IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-Ā-TARA ROHE

CIV-2017-485-704
[2018] NZHC 2217

UNDER	the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012
IN THE MATTER OF	an appeal under s 105
BETWEEN	THE TARANAKI-WHANGANUI CONSERVATION BOARD CLOUDY BAY CLAMS LIMITED FISHERIES INSHORE NZ LIMITED GREENPEACE OF NEW ZEALAND INC KIWIS AGAINST SEABED MINING INC NEW ZEALAND FEDERATION OF COMMERCIAL FISHERMEN INC SOUTHERN INSHORE FISHERIES MANAGEMENT COMPANY LIMITED TALLEY'S GROUP LIMITED TE OHU KAI MOANA TRUSTEE LIMITED TE RUNANGA O NGĀTI RUANUI TRUST THE ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NZ INC THE TRUSTEES OF TE KĀHUI O RAURU Appellants
AND	THE ENVIRONMENTAL PROTECTION AUTHORITY First Respondent
	TRANS-TASMAN RESOURCES LIMITED Second Respondent

Hearing: 16-20 April 2018

Counsel: J D Gardner-Hopkins for The Taranaki-Whanganui Conservation Board

F M R Cooke QC, R A Makgill, J L Inns and H K Irwin-Easthope for Cloudy Bay Clams Limited, Fisheries Inshore NZ Limited, NZ Federation of Commercial Fishermen Inc, Southern Inshore Fisheries Management Company Limited, Talleys Group Limited, Te Ohu Kai Moana Trustee Limited, Te Runanga o Ngāti Ruanui Trust and The Trustees of Te Kāhui o Rauru

D Salmon, D A C Bullock and D Currie for Greenpeace of NZ Inc and Kiwis Against Seabed Mining Inc

M C Smith, H E McQueen and P D Anderson for Royal Forest and Bird Protection Society of NZ Inc

V Casey QC and C J Haden for The Environmental Protection Authority

J B M Smith QC, M J Slyfield and V N Morrison-Shaw for Trans-Tasman Resources Limited

Judgment: 28 August 2018

JUDGMENT OF CHURCHMAN J

TABLE OF CONTENTS

The consents [4]
Approach to appeals [7]
The application [10]
Issues on appeal [18]
Should the EPA have returned the application as incomplete? [45]
What are the relevant purposes of the EEZ Act? [70]
Legislative history relating to discharges [70]
Purpose [90]
The appellants' argument [106]
Analysis [117]
Other marine management regimes [122]
Analysis [153]
International law obligations [163]
Section 59(2)(f) – economic benefit [178]
Did the DMC properly assess the effects on existing interests correctly? [192]
Were only physical effects on the existing interests of iwi considered? [195]
Was a cultural impact assessment by tangata whenua necessary? [206]
Did the DMC need to consider claims of customary title under MACA? [229]
What is the relevance of New Zealand's obligations under UNDRIP? [234]
Was proper regard given to the Treaty of Waitangi? [238]
Did the DMC apply the information principles correctly? [244]
Did the DMC make "full use of its powers"? [252]
Was the impact assessment adequate? [265]
Did the DMC act on the best information available? [276]

Analysis [297]
Was there a lack of information on the proposal's impacts? [300]
Did the DMC err in failing to consider requiring a bond for performance of conditions? [301]
Was the DMC required to apply a precautionary approach? [313]
Analysis [331]
Adaptive management approach [347]
What is "adaptive management"? [351]
Was the DMC's interpretation of what amounted to an adaptive management approach too narrow? [375]
Analysis [397]
Did the DMC observe the principles of natural justice? [406]
Outcome [420]

[1] The large south-westerly swells that roll into the South Taranaki Bight start far away in the Southern Ocean and the waves encountered are driven by winds blowing unhindered across the Tasman Sea. These powerful forces shape a marine environment that is both turbulent and dynamic.

[2] Despite the appearance of vast emptiness, many taonga lie beneath the surface of the waters off the South Taranaki Coast. Those taonga include hydrocarbon deposits which have provided the basis for Taranaki's oil and gas industry;[1] substantial iron sand deposits formed by the erosion of volcanic material from Mt Taranaki and concentrated by sea currents and tides; a habitat for fish exploited by large commercial fishing companies;[2] a seafood resource used by tangata whenua and by recreational fishers; and a habitat for marine flora and fauna, ranging from simple bottom dwelling organisms (benthic biota) and phytoplankton, through plants like sponges and seaweed, up to 13 different cetacean species, including internationally endangered blue whale and nationally critical or endangered Southern right whale, killer whale and Maui's dolphin.

