. Environmental effects do not become less than minor simply because of the purpose of the FTAA. What changes is the weight to be placed on those more than minor effects; they may be outweighed by the purpose of facilitating the delivery of infrastructure and development projects with significant regional or national benefit, or they may not: *Enterprise Miramar*, at [55]

52. The principles in *Enterprise Miramar* should also inform the interpretation of clause 6 of Schedule 10 of the FTAA, mandating separate consideration of each of the listed matters on their own terms, before moving to the weighing exercise. In that exercise, environmental effects or other impacts may be outweighed by the FTAA's purpose, or they may not. Weight to be afforded to the purposes of the FTAA should not be such as to neutralise the other relevant decision-making criteria stemming from the EEZ Act.

Extent of regional or national benefits

53. Section 81(4) of the FTAA requires the Panel to consider the extent of the project's regional or national benefits when taking the purpose of the FTAA account under clause 6(1)(a) of Schedule 10.

---

[25] *Enterprise Miramar* at [55]
[26] In contrast, the Maitahi panel "did not find reference to section 34(1) HASHAA to be of much assistance" (at [68])
[27] Bledisloe decision at [121]
[28] Bledisloe decision at [121]

54. As already noted, the purpose of the FTAA is "to facilitate the delivery of infrastructure and development projects with significant regional or national benefits".[29] The project's regional or national benefits are also relevant to any decision by a panel to decline an approval under section 85(3).

55. "Infrastructure" is defined by reference to the definition in s 2 RMA.[30] "Development" is not defined.

56. The panel considering the Maitahi Village application ("the Maitahi panel") assessed this same criterion in the context of a resource consent.[31] The Maitahi panel described this as "essentially a forensic exercise".[32] Panels must reach their own assessment of the extent of benefits and are not required or obliged to treat a project as having significant regional or national benefits on the basis of its listing or referral. The Maitahi panel rejected the applicant's submissions that the Panel could rely on the fact that the Project is listed in Schedule 2 for any finding that it has significant regional or national benefits:[33]

> [84] … these findings were made by bodies other than the Panel which has statutory responsibility for making decisions on approvals sought in a substantive application under s 81. By virtue of s 81(4) it falls to the Panel, when taking the purpose of the FTAA into account, to consider the extent of the regional or national benefits. This is something the Panel itself must do in the context of its analysis of, and findings on, regional or national benefits.
>
> [85] The notion that a panel could rely on findings of another body is also inconsistent with the statutory requirement for the Panel to undertake a proportionality test under s 85(3). ...

57. For all matters of interpretation, s 10(1) of the Legislation Act 2019 will apply. It provides that "the meaning of legislation must be ascertained from its text and in the light of its purpose and its context". The Maitahi panel found that purpose and context was "conveniently summarized in the Legislative Statement outlining the Parliamentary intention for decision making by expert panels" as follows:[34]

> The purpose and provisions of the Bill will take primacy over other legislation in decision making. This means that approvals can be granted despite other legislation not allowing them, such as, projects that are prohibited activities or those which are inconsistent with RMA National Direction. This approach is intended to ensure key infrastructure and other

---

[29] Section 3 FTAA

[30] Section 4(2)(a) FTAA

[31] An equivalent to Clause 6(1)(a) of Schedule 10 is found for resource consents at clause 17(1)(a) of Schedule 5

[32] Record of decision of the Expert Consenting Panel considering the Maitahi Village application dated 18 September 2025 ("Maitahi decision") at [82]

[33] At [83]–[85]

[34] At [51], citing the Legislative Statement, para 17.

development projects with significant benefits for communities are not declined where the benefit of approving the project outweighs any issue identified.

58. Extent "should be assessed or quantified depending on their nature as varying between modest and meaningful, substantial or of real value".[35]

59. Both the Maitahi and Bledisloe panels took "some guidance" from s 22 FTAA which relates to the criteria for assessing a referral application, because the first criterion is whether "the project is an infrastructure or development project that would have significant regional or national benefits".[36] The Maitahi panel described the s 22 matters as providing "some useful guidance … a flavour of what is required", but with the question of whether a project is in fact one with significant regional or national benefits remaining "an intensely factual determination turning on the particular circumstances of the Application".[37]

60. Noting the dictionary definition of "significant" as "full of meaning or import, and "important, notable", the Maitahi panel was content to use "sufficiently great or important to be worthy of attention; noteworthy" as a working definition.[38]

61. Any factual assessment of regional or national benefits, particularly in relation to infrastructure or development projects, will be informed by related economic and social factors. The relevant regional context will therefore be important.[39] The Maitahi panel noted that the word "extent" is not defined and that the dictionary definition refers variously to terms such as "assessment" or "assessed value" or degree, size, magnitude, dimensions or breadth of the thing being measured. The panel took that approach to its evaluative task, "bearing in mind that not all benefits are able to be calculated in precise financial or monetary terms. Sometimes expression of quantification or value in absolute terms may simply not be possible."[40]

62. While the Maitahi project's contribution to housing and construction jobs was considered undeniably regionally significant, the panel did not consider upgrades to increase the capacity of downstream wastewater pipe infrastructure and a new shared commuter path to be significant:[41]

---

[35] Maitahi decision at ix (Executive Summary)
[36] Maitahi decision at [513], Bledisloe panel decision at [285]
[37] Maitahi decision at [515]
[38] At [516]
[39] At [517]
[40] At [819]
[41] At [525]

> [525] … While these are undoubtedly benefits of the development, arguably they do not classify as being of regional significance. They are amenities which will serve to enhance the environment for those who live there. At best the benefits will accrue to visitors who seek to enjoy the environment and amenities associated with proposed walking tracks and cycleways.

63. The Panel's testing of regional or national benefit must be evidence-based. For claimed benefits – the Panel can and should rely on objective evidence and expert assessment to test whether contended benefits will be delivered, in what form, and to what extent – and ultimately whether they are actually "regional" or "national" in nature.

Clause 6(1)(b) – sections 10 and 11 of the EEZ Act

Section 10

64. The purpose of the EEZ Act is set out in section 10:

> **10 Purpose**
>
> (1) The purpose of this Act is-
>
> (a) to promote the sustainable management of natural resources of the exclusive economic zone and the continental shelf; and
>
> (b) in relation to the exclusive economic zone, the continental shelf, and the waters above the continental shelf beyond the outer limits of the exclusive economic zone, to protect the environment from pollution by regulating or prohibiting the discharge of harmful substances and the dumping or incineration of waste or other matter.
>
> (2) In this Act, **sustainable management** means managing the use, development, and protection of natural resources in a way, or at a rate, that enables people to provide for their economic well-being while-
>
> (a) sustaining the potential of natural resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of the environment; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.
>
> (3) In order to achieve the purpose, decision-makers must-
>
> (a) take into account decision-making criteria specified in relation to a particular decisions; and
>
> (b) apply the information principles to the development of regulations under section 27, 29A, 29B, or 29E and the consideration of applications for marine consent.

Section 10(1) of the EEZ Act

65. The majority in the Supreme Court's decision *TTR* interpreted section 10 (1)(b) as an environmental bottom-line, requiring protection of the environment from material harm.[42] The majority observed that s 10(1)(b) imposes a requirement cumulative on the s 10(1)(a) requirement of

[42] *TTR* at [245]-[253] per Glazebrook J; [292] per Williams J; [305] per Winkelmann CJ.

sustainable management, providing something "more than" sustainable management that must be separately addressed.[43]

66. Accordingly, the majority in *TTR* formulated a three-step approach to determining discharge and dumping applications under the EEZ Act as follows:[44]

> (a) Is the decision-maker satisfied that there will be no material harm caused by the discharge or dumping? If yes, then step (c) must be undertaken. If not, then step (b) must be undertaken.
>
> (b) Is the decision-maker satisfied that conditions can be imposed that mean:
>
> (i) material harm will be avoided;
>
> (ii) any harm will be mitigated so that the harm is no longer material; or
>
> (iii) any harm will be remedied within a reasonable timeframe so that, taking into account the whole period harm subsists, overall the harm is not material?
>
> If not, the consent must be declined. If yes, then step (c) must be undertaken.
>
> (c) If (a) or (b) is answered in the affirmative, the decision-maker should perform a balancing exercise taking into account all the relevant factors under s 59, in light of s 10(1)(a), to determine whether the consent should be granted.

