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

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SUBMISSIONS FOR THE ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED IN RESPONSE TO MINUTE 11 OF THE EXPERT PANEL

14 November 2025

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INTRODUCTION

1. These submissions address the list of questions developed by the Expert Panel in Appendix A of Minute 11 dated 4 November 2025.

Jurisdiction and statutory framework

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

2. The factual findings made by earlier Decision-Making Committees are relevant but not binding on the Expert Panel. The Expert Panel will need to reach its own views on the factual matters that are raised in the application.

3. The degree of relevance, and therefore weight, given to the earlier findings of earlier DMCs is a matter for the Panel to determine. The key factors in assessing relevance is the extent to which the application aligns with those previously considered and the extent of new information provided in support of and in opposition to the application. The more similar the applications, the greater weight the earlier decision should be given.

4. The current FTAA application is very similar to the application lodged in 2016. In addition, the DMC convened to consider the 2016 application had the benefit of holding a hearing which involved evidence from expert witnesses, who were the subject of cross examination. The factual findings that the DMC made on 3 August 2017 on the 2016 application are therefore highly relevant to the Expert Panel's assessment.

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

5. The Panel is not required to make a determination per se, but it may wish to make comment. Under section 90 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act), the decision to lodge a joint application for marine and resource consents lies with the applicant. Section 90 EEZ Act provides:

> **Application for consent for cross-boundary activity**
> A person who intends to undertake a cross-boundary activity **may—**
> (a) prepare a joint application for consent that complies with the requirements of—
> (i) this Act and any regulations in relation to the part of the activity that relates to the exclusive economic zone or the continental shelf; and
> (ii) the Resource Management Act 1991, and any regulations, national environmental standards, or regional or district plans made under that Act, in relation to the part of the activity that relates to New Zealand; or

(b) apply for a marine consent and a resource consent for a cross-boundary activity separately, whether concurrently or at different times.
(emphasis added)

6. "Cross-boundary activity" is defined as "an activity that is carried out partly in the exclusive economic zone or in or on the continental shelf and partly in New Zealand."[1]

7. Clause 3 of Schedule 10 to the FTAA retains the ability to lodge a joint marine and resource consent application:

3 Combination of applications for marine consent and approval described in section 42(4)(a)

(1) Subclause (2) applies if the substantive application includes related applications for a marine consent and an application for an approval described in section 42(4)(a) for a cross-boundary activity (within the meaning of section 88 of the EEZ Act).
(2) The impact assessment under the EEZ Act and the assessment of environmental effects under the Resource Management Act 1991 must be combined.

8. The application does not include related application. Clause 3 of Sch 10 of the FTAA means it is not necessary for the Expert Panel to determine whether consents are required under the RMA.

2.(b) 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?

9. As above, TTR's proposal requires approval under the RMA. Therefore, a separate approval under the RMA for necessary resource consents will be required. Section 5(1)(l) of the FTAA does not apply.

10. Where any portion of the sediment plume settles within the coastal marine area, the activity triggers the requirement for a resource consent pursuant to section 12(1)(d) of the RMA:

No person may, in the coastal marine area,—

...

(d) deposit in, on, or under any foreshore or seabed any substance in a manner that has or is likely to have an adverse effect on the foreshore or seabed; or

…

unless expressly allowed by a national environmental standard, a wastewater environmental performance standard, a stormwater environmental performance standard, an infrastructure design solution, a rule in a regional coastal plan as well as a rule in a proposed regional coastal plan for the same region (if there is one), or a resource consent.

[1] EEZ Act s88

11. It is anticipated that the applicant will argue that a deliberate act or similar is necessary. Mining at the 12-nautical-mile boundary is expected to cause almost immediate seabed deposition within the coastal marine area when currents facilitate plume transport. See Figure 1 for a spatial representation.[2]

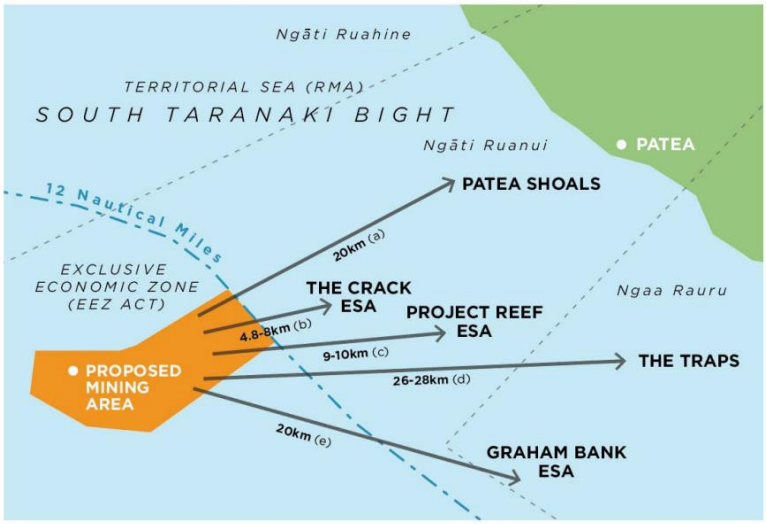

Figure 1: Diagram from *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127

12. The requisite nexus is demonstrated by modelling evidence showing predicted plume settlement within the territorial sea.[3]

