

In the High Court of New Zealand
Wellington Registry
CIV-

in the matter of an appeal under s 105(1) of the Exclusive
Economic Zone and Continental Shelf (Environmental
Effects) Act 2012

between

KIWIS AGAINST SEABED MINING INCORPORATED
an incorporated society having its registered office at 6 Wi
Neera Street, Raglan
First Appellant

and

GREENPEACE OF NEW ZEALAND INCORPORATED
an incorporated society having its registered office at 11
Akiraho Street, Mt Eden
Second Appellant

and

ENVIRONMENTAL PROTECTION AUTHORITY
an authority constituted pursuant to section 7 of the
Environmental Protection Authority Act
2011, having its offices at Level 10,
215 Lambton Quay, Wellington
Respondent

NOTICE OF APPEAL
31 AUGUST 2017

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NOTICE OF APPEAL

Take notice that the Appellants, Kiwis Against Seabed Mining Incorporated (**KASM**) and Greenpeace of New Zealand Incorporated (**GPNZ**), submitters on an application filed by Trans-Tasman Resources Limited (**TTR**) under s 38 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (**EEZ/CS Act**) for a marine consent filed on 23 August 2016, is appealing to the High Court under s 105(1) of the EEZ/CA Act against the whole of the decision of the Environmental Protection Authority (**EPA**) acting through its delegated Decision-making Committee (**DMC**) dated 3 August 2017 and notified to KASM and GPNZ on 10 August 2017 (**Decision**).

POINTS OF APPEAL

1. Error of law: The DMC failed to exercise its powers in a manner which ensured that KASM's and GPNZ's rights of natural justice, as a submitter, were followed.

Grounds of appeal / particulars

- (a) The DMC improperly called for new evidence late in the hearing without adequate time for consideration of consequential changes in evidence, rebuttal evidence, witness caucusing, and adequate consideration of evidence;
- (b) The DMC improperly considered evidence which was not before it by taking into account evidence from the first DMC decision in 2014 (Decision, paragraph 498);
- (c) The DMC failed to make available Appendix 5 "Decision-Making Procedures" before or during the hearing, contrary to the requirements of s 17 of the EEZ/CS Act.

2. Error of law: The DMC failed to act in accordance with the requirements of s 10 of the EEZ/CS Act, including by failing to properly apply the environmental bottom lines contained in s 10.

Grounds of appeal / particulars

- (a) The DMC found that the recovery of the Patea Shoals – which will be fundamentally changed for at least two generations by changes to benthic habitats – will not recover to an exact replication of the environment that existed before the commencement of mining (Decision, paragraph 43);
- (b) The DMC found that that under the base case, reductions in high visibility days will be major for The Crack and The "Project Reef" (minus 50% and minus 32% respectively) when mining operations are at the eastern end of the mining site (Decision, paragraph 777);
- (c) The DMC found that mining will cause significant localised damage to the benthic environment, phytoplankton and zooplankton, fish and marine mammals (Decision, paragraphs 350, 932, and 970);

- (d) The DMC failed to properly consider and uphold the matters listed in s 10(2);
 - (e) The DMC failed to take into account decision-making criteria in respect of the relevant decisions for the purposes of s 10(3).
3. Error of law: The DMC erred by granting the consent despite the lack of an impact assessment providing an adequate environmental baseline, namely a description of the current state of the area where it is proposed that the activity will be undertaken and the environment surrounding the area, contrary to the requirements of ss 38 and 39 of the EEZ/CS Act.

