

BEFORE THE EXPERT PANEL

IN THE MATTER of the Fast-track Approvals Act 2024 (FTAA)

AND

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

**LEGAL SUBMISSIONS ON BEHALF OF ENVIRONMENTAL DEFENCE SOCIETY
INCORPORATED (EDS)**

14 November 2025

Environmental Defence Society Inc



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MAY IT PLEASE THE PANEL

Introduction

1. These legal submissions are filed on behalf of Environmental Defence Society Incorporated (**EDS**) on the Taranaki VTM Project (**Project**) in accordance with paragraph [6] of the Notice of Hearing (**Notice**), dated 11 November 2025.¹ They respond to the legal issues identified in Appendix A of the Notice.
2. EDS welcomes the Panel's decision to hold a hearing on specific legal issues and the opportunity to submit. Counsel is also grateful to be able to appear online. Mr Enright will appear online until 11.30am, with Mr Commissaris appearing in person at the hearing. In response to paragraph 10 of the Notice, Counsel anticipates responding to the matters raised in these submissions, and any other matter the Panel considers relevant.
3. These submissions should be read alongside EDS's comments on the Project, dated 06 October 2025.²

Issues

Jurisdiction and statutory framework questions

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

4. EDS submits that factual findings of Decision-Making Committees (**DMC**) on previous applications by Trans-Tasman Resources Ltd (**TTR** or **Applicant**) should be treated as persuasive for the FTAA process, to the extent that the application remains materially unchanged. This particularly applies to the 2017 DMC process. However the Panel will need to treat the majority decision with some caution, in respect of any issues of law, or mixed issues of fact and law, given the subsequent appeals process.
5. Although the legal context in which the FTAA substantive application is being considered is different, the existing environment, and anticipated effects, from the project remain the same or substantially similar. Therefore, while the Panel must make its own factual findings in the context of the FTAA and the substantive application before it, the Panel may take guidance from earlier factual findings. This is particularly the case where aspects of the application remain (largely) unchanged and/or where no new evidence has been presented.

¹ Notice of Hearing on 26 November 2025, dated 11 November 2025

² Comments of the Environmental Defence Society Incorporated, dated 06 October 2025, available [here](#)

6. Where new evidence is available, or substantive changes have been made to the Project since its earlier iterations, the Panel should focus on the materiality of those changes and any new evidence.
7. EDS considers that such an approach is consistent with the procedural principles in s 10 FTAA, particularly the need for efficiency, consistency and timeliness.³

Is the Panel required to determine whether TTR's proposal requires approval under the Resource Management Act 1991 ("RMA")? If so, does TTR's proposal require approval under the RMA, and is s 5(1)(l) of the Fast-track Approvals Act 2024 ("FTAA") relevant?

8. This is an issue previously raised by EDS. Resource Management Act 1991 (**RMA**) consents are within scope of the FTAA.⁴ It is submitted that TTR will require one or more resource consents under s 12(1)(d) of the RMA, in circumstances where discharged sand migrates from the point of release in the exclusive economic zone onto the seabed or foreshore of the coastal marine area, and causes an adverse effect. For the reasons previously articulated (in relation to earlier iterations of the project), EDS submits that the proposal requires consent(s) under the RMA.⁵
9. The Applicant has not applied for RMA consents, and this is a fundamental oversight as it means the project will be unable to lawfully proceed absent a future process to address relevant RMA consents required. This is relevant to the question of net benefit (for a project unable lawfully to proceed, contingent on a future process reliant on discretionary assessment by a consent authority).
10. In strict jurisdiction terms, the Panel's jurisdiction is limited to the scope of the application before it.⁶ This is not a 'staging' issue.⁷ A decision-making Panel would not normally be required to assess whether additional consents are required, unless the grant of consent would be frustrated absent those consents. However, the Panel does not have jurisdiction to direct additional RMA consents are applied for.
11. On balance, EDS submits that the FTAA does not require the Panel to determine whether TTR's proposal requires approval under the RMA, nor is TTR required to seek all necessary approvals for the proposal under the FTAA. Rather, the Applicant bears the risk that the proposal will not be able to legally proceed if resource consents under the RMA are required that have not been sought and

³ FTAA, s 10

⁴ FTAA, s 42(4)

⁵ Comments of the Environmental Defence Society Incorporated, dated 06 October 2025, at [9], available [here](#); Submissions of counsel for Environmental Defence Society in response to memorandum of counsel for the Environmental Protection Authority dated 1 April 2014, dated 8 April 2014, available [here](#)

⁶ FTAA, s 81(1)

⁷ Such as s 81(5) FTAA

granted. But the Panel may, as a matter of discretion, have regard to the need for additional RMA consents as relevant to the question of immediacy of claimed net benefits. Given these are contingent on securing additional RMA consents, this means the benefits are not capable of being secured and this may affect their net value.