[3] The tangata whenua also see the sea itself (Tangaroa) as a living entity having a mauri or life force that is itself a taonga. They see themselves as the custodians or kaitiaki of that taonga. It is the relative importance that each of the different parties to this case place on these various taonga that has shaped these proceedings.

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1 The Kupe, Māori, Tui and Māui installations lie to the north and west of the site.
2 Commercial fishing interests, including those that are appellants, intensively trawl the area.

The consents

[4] The Environmental Protection Authority (EPA), granted Trans-Tasman Resources Limited (TTR) consents to extract and process seabed material containing iron ore and to discharge processed material into the sea.[3] The granting of those consents has been challenged.

[5] Seven separate appeals have been lodged by entities who were submitters before the EPA. Those appeals had been consolidated and were heard together. The appellants include:

(a) Iwi: Ngāti Ruanui and Ngā Rauru Kītahi;

(b) Commercial fisheries interests: Cloudy Bay Clams Limited, Fisheries Inshore NZ Limited, NZ Federation of Commercial Fishermen Inc, Southern Inshore Fisheries Management Co Limited, and Talleys Group Limited;

(c) Environmental bodies or groups: The Taranaki-Whanganui Conservation Board, Greenpeace of NZ Inc, Kiwis Against Seabed Mining Inc, and The Royal Forest and Bird Protection Society of NZ Inc; and

(d) Te Ohu Kai Moana Trustee Limited.

[6] Many of the points raised in the appeals overlap. The broad issue for determination on the appeal, however, can be described as being whether the consents granted by the EPA are in accordance with the provisions of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act or the Act) and consistent with legal obligations that the parties contend arise from other sources including:

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[3] Environmental Protection Authority *Trans-Tasman Resources Ltd Marine Consent Decision* (EEZ000011, 3 August 2017) [*Decision*].

(a) the Resource Management Act 1991 (RMA) and related legislative instruments including the Coastal Marine Policy Statement (CMPS); and

(b) international conventions such as the United Nations Convention on the Law of the Sea (UNCLOS), the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the Treaty of Waitangi, and the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA).

Approach to appeals

[7] Although a number of the submissions are similar (the iwi appellants, the fisheries appellants and Te Ohu Kai Moana are substantially the same), there are a large number of different issues raised across the various appeals. Many of the grounds advanced by the different appellants overlap and a number of similar grounds are expressed in different ways.

[8] The most efficient way of addressing these appeals is on an issue basis rather than addressing each ground of each appeal separately.

[9] I have identified eight separate issues that broadly cover all of the allegations raised by the appellants. These are:

(a) What approach should be taken to identifying whether the issues appealed on amount to questions of law (permitted by s 105 of the EEZ Act) or questions of fact in respect of which no appeal is allowed?

(b) Should the EPA have returned the application as incomplete under s 41 on the basis that it did not contain the information required by s 39?

(c) What are the relevant purposes of the EEZ Act?

(d) Did the Decision-Making Committee (DMC) fail to apply the information principles in the EEZ Act correctly?

(e) Did the DMC properly assess the effects on existing interests?

(f) Was the DMC required to apply a precautionary approach, and did they do so?

(g) Did the DMC adopt a prohibited adaptive management approach to the marine discharge consent?

(h) Did the DMC observe the principles of natural justice?

The application

[10] In August 2016, TTR lodged an application for marine consents and marine discharge consents for various activities associated with the extraction and processing of seabed material containing iron ore. The application related to an area off the South Taranaki Bight some 22 to 36 kilometres offshore and encompassing approximately 66 square kilometres.

[11] The consents granted by the EPA permit TTR to extract up to 50 million tonnes of seabed material per annum, and process that on an Integrated Mining Vessel. Some 10 per cent of the material extracted will be processed into iron ore concentrate. The remaining material is to be returned to the seabed by way of a controlled discharge.

[12] This application was the sequel to an earlier application made by the applicant in November 2013 which was declined by a differently constituted DMC in June 2014.