Grounds of appeal / particulars

- (a) The DMC found that the applicant did not provide an impact assessment containing adequate baseline information on the current state of the area where the activity will take place and the environment surrounding the area (Decision, paragraph 36), contrary to the requirements of under ss 38 and 39 of the EEZ/CS Act;
 - (b) Despite this, the DMC granted the consent and held that the "Pre-Commencement Monitoring Plan" (**PCEMP**) over the two years following the grant of the consent would provide adequate information;
 - (c) In doing so, the DMC wrongly treated the PCEMP as a substitute for the baseline monitoring required by the EEZ/CS Act before a consent can be granted;
 - (d) The DMC erred by granting the consent when TTR had failed to provide an adequate Impact Assessment with its application as required by ss 38 and 39 of the EEZ/CS Act.
4. Error of law: The DMC erred in failing to properly apply the Information Principles in s 61 of the EEZ/CS Act.

Grounds of appeal / particulars

- (a) The DMC accepted that the information available was uncertain and inadequate (Decision, paragraph 36) but failed to favour caution and environmental protection as it was required to do under s 61(2);
- (b) The DMC wrongly placed weight on TTR's assessments that relied heavily on modelling based on inputs from modelling, rather than actual data (leading to compounding uncertainty);
- (c) Other examples of the DMC failing to favour caution and environmental protection include:
 - (i) The DMC accepted that "beyond the 120 dB level there is a risk of adverse behavioural impacts on marine mammals which Mr van Helden estimated is possibly as high as 50% for sensitive species" (Decision, paragraph 53) and

acknowledge the evidence that “the interim guidelines, which were developed in the late 1990s, have been superseded by draft guidelines which no longer use the 120 dB threshold” (Decision, paragraph 130). Despite this the Condition 11 applies the interim guidelines and a threshold of 130dB;

- (ii) With respect to seabirds, the experts agreed (Decision paragraph 577), that there have been no systematic and quantitative surveys of little penguins and other seabirds, there has been no systematic coastline survey for the presence of breeding little penguins and that the project will increase turbidity and reduce light intensity within the water column, and this will affect seabirds. The DMC accepted that “there is a lack of detailed knowledge about habitats and behaviour of seabirds in the STB. It is difficult to confidently assess the risks or effects at the scale of the Patea Shoals or the mining site itself” (Decision paragraph 579). Despite this, the consent was granted and the only conditions relevant to seabirds was Condition 48 (to include seabirds in the PCEMP) and Condition 66 (to require the development of a seabird effects mitigation and management plan);
 - (d) Rather than refuse to grant the consent on the basis of the TTR’s failure to provide adequate and sufficiently certain information, or request further information, the DMC wrongly granted the consent;
 - (e) The DMC improperly treated the information before it as a “starting point” for later monitoring, and wrongly considered that the information requirements under the Act could be satisfied by post-consent monitoring and by otherwise gaining further information after the consent was granted (Decision, paragraph 36).
5. Error of law: The DMC erred by failing to require TTR to provide further baseline information, despite it being possible to provide that information without unreasonable time or cost, with the consequence that the DMC failed to make its decision on the basis of the best available information, contrary to the requirements of s 61.

Grounds of appeal / particulars

- (a) The DMC purported to take an approach that reduced uncertainty but also recognised “that the cost of augmenting some of the knowledge of the marine environment by way of survey efforts may not meet the Act’s definition of best available information” (Decision, paragraph 13);
- (b) The DMC only referred to two examples in support of this proposition, namely (i) survey efforts to establish 3 years’ survey effort to establish knowledge about the seasonal patterns of marine mammals and, (ii) a decade of study to establish changes in reproductive rates or feeding efficiency;

- (c) However, there were a range of other further studies that could have been undertaken without unreasonable time or expense (as the Alternative View recognised at paragraph 138 of its decision);
 - (d) There is contradiction in the reasoning of the DMC, both finding that further studies required unreasonable cost, effort or time (therefore not being part of the best available evidence for the purposes of the consent decision), yet imposing conditions to undertake further studies and monitoring in the two years following consent.
6. Error of law: The DMC erred by failing to take into account the nature and effect of other marine management regimes, including the Resource Management Act 1991 (**RMA**) and the New Zealand Coast Policy Statement (**NZCPS**), as required by s 59(2)(h) of the EEZ/CS Act.