13. Notably, where the RMA requires deliberateness, it clearly states so. For example, the definition of "dumping" expressly refers to deliberate disposal:

> **dumping** means,—
> (a) in relation to waste or other matter, its **deliberate** disposal; and
> (b) in relation to a ship, an aircraft, or an offshore installation, its **deliberate** disposal or abandonment;—
> but does not include the disposal of waste or other matter incidental to, or derived from, the normal operations of a ship, aircraft, or offshore installation, if those operations are prescribed as the normal operations of a ship, aircraft, or offshore installation, or if the purpose of those operations does not include the disposal, or the treatment or transportation for disposal, of that waste or other matter; and to dump and dumped have corresponding meanings
> (emphasis added)

[2] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at Appendix 3
[3] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at Appendix 3 (see table)

14. "Deposit" is not defined and must take its ordinary meaning of "to leave something somewhere".[4]

15. As the applicant has chosen to use the FTAA for the marine consents, it will be incumbent upon them to obtain any other necessary approvals. It is uncertain whether these approvals would be granted.

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

16. Other than as noted above, it appears they do.

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

17. Not applicable.

Benefits and economic assessment

4. 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:

18. The reference to benefits is to net benefits not gross benefits. Gross benefits are simply a measure of economic activity and do not represent the benefits to the wellbeing of New Zealand.

19. When determining what these net benefits are, it is important that costs and disbenefits are considered but not double-counted. Double counting could occur where a cost or disbenefit was considered as part of a cost-benefit analysis when determining the regional or national benefits of an application and also an impact that weighed against granting consent in the proportionality assessment under s 85(3).

(a) Whether a gross benefit approach is required?

20. No. Gross benefits alone are insufficient, as they merely reflect the economic activity generated and do not represent the benefits of the application.

21. This issue was considered by the Expert Panel's draft decision on the Delmore application for a residential subdivision in Auckland. The applicant had provided economic evidence from Adam Thompson from Urban Economics. [5]

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[4] Cambridge Dictionary https://dictionary.cambridge.org/dictionary/english/deposit accessed 10 November 2025

[5] Record of Decisions of the Expert Panel considering the Delmore application dated 17 September 2025 at [493]

> Mr Thompson's report also cites the proposal will contribute to regional GDP and employment through construction with direct and indirect benefits to primary industry. This is estimated at $292.9m to GDP and approximately 2,200 FTE jobs in the regional economy, including building and related services as well as agriculture, forestry and logging, during the construction phase. The report also estimates employment and GDP from ongoing household expenditure.

22. The Council disagreed with Mr Thompson's approach and the Panel sought independent economic advice from Dr Tim Dennne. Dr Denne considered that the approach adopted by Mr Thompson was inappropriate because it measured economic impact rather than the net benefit created:[6]

> UE has conducted a form of Economic Impact Analysis (EIA) to estimate GDP effects. The Treasury's comments when comparing EIA with CBA are relevant. They note that EIA "differs from CBA in that it measures the economic impact of a project, that is to say the activity generated, rather than the net benefit created. **Because it measures the activity generated, it treats costs as a benefit**" (emphasis added). As an extreme example, the Treasury notes the positive measured contribution to GDP that would be observed from digging a hole in the ground and filling it in again, with the implication that careful thought is needed before simply using GDP changes as a measure of economic benefit. The Treasury goes on to conclude that "EIA can provide useful contextual information for decision-makers, but it is not suitable as a tool for measuring the balance of costs and benefits of a decision to society". Such a balance is exactly what the requirement is for the analysis under the FTAA.

23. The Panel accepted Dr Denne's advice.[7]

24. For these reasons, a gross-benefit approach is not appropriate as it represents economic activity and is likely to overstate the benefits of a project in a way that is not anticipated by the FTAA.

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

25. Associated economic costs must be considered. This includes opportunity costs (i.e. what alternative uses of resources or areas are foregone) and displacement effects (i.e. fisheries).

