

BEFORE THE ENVIRONMENTAL PROTECTION AUTHORITY

IN THE MATTER of the Exclusive Economic Zone and
Continental Shelf (Environmental Effects)
Act 2012

AND

IN THE MATTER of a Reconsideration of Applications by
Trans-Tasman Resources Limited (TTRL)

JOINT STATEMENT OF EXPERTS IN THE FIELD OF

PLANNING (INCLUDING CONDITIONS)

Dated 27 February 2024

INTRODUCTION

1. Expert caucusing on the topic of planning (including conditions) took place via videoconference on 27 February 2024.
2. The conference was attended by the following experts:
 - a) Phil Mitchell (TTRL) (PM), and
 - b) Natasha Sitarz (Forest & Bird) (NS).
3. Chris Simmons (ChanceryGreen) acted as facilitator.
4. Jillian Kennemore (EPA) acted as scribe.

CODE OF CONDUCT

5. The experts confirm that we have read the Environment Court Code of Conduct 2023 and agree to comply with it. We confirm that the issues addressed in this Joint Statement are within our area of expertise, unless stated otherwise.

SCOPE OF STATEMENT

6. In accordance with DMC Minute and Directions 10:
 - a) The Joint Statements from 2017 ("2017 Joint Statements") has formed the starting point for the caucusing session.
 - b) We have endeavored to:
 - (i) comment on whether there is any new or updating evidence that changes the previous positions; and
 - (ii) if so, identify what the evidence is and how it changes the positions.
7. In preparing for this caucusing session, we have reviewed the following 2024 Joint Statements:
 - a) Effects on marine mammals
 - b) Effects on fishing and fish
 - c) Effects on seabirds
 - d) Sediment plume modelling and effects on benthic ecology (noting that only limited time was available to consider the relevance of this Joint Statement because it was provided immediately before this caucusing session commenced)
8. In this Joint Statement we report the outcome of our discussions in relation to each issue (below) by reference to points of agreement and disagreement relating to facts, assumptions, uncertainties, and expert opinions. We have noted where each of us is relying on the opinion or advice of other experts. Where we are not agreed in relation to any issue, we have set out the nature and basis of that disagreement.

ISSUES

Review and comment on 2 March 2017 Conditions and Planning Joint Statement

9. PM and NS were two planners of seven participants in the 2017 conferencing.
10. PM and NS agree that the issues and conditions considered in the 2017 Joint Statement have largely been overtaken by issues identified by the Supreme Court and the conditions set out in the 2017 DMC decision. Accordingly, to assist the DMC, PM and NS have focused on the particular issues presented in this current Joint Statement.
11. PM and NS have not reconsidered the entire suite of conditions imposed by the 2017 DMC and consider that it may be helpful for further conferencing to take place once the DMC has heard the evidence.

Review and comment on 2024 Joint Statements

12. Any matters raised in the other 2024 Joint Statements that are relevant to this planning statement have been considered below.

Approach to assessing 'No material harm' – key differences

13. PM and NS agree that 'material harm' is not defined in any relevant legislation.
14. NS and PM agree that assessing 'material harm' requires a factual assessment that is informed by expert opinion and takes into account the relevant qualitative, quantitative, temporal and spatial aspects of the matter.
15. NS and PM agree that minor or transitory effects may be acceptable in the context of a directive provision that requires adverse effects to be 'avoided'.
16. PM has assessed 'material harm' by drawing an analogy with how the RMA deals with directive provisions that require adverse effects to be 'avoided' – for example, policies 11, 13, 15 and 17 of the New Zealand Coastal Policy Statement (NZCPS). He has assessed (Evidence in Chief para 50) 'material harm' as being an adverse effect that will be significant following the implementation of any mitigation or management measures.
17. To the extent that MMR 'bottom lines' are relevant when assessing 'material harm' in the CMA, PM agrees with NS ~~but considers (para 24 Rebuttal) they are to be taken into account and are not required to be complied with.~~
18. PM considers that there is a distinction to be made between 'material harm' and 'avoiding adverse effects' because, as the Supreme Court (SC) has observed, it is the avoidance of 'material harm' that is required, not the avoidance of adverse effects and that this assessment, in so far as it relates to the CMA is, in his understanding, also consistent with what the SC said in its recent Port Otago decision.
19. NS has considered 'material harm' in terms of the requirement under section

59(2)(h) of the EEZ Act 'to take into account' the nature and effect of Marine Management Regimes (MMR) and the SC determination on the importance of 'bottom lines' to the nature and effect of MMRs. NS has also considered SC[10] on what is required to take into account the nature and effect of MMRs under section 59(2)(h) and their consideration that there must be synergy in the approach to the NZCPS 'bottom lines' and section 10(1)(b) (SC[280]) and that the NZCPS is in lockstep with section 10(1)(b) (SC[298]) of the EEZ Act. NS considers that MMR bottom lines are relevant to determining what is 'material harm' in the Coastal Marine Area (CMA); that is, the MMR 'bottom line' is the basis for determining 'material harm'.

20. NS and PM agree that the planning interpretation on this issue is closely entwined with legal aspects, which is beyond their role as independent planning witnesses.