Grounds of appeal / particulars

- (a) The DMC failed to have proper regard to the precautionary approach provided for in the NZCPS;
 - (b) The DMC failed to have regard to the requirements of ss 5, 6, 7, and 107 of the RMA, despite finding that it had assess effects within the coastal marine area, in the same way as if the consents were applied for in that area (Decision, paragraph 1010).
7. Error of law: the DMC erred by failing to apply a precautionary approach, including in relation to s 10 (environmental bottom lines and decision making criteria) and s 61 (information principles).

Grounds of appeal / particulars

- (a) The DMC found it was not required to apply a precautionary approach (Decision, paragraph 40);
 - (b) In doing so the DMC failing to adequately consider and apply the requirements of international law, (including the requirements of the United Nations Convention on the Law of the Sea, the Convention on Biological Diversity 1992, and customary international law) and failed to properly apply the requirements, policies and objectives of the NZCPS, the RMA, and the EEZ/CS Act;
 - (c) The DMC wrongly drew a distinction between "caution" and "precaution" in s 61 of the EEZ/CS Act.
8. Error of law: The DMC erred by failing to properly take into account, and assess, all cumulative effects on the environment (that is, any cumulative effect that arises over time or in combination with other effects) contrary to the requirements of s 59(2) of the EEZ/CS Act.

Grounds of appeal / particulars

- (a) The DMC failed to take into account cumulative effects of noise from the proposed activity and from other activities on marine

mammals, despite the agreement of experts that such impacts should be taken into account (Decision, paragraph 520);

- (b) The DMC failed to take into account the cumulative effects of background suspended sediment in the environment and the effect of the sediment plume created by the activity, despite recognising background effects (Decision, paragraphs 310, and 955-957).
9. Error of law: the DMC erred by finding that s 59(2)(f) did not require it to consider economic costs or potential economic benefits, or a benefit cost analysis.

Grounds of appeal / particulars

- (a) The DMC held that benefits were sufficient and costs did not need to be analysed, and that a benefit cost analysis was unnecessary (Decision, paragraph 805);
 - (b) The DMC failed to take into account environmental, social or cultural costs and benefits (Decision, paragraph 806);
 - (c) The DMC failed to take into account potential businesses and economic benefits that would be precluded or harmed by the activity (Decision, paragraphs 808-809).
10. Error of law: The DMC erred by granting the consent subject to conditions that amount to, or contribute to, an adaptive management approach, contrary to s 87F(4) of the EEZ/CS Act.

Grounds of appeal / particulars

- (a) The DMC recognised that s 87F(4) of the EEZ/CS Act prohibited application the use of an adaptive management approach (Decision, paragraph 1055);
- (b) Despite this, the DMC applied an approach that is actually or in effect an adaptive management approach, including because:
 - (i) The DMC decided that TTR could commence mining following the two year monitoring requiring by the PCOMP (Decision, paragraph 1064);
 - (ii) The DMC decided that "extraction cannot commence until the SCC limits set by Schedule 2 have been reviewed, adjusted if necessary to reflect actual (rather than modelled" conditions, and then passed through the same TRG / EPA review and certification processes" (Decision, paragraph 1064);
 - (iii) the DMC applied a range of conditions (including but not limited to conditions 5, 48, 49, 50, 51, 53, 56, 61, 66, 67, 73 and Schedule 3) that amount or contribute to an adaptive management approach.

11. Error of law: The DMC erred by failing to properly apply the requirements of s 63(2)(a) of the EEZ/CS Act to consider imposing a bond for the performance of conditions of the consent, and failed to consider the proper role for a bond described in s 65 of the EEZ/CS Act.