Material harm

67. Winkelmann CJ explained the concept of material harm as follows:[45]

> … Whether harm is material in any one case will require assessment of a multiplicity of factors, such as the volume of the harmful substance discharged into the expanse of the sea, the flora, fauna and natural characteristics of the area of seabed affected, the size of seabed or volume of water affected, and the time for which the damage will last. There are therefore qualitative, temporal, quantitative and spatial aspects to materiality that have to be weighed.
> … Consideration must be given to the impact of the discharge upon the marine ecosystem when assessing what is to be adjudged a material level of harm. Consideration must also be given to the impact upon those who depend upon that ecosystem – s 59(2)(a) and (b) require any effects on existing interests of allowing the activity to be taken into account.

68. In explaining why "material harm" is an appropriate standard, Glazebrook said:[46]

> If the environment is materially harmed, then it cannot be said to have been protected from pollution. On the other hand, it seems most unlikely that the purpose of s 10(1)(b) was to protect the environment against immaterial harm.

[43] *TTR* at [245], [250] per Glazebrook J; [292] per Williams J; [305] per Winkelmann
[44] *TTR* [2021 NZSC 127 at [5], and [6]
[45] *TTR* at [310]; per Winkelmann CJ (Glazebrook J agreeing at [255])
[46] *TTR* at [252]

69. Material harm does not need to permanent. Temporary harm can be material.[47] The longer the timeframe before the harm is remediated, the less likely that the harm is immaterial.[48] A longer timeframe will also make it more difficult for the decision-maker to be satisfied that remediation will in fact occur, given the requirement to favour caution and environmental protection.[49]

70. In *Port Otago Limited v Environmental Defence Society ("Port Otago"),*[50] the Supreme Court imported the *TTR* concept of "material harm" to the RMA context. *Port Otago* concerned the application of Policy 9 of the New Zealand Coastal Policy Statement (the "ports policy") alongside policies that require the avoidance of adverse effects on listed values ("avoidance policies").[51] NZCPS Policies 11, 13, and 15[52] all make a clear distinction between the most important areas, where adverse effects must be avoided and other less important areas where adverse effects may be "avoided, remedied, or mitigated". For example, Policy 13 provides:

> **Policy 13 Preservation of natural character**
>
> (1) To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use, and development:
>
> (a) avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character; and
>
> (b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on natural character in all other areas of the coastal environment;

71. In *Port Otago,* the Supreme Court observed that when avoiding adverse effects, "the standard was protection from material harm, albeit that temporary harm can be material".[53] The Court was careful to refer to situational context:[54]

> The avoidance policies in the NZCPS must be interpreted in light of what is sought to be protected including the relevant values and areas and, when considering any development, whether measures can be put in place to avoid material harm to those values and areas.

---

[47] *TTR* at [252]
[48] *TTR* at [257]-[258] per Glazebrook J
[49] *TTR* at [258] per Glazebrook J
[50] *Port Otago Limited v Environmental Defence Society Inc* [2023] NZSC 112 (*"Port Otago"*)
[51] NZCPS Policy 11 (Indigenous Biodiversity), 13 (Natural character), 15 (Natural features and natural landscapes) and 16 (Surf breaks of national significance)
[52] NZCPS Policy 16 only deals with nationally significant surf breaks across Aotearoa
[53] *Port Otago* at [65]
[54] *Port Otago* at [68]

72. We submit that the requirement to identify the relevant values and areas means that "material harm" cannot be interpreted in a vacuum and must be determined in relation to the values and areas in question. For example, this includes whether the values and areas are covered by Policy 13(a) or (b) of the NZCPS.

73. "Material harm" should not be equated or conflated with "significant adverse effects" referred in NZCPS Policy 13(1)(b). If material harm was equated with significant adverse effects, there will be effects that contravene the words of the stricter "avoid" policies. For example, if "significant adverse effect" is equated to "material harm", then a more than minor but not significant adverse effect on a Policy 13(a) value would be not considered inconsistent with Policy 13. This would ignore the clear and deliberate distinction that Policy 13 makes between the most important values identified in Policy 13(a) and other important values in Policy 13(b).

74. Such an outcome was not what was contemplated by the Supreme Court as it would be contrary to the emphasis that its previous *King Salmon*[55] decision had placed on words and terminology employed when interpreting policies:[56]

> It is clear from this Court's decision in King Salmon that the NZCPS avoidance policies have a directive character. This Court said that the term "avoid", as used in the NZCPS, has its ordinary meaning of "not allow" or "prevent the occurrence of", meaning that the policies at issue in that appeal provided "something in the nature of a bottom line". The Court noted, however, that what was to be avoided with regard to those policies was, in that case, the adverse effects on natural character and that prohibition of minor or transitory effects would not likely be necessary to preserve the natural character of coastal environments.

75. The concept of "material harm" is similar to the RMA concept of a "more than a minor effect".[57] For example, under the RMA consents for a "non-complying" activity may only be granted if either its adverse effects on the environment will be no more than minor or the activity itself is not contrary to the objectives and policies of the relevant regional plan.[58]

---

[55] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593

[56] *Port Otago* at [64]

[57] See RMA, ss 95A(8)(b), 95D, 95E(1), 149ZCB(2)(a), 182(5), Clause 6(1)(h) of Schedule 6.

[58] RMA s104D(1)(a) "Despite any decision made for the purpose of notification in relation to adverse effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—(a) the adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor…"

76. In other words, “immaterial harm” is akin to a “minor” effect. If an effect from granting a discharge or dumping consent would be more than minor under the RMA, it cannot be treated as “immaterial” per *TTR.*

77. While “minor” is not defined in the RMA, the High Court in *Elderslie Park Ltd v Timaru DC* found it to mean “lesser or comparatively small in size or importance”. [59] The Court held that “ultimately an assessment of what is minor must involve conclusions as to facts and the degree of effect” and that “there can be no absolute yardstick or measure.”[60]

Section 10(3) of the EEZ Act

78. The “decision-making criteria" referred to in section 10(3)(a) are found in section 59 EEZ Act (marine consent authority’s consideration of application), section 60 (matters to be considered in deciding extent of adverse effects on existing interests), and the information principles in section 61.

79. For completeness, it is noted that the Supreme Court majority held that s 10(3) does not affect the conclusion that s 10(1) has substantive or operative force:[61]

> Section 10(3) merely makes it clear that the information principles and the specific decision-making criteria in the EEZ Act must be considered and applied in “order to achieve the purpose” of the Act, meaning that any assessment must be done in light of both of the purposes in s 10(1) in cases where s 10(1)(b) applies.

Definition of “environment”

80. The term “environment” is used but not defined under the FTAA. Section 4(2) of the FTAA provides that terms used and not defined in the FTAA have the meanings given in the RMA if they are defined in that Act. The RMA definition of “environment” is:

> **environment** includes—
> (a) ecosystems and their constituent parts, including people and communities; and
> (b) all natural and physical resources; and
> (c) amenity values; and
> (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters

81. Under the EEZ Act “environment” is narrowly defined, focussed exclusively on the natural environment:

---

[59] *Elderslie Park Ltd v Timaru District Council* [1995] ELHNZ 41
[60] *Elderslie Park Ltd v Timaru District Council* [1995] ELHNZ 41
[61] *TTR* at [247] per Glazebrook J, [292] per Williams J, [304] per Winkelmann CJ

environment means the natural environment, including ecosystems and their constituent parts and all natural resources of-

(a) New Zealand:
(b) the exclusive economic zone:
(c) the continental shelf:
(d) the waters beyond the exclusive economic zone and above and beyond the continental shelf.