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

[6] Tim Denne "Delmore Fast Track Approvals Act Application – Review of Economic Analyses" (13 August 2025) https://www.fasttrack.govt.nz/__data/assets/pdf_file/0004/10111/TD-Delmore-Economics-Review-130825.pdf at Section 3.2, page 5

[7] Record of Decisions of the Expert Panel considering the Delmore application dated 17 September 2025 at [500]

26. A net assessment is required. This ensures that the actual benefits are measured, rather than gross benefits or economic impact, which may not represent real benefit. The reasons for this were articulated Dr Denne:[8]

> It seems reasonable to assume the definition of benefits is that the project will make the lives of New Zealanders better, ie it will improve aggregate wellbeing. This is consistent with the suggestions by Auckland Council and Dr Meade for a CBA test to be used …

27. Without considering benefits against costs, the Panel risks overestimating the project's benefits, which could distort the proportionality exercise required under s 85(3). Section 85(3) requires the Panel to assess whether the adverse effects of the activity are proportionate to its benefits. If benefits are overstated because costs have not been factored in, the legal balancing exercise becomes flawed.

28. A net benefit approach and cost-benefit approach are not mutually exclusive. This will depend on the costs included in the cost-benefit analysis, including the extent to which the cost-benefit analysis includes costs associated with environmental impacts that would form part of the proportionality assessment under s 85(3).

29. An example can be seen in the evidence of Dr Denne in the Delmore example.[9] Dr Denne discussed a possible cost-benefit analysis, where environmental costs were defined narrowly as those associated with complying with the environmental conditions outlined in the consent. Dr Denne noted that other economists favoured including a wider range of costs in the cost benefit analysis.[10]

30. If such a narrow view of environmental costs is adopted, then other environmental impacts, such as effects on fisheries, must be separately considered within the proportionality assessment.

31. These impacts may not be captured in the cost-benefit analysis but are nonetheless central to determining whether the overall effects of the activity are acceptable. In the Delmore decision, the Expert Panel was not satisfied

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[8] Tim Denne "Delmore Fast Track Approvals Act Application – Review of Economic Analyses" (13 August 2025) https://www.fasttrack.govt.nz/__data/assets/pdf_file/0004/10111/TD-Delmore-Economics-Review-130825.pdf at Section 3.1, page 4

[9] Tim Denne "Delmore Fast Track Approvals Act Application – Review of Economic Analyses" (13 August 2025) https://www.fasttrack.govt.nz/__data/assets/pdf_file/0004/10111/TD-Delmore-Economics-Review-130825.pdf at Section 3.3, page 6

[10] Tim Denne "Delmore Fast Track Approvals Act Application – Review of Economic Analyses" (13 August 2025) https://www.fasttrack.govt.nz/__data/assets/pdf_file/0004/10111/TD-Delmore-Economics-Review-130825.pdf at Section 3.3.2, page 8

that the claimed benefits outweighed the residual environmental risks, particularly where those risks were uncertain or not fully quantified. This highlights the importance of ensuring that cost-benefit analyses do not obscure or exclude material environmental effects that bear directly on the statutory tests for approval.

32. The panel considering the Delmore application found that:

    a. because a project is in Schedule 2 of the FTAA does not mean there is no requirement for the Panel to assess the benefits – section 81(2) and 85 being very clear this regard;[11] and

    b. The benefits of the proposal had been overstated due to an absence of cost-benefit analysis.[12]

33. The TTR assessment is an economic impact assessment that does not consider costs. There is some attempt in the evidence of Christina Leung and Ting Huang of 13 October 2025 to consider costs, such as the impact on fishing. However, this falls short of the analysis necessary to identify net benefits.

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

34. The approach under the FTAA is consistent with that under s 5(2)(f) of the EEZ Act. In *Trans-Tasman Resources* France and Young JJ found that a gross environmental benefits approach was inappropriate under the EEZ Act:[13]

> [189] On the first issue, the Court of Appeal considered that addressing economic benefit under s 59(2)(f) must address net economic benefit, but said there was nothing to suggest that the DMC only considered gross benefits. We agree that the DMC would need to satisfy itself that there was an economic benefit so that, if there were material economic costs, the DMC would be obliged to take those into account. The issue then is whether the DMC approached this matter correctly.

35. The other Supreme Court justices did not address this matter.

(b) if not, are two separate economic assessments needed?