Approach to assessing 'favouring caution and environmental protection' – key differences

21. NS and PM agree that this matter arises when there is uncertain or inadequate information (section 61(2) of the EEZ Act).
22. NS and PM agree that determining whether information is uncertain or inadequate is informed by expert opinion, noting what appear to be a number of substantive disagreements.
23. On the basis it was determined that there is uncertain or inadequate information (which PM does not accept based on the TTRL technical evidence), PM and NS have considered how favouring caution and environmental protection would be undertaken and assessed.
24. NS and PM agree that conditions must be adequate to manage potential effects. Where there is uncertainty as to the scope, scale, or significance of adverse effects, conditions will need to be adequate to:
 - a) identify adverse effects, including those that were not anticipated; and
 - b) manage any unanticipated adverse effects so that they are not greater than anticipated (allowing for minor differences that are not material).
25. NS and PM agree that conditions will also need to be certain and enforceable.
26. PM considers that the proposed conditions (as amended) appropriately respond to all the relevant issues and appropriately favour caution and environmental protection as required by section 61 of the EEZ Act.
27. NS considers that the proposed conditions are not adequate in terms of the matters set out in paragraphs 24 and 25 above (refer NS 6 October 2023 evidence – paras 66-74).
28. PM has amended paragraphs 13 and 19 of his rebuttal statement as set out below, with the amended text shown as underlined:

- 13 *As the policies of the NZCPS (or the provisions of any other MMR) are a matter for consideration under section 59, they are, other than where they establish a bottom line akin to avoiding “material harm”, part of what the Supreme Court calls “a balancing exercise”. In my opinion therefore, a proposal may be granted marine consent even if it is inconsistent with one or more policies of the NZCPS (or any other MMR).*
- 19 *In summary, it is my opinion that consideration of the consistency of a proposal with the nature and effect of the NZCPS, or any other MMR, is, subject to the caveat I have inserted into my paragraph 13, part of the ‘balancing exercise’ required under section 59 of the EEZ Act and forms part of the consideration of an application. That consideration includes of the proposal’s consistency with the overall purpose of section 10 of the EEZ Act.*

Relevance of s107 RMA

29. NS and PM disagree as to whether section 107 of the RMA represents a ‘bottom line’.
30. Irrespective of whether section 107 represents a ‘bottom line’:
- a) NS considers that in interpreting and applying section 107 it is first necessary to clearly establish the relevant zone of ‘reasonable mixing’.
 - b) PM considers that the expert evidence is sufficient to interpret and apply section 107, and that it is not necessary to examine more closely the relevant zone of ‘reasonable mixing’.

COMMENT ON CONDITIONS

Conditions relating to marine mammals

31. PM’s Evidence in Chief of 19 May 2023 (para 27) has proposed amendments to conditions 10 and 67 that remove reference to adverse effects being assessed ‘at a population level’.
32. NS’s Evidence in Chief of 6 October 2023 (para 19–34) responds to these proposed amendments setting out a range of concerns on conditions 9 and 10. NS has also set out in paras 66-74 of her evidence her concerns on other conditions which also relate to marine mammals. On the basis of those concerns, NS is of the view that the condition requirements set out at paras 24-25 above have not been achieved and do not favour caution and environmental protection.
33. PM’s rebuttal evidence of 23 January 2024 (para 82) records agreement with NS (at para 25 of her 2023 evidence) that condition 10(b) should be amended to refer to effects that are not addressed by condition 10(a).
34. For the sake of completeness, the amendments proposed by PM are as follows:
- 10 Notwithstanding the requirements of Conditions 11, 37, 67 and 88, with respect to marine mammals (excluding seals), the Consent Holder shall ensure that:*
- a) *There are no adverse effects ~~at a population level~~ on:*
 - (i) *Blue whales; or*

- (ii) Marine mammal species classified under the New Zealand Threat Classification
- (iii) System as “Nationally Endangered”, “Nationally Critical” or “Nationally Vulnerable”; or
- (iv) Marine mammal species classified as “Endangered” or “Vulnerable” in the International Union for the Conservation of Nature “Red List”;

that utilise the South Taranaki Bight.

- b) For species other than those identified in Condition 10a, aAdverse effects on marine mammals, including but not limited to effects arising from:

- (i) Noise;
- (ii) Collision and entanglement;
- (iii) Spills; and
- (iv) Sediment in the water column,

are avoided to the greatest extent practicable.

35. NS agrees with the proposed changes to condition 10(b), but retains other concerns with condition 10 as referred to at paragraph 32 above.

Conditions relating to seabirds

36. PM has recommended changes to condition 9 consistent with those recommended for condition 10, as set out in paragraphs 31 and 33 above.

37. PM has also recommended a change to condition 9(a) (evidence on 19 May 2023 para 38) to reflect changes made to the New Zealand Threat Classification System. Revised condition 9 would read as follows:

9. At all times during the term of these consents, the Consent Holder shall comply with the following:
- a) There shall be no adverse effects ~~at a population level~~ on seabird species that utilise the South Taranaki Bight that are classified under the New Zealand Threat Classification System ~~as “Nationally Endangered”, “Nationally Critical” or “Nationally Vulnerable” or classified as “Endangered” or “Vulnerable”~~ in the International Union for the Conservation of Nature “Red List” as “Threatened”; and
 - b) For species other than those identified in Condition 9 a, aAdverse effects, on seabirds, including but not limited to effects arising from:
 - (i) Lighting (including the Integrated Mining Vessel (“IMV”), Floating Storage and Offloading Vessel);
 - (ii) Spills; and
 - (iii) The effect of sediment in the water column on diving birds that forage visually shall be mitigated, and where practicable avoided.

38. NS agrees with the proposed changes to condition 9(b), but retains concern with condition 9, as referred to at paragraph 32 above.

Other conditions

39. Time has precluded PM and NS from going through each condition in detail. While their evidence sets out their respective comments on certain conditions, PM and NS agree that there may be benefit targeted conferencing on the detailed wording of conditions.

SIGNATURES OF EXPERTS



Phil Mitchell (TTRL)



Natasha Sitarz (Forest & Bird)