[13] The applicable law governing the current application is the law in force as at August 2016. This means that the amendments introduced through Part 5 of the Resource Legislation Amendment Act 2017 do not apply.

[14] The area in respect of which the consents were granted is located in the exclusive economic zone. It abuts the Coastal Marine Area (CMA). The location of the site has significant consequences in terms of which legislative framework applies. Activities in the CMA are governed by the RMA. Activities in the EEZ beyond the CMA are governed by the EEZ Act, the Exclusive Economic Zone and Continental

Shelf (Environmental Effects – Discharge and Dumping) Regulations 2015, and by New Zealand's international obligations.

[15] Section 11 of the EEZ Act provides:

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

[16] UNCLOS qualifies the absolute jurisdiction that New Zealand has over areas beyond its immediate territorial waters. It sets out obligations in relation to protection and preservation of the marine environment,[4] the exploitation of natural resources,[5] and preventing, reducing and controlling pollution of the marine environment.[6]

[17] The provisions of the EEZ Act need to be interpreted consistently with the obligations set out in UNCLOS.

Issues on appeal

[18] The appeals in this case are brought under s 105 of the EEZ Act. Such appeals are limited in nature. Section 105(4) provides that, "An appeal lodged under this section may be only on a question of law."

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4 United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994), Art 192.
5 Article 193.
6 Article 194.

[19] As emphasised by the Supreme Court in *Bryson v Three Foot Six Ltd*, the scope of such appeals is narrow.[7]

[20] The limited nature of the available appeal has implications for many of the grounds advanced by the appellants. For example, one of the issues is whether or not the DMC had based its decision on the "best available information" as required by s 61(1)(b) and s 87E(3).[8] What constitutes the best available information, is informed by a consideration of cost, effort and time.[9] These are issues of fact, not law.

[21] Some of the appellants, in particular the Taranaki Whanganui Conservation Board (the Conservation Board), attempted to portray these issues as mixed questions of fact and law. Often that is not the case and what is really being challenged is findings of fact.

[22] Similarly to appeals from the EPA, appeals from the Environment Court to the High Court are also limited to questions of law.[10] The *Countdown Properties* decision was recently confirmed as the leading authority as to what questions of law are in the context of the RMA.[11] Counsel are generally agreed that the Court should adopt the "*Countdown* approach" in determining what questions of law are.[12]

[23] The approach adopted by the full High Court in *Countdown Properties* is that appeals from decisions of the Environment Court should only be allowed if it is considered that the Court:[13]

- applied a wrong legal test; or
- came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come; or
- took into account matters which it should not have taken into account; or

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7 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [25]-[26]. See also *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 per Blanchard J at [50].

8 Section 87E was repealed on 1 June 2017 by s 249 of the Resource Legislation Amendment Act 2017 but was in force at the time the application for resource consents was made.

9 Section 61(5).

10 Resource Management Act 1991, s 299.

11 See *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281 at [52].

12 See *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC).

13 At 153.

- failed to take into account matters which it should have taken into account.

[24] The decision to restrict appeals from the EPA to the High Court to questions of law was a deliberate one. There was extensive debate in the Committee of the whole House (where a Supplementary Order Paper to allow full merits appeals to the Environment Court was not agreed to).[14]

[25] Ms Casey QC, counsel for the EPA, submitted that the limited scope of appeal is an important feature of the statutory regime, forming part of the deliberate balance between the public interest and participation in decisions under the EEZ Act, and the public interest in the efficiency and cost effectiveness of the consenting regime.

[26] Ms Casey also noted that the limited right of appeal reflected the specialist nature of the decisions made under the EEZ Act, and the expertise of the decision-making bodies themselves. I accept these submissions and the further submission that consenting decisions are not *inter-parties* disputes, and that, in making a decision on a consent application, a DMC is required to make expert assessments and exercise a broad judgement, and balance various public and private interests.

[27] Mr Gardner-Hopkins, for the Conservation Board, referred to the fact that the DMC did not have a member with the expertise or experience of being a Judge or lawyer, and also noted that the DMC was evenly split in its decision with the "majority" being achieved by the use of the Chair's casting vote. He also submitted that "… the members of the minority were those who had the greater scientific and technical expertise in comparison to the majority."