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[11] Record of Decisions of the Expert Panel considering the Delmore application dated 17 September 2025 at [501]

[12] Record of Decisions of the Expert Panel considering the Delmore application dated 17 September 2025 [501] at [503]; see Statement of Evidence of Natasha Sitarz dated 6 October 2025 for a discussion of cost-benefit analysis [42]-[59]

[13] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [189]

36. It follows that separate economic assessments are not required.

Climate change

37. Forest & Bird defers to Greenpeace/KASM on questions 6-8.

Treaty, cultural and planning instruments

38. Forest & Bird defers to the Iwi Parties on questions 9-11.

12. When considering national or regional planning instruments prepared under the RMA under s 59(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?

39. The Supreme Court's decision in *Royal Forest & Bird Protection Society v New Zealand Transport Agency* [2024] NZSC 26 (*East West Link)* is relevant to the Panel's assessment of provisions (including environmental bottom lines) under the national or regional planning documents referred in s 59(2)(h), for example the New Zealand Coastal Policy Statement.

40. In *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 (*Trans-Tasman Resources*)*,* the Supreme Court minority found that the DMC needed to "directly confront the effect of the environmental bottom lines in the NZCPS in relation to areas where TTR's mining activities would be felt."[14] The majority took a different approach, with Glazebrook finding:[15]

> … I agree that the way the New Zealand Coastal Policy Statement 2010 (NZCPS) was dealt with by the DMC majority was an error of law. My reasons for this differ from those of Ellen France J. She says that, although the NZCPS was not directly applicable to Trans-Tasman Resources Ltd's (TTR) proposed activities, the DMC majority needed to confront the effect of the environmental bottom line in the NZCPS and explain briefly why that factor was outweighed by other s 59 factors. I agree that the NZCPS was not directly applicable and that the DMC nevertheless needed to take into account the environmental bottom line in the NZCPS. I do not, however, consider this environmental bottom line can be outweighed by other s 59 factors. This is because, on the approach I take, s 10(1)(b) itself provides an environmental bottom line that cannot be overridden. There must be synergy in the approach to the NZCPS bottom line and s 10(1)(b).

[14] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [186]

[15] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at at [280], Williams J and Winkelmann CJ agreed with Glazebrook J on this point at [298] and [331] respectively

41. *East West Link* was a decision under the Resource Management Act 1991. However, it contains interpretative principles which guide how to address planning provisions, including policy documents such as the NZCPS which contain environmental bottom lines and other restrictive policies in areas affected by the proposal.

42. The "environmental bottom lines" in the NZCPS include those that relate to the protection of indigenous biological diversity (Policy 11), and preservation of natural character especially in areas of the coastal environment with outstanding natural character (Policy 13).[16]

43. There are also directive policies in the NZCPS which are "very specific as to subject matter and concrete as to intended effect." For example, NZCPS Policy 22(2) to "*require* that… development will not result in a significant increase in sedimentation in the coastal marine area."[17] The Supreme Court found that NZCPS Policy 22(2) provides no "wriggle room."[18]

44. These provisions are relevant because, although the mining activity will be occurring outside the coastal marine area (further seawards of the outer limit of New Zealand's territorial sea), the modelling suggests that the effects of sedimentation will occur in coastal marine area.

45. The statutory obligation in s 59(2)(h) to "take into account" documents such as the New Zealand Coastal Policy Statement (and its objectives and policies) bears similarity with the RMA obligation to "have regard to" or "have particular regard to"[19] – although "take into account" is arguably stronger.[20]

46. Powell J, in the (overturned) High Court decision, considered the statutory obligation to "give effect" to the NZCPS and its "environmental bottom line" policies, such as Policy 11. Powell J found that the Board of Inquiry considering the East West Link project only needed to satisfy "the softer regard/particular regard standards under ss 104 and 171" where "the

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[16] See Statement of Evidence of Natasha Sitarz dated 6 October 2025 for a discussion of applicable NZCPS "bottom lines" at [23]-[30]
[17] *Royal Forest & Bird Protection Society v New Zealand Transport Agency* [2024] NZSC 26 at [140]
[18] *Royal Forest & Bird Protection Society v New Zealand Transport Agency* [2024] NZSC 26 at [104]
[19] Resource Management Act, ss 104 and 171
[20] *New Zealand Federation of Commercial Fishermen Inc v Minister of Fisheries* HC Wellington CIV-2008-485-2016, 23 February 2010 at [29]–[34]; citing Fisheries Bill (63-2) (select committee report) at viii.

requirement was merely to "give genuine attention and thought" to the NZCPS, rather than a duty to accept its requirements."[21]

47. Likewise, the applicant and respondent Council argued before the Supreme Court that the "directive potency" of NZCPS Policy 11 was "diluted by the fact that ss 104 and 171 require only that consent authorities have regard or particular regard to it" which, it was said, "is materially different to the "give effect" standard applicable to plan preparation in Part 5; the standard at issue in *King Salmon*".[22]

48. The Supreme Court held that Powell J erred in his approach. Directive policies had to be applied:[23]

> [169]…[Powell J] erred in his application of the duties to have regard/particular regard relevant objectives and policies. Again, those duties do not invest consent authorities with a broad discretion to "give genuine attention and thought" to directive policies, only to then refuse to apply them. That would contradict what we have already described as the consistently strong "avoid" language employed from top to bottom in the RMA hierarchy of objectives and policies. It would also be to waste the significant resources invested by public and private stakeholders in the processes by which those objectives and policies are settled.