Benefits and economic assessment

Is the project's feasibility a relevant consideration?

12. The term 'feasibility' is not used in the FTAA. Nonetheless, EDS submits that the project's feasibility is a relevant consideration under ss 81 and 85 of the FTAA in context of:
 - a. Determining the likelihood of asserted benefits materialising;
 - b. Practicability of the project being implemented, and the consent holder being able to implement the consent conditions; and
 - c. Setting conditions including performance and compliance bonds.
13. EDS submits that the feasibility of a project is distinguishable from concepts like financial viability, which are not relevant considerations for the purposes of resource consent applications under the RMA.⁸
14. "Feasibility" (which concerns whether something can be done⁹) is wider than 'financial viability', which EDS submits is a narrower consideration that focuses on whether the project is financially worthwhile and profitable for the developer.
15. In its broader sense, whether the project can be practically implemented (i.e. its feasibility) is directly relevant to the Panel's consideration of whether the asserted benefits will materialise and determining their likely significance (in accordance with the FTAA), and whether the impacts have been appropriately identified and the likelihood that they can be managed in the manner claimed.
16. Such an approach is consistent with *Remediation (NZ) Ltd v Taranaki Regional Council*, where the Environment Court needed to be convinced "the whole project can work properly." The Court held that the onus is on the applicant to

⁸ *NZ Rail Ltd v Marlborough District Council* HC Wellington AP169/93, 4 November 1993, available [here](#)

⁹ "Feasibility" is defined in the Cambridge dictionary as "the possibility that something can be made, done, or achieved, or is reasonable"

provide “sufficient detail” to “assure [the Court] of the project feasibility in environmental terms.”¹⁰

How should “benefits” be interpreted under the FTAA when considering the extent of the project’s regional or national benefits and the purpose of the FTAA, including:

- (a) whether a gross benefit approach is required;*
- (b) whether disbenefits or other costs are relevant; and*
- (c) whether a net benefit or cost-benefit approach is required?*

17. The FTAA requires the Panel to consider the extent of the Project’s regional or national benefits,¹¹ and then determine whether any impacts of the Project are sufficiently significant to be out of proportion to those regional or national benefits.¹²

18. EDS submits that this process should be approached in two distinct steps:

- a. First, the *extent* of regional or national benefits is considered by discounting from any claimed benefit any comparable adverse impact or element of the counterfactual;

Then:

- b. By stepping back and considering whether the broader (not already discounted) impacts are sufficiently significant to be out of proportion to the extent of regional or national benefits assessed above.

19. The first step involves a determination of the net economic benefit, the net climate benefit, and the net of any other type of benefit claimed. This is consistent with the approach confirmed by the Court of Appeal and Supreme Court in relation to s 59(2)(f) of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (**EEZ Act**), whereby a determination as to whether there will be an economic benefit to New Zealand requires “material economic costs” to be taken into account.¹³

20. The second step is then required in accordance with s 85(3), whereby a more qualitative overall assessment is made as to the proportionality of the impacts compared to the benefits. This process requires a broader assessment of the adverse impacts and aspects of the counterfactual not already addressed when

¹⁰ *Remediation (NZ) Ltd v Taranaki Regional Council* [2024] NZEnvC 213, at [331], available [here](#) (subject to appeal, with decision pending). Also affirmed in *CJ Industries Ltd v Tasman District Council* [2025] NZEnvC 213 at [176], available [here](#) (also subject to appeal on unrelated issues, with decision pending)

¹¹ FTAA, s 81(4)

¹² FTAA, s 85(3)

¹³ *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, at [189], available [here](#)

determining the “extent” of each benefit above. Such impacts include intrinsic environmental and social impacts, and any other matter raised that weighs against granting the approval.¹⁴ This avoids the risk of double-counting of impacts.

21. In undertaking this second step, EDS submits that a net cost-benefit analysis (CBA) is required. Detailed reasons are provided from paragraphs [25]-[32] of EDS’s comments and are not repeated here.¹⁵ In summary, without a CBA, the significance of benefits and impacts cannot be comparatively assessed, nor can the extent of benefits that accrue within New Zealand be reliably assessed.
22. Section 85(3) requires a CBA because that section explicitly involves the comparison of wide-ranging and not-directly-related impacts with benefits. This may be contrasted with the EEZ Act (where economic benefit is one of 13 relevant factors listed by the Act).^{16 17} As noted by EDS previously, the question of methodology (for preparation of a CBA that measures net benefits) will be an evidential and evaluative issue, based on the expert evidence before the Panel.