Section 11 – International obligations

82. Section 11 provides:

> **11 International obligations**
> This Act continues or enables the implementation of New Zealand's obligations under various international conventions relating to the marine environment, including—
> (a) the United Nations Convention on the Law of the Sea 1982:
> (b) the Convention on Biological Diversity 1992:
> (c) the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL):
> (d) the Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter, 1972 (the London Convention).

83. UNCLOS places obligations on signatory States (including New Zealand) relating to protection and preservation of the marine environment. There is a general obligation in Art 192 "to protect and preserve the marine environment". Under Art 194, States have obligations to prevent, reduce and control pollution of the marine environment. Under Art 194(1), States are required to take:

> … all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.

84. Art 194(3) provides that the measures taken need to deal with all sources of pollution of the marine environment. The measures are to include, amongst other things, "those designed to minimize to the fullest possible extent" pollution from various sources, including pollution from activities such as seabed mining.

85. Art 208(1) provides for coastal states to "adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with sea-bed activities subject to their jurisdiction". Under Art 208(3), national legislation and regulations in this respect are to be "no less effective" than international rules.

86. Considering those provisions of UNCLOS in *Trans-Tasman Resources,* the Supreme Court said:[62]

> The case law and commentary on arts 192—194 of the LOSC suggest that what is envisaged is a balance between environmental protection and preservation (art 192) and the economic development of resources (art 193), **but that the balance is tilted towards environmental protection. That environmental protection has priority over economic development is apparent in the wording of art 193 which provides that states can exploit resources "in accordance with" their duty to protect and preserve the environment.**
> (our emphasis)

87. The UNCLOS provisions do not easily lend themselves to a weighing exercise as prescribed by the FTAA.

88. The EEZ Act obviously differs from the FTAA in that it contains environmental bottom-lines – whereas the FTAA treats these bottom-lines as considerations under Clause 6 of Schedule 10. We submit this still requires decision-makers to place significant weight on the values of the natural environment and their protection under the FTAA. The narrowed definition of environment (focusing on the natural environment), the environmental bottom-lines, the information principles, and requirement to enable the implementation of New Zealand's obligations under UNCLOS all indicate that the criteria listed in (b)-(d) of clause 6 of the Schedule 10 must still weigh heavily in the Expert Panel's decision-making.

Clause 6(1)(c) – any relevant policy statements issued under the EEZ Act

89. Section 6(1)(c) does not materially influence the assessment as there are no applicable policies currently in force.

Clause 6(1)(d) - sections 59, 60, 61(1)(b) and (c) and (2) to (5), 62(1A) and (2), 63, and 64 to 67 of the EEZ Act

Section 59: decision-making criteria

90. When considering an application for a marine consent and submissions on an application, specified decision-making criteria are set out in s 59. The focus of Forest & Bird's comments are the following factors in section 59(2):

> **59 Marine consent authority's consideration of application**
> (1) This section and sections 60 and 61 apply when a marine consent authority is considering an application for a marine consent and submissions on the application.
> (2) If the application relates to a section 20 activity (other than an activity referred to in section 20(2)(ba)), a marine consent authority must take into account—

[62] *TTR* at [93]

(a) any effects on the environment or existing interests of allowing the activity, including—
    (i) cumulative effects; and
    (ii) effects that may occur in New Zealand or in the waters above or beyond the continental shelf beyond the outer limits of the exclusive economic zone; and
…
(d) the importance of protecting the biological diversity and integrity of marine species, ecosystems, and processes; and
(e) the importance of protecting rare and vulnerable ecosystems and the habitats of threatened species; and
(f) The economic benefit to New Zealand of allowing the application; and
(g) the efficient use and development of natural resources; and
(h) the nature and effect of other marine management regimes; and
(i) best practice in relation to an industry or activity; and
(j) the extent to which imposing conditions under section 63 might avoid, remedy, or mitigate the adverse effects of the activity; and

91. Section 59(2)(h) requires that the marine consent authority take into account the nature and effect of other marine management regimes (or "MMRs").

92. Marine management regimes are defined to include the regulations, rules, policies, and statutory powers that apply within the territorial sea, exclusive economic zone, or continental shelf.[63] Section 7(2) of the EEZ Act provides a non-exhaustive list of 15 such regimes, including the Crown Minerals Act, the Fisheries Act 1996, the RMA, the Marine and Coastal Area (Takutai Moana) Act (MACA), and the Wildlife Act 1953.

93. The key marine management regime is the New Zealand Coastal Policy Statement (NZCPS), which is promulgated under the RMA and applies in the coastal marine area (CMA).[64] The NZCPS contains bottom lines with respect to the protection of indigenous biodiversity (Policy 11), natural character (Policy 13) and outstanding natural landscapes (Policy 15).

94. The Supreme Court held that the correct approach to s 59(2)(h) required identification and consideration of these bottom lines. Young and France JJ found:

> [187] Accordingly, we agree with the Court of Appeal that the difference in approach between the DMC majority and the minority on this aspect was not solely one of weight. Rather, there was an error of law in "not assessing whether the proposal would produce

---

[63] Section 7, EEZ Act

[64] See s 2 RMA: *"**coastal marine area** means the foreshore, seabed, and coastal water, and the air space above the water— (a) of which the seaward boundary is the outer limits of the territorial sea: (b) of which the landward boundary is the line of mean high water springs, except that where that line crosses a river, the landward boundary at that point shall be whichever is the lesser of— (i) 1 kilometre upstream from the mouth of the river; or (ii) the point upstream that is calculated by multiplying the width of the river mouth by 5"*

outcomes inconsistent with the objectives of the RMA and NZCPS within the CMA". In particular, the DMC majority "did not identify relevant environmental bottom lines under the NZCPS and did not consider whether the effects of the TTR proposal would be inconsistent with those bottom lines".

95. Justice Glazebrook agreed that the NZCPS was not directly applicable but that the DMC nevertheless needed to take into account NZCPS environmental bottom lines. Justice Glazebrook did not consider that the environmental bottom line can be outweighed by other s 59 factors.[65] Winkelmann CJ and William JJ agreed with Glazebrook on this point.[66]

Section 60: Matters to be considered in deciding extent of adverse effects on existing interests

96. Section 60 of the EEZ Act sets out the matters to be considered in deciding the extent of adverse effects on existing interests.

97. Section 60 was not extensively scrutinised by the Supreme Court in *TTR,* and the impact of existing interests is not a main area of focus for Forest & Bird.

Section 61(1)(b) and (c) and (2) to (5): Information principles

98. The relevant parts of section 61 of the EEZ Act referred to under the FTAA are highlighted as follows:

61 Information principles

(1) When considering an application for a marine consent, a marine consent authority must—

(a) make full use of its powers to request information from the applicant, obtain advice, and commission a review or a report; and

(b) base decisions on the best available information; and

(c) take into account any uncertainty or inadequacy in the information available.

(2) If, in relation to making a decision under this Act, the information available is uncertain or inadequate, the marine consent authority must favour caution and environmental protection.

(3) If favouring caution and environmental protection means that an activity is likely to be refused, the marine consent authority must first consider whether taking an adaptive management approach would allow the activity to be undertaken.

(4) Subsection (3) does not—

(a) apply to an application for—

(i) a marine dumping consent; or

(ii) a marine discharge consent; or

(iii) a marine consent in relation to an activity referred to in section 20(2)(ba); or

(b) limit section 63 or 64.