49. The panel in the Bledisloe North Wharf and Fergusson North Berth Extension application, following *East West Link,* treated "take into account" as requiring it 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."[24]

50. This accords with the Supreme Court's finding that it is not open to decision makers at the consent level to "undermine the choices made in planning documents of favouring environmental protection through avoidance policies if directly applicable to the relevant project."[25]

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[21] *Royal Forest & Bird Protection Society v New Zealand Transport Agency* [2024] NZSC 26 at [140]
[22] *Royal Forest & Bird Protection Society v New Zealand Transport Agency* [2024] NZSC 26 at [97]
[23] *Royal Forest & Bird Protection Society v New Zealand Transport Agency* [2024] NZSC 26 at [169]
[24] Record of Decisions of the Expert Panel considering the Bledisloe North Wharf and Fergusson North Berth Extension dated 21 August 2025 at [119]; see also [39]-[40] of Forest & Bird's Legal Comments dated 6 October 2025
[25] *Royal Forest & Bird Protection Society v New Zealand Transport Agency* [2024] NZSC 26 at [224]

51. Relatedly, the Supreme Court also found that relevant objectives and policies cannot "simply be put in a blender with the possible effect that stronger policies are weakened and weaker policies strengthened."[26]

52. The Supreme Court recognised the rigidity caused by "avoid" policies could be overcome in very limited circumstances and developed a bespoke "exceptions pathway" in relation to the proposed East-West Link proposal:

> [118] Though expressed in different ways, the relevant NZCPS and AUP policies in essence require a proponent seeking to locate significant infrastructure requiring reclamation in a SEA to show that three elements are met:
>
> (a) it is a necessary—and not just a desirable—solution by reference to functional or operational need, the regional or national benefit obtained, and the absence of any practicable alternative locations or solutions;
>
> (b) adverse effects that cannot be avoided have been remedied or mitigated to a standard that corresponds with the significance of the environment, ecosystem and/or species that ought to have been protected to an avoid standard; and
>
> (c) the benefits of the solution plainly justify the environmental cost of granting consent

53. The "exceptions pathway" was unique to the East-West Link proposal – involving a regionally significant road in Auckland and reclamation of the coastal marine area. It was under the Auckland Unitary Plan and engaged different provisions under NZCPS – the reclamation policy. In concluding there was a pathway through the "avoid" framework, the Supreme Court observed that "it would be wrong to treat the distinctive context of Auckland and the EWL as irrelevant; this would risk subverting the purpose of the RMA."[27]

54. In any event, given the circumscribed grounds for decline in s 85(3) FTAA, the "exceptions pathway" is largely irrelevant. The reasons for establishing an exceptions pathway do not arise under the FTAA in the same way.

55. In summary, *East-West Link* requires that, when undertaking its s 81(2) analysis, the Expert Panel apply the directive policies in the NZCPS (and other planning documents) according to their terms. When deciding whether to grant consent under s 85(3), a breach of these bottom lines will weigh heavily against granting consent, but may not be determinative.

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[26] *Royal Forest & Bird Protection Society v New Zealand Transport Agency* [2024] NZSC 26 at [80];
[27] *Royal Forest and Bird Protection Society and New Zealand Transport Agency* [2024] NZSC 26 at [120]

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

56. No. Section 9 of the Fisheries Act 1996 requires decision makers take into account that "habitat of particular significance for fisheries management should be protected."[28] The Fisheries Act does not contain a requirement that habitats of particular significance for fisheries management be formally identified nor any statutory criteria or mechanisms to determine "particular significance."

57. The Fisheries Act does not define "habitat of particular significance for fisheries management", nor prescribe what is required to protect them. These terms should take their ordinary meaning.

58. By way of context, section 9 and 10 of the Fisheries Act contains environmental and information principles intended to guide decision-making. Both sections require decision-makers to take the stated principles into account when making decision under the Act "in relation to the utilisation of fisheries resources or ensuring sustainability".

59. "Ensuring sustainability" and "utilisation" are defined under the Act's purpose:

> (1) The purpose of this Act is to provide for the utilisation of fisheries resources while ensuring sustainability.
> (2) In this act—
> **ensuring sustainability** means—
> (a) maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations; and
> (b) avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment
> **utilisation** means conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural well-being.