Does the same approach apply when the Panel takes into account “the economic benefit to New Zealand of allowing the application” under s 59(2)(f) EEZ Act? If not, are two separate economic assessments needed?

23. The economic benefit to New Zealand is one such benefit that must be considered by the Panel. Like all asserted benefits, as described above, EDS submits that a ‘net’ approach is required that discounts the comparable negative economic impacts. This is consistent with the approach articulated above, and as confirmed by the Court of Appeal and Supreme Court. It is submitted that this approach does not require two separate economic assessments.

Climate change

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

24. Consistent with the approach described above, EDS submits that a net approach to climate effects is required.

¹⁴ FTAA, s 85(5)

¹⁵ Comments of the Environmental Defence Society Incorporated, dated 06 October 2025, available [here](#)

¹⁶ In *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, at [282], available [here](#), the Court of Appeal noted that a cost-benefit analysis “may well be an appropriate approach to adopt, in particular where economic benefit is a critical factor.”

¹⁷ *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, at [195], available [here](#)

Treaty, cultural and planning instruments

When considering national or regional planning instruments prepared under the RMA under s 9(2)(h) EEZ Act, to what extent, if any, should the Panel be guided by the Supreme Court's decision in Royal Forest & Bird Protection Society v New Zealand Transport Agency [2024] NZSC 26?

25. This is now the leading authority from the Supreme Court on interpretation of planning instruments in context of a resource consent proposal, and should be treated as highly persuasive. EDS otherwise adopts Royal Forest & Bird's submissions on this topic.

Existing interests and infrastructure

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

26. EDS does not comment on whether the potential for offshore wind energy is an "existing interest". However, EDS submits that the potential for offshore wind energy generation in the project area is relevant in terms of ss 5 and s 7(b) RMA regarding wider wellbeing, climate related impacts on future generations from renewable energy, and the efficient use and development of natural and physical resources, and in terms of the Panel's assessment of impacts under s 85(3). Foregoing offshore wind in preference of TTR's project represents a significant opportunity cost that is a relevant impact to be considered under s 85(3).
27. That opportunity cost arises in the form of foregone economic benefits, climate benefits, improved energy security, and alignment with Government policy on economic growth, climate and energy, which would all be associated with offshore wind generation activities.

Decision tests, inconsistency and discretion

To what extent, if any, is the decision of the Supreme Court in Trans-Tasman Resources v Taranaki-Whanganui Conservation Board [2021] NZSC 127 binding on the Panel or of highly persuasive significance?

28. EDS submits that the Supreme Court's decision is binding on the Panel under the FTAA in respect of the way that the Panel should interpret and apply provisions of the EEZ Act, subject only to explicit direction to the contrary in the FTAA.

29. Alternatively, if treated as highly persuasive, then it should be applied as an authoritative statement from Aotearoa New Zealand's highest Court.

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

30. The Panel's discretionary ability to decline the Application is confined to s 85 of the FTAA. Breach of s 62 EEZ Act is an impact that is relevant to the s 85 assessment, because it is a relevant adverse impact that weighs against granting the approvals.¹⁸ Bearing in mind that the definition of 'impact' is wide-ranging and can include breach of directive policy or legislative instrument.¹⁹ Therefore, (non)compliance with s 62 should inform the decision on whether to decline approvals under s 85.
31. While not conferring discretion to decline approval *per se*, s81 prescribes jurisdictional parameters for the Panel. A proposal that does not meet the jurisdictional requirements of s 81(2) FTAA may be subject to correction for error of law.

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

32. EDS submits that the statutory purpose in s 3 FTAA is procedural not substantive. Delivery of projects is to be 'facilitated' – i.e. placed before the decision-making panel on an expedited basis. The purpose does not of itself provide a direction as to the substantive outcome. This is also reflected in the detailed machinery provisions of the Act, which ensure speedy consideration (but not necessarily approval) of referred and listed projects. The reference to "facilitate" in s 22(1)(b)(i) reflects a procedural focus; a default, or pre-determined outcome (of approval) is not anticipated.
33. As with the RMA in Pt 6 (and the equivalent provisions in the EEZ Act), the substantive decision-making criteria are in ss 81-85, and (in this case) Schedule 10. The ability to grant or decline approval is governed by ss 81-85 and not by a duty to facilitate the grant of approval.
34. Relevantly, the Panel is not obliged or required to grant approval in circumstances where a proposal does not meet the proportionality threshold in s 85(3) FTAA. Where adverse impacts are disproportionate to the net regional and national benefits, then EDS submits that approval must be declined (subject only to a residual discretion to approve).