[28] The expertise or otherwise of the members of the DMC is not a point of law upon which an appeal can be based. Neither is the fact that the various members of the DMC have different backgrounds and expertise. The issue is whether or not the DMC made a mistake of law. That is not something to be ascertained by looking at the qualifications or experience of the members of the DMC, but by looking at what they actually said.

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[14] (21 August 2012 and 22 August 2012) 683 NZPD 4592 and 4546; Supplementary Order Paper 2012 (95) Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2012 (321-3).

[29] Neither is there any significance in the fact that this decision was one produced by the Chair's casting vote. In the absence of an error of law, that fact is irrelevant, as is the fact that the decision in relation to these consents differed from a prior DMC decision in relation to an earlier application.

[30] The DMC was not obliged to follow the prior DMC decision. Even the Environment Court, in its *de novo* jurisdiction, is not obliged to do that. In *Guardians of Paku Bay Association Inc v Waikato Regional Council*, Wylie J said:[15]

> It has traditionally been accepted that, while the Environment Court is entitled to take into account the decisions and dicta of other courts which have considered the same or similar matters at an earlier stage, it is not bound by its previous decisions, and is free to consider each case on its merits. Its failure to take into account previous decisions is not an error of law.

[31] Some of the appellants essentially invited this Court to prefer the findings of fact made by the minority of the DMC. That is not an available approach unless it can be demonstrated that the majority's findings of fact were ones which, on the evidence, could not reasonably have been reached or unless it took into account matters which it should not, or failed to take into account matters which it should have.

[32] The Court of Appeal recently emphasised this approach in *Equus Trust v Christchurch City Council* where it said:[16]

> Where an appeal is limited to a question of law which concerns the interpretation of legislation, it is not sufficient for an applicant simply to point to one interpretation being perhaps preferable to another. The Supreme Court made this abundantly clear in *Vodafone New Zealand Ltd v Telecom New Zealand* when endorsing the observation of Lord Mustill in *R v Monopolies and Mergers Commission ex parte South Yorkshire Transport Ltd*. Where a legislative instrument genuinely makes available a range of meanings, the Court is entitled to substitute its own opinion for that of the original decision maker "only if the decision is so aberrant that it cannot be classed as rational". These principles apply with particular force when the decision maker is a specialist tribunal.

[33] Another leading case on what amounts to a question of law is the decision of the Court of Appeal in *Centrepoint Community Growth Trust v Takapuna City Council*.[17] This case was an appeal bought under s 162H of the Town and Country

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15 *Guardians of Paku Bay Association v Waikato Regional Council* [2012] 1 NZLR 271 at [61(f)].
16 *Equus Trust v Christchurch City Council* [2017] NZCA 200 at [7] (citations omitted).
17 *Centrepoint Community Growth Trust v Takapuna City Council* [1985] 1 NZLR 702 (CA).

Planning Act 1977 which was replaced by the RMA. The Court referred to and followed a decision of the NSW Supreme Court in *Australian Gaslight Co v Valuer-General*.[18]

[34] Mr J Smith QC, counsel for TTR, acknowledged that there was a slightly divergent approach between the decisions of the Court of Appeal in *Centrepoint* and the NSW Supreme Court in *Australian Gaslight*, with the former describing the first step (ascertainment of meaning of statutory words) as a question of law and the latter describing it as a question of fact. However, he pointed to the fact that the Court in *Centrepoint* acknowledged the decision of *Brutus v Cozens*[19] as authority for the proposition that where the interpretation involves "ordinary English words" the first steps "may be categorised as involving fact alone".[20]

[35] I accept the submissions of TTR that in most cases, absent special reason to the contrary, ordinary or common meaning (and usage) prevails and, in effect, statutory meaning is usually resolved as a question of fact.[21]

[36] I will therefore approach cautiously the claims by the appellants that are based on a sufficiency of evidence.[22]

[37] A number of the appellants have submitted that the EPA either considered irrelevant matters or failed to consider relevant matters. Such a submission cannot be a backdoor way to effectively achieve merits review.

[38] Any failure to take into account a relevant matter must be a complete failure rather than the weight that the DMC gave to the particular matter. It also must be a failure that is material to the decision.