60. The identification of a "habitat of particular significance for fisheries management" is a matter to be determined on the evidence. This interpretation is consistent with s 10(a) information principles that decisions should be based on the best available information (defined in s 2 of the Fisheries Act as "the best information that, in the particular circumstances, is available without unreasonable cost, effort, or time"). Section 10(b) requires decision makers "consider any uncertainty in the information available in any case." Section 10(c) requires decision-makers be "cautious when information is uncertain, unreliable, or inadequate".

[28] Fisheries Act, s 9(c)

61. Most notably, s 10(d) states that any uncertainty in information "should not be used as a reason for postponing or failing to take any measure to achieve the purpose" of the Act. The High Court has found that the information principles in the Act are "not a light-touch obligation", and that having regard to the best available information in a scientific context is an incident of lawful decision-making, which is elevated in a fisheries context.[29]

62. This interpretation is also consistent with the purpose of the Fisheries Act, which the Courts, including the Supreme Court, have consistently held creates an environmental bottom-line.[30] The "ultimate priority" of the Fisheries Act is ensuring sustainability; fisheries resources are to be utilised, but this utilisation must not jeopardise sustainability.[31]

63. To limit the phrase "habitat of particular significance for fisheries management" to only formally identified areas could produce perverse outcomes. The marine environment is dynamic, and ongoing discoveries mean that fixed lists may become outdated or fail to capture newly identified sites that meet section 9(c) of the Fisheries Act.

64. For completeness, it is noted that Fisheries New Zealand has released guidelines for the identification of habitat of significance for fisheries management (FNZ Guidelines).[32] The FNZ Guidelines outlines processes for their identification. While non-Parliamentary material is not authoritative, the FNZ Guidelines do acknowledge that "defining and mapping the spatial distribution of the habitat is not a prerequisite for an area to be identified as a [habitat of significance for fisheries management]."[33]

13. (b) If so, what form must such identification take?

65. Whether a habitat qualifies as a habitat of significance for fisheries management will depend on the evidence. It must be assessed in accordance with s 10 of the Fisheries Act using the best available information, applying

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[29] *Environmental Law Initiative and Minister for Oceans and Fisheries* [2022] NZHC 2969 at [103]
[30] *New Zealand Recreational Fishing Council Inc v Sanford Ltd* [2009] NZSC 54, [2009] 3 NZLR 438 at [39]–[40]; cited with approval in *Seafood New Zealand Ltd v Royal Forest & Bird Protection Society of New Zealand Inc* [2024] 1 NZLR 511 at [15] and [83]. *The Environmental Law Initiative v Minister for Oceans and Fisheries* [2022] NZHC 2969, at [11]
[31] *New Zealand Recreational Fishing Council Inc v Sanford Ltd* [2009] NZSC 54, [2009] 3 NZLR 438 at [39]–[40]; cited with approval in *Seafood New Zealand Ltd v Royal Forest & Bird Protection Society of New Zealand Inc* [2024] 1 NZLR 511, at [83] per Miller J
[32] Fisheries New Zealand *Guidance for the identification of habitat of particular significance for fisheries management and taking into account that they should be protected* (February 2025)
[33] Fisheries New Zealand *Guidance for the identification of habitat of particular significance for fisheries management and taking into account that they should be protected* (February 2025) at 9

caution where uncertainty exists. Decision-makers cannot rely on gaps or uncertainty in data as a reason to delay or avoid measures necessary to achieve the Fisheries Act's purpose. As a matter of orthodox statutory interpretation, decision-makers must also look to the Act's purpose including of "ensuring sustainability."

66. "Best available information" is broadly defined in s 2 of the Act as "the best information that, in the particular circumstances, is available without unreasonable cost, effort, or time." "Best available information" includes more than Western science, it can draw on industry insights, local expertise, and mātauranga Māori.

Existing interests and infrastructure

67. Questions 14 and 15 are not a major focus for Forest & Bird.

Conditions, adaptive management and monitoring

16. Which, if any, of the conditions proposed by the applicant constitute adaptive management within ss 61(3) and s 64(2) EEZ Act?

68. The Supreme Court in *Trans-Tasman Resources* accepted the "consent envelope" approach articulated by the Court of Appeal as a principled way to distinguish lawful monitoring conditions from prohibited adaptive management under the EEZ Act. [34]

69. Under the consent envelope approach, conditions may require that the activity is modified. This is not adaptive management where activities remain within the consent envelope, that is, the envelope of activities and effects which are anticipated to occur as a result of granting consent. However, conditions cannot allow the envelope of the consent itself to be adjusted in response to monitoring, as this would amount to adaptive management. That is, the envelope of permitted effects must be fixed at the time of consent.