(5) In this section, best available information means the best information that, in the particular circumstances, is available without unreasonable cost, effort, or time.

---

[65] *TTR* at [280]

[66] *TTR* at [298] (Williams J) and [331] (Winkelmann CJ)

99. Thus, it is only 61(1)(a) that is not applied for the purposes of a FTAA assessment. This may indicate an intention to yield to the FTAA's own processes for conducting a hearing[67] or requesting further information or comments.[68]

100. The highlighted provisions contain directions as to weight in decision-making. Section 61(2) of the EEZ Act requires caution and environmental protection to be "favoured", rather than weighed, in the Panel's decision-making.

101. When examining the 2016 application considered by the DMC, the Supreme Court in *TTR* unanimously found the DMC erred by not complying with the requirement to favour caution and environmental protection – illustrated in the conditions imposed regarding effects on marine mammals and seabirds and effects caused by the sediment plume.[69] France and Young JJ found that exercising caution and environmental protection required the DMC to be confident that conditions would avoid, remedy or mitigate the harm:[70]

> [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. To take just one example, for those dolphin species which are critically endangered, a very small change in population could have a disastrous effect. But conditions 9 and 10 do not respond to or reflect this because the population level that is problematic is not defined. The end result is that the DMC simply could not be satisfied that the harm could be remedied, mitigated or avoided.

102. Glazebrook J concurred with France and Young JJ that the DMC did not favour caution or environmental protection, observing an "almost total lack of information in this case on seabirds and marine mammals and the similar issues with the sediment plume and suspended sediment levels."[71] Glazebrook J further found:[72]

> [275] This information deficit could not legitimately be compensated for by conditions designed to collect the very information that would have been required before any conclusion at all could be drawn as to the possible effects, any possible material harm and any effect of any possible conditions. No conclusion was therefore possible on whether the bottom line could be met and a consent could not legitimately be granted.

---

[67] Sections 57-58 FTAA
[68] Sections 67-70 FTAA
[69] *TTR* at [11]
[70] *TTR* at [129]
[71] *TTR* at [274], see also [294] and [299] per Williams J and [328] per Winkelmann CJ
[72] *TTR* at [275]

103. The Supreme Court majority observed that deferring issues to management plans where there was a lack of sufficient information deprived the public of their participation rights, since they would not have the ability to participate in the development of these management plans as they did at the public hearing of the consent application.[73]

104. The requirement to favour caution and environmental protection is also tied to the requirement in section 61(1)(b) of the EEZ Act to "base decisions on the best available information." Where the best available information is unavailable, that will increase uncertainty and engage the need to favour caution and environmental protection.[74]

105. Forest & Bird considers that favouring caution and environmental protection means that the Panel must be satisfied that it can properly assess environmental effects and have confidence in both the level of effects and that the conditions imposed will ensure that material harm is avoided.

Section 62(1A) and (2): Decisions on applications for marine consents

106. The relevant parts of section 62 of the EEZ Act which clause 6, Sch 10 FTAA requires be "taken into account" are highlighted as follows:

> (1) After complying with sections 59 to 61, a marine consent authority may—
> (a) grant an application for a marine consent, in whole or in part, and issue a consent; or
> (b) refuse the application.
> **(1A) However, the marine consent authority must refuse an application for a marine dumping consent or an application relating to an activity referred to in section 20(2)(ba) if—**
> **(a) the marine consent authority considers that the waste, other matter, or pipeline may be reused, recycled, or treated without—**
> **(i) more than minor adverse effects on human health or the environment; or**
> **(ii) imposing costs on the applicant that are unreasonable in the circumstances; or**
> **(b) the waste, other matter, or pipeline is identified in such a way that it is not possible to assess the potential effects of dumping or abandoning it on human health or the environment; or**
> **(c) the marine consent authority considers that dumping the waste or other matter or abandoning the pipeline is not the best approach to its disposal in the circumstances.**
> **(2) To avoid doubt, the marine consent authority may refuse an application for a consent if it considers that it does not have adequate information to determine the application.**
> (3) If the marine consent authority grants the application, it may issue the consent subject to conditions under section 63.

[73] *TTR* at [277] and [278] per Glazebrook J, at [294] per Williams J, at [329] per Winkelmann CJ
[74] *TTR* at [137] per Young and France JJ

107. Notably, s 62(2), which provides ability to refuse an application if there is not adequate information, remains a critical factor for the Panel to "take into account."

108. Under Section 81(2)(f) of the FTAA, panels can only decline approval in accordance with section 85, which does not include a provision about inadequate information. However, it is unusual that section 62(2) has not been emasculated in the same way that section 62(1A) has been via clause 6(2) of Schedule 10 of the FTAA.[75] At the very least, this indicates that section 62(2) will require close consideration and will ultimately carry significant weight.

Sections 63, and 64 to 67 of the EEZ Act: Conditions

109. Under section 63 of the EEZ Act the Panel can impose "any condition that it considers appropriate to deal with adverse effects of the activity authorised by the consent on the environment or existing interests."[76] Conditions can include requirements for bonds, insurance, monitoring, and observers.[77]

110. When setting conditions the Panel:

  a. must not impose a condition that would be inconsistent with the EEZ Act[78], and

  b. may not impose a condition to deal with an effect if the condition would conflict with a measure required in relation to the activity by another marine management regime or the Health and Safety at Work Act 2015.[79]

111. Section 63 is a focal point of Forest & Bird's comments and is addressed in more detail below. For completeness, it is noted that section 64 of the EEZ Act addresses the use of adaptive management. Section 64 does not apply to the application at hand as an adaptive management approach is not

[75] Clause 6(2), Sch 10 of the FTAA states: *"For the purposes of subclause (1)(d), the panel must take into account that section 62(1A) of the EEZ Act would normally require an application to be declined, but must not treat that provision as requiring the panel to decline the approval the panel is considering"*
[76] Section 63(1) EEZ Act
[77] Section 63(2) EEZ Act
[78] Section 63(3) EEZ Act
[79] Section 63(4) EEZ Act

permitted in the context of a marine discharge consent.[80] Section 65 deals with bonds and s 66 with monitoring conditions.

Conditions of consent

Clause 7 of Schedule 10 - conditions

112. Clause 7 of Schedule 10 applies sections 63-67 of the EEZ Act "with any necessary modification as if the references to a marine consent authority in those sections were references to the panel." Clause 7 treats sections 63-67 as sections to be applied by the Panel, rather than "taken into account" or weighed.

113. This EEZ Act cross-reference indicates that case law on condition-setting under the EEZ Act is also likely to be relevant.

114. *TTR* has also laid down key principles as to the formulation of conditions. The Supreme Court majority held that the applicant could not resort to post-decision information-gathering and monitoring to fill critical gaps in the information available about the likely environmental effects; to do so would deprive the public with the ability to engage with fundamental aspects of the application – including whether the conditions contained in management plans would meet the risk of material harm caused by the discharges:[81]

> [277] In my view, there is also force in the Royal Forest and Bird Protection Society of New Zealand Inc's submissions about conditions in this case meaning there was a deprivation of participation rights, as the Court of Appeal found. Participation is only meaningful on the basis of sufficient information, including as the possible effects of the conditions. That information was in important respects entirely lacking and would only become available once the pre-commencement monitoring had occurred and the opportunity for public input had passed.

115. Glazebrook J added that:[82]

> [282] In this case the real issue was that there was totally inadequate baseline information provided by TTR in a number of respects and therefore, as indicated above, the application should have been declined. 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.