Grounds of appeal / particulars

- (a) In granting the consent, the DMC relied heavily on the ongoing performance of conditions by TTR, including post-consent monitoring;
- (b) Despite this reliance, the DMC did not require TTR to provide a bond for performance of these conditions (Decision, paragraph 1074);
- (c) Instead, the DMC found that a bond was not necessary in addition to the public liability insurance offered by TTR (Decision, paragraph 1074);
- (d) In doing so, the DMC wrongly conflated the purpose and effect of a bond with the effect of public liability insurance, and failed to consider the proper role of a bond under s 65 of the EEZ/CS Act.

12. Error of law: The DMC erred by applying conditions that were not within the scope of its powers including under s 63 of the EEZ/CS Act.

Grounds of appeal / particulars

- (a) Section 63(1) of the EEZ/CS Act empowered the DMC to grant a consent subject to any condition that "it considers appropriate to deal with the adverse effects of the activity on the environment or existing interests";
- (b) The conditions imposed by the DMC requiring TTR to engage in pre-commencement monitoring through the PCEMP are not conditions that deal with the adverse effects of the activity authorised by the consent;
- (c) Instead, the DMC wrongly substituted conditions (including the PCEMP) for the baseline evidence that was required to form part of TTR's application but which was inadequate;
- (d) The conditions effectively, and wrongly, involved the DMC delegating its decision-making responsibility to impose conditions on a consent to deal with adverse effects of the activity on the environment to the EPA following the granting of the consent;
- (e) The result of the DMC's approach is that a number of conditions are unenforceable due to baseline data, including:
 - (i) Condition 9 which provides: "There shall be no adverse effects at a population level of 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'

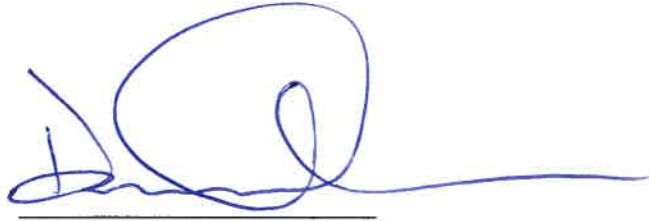
or classified as 'Endangered' or 'Vulnerable' in the International Union for the Conservation of Nature 'Red List'. However, there is no baseline data – as the DMC found “there have been no systematic and quantitative studies of the at-sea distributions and abundances of seabirds within the area” (Decision, paragraph 563).

- (ii) Condition 11 which provides: “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 System as 'Nationally Endangered', 'Nationally Critical' or 'Nationally Vulnerable'; or (iii) 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”. Again, the DMC accepted there is no adequate baseline data: “Although we have had regard to the Department of Conservation sightings and strandings databases, we consider them to be indicative only of presence, and not of abundance or distribution. We also agree that the marine mammal aerial survey data provided by TTRL should be treated with caution” (Decision, paragraph 524).

Relief sought

- 13. That the Decision be set aside in whole or in part and that this Court grant such relief as arises from the determination of the appeal, including:
 - (a) An order that the DMC reconsider such part or parts of the decision as the Court may direct, and in such manner as the Court may direct; and/or
 - (b) Findings as to law and directions as to their implementation by the DMC on further consideration of TTR's application; and/or
 - (c) An order that the application be heard again; and/or
 - (d) Directions as to how the statutory requirements as to the manner in which the DMC is to determine any application are to be applied in any further or new hearing so that the DMC properly applies its powers; and/or
 - (e) Declarations as to the law in respect of each error of law raised in this proceeding by the appellant; and/or
 - (f) Such further or other orders, declarations, or directions as may be required; and
 - (g) Costs.

Dated 31 August 2017

A handwritten signature in blue ink, consisting of a large, stylized 'D' followed by a horizontal line extending to the right.

Davey Salmon / David Bullock
Counsel for the Appellants

This document is filed by Davey Salmon solicitor for the Appellants of the firm LeeSalmonLong.

Documents for the Appellant may be served at the offices of LeeSalmonLong situated on Level 16, Vero Centre, 48 Shortland Street, Auckland, or may be posted to P O Box 2026, Shortland Street, Auckland.