70. Under the Supreme Court's approach, the conditions as proposed by TTR do not amount to adaptive management.

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

71. The Supreme Court in *Trans-Tasman Resources* considered the issue of pre-commencement monitoring. Justices France and Young found that conditions

[34] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [207] and [281]

requiring pre-commencement monitoring were not unlawful merely because they related to collection of baseline data before mining.[35] Justices France and Young held that all conditions must still comply with the statutory requirement to favour caution and environmental protection. They went on to find that there was insufficient information for the DMC to be satisfied that the conditions met that requirement, and that this deficiency could not be remedied by relying on pre-commencement monitoring alone.[36]

72. Justices France and Young's primary concern related to seabirds and marine mammals, but they also noted similar issues with other environmental effects, including sediment plume impacts. They concluded that the conditions did not favour caution and environmental protection. Justice Glazebrook agreed, although was more critical of the absence of information provided by TTR.[37]

73. Chief Justice Winkelmann and Justice Glazebrook[38] also noted that the pre-commencement monitoring reduced public participation.

74. The conditions proposed have not materially changed from those in the 2016 application. The removal of the reference to population level effects does not materially change the concern about the absence of adequate information in the application.

75. On this basis, under the EEZ Act the conditions relating to pre-commencement monitoring are unlawful.

Decision tests, inconsistency and discretion

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

76. The Panel is bound by the Supreme Court's interpretation of the EEZ Act provisions, including meaning and effect, referenced in Clause 6(1)(b)-(d) of

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[35] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [123]-[136]

[36] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [129]

[37] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [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.*"

[38] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 [278]

Schedule 10 to the FTAA, that is, the EEZ Act's purpose in s 10, decision-making considerations under s 59, and requirements pertaining to conditions under ss 61-67.

77. Although the statutory purpose of the FTAA carries greater weight[39], the Court of Appeal, examining a comparable provision under the Housing Accords and Special Housing Areas Act 2013, held that other provisions must still be assessed independently, without being influenced by the statutory purpose assessment.[40]

78. As the application relies on largely the same material, the deficiencies identified by the Supreme Court also remain directly relevant.

79. Given the distinct test set out in s 85(3) FTAA, the Supreme Court's decision will be of highly persuasive significance, or at least influential, when it comes down to the proportionality assessment.

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

80. Section 62 EEZ Act is not a standalone ground but the Panel's findings under this provision will need to be factored into the Panel's s 85 assessment.

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

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

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

81. Forest & Bird defers to the Iwi Parties on these queries.

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

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[39] Clause 6(1)(a) of Schedule 10 to the FTAA

[40] See *Enterprise Miramar Peninsula Incorporated v Wellington City Council* [2018] NZCA 541 at [41], [53], [55]. See also [41]-[52] of the memorandum of legal comments of counsel for the Royal Forest and Bird Protection Society of New Zealand Inc 6 October 2025 for a more fulsome explanation.

82. Yes. The purpose specified within s 3 of the FTAA is consistent with the balance of the Act. The FTAA outlines several procedural and substantive steps to implement this purpose.

83. Procedurally, FTAA applications are facilitated by a process that is faster and less rigorous than that provided by the other legislation, such as the RMA or the EEZ Act.

84. Substantively, FTAA applications are facilitated by provisions that promote development. This includes things like limiting the grounds on which applications can be declined. However, this facilitation is not unlimited. Consents can still be declined.

85. The effect of this is that there is no need to go beyond the purpose as set out in s 3, when considering the purpose of the FTAA under cl(6)(1)(a) of Schedule 10.

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

86. The ordinary meaning of "facilitate" is to "make something possible or easier."[41] Other meanings include to "to make easier the progress of."[42]

87. Facilitate does not equate to guaranteeing approval.[43] "Facilitate" could be understood as streamlining processes, but not as enabling deficient applications to pass.

88. This is consistent with 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."[44] Where the benefit of approving is outweighed by issues identified, that statutory purpose is implemented by declining the approval.

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

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[41] Cambridge Dictionary https://dictionary.cambridge.org/dictionary/english/facilitate accessed 10 November 2025
[42] Collins New Zealand Dictionary, Harper Collins 2017
[43] See [128]-[130] of the memorandum of legal comments of counsel for the Royal Forest and Bird Protection Society of New Zealand Inc 6 October 2025
[44] Legislative Statement for Fast-Track Approvals Bill https://www.nzlii.org/nz/legis/bill_ls/ftabfrls568.pdf at [17]

89. Inconsistency or contrariness s 81(2) must weigh heavily in the s 85(3) assessment. Parliament has chosen to require consideration of the EEZ Act and other documents via s 81(2). Section 85(5) imports s 81(2) into the 85(3) assessment. At the very least, inconsistency with the EEZ Act will influence how the Panel assesses the adverse impacts.