116. Relatedly the Supreme Court in *TTR* considered language in conditions such as "There shall be no adverse effects at a population level of [various

[80] Section 64(1AA) EEZ Act
[81] *TTR* at [277] per Glazebrook J; [295] per Wiliams J; at [329] per Winkelmann CJ
[82] *TTR* at [282] per Glazebrook J

threatened] seabird species that utilised the South Taranaki Bight" is vague and problematic and does not meet the requirement to favour caution and environmental protection.[83]

117. For completeness, section 83 of the FTAA sets an additional requirement on the Panel when setting conditions:

> When exercising a discretion to set a condition under this Act, the panel must not set a condition that is more onerous than necessary to address the reason for which it is set in accordance with the provision of this Act that confers the discretion

118. The ordinary meaning of "onerous" is "difficult to carry out".[84] It will require a panel to check that proposed conditions are not more "difficult to carry out" than is necessary to address the reason for the condition, and in some circumstances it may have a substantive impact, for example where there are two equally effective alternative methods of controlling an effect proposed by participants and one is more onerous than the other.

119. This does not alter or detract from the obligations set out in section 63 above. A condition that meets the obligations under s 63 EEZ Act can be said to be "necessary to address the reason for which it is set in accordance with the provision of this Act that confers the discretion" per s 83 of the FTAA. Clause 7 of Schedule 10 effectively enables decisions on conditions imposed under the FTAA to work together with other statutes and not conflict.

Power to decline consent

120. The circumstances the Panel may decline an application are constrained under section 85.

121. There are specific circumstances in which the Panel "must" decline an application.[85] Forest & Bird's assessment has not identified any reasons why the application "must" be declined as per s85(1) of the FTAA.

122. Section 85(3) provides that the Panel "may" decline an approval if, in complying with section 81(2), it forms the view that:[86]

> (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—

[83] *TTR* at [205]
[84] Collins New Zealand Dictionary, 2017 Harper Collins.
[85] Section 85(1) and (2) FTAA
[86] Section 85(3) FTAA

(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.

123. Thus, a finding that an application does not avoid material harm under cl 6 of Sch 10 may not necessarily be fatal to an application on its own. The Maitahi Panel observed the s 85(3) discretion as "circumscribed".[87]

124. "Impacts" is not limited to adverse effects and includes "any matter considered by the panel in complying with section 81(2) that weighs against granting the approval."[88] The term "impacts" is broad and could encompass matters such as material harm caused by discharge or matters arising from marine management regimes under section 59 EEZ Act.

125. Section 85(4) states that a panel may not form a view that an adverse impact meets the threshold in subsection (3)(b) solely on the basis that the impact is inconsistent with or contrary to a provision of a specified Act or any other document.

126. The provision does not prohibit consideration of inconsistency or contrariness with a provision of the EEZ Act or other document such as a marine mammal regime – it only prevents reliance on inconsistency alone as sufficient grounds for decline. The threshold for decline is not met where inconsistency is the only factor supporting a decline decision. However, it could be met where there is inconsistency with a provision of the EEZ Act, coupled with one or more adverse impacts (environmental, social, or economic) – both factors legitimately may contribute to a decision to decline.

127. Section 85 has been described as the "proportionality test."[89] The assessment was described by the Expert Panel that considered the Maitahi Village application as "[not] formulaic or mathematical… Rather, because the impacts are not always such as to allow precise quantification (particularly when taking into account conditions), the process has been treated as inherently evaluative."[90]

128. The statutory discretion to decline must be exercised in accordance with the statutory purpose. The statutory purpose of "facilitating" (meaning "to make

[87] Maitahi decision at [93]
[88] Section 85(5) FTAA
[89] Maitahi decision at [101]
[90] Maitahi decision at [101]

easier the progress of"[91]) developments with significant national or regional benefits is implemented by the expedited process and enabling consenting framework provided by the FTAA and does not indicate that all decisions will necessarily result in an approval. If that were not correct, the FTAA could have taken an approach that guaranteed approval, subject only to an assessment of what conditions should apply.

129. Speaking to the Bill in committee, the provision (previously numbered cl 24WD) was descried as "a very clear decline clause" by Minister Bishop, which demonstrates the intention was not "development at all costs":[92]

> … the various pieces of underlying legislation are in the schedules and all of the environmental considerations as part of those statutes are part of the bill. The member says, "Is the Government's position development at all costs?" No it isn't. And I point him to clause 24WD, which is "When panel must or may decline approvals", which is the panel must decline an approval if the panel forms the view that there are one or more adverse impacts in relation to the approval sought. And this is the key issue: those adverse impacts are sufficiently significant to be out of proportion for the project's regional or national benefits that the panel has considered under section 24W(3)(a) after taking into account conditions, etc. So there's a very clear decline clause.

130. Returning to the purpose indicated by the Legislative Statement, it is "to ensure key infrastructure and other development projects with significant benefits for communities are not declined where the benefit of approving the project outweighs any issue identified".[93] Where the benefit of approving is outweighed by issues identified, that statutory purpose is implemented by declining the approval.

ASSESSMENT OF THE APPLICATION

131. This part assesses the application against the matters in Clause 6(1) of Schedule 10 including conditions, and the circumstances when consent can be declined under section 85(3).

Assessment under Clause 6(1) of Schedule 10

132. The assessment under Clause 6(1) of Schedule 10 of the FTAA should ideally commence with addressing each element in Clause 6(1)(b)-(d) first – to establish a baseline understanding of potential harm – before assessing the application against the purpose of the FTAA per clause 6(1)(a).

Key issues

---

[91] Collins New Zealand Dictionary, Harper Collins 2017

[92] Fast-track Approvals Bill – In Committee – Part 1 10 December 2024

[93] Legislative Statement, Paragraph 17

133. Key issues include the effects of the plume, which the DMC found to cause significant and major adverse effects at important sites. Further concerns are the effects on seabirds and marine mammals. The lack of information on the species present and the likely impacts leads to a reliance on conditions that are vague, unenforceable, or contingent on future monitoring and adaptive management. Such conditions may fail to provide the necessary certainty required under the EEZ Act and FTAA, particularly in the context of a marine discharge consent.

134. There is also the claimed benefit to New Zealand of the proposed activity, including economic development and employment opportunities. This is an issue that is critical under s 85(3) of the FTAA but is also relevant under Clause 6(1)(d) of Schedule 10.

Clause 6(1)(b) – Sections 10 of the EEZ Act

The sediment plume

135. The plume consists of fine sediment particles discharged back into the water column after offshore processing. The effects of the plume include reducing primary production, smothering the seabed, and disrupting marine mammals and seabirds. The discharge from the Integrated Mining Vessel (IMV) is the dominant source of fine sediment. The proportion of fine sediments in the discharge is critical because, if the proportion of fine sediment exceeds the modelled 3.4%, suspended sediment concentrations (SSC) could increase significantly, potentially doubling or tripling.[94] This would have ecological effects that extend well beyond those predicted in the application.

136. While suspended, sediments reduce water clarity, limiting light availability for photosynthetic organisms such as phytoplankton and macroalgae. This suppresses primary productivity, which forms the base of the marine food web. The effects extend well beyond the immediate mining zone. Appendix 3 to the Supreme Court's decision in *TTR* sets out the DMC findings on the adverse effects at various features landward of the mining operation. The 2017 DMC found moderate to significant effects on primary production at sites including Project Reef, Pātea Shoals, The Crack, and Graham Bank.[95]

137. In the 2017 marine consent decision, the majority of the DMC acknowledged that the sediment plume generated by seabed mining would have adverse

[94] JWS 23 February 2024, paragraph 13
[95] *TTR* at Appendix 3, and DMC Decision at [64]–[73]

environmental effects, particularly on benthic habitats, water clarity, and light penetration.

138. The majority acknowledged that the plume was expected to reduce light availability in the water column and deposit fine sediment over surrounding areas, potentially affecting filter-feeding organisms and sessile invertebrates. The majority considered plume modelling.