¹⁸ FTAA, s 85(5)

¹⁹ Such as s 85(4) FTAA

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

35. EDS submits that inconsistency with a provision of the EEZ Act, or with a document that the Panel must take into account or consider in complying with s 81(2) FTAA, is a matter that weighs against granting the approvals (i.e. an adverse impact).²⁰
36. That inconsistency may, on its own or in combination with any other impact, be so significant that it is out of proportion to the regional or national benefits of the Project.
37. Although s 85(4) is intended to confirm that being inconsistent with, or contrary to, a single legislative or policy wording is not *per se* determinative, EDS submits that s 85(4) does not preclude substantial weight being applied to the individual instrument wording and influencing the s 85(3) FTAA determination, particularly where the language used is directive, such as the requirement to apply precaution where an assessment is incomplete and there are significant risks to high biodiversity values. Contrary to the position advanced by TTR,²¹ s 85(4) of the FTAA does not preclude the breach of the instrument's wording from tipping the s 85(3) proportionality balance.
38. It may be rare for a policy or statutory instrument to operate alone, rather than in tandem with evidential findings. For example, the relevant instrument may be 'effects-based', such as Policy 11 of the New Zealand Coastal Policy Statement 2010, and may be directive in combination with evidential findings on rare and threatened species, meaning that the project fails the proportionality threshold on the totality of the effect including breach of instrument.

What does "out of proportion" in s 85(3) mean and how should it be applied?

39. EDS's original comments discussed the different ways of approaching the 'out of proportion' assessment. In summary, EDS submits that proportionality requires a comparative case-by-case assessment, where:
 - a. Impacts that are 'greater than' or 'outweigh' the benefits will be 'out of proportion'; and
 - b. Impacts that, when deducted from the benefits, render the remaining net benefit not significant, will be out of proportion to the benefits. Such a

²⁰ FTAA, s 85(5)

²¹ Legal submissions on behalf of Trans-Tasman Resources Limited in response to comments received, dated 13 October 2025, at [71]-[79], available [here](#)

conclusion would be consistent with the purpose of the FTAA which, in EDS's submission, should be read as facilitating the delivery of infrastructure and development projects with significant regional or national *net* benefits.

40. EDS submits that the output of a CBA would support the Panel to assess whether any net benefit is significant, and therefore whether the impacts are proportionate. A positive CBA output will not always constitute a *significant* regional or national *net* benefit. EDS submits that, unless the *net* benefit is significant, the impacts should be considered out of proportion for the purposes of s 85(3) of the FTAA.
41. The Applicant, in reply legal submissions, argues that this would lead to 'double-counting'.²² EDS disagrees. As noted above, EDS supports a process where:
 - a. The extent of regional or national benefits is considered by discounting from any asserted benefit any comparable adverse impact or element of the counterfactual; then
 - b. The significance of other, broader impacts is comparatively assessed to determine whether those impacts (individually or together) are so significant to be out of proportion to the extent of regional or national benefits.
42. This avoids 'double-counting' because each impact is only assessed and weighed once.

Is there, in a substantive sense, any difference between an "impact" and an "environmental effect" under the FTAA? If so, what if any consequence(s) does that difference have for the Panel's decision on the application?


43. As a starting point, s 85(5) FTAA confirms that 'adverse impact' is to be given a wide meaning, subject to relevance and meeting threshold requirements in s 81(2) ("any matter"):

"In subsections (3) and (4), **adverse impact** means any matter considered by the panel in complying with [section 81\(2\)](#) that weighs against granting the approval."
44. Subject to relevant and probative evidence, "adverse impact" therefore includes any relevant matter considered by the Panel that weighs against the grant of approvals. 'Impact' as used in the FTAA, particularly s 85, is therefore a wider category than "effect" as defined by s 3 RMA.

²² Legal submissions on behalf of Trans-Tasman Resources Limited in response to comments received, dated 13 October 2025, at [111], available [here](#)

45. While 'impact' includes "effects" as a subset, it also includes a wider suite of both risks and consequences. It is plainly anticipated by s 85(4) that an impact may include a breach of a statutory or policy instrument, insufficiency of information or uncertainty, as well as actual and potential effects (or risk of effects) on the environment.

Dated this 14th day of November 2025



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