90. There would be no point in undertaking the s 81(2) analysis unless it was relevant to the question of whether or not to decline consent. The s 81(2) analysis informs the adverse impacts that might justify the decline of consent.

91. For example, s 81(2) refers to s 10 of the EEZ Act, which contains the EEZ Act bottom line regarding material harm from discharges of hazardous substances. This makes consideration of the adverse effects of the sediment discharge a relevant matter for the purposes of the s 85(3) evaluation. This is because the definition of adverse impact in s 85(5) includes "any matter considered by the panel in complying with section 81(2) that weighs against granting the approval."

92. If the Panel, as part of its s 81(2) evaluation, found that the effects of the sediment discharge breached the material harm bottom line, the sediment discharge would weigh more heavily against granting consent than if the Panel found that the sediment discharge did not cause material harm.

93. Section 85(4) is also relevant. This stipulates that a panel "may not form the view that an adverse impact meets the threshold in subsection (3)(b) **solely on the basis** that the adverse impact is inconsistent with or contrary to a provision of a specified Act or any other document" (emphasis added).[45]

94. The provision does not prevent consideration of inconsistency or contrariness of the EEZ Act, the NZCPS or other relevant planning document. It only prevents reliance on inconsistency alone as sufficient grounds for decline. In other words, the threshold for decline is not met where inconsistency is the *only* factor supporting a decline decision.

95. Where inconsistency with an Act or other document occurs alongside actual adverse impacts, both factors may legitimately contribute to a decision to decline. The inconsistency with the EEZ Act gives the actual adverse impacts greater weight in the s 85(3) evaluation.

[45] See [125]-[126] of the memorandum of legal comments of counsel for the Royal Forest and Bird Protection Society of New Zealand Inc 6 October 2025

96. Forest & Bird's earlier legal memorandum identified numerous adverse impacts that are considered sufficiently significant to be out of proportion to the suggested regional or national benefits.[46]

24. In relation to ss 85(3)-(5) FTAA, how is inconsistency with the EEZ Act or with documents taken into account under s 81(2) to be factored into the s 85(3) assessment?

97. As above.

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

98. Yes – while at first blush there seems little difference, the term "impact" is wider and more flexible.

99. 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:[47]

> 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

100. Similarly, "effect" is not defined in the FTAA but is defined under the RMA Act as:[48]

> In this Act, unless the context otherwise requires, the term effect includes—
> (a) any positive or adverse effect; and
> (b) any temporary or permanent effect; and
> (c) any past, present, or future effect; and
> (d) any cumulative effect which arises over time or in combination with other effects—regardless of the scale, intensity, duration, or frequency of the effect, and also includes—
> (e) any potential effect of high probability; and
> (f) any potential effect of low probability which has a high potential impact.

101. "Impact" (per se) is not defined under either the EEZ Act, RMA, or FTAA.

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[46] Memorandum of legal comments of counsel for the Royal Forest and Bird Protection Society of New Zealand Inc 6 October 2025 at [207]-[213]
[47] RMA, s 2
[48] RMA, s 3

102. Meanings of impact in the Cambridge Dictionary include:[49]

> *the force or action of one object hitting another*
> *a powerful effect that something, especially something new, has on a situation or person to have an influence on something*

103. However, the FTAA provides a definition of "adverse impacts" – defined as "any matter considered by the panel in complying with section 81(2) that weighs against granting the approval."[50]

104. The term "impact" is broader than an "environmental effect", as it contains no parameters – for example, an effect of low probability in section 3(f) of the RMA contains a threshold. If an effect falls below the threshold below "low" it may not be treated as an effect. The term "impact" is not constrained in such a way.

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

105. When considering an "adverse impact" the definition leaves the panel with broad scope to determine what matters weigh against granting the approval.

106. "Adverse impact" could encompass matters that are broader than "environmental effects" and would include, for example: breach of international obligations, tikanga Māori, or matters arising from marine management regimes.

CONCLUSION

107. Counsel thanks the Panel for the opportunity to provide a response to its legal questions.

Dated: 14 November 2025

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Counsel for the Royal Forest and Bird Protection Society Inc

[49] Cambridge Dictionary https://dictionary.cambridge.org/dictionary/english/impact accessed 10 November 2025
[50] Section 85(5) FTAA