139. The majority accepted that plume modelling was subject to uncertainty but concluded that the information provided was sufficient for decision-making under section 61 of the EEZ Act. However, subsequent expert conferencing confirms that the worst-case scenario modelling did not incorporate short-term variability in ultra-fine content, wave conditions, or discharge rates, factors that materially affect SSC outputs.[96]

140. The DMC imposed conditions intended to manage the effects of the plume, including operational limits, monitoring requirements, and adaptive management provisions. Taking these conditions into account, the majority found that the effects of the plume could be avoided, remedied, or mitigated, and did not make a positive finding of material harm under section 10(1)(b).

141. TTR's 2025 application is materially the same as the withdrawn 2016 proposal. It involves the same extraction method, operational footprint, and sediment discharge process, with no substantive changes to the modelling of environmental effects or the mitigation of key risks. The key NIWA reports that form part of the 2025 application are dated 2015.

142. The DMC findings on the effects of the plume are therefore highly relevant. The DMC considered largely the same evidence that has been used to support the fast-track application and reached the conclusion it did after a robust process, including a hearing where the witnesses were subject to cross-examination.

143. The defects from TTRL's 2016 application have not been remedied.

144. TTR are relying on the less environmentally stringent provisions of the FTAA to advance a proposal whose environmental effects are unchanged. In the absence of new evidence, the application continues to raise the same issues of material harm that previously failed to meet the statutory threshold under the EEZ Act.

---

[96] Paragraphs 19 and 20, Issue 1 sediment modelling 13 Feb 2017 as confirmed by paragraph 13, JWS 23 February 2024

145. The plume breaches the bottom line in s 10 of the EEZ Act. Under the FTAA, breaching a bottom line in the EEZ Act does not automatically require consent to be declined. Section 85(3) of the FTAA, not section 10 of the EEZ Act, sets out the circumstances under which consent can be declined.

146. While not determinative that the consent must be declined, the breach of the bottom line in s 10 weighs heavily against granting consent. The evidence demonstrates that the sediment plume will cause material harm to benthic ecosystems and marine biodiversity.

Clause 6(1)(d) – sections 59, 60, 61(1)(b) and (c) and (2) to (5), 62(1A) and (2), 63, and 64 to 67 of the EEZ Act

147. These submissions address the provisions referred in cl 6(1)(d) in order, except sections 60 and 64-67. Sections 60 and 64-67 are not assessed as they do not raise any issues of importance to Forest & Bird.

Section 59 of the EEZ Act

148. Section 59 of the EEZ Act outlines the matters that must be considered when determining an application for a marine consent. These comments assess the ecological or environmental considerations (s59(2)(a), (d) and (e)), economic considerations (s59(2)(f) and other marine management regimes (s59(2)(h)).

<u>Ecological and environmental considerations under section 59(2)(a), (d) and (e)</u>

149. Section 59(2) requires the decision-maker to consider a range of interrelated environmental matters when assessing a marine consent application. This includes the effects of the activity on the environment, with specific attention given to cumulative effects and effects that may occur in New Zealand or in the waters above or beyond the continental shelf beyond the outer limits of the exclusive economic zone.

150. Other considerations include the importance of protecting biological diversity and maintaining the integrity of marine ecosystems (s59(2(d)). This is relevant as the plume and noise generated by mining will impact biological diversity and marine ecosystems.

151. There is also the need to safeguard rare and vulnerable ecosystems and threatened species (s59(2)(e)). This is relevant because there are threatened species in the vicinity of the site, including pygmy blue whales (threatened - nationally vulnerable) and Māui dolphins (threatened - nationally critical).

152. The main effects relate to the plume and the impact of noise on marine mammals. The effects of the plume are discussed above and are significant.

153. Forest & Bird has provided evidence from Dr Clement, who raises serious concerns about the potential acoustic impacts of TTRLs proposed mining operations on vulnerable marine mammal species. The concern is that the continuous, low-frequency noise generated by the IMV and crawler could significantly elevate ambient sound levels across a wide area. The noise environment currently includes impacts from passing ships. The application will add a permanent noise source into the environment leading to cumulative effects.

154. This increase poses risks of behavioural disturbance, habitat displacement, and even auditory injury to species such as Māui and hector's dolphins and pygmy blue whales, which rely on acoustic cues for navigation, foraging, and communication.

155. Dr Clement is concerned about the absence of baseline soundscape data and robust cumulative noise modelling. Dr Clement advises that without these, the scale and severity of impacts cannot be reliably assessed, but that they may be significant.

<u>Economic Benefit to New Zealand</u>

156. Section 59(2)(f) requires the marine consent authority to consider the economic benefit to New Zealand of allowing the proposed activity. This includes both direct and indirect contributions to national welfare, such as employment, infrastructure investment, export earnings, and regional development.

157. Forest & Bird has called evidence from Professor Glenn Banks from Massey University. Professor Banks critically assesses the economic benefits claimed by TTRL, concluding that they are overstated, unreliable, and disproportionately low relative to the scale of extraction. Professor Banks also challenges the credibility of the NZIER Input/Output modelling, arguing it inflates employment and GDP impacts while ignoring volatility in commodity prices and exchange rates.[97]

158. There will be a limited benefit to New Zealand from the mining operation. The benefit to New Zealand from the capital expenditure is only around 5% of

[97] Evidence of Professor Banks, pp. 7–8

the projected NZ$1 billion capital investment would be spent within New Zealand, with the majority of equipment and services sourced offshore.[98]

159. In terms of the operational expenditure, at least 51% of export revenue is projected to flow offshore, with further erosion likely through tax concessions and profit shifting.[99]

160. Employment gains are modest, and many roles are expected to be filled by overseas specialists, limiting local benefit. The modelling excludes potential revenue from titanium dioxide, a product that could be worth up to NZ$1 billion annually. [100]

161. The economic benefit to New Zealand is neither significant nor dependable, and the NZIER modelling fails to reflect the risks of the project.

Marine Management Regimes (MMRs)

162. Section 59(2)(h) requires that the marine consent authority take into account the nature and effect of other marine management regimes.

163. Ms Sitarz assesses the TTR proposal against the MMRs under the Resource Management Act, including the New Zealand Coastal Policy Statement (NZCPS). Ms Sitarz concludes that these MMRs include environmental bottom lines, which are limits or thresholds that must not be breached, particularly in ecologically sensitive areas. [101]

164. Based on the expert evidence, Ms Sitarz concludes that the sediment plume generated by the mining activity poses a risk of material harm to benthic habitats, rocky reef systems, and associated marine life.[102]

165. Ms Sitarz refers to the NZCPS, as a MMR that sets bottom lines for indigenous biodiversity, including the avoidance of adverse effects on threatened species, natural character, and landscape. In her view, the proposal is inconsistent with these bottom lines, particularly in relation to marine mammals and seabirds.[103]

166. Ms Sitarz considers that the proposed conditions, particularly those relating to sediment discharge, are not sufficient to ensure that the activity would be

[98] Evidence of Professor Banks, at [23]-[27]
[99] Evidence of Professor Banks, at [40]–[54]
[100] Evidence of Professor Banks, at [59]
[101] Evidence of Natasha Sitarz at [229]
[102] Evidence of Natasha Sitarz at [25]
[103] Evidence of Natasha Sitarz at [238], [243]

halted before adverse effects occur. Ms Sitarz is concerned that the conditions may allow continued discharge even when sediment concentrations exceed levels known to cause ecological damage.[104]

167. Because the proposal does not give effect to the bottom lines within the MMRs,Ms Sitarz concludes that without enforceable conditions, the nature and effect of the MMRs weigh against granting consent.[105]

Section 61(1)(b) and (c) and (2) to (5) of the EEZ Act – Information Principles

168. Section 61(1)(c) and 61(2) of the EEZ Act require the decision-maker to take into account any uncertainty or inadequacy in the information available. Where such uncertainty exists, the decision-maker must favour caution and environmental protection.

169. The information principles are important in this case because, as Young and France JJ said in *Trans-Tasman Resources*, the "*information principles in the context of applications for a marine discharge may nonetheless tilt the balance in favour of environmental protection*."[106]

170. In this case, the information concerning the effects on seabirds and marine mammals is uncertain. As Justices Young and France said

> [125] 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.

171. A fundamental error in the 2017 DMC decision was its failure to apply the precautionary obligation under ss 61 and the now repealed 87E. The requirement to favour caution and environmental protection was clearly triggered yet not applied.[107]

172. The Expert Panel must assess whether the best available information remains uncertain or inadequate. If it does, then the statutory obligation to favour caution and environmental protection applies. A failure to meet this obligation renders the proposal inconsistent with s 61(2).

---

[104] Evidence of Natasha Sitarz at [388]
[105] Evidence of Natasha Sitarz at [264]
[106] *TTR* [2021] NZSC 127 at [117]
[107] Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board & Ors [2021] NZSC 127 at [103]–[138], [238], [272]–[279], [294]–[295] and [321]–[330]

173. While additional evidence has been presented since 2017, the uncertainties are unresolved. For example, seabird experts in the 2024 Joint Witness Statement (JWS) acknowledged new information but maintained their earlier view that the full extent of little penguin breeding in the region remains unknown. Experts also disagreed on the ecological significance of the South Taranaki Bight as a feeding area for little penguins and the extent of adverse effects on fairy prions.

174. Dr Cockrem confirms that uncertainty remains regarding seabird population numbers and the degree of impact. He considers that, given the existing gaps in information, it is not possible to conclude with confidence that the proposed conditions would avoid material harm.

175. The obligation to favour caution and environmental protection under s 61(2) of the EEZ Act has been clearly triggered in this case. The evidence demonstrates unresolved uncertainty and inadequacy in the information available regarding the effects on seabirds and marine mammals, including population dynamics, habitat use, and the potential for material harm. In such circumstances, the statutory direction is unequivocal: where uncertainty exists, the decision-maker must favour environmental protection.

176. On the basis of the precautionary framework, consent would be required to be declined under the EEZ Act. This conclusion is highly relevant but not determinative under the FTAA due to the operation of s 85(3), which requires an evaluation of the impacts and the regional and national benefits.

Section 63 of the EEZ Act – Conditions

177. There are a number of concerns about the conditions proposed by TTR. The conditions of particular concern relate to noise, marine mammals and seabirds, management plans and pre-commencement monitoring.

<u>Noise</u>

178. Proposed Condition 12 provides that the total noise output from the crawler and IMV is not more than 177dB:

> 12. The Consent Holder must design and construct the crawler and IMV to achieve, at full production, a total combined noise source level (measured in water), of not more than 177 dB re 1µPa RMS linear at one (1) metre.

179. The issue of noise from the crawler and IMV was the subject of considerable discussion and evidence related to the 2016 application. This was due to concerns about the effect that this would have on marine mammals.

180. As part of its case for the 2016 application, Forest & Bird called expert evidence from Anton van Helden, a marine mammal specialist, who raised concerns about the potential behavioural and physiological impacts of underwater noise on cetaceans, including species listed as threatened under the New Zealand Threat Classification System. In response to this and other acoustic evidence, including that of Mr Humphreson, TTRL revised its proposed threshold downward to 171 dB. The DMC recorded that TTR had proferred a limit of 171dB by the end of the hearing:

> 495. Much of the hearing evidence and discussion around the potential for noise to affect marine mammals centred on TTRL's proposed Condition 11. Later in the hearing, the applicant proffered new conditions 12A, 12B, 12BB, 12BC and 12C to supplement Condition 11. The conditions we have imposed renumber those conditions as 12 to 17 (counting the splitting of one condition). They are:
>
> - Condition 12 (previously 12A) limits the source noise level to 171 dB (IMV and crawler operating at full production).

181. The 171 dB limit was based on the evidence of TTR's own witness, Mr Humpreson, which the DMC accepted.

> 533. We accept the model used and the general approach adopted by Mr Humpheson. That is, 'back calculation' from the limits set by Condition 11 establishes the maximum sound level allowed to be produced at source. Mr Humpheson has told us that the level is 171 dB. Based on his experience of naval architecture and designing for specific acoustic outcomes in marine environments, he believes an engineering solution to keep noise within that limit is possible, while also allowing for some engineering 'headroom'. He told us that "I'm reasonably happy within a plus or minus 2 decibels that the noise levels are in the right order."

182. No explanation has been given for this change.

183. Dr Clement's evidence raises serious concerns about TTR's ability to manage underwater noise effects from its proposed mining operations. Predicted sound levels are based only on the Integrated Mining Vessel and seabed crawler, without accounting for other vessels or operational variability. The absence of baseline ambient noise data and reliance on a single numeric limit (Condition 11) means frequent exceedances are likely, exposing marine mammals to behavioural disturbance, auditory stress, or injury. The proposed conditions do not adequately address these risks, particularly given the continuous nature of the mining activity and the lack of mitigation detail.

184. TTR has also failed to assess cumulative noise effects in an area already impacted by shipping, fishing, and oil and gas activity. Unlike transient vessel noise, the mining operation would introduce a stationary, long-term noise source that alters the ambient soundscape over time. Even small increases in decibel levels can significantly affect marine mammals and broader

ecosystems. Without baseline acoustic data, it is not possible to model how the Proposal's noise will interact with existing conditions or vary across different environmental scenarios. Dr Clement concludes that the lack of cumulative assessment and baseline monitoring undermines the reliability of TTRL's impact predictions and risks chronic noise pollution in the STB.

Pre-commencement monitoring

185. Proposed conditions 47-51 provide for pre-commencement monitoring. These conditions stipulate that, before any seabed extraction commences, TTR must conduct at least two years of comprehensive environmental monitoring under a certified Pre-commencement Environmental Monitoring Plan (PCEMP). This monitoring must cover a wide range of parameters, including sediment concentrations and quality, marine biology, water chemistry, underwater noise, and effects on marine mammals, seabirds, and fisheries. The purpose is to establish baseline environmental conditions and validate sediment plume modelling.

186. The PCEMP must be prepared by qualified experts, peer reviewed, and assessed by a Technical Review Group before being certified by the EPA. Its purpose is to ensure that monitoring is scientifically robust, spatially representative, and sufficient to inform compliance, adaptive management, and the appropriateness of sediment discharge limits.

187. The PCEMP conditions are inconsistent with the Supreme Court's decision in *TTR*.[108] The Court held that section 10(1)(b) imposes a substantive environmental bottom line. If material harm from marine discharge cannot be avoided through regulation, the activity must be prohibited. The Supreme Court rejected the use of adaptive management to address evidentiary gaps, stating that the EPA must be satisfied at the time of decision-making, not after further data is collected, that adverse effects can be adequately avoided, remedied, or mitigated.

188. The majority in *TTR* found that attempts to rectify information deficits by imposing conditions requiring pre-commencement monitoring, which would later inform the creation of management plans, inappropriately deprived the public of the right to be heard on a fundamental aspect of the application.

189. The PCEMP framework does precisely what the Supreme Court said it should not. It defers validation of sediment plume modelling, thresholds, and ecological baselines to a post-consent process, excluding public scrutiny from

[108] [2021] NZSC 127

decisions that are critical to the grant of consent. This approach undermines the requirement under the EEZ Act to favour caution.

Seabirds and Marine Mammals

190. Proposed conditions 9-10 relate to seabirds and marine mammals. Both require that adverse effects on threatened species be avoided entirely, and that effects on other species be mitigated or avoided where practicable. However, there are additional operational safeguards, such as mandatory observers, vessel speed restrictions near cetaceans, video monitoring, and reporting protocols for strikes or sightings, reflecting the heightened sensitivity and mobility of marine mammals.

191. Dr Clement concludes that TTR's proposed conditions relating to under [redacted] noise and marine mammals are inadequate. While Conditions 10–18, 3 [redacted] and 88 include monitoring requirements, they lack clear responses or [redacted] mitigation actions if noise thresholds are exceeded. The primary noise [redacted] sources, IMV, crawler, and support vessels, offer limited scope for reduc [redacted] once operations begin, and even with emerging quieting technologies, [redacted] exceedances of Condition 11 are likely. As the vessels will be purpose-b [redacted] and continuously operating, meaningful noise reduction would require [redacted] restricting mining activity itself. In Dr Clement's view, Condition 11 is un [redacted] to be achievable under the current proposal

Management Plans

192. The seabird and marine mammal management plan conditions propose [redacted] TTR are inadequate and fail to meet the statutory threshold set out in s [redacted] 10 of the EEZ Act. They do not reflect the scale, duration, or uncertainty [redacted] the effects, nor are they enforceable.

193. The draft Seabird Effects Mitigation and Management Plan and the draft Marine Mammal Management Plan are now dated 2025. However, the changes from the 2016 versions are limited. The primary updates reflect amendments to Conditions 9 and 10, the most significant of which is the removal of population level effects.

194. These revisions do not constitute substantive improvements in how effects on seabirds and marine mammals will be managed. The same criticisms that were made with respect to the earlier management plans remain valid. The proposed management plans y do not provide greater clarity, enforceability, or ecological responsiveness. The plans remain vague in their commitments and lack the specificity required to ensure effective mitigation.

195. Other management plans relevant to marine mammals, including those embedded within the draft Baseline Environmental Monitoring Plan and the draft Environmental Monitoring and Management Plan, do not appear to have been updated. Both documents remain dated 2016 and do not reflect current scientific understanding, expert recommendations, or the scale and duration of the proposed activity. Their continued use undermines the credibility of the management framework and fails to meet the precautionary standard required under section 61 of the EEZ Act.

196. The reliance on outdated plans and minimal revisions to key conditions suggests that TTRL has not meaningfully addressed the ecological risks identified in the 2017 hearing or subsequent expert conferencing. The absence of enforceable thresholds, real-time monitoring protocols, and mandatory operational responses renders the management plans ineffective in avoiding, remedying, or mitigating adverse effects.

197. Specifically, the marine mammal conditions do not require baseline soundscape data, spatial exclusion zones, or seasonal restrictions to protect migratory corridors and breeding grounds. There is no commitment to real-time acoustic monitoring or shutdown protocols when marine mammals are present. Similarly, the seabird conditions omit targeted monitoring of population trends, foraging success, or breeding outcomes, and fail to link sediment plume effects to adaptive management triggers.

198. Monitoring needs to be tied to enforceable actions. The current conditions rely on post-consent monitoring and uncertain adaptive management frameworks without specifying thresholds, triggers, or consequences. The application fails to demonstrate that material harm can be avoided or mitigated.

Clause 6(1)(a) – Purpose of the FTAA

199. After the assessments have been made under Clause 6(1)(b) and (d), the purpose of the FTAA is then considered, which is to facilitate the delivery of development projects with regional and national benefits.

200. In this case, the purpose does not assist the application as there are no significant regional or national benefits.

201. Professor Banks examines whether there are regional or national benefits from the TTR seabed mining proposal and concludes that the NZIER modelling significantly overstates regional and national gains by relying on input/output

multipliers that do not reflect the realities of offshore capital flows and commodity price volatility.

202. Employment benefits are also limited, with many roles requiring specialised skills not available locally. Tax contributions are expected to be volatile and difficult to forecast, based on comparative examples from other extractive industries.

203. The mining does not demonstrate a significant economic benefit to New Zealand or Taranaki.

Conclusion about Clause 6(1)

204. Clause 6(1) of Schedule 10 of the FTAA does not support the grant of consent. The application is contrary to the EEZ Act, breaching the environmental bottom line established under section 10(1)(b) of the EEZ Act, which requires that material harm to the environment or existing interests be avoided, remedied, or mitigated.

205. The proposal is also contrary to several mandatory considerations for marine consent, including the protection of marine biodiversity and the requirement to favour caution.

206. The application does not demonstrate regional or national benefits, which are required to overcome the failure of the application to meet Clause 6(b) and (d) of Schedule 10. The economic benefits will be significantly less than claimed by TTR. To the contrary, they are inadequate to establish significant regional or national benefits. In the absence of such benefits, this factor does not assist in overcoming the breach of the environmental bottom lines set out in section 10 of the EEZ Act, which require that material harm be avoided, remedied, or mitigated.

ASSESSMENT UNDER S 85(3)

207. As noted above, section 85(3) of the FTAA provides that a panel may decline consent only where the adverse effects of the proposed activity outweigh its regional or national benefits. The assessment under s 85(3) requires a balancing exercise that takes into account the evidence of both environmental impact and regional or national benefits.

208. In this case, the adverse environmental effects are significant, while the claimed benefits are speculative and overstated, and not regionally or nationally significant.

209. The sediment plume generated by the proposed mining operation will cause major effects at The Crack, significant effects on the Patea Shoals, Project Reef, and Graham Bank.[109]

210. The plume is also expected to cause long-term degradation of benthic habitats, reduce primary productivity, and disrupt the foraging grounds of pygmy blue whales by reducing the abundance of their only source of food, krill. This genetically distinct population relies on the STB as its only known feeding and nursing habitat in New Zealand.

211. In addition, the continuous noise from the mining vessel and crawler poses serious risks of behavioural disturbance, habitat displacement, and physiological stress to marine mammals, including the threatened pygmy blue whales and the critically endangered Māui dolphins. These effects are cumulative with existing noise, long-lasting (20 years), and materially harmful.

212. By contrast, there are no regional and national benefits. The majority of capital and operational expenditure will flow offshore, and employment gains are modest. Projected economic returns are inflated by unreliable modelling. The benefits are not significant, and certainly not sufficient to outweigh the scale and severity of environmental harm.

213. Accordingly, under section 85(3), the legal threshold for declining consent is met. The adverse effects, particularly those relating to the sediment plume and noise, are significant. In the absence of demonstrable regional or national benefit, consent should be declined.

CONCLUSION

214. The South Taranaki Bight is recognised as an ecologically significant marine region, supporting a diverse array of habitats and species. It is home to at least 35 marine mammal species, including pygmy blue whales, which are now confirmed as a genetically distinct population reliant on the STB as their only known feeding and nursing ground in New Zealand. Critically endangered māui dolphins are also present. Key geomorphological features such as the Crack, the Traps, and Pātea Shoals are significant sites near the proposed mining location.

215. Under section 85(3) of the FTAA, consent can only be declined if the adverse effects of granting the approval would outweigh the project's regional or

[109] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board & Ors* [2021] NZSC 127 at Appendix 3

national benefits. The adverse impacts from the sediment plume are significant and enduring. The adverse effects of noise are difficult to determine given the absence of appropriate baseline acoustic data. These effects are not minor or temporary, and in several cases, such as the risk to pygmy blue whales and Māui dolphins, may be irreversible.

216. The economic evidence indicates that the proposal's regional and national benefits are modest, uncertain, and overstated. The modelling used by the applicant does not quantify net benefits, fails to account for sector volatility and offshore leakage, and does not demonstrate significance.

217. In the absence of credible evidence of significant regional or national benefit, the Panel cannot be satisfied that the benefits outweigh the adverse effects. On that basis, the statutory threshold for declining consent under section 85(3) is met, and the application should be declined.

Dated: 6 October 2025

[redacted]

Counsel for Royal Forest and Bird Protection Society of New Zealand Inc