[39] A number of the appellants referred to tests and concepts drawn from the RMA. An example is the submissions of Mr Salmon, counsel for Kiwis Against Seabed

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18 *Australian Gaslight Co v Valuer-General* (1940) 40 SR (NSW) 126.
19 *Brutus v Cozens* [1973] AC 854 (HL).
20 *Centrepoint*, above n 17, at 706.
21 See Oliver Jones (ed) *Bennion on Statutory Interpretation* (6th ed, LexisNexis, London, 2013) at 1095.
22 In accordance with *Marris v Ministry of Works and Development* [1987] 1 NZLR 125 (HC) at 127; *Hutchison Bros Ltd v Auckland City Council* (1988) 13 NZTPA 39 (HC).

Mining (KASM) and Greenpeace. Mr Salmon identifies what he described as the "environmental bottom lines" where he says:

> The definition of sustainable management in s 5(2) of the RMA therefore contemplates a bottom line of environmental protection, as well as use and development.

[40] He then goes on to submit:

> The same observations must apply in respect of "sustainable management" under s 10(2) of the [EEZ Act], which also requires protection of natural resources and its use and development.

[41] Counsel also developed an argument based on the proposition that the "precautionary principle" was inherent in the RMA's provisions, and that the DMC was therefore obliged to have regard to it, particularly in relation to the New Zealand Coastal Policy Statement (NZCPS).

[42] As counsel for EPA noted, the legislative history of the EEZ Act confirms that there was a deliberate decision to create a separate and different regime from that governed by the RMA. Counsel refers to a statement recorded in the Regulatory Impact Statement to the EEZ Bill which said:[23]

> It would not be possible to extend the RMA in its current form without significant changes to the governance arrangements (for example to the devolved nature of planning and decision-making). It is also inconsistent with New Zealand's rights and obligations under international law. The RMA is complex and has a large volume of case law behind it. Adapting the RMA to cover the EEZ and ECS is likely to result in unintended consequences as it was designed for application in areas over which New Zealand has full sovereignty.

[43] Counsel for the EPA concluded:

> RMA concepts such as "environmental bottom lines", ss 6-8 of the RMA, and the RMA hierarchy of planning documents [as discussed in *King Salmon* [2014] NZLR 593] are not to be grafted onto the EEZ Act regime: the statute is fully prescriptive and is to be read on its own terms.

[44] I accept that there is a danger in assuming (as many of the submissions on behalf of the appellants do) that concepts developed under the RMA (such as

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[23] Ministry for the Environment *Regulatory impact Statement: Exclusive Economic Zone and Extended Continental Shelf Environmental Effects Legislation* (20 April 2011) at 13.

environmental bottom lines) should automatically be transferable to a consideration of the provisions of the EEZ Act.

Should the EPA have returned the application as incomplete?

[45] Under s 38 of the EEZ Act, any person may apply to the EPA for a marine consent to undertake a discretionary activity. The application must:

(a) be made in the prescribed form;

(b) fully describe the proposal; and

(c) include an impact assessment prepared in accordance with s 39.

[46] Section 87B of the Act provides for marine discharge consent applications with much the same requirements as for a marine consent, the only difference being that the impact assessment was also to be in accordance with any regulations.

[47] In terms of the requirements for an impact assessment, s 39 provides that it must:

(a) describe the activity for which consent is sought; and

(b) describe the current state of the area where it is proposed that the activity will be undertaken and the environment surrounding that area; and

(c) identify the effects of the activity on the environment and existing interests (including cumulative effects and effects that may occur in New Zealand or in the sea above or beyond the Continental Shelf beyond the outer limits of the Exclusive Economic Zone; and

(d) identify persons whose existing interests are likely to be adversely affected by the activity; and

(e) describe any consultation undertaken with persons described in paragraph (d) and specify those who have given written approval to the activity; and

(f) include copies of any written approvals to the activity; and

(g) specify any possible alternative locations for, or methods for undertaking, the activity that may avoid, remedy, or mitigate any adverse effects; and

(h) specify the measures that the applicant intends to take to avoid, remedy, or mitigate the adverse effects identified.

[48] Any application for a marine consent and/or a marine discharge consent may be returned as incomplete under s 41 if the EPA decides the included impact assessment does not comply with s 39. The EPA has 10 working days from the date on which it receives the application to make this determination.[24]

[49] TTR's application was supported by a 320-page impact assessment, along with 520 pages of appendices and 42 technical reports commissioned from third parties.

[50] Several of the appellants have submitted that the DMC should have returned the report as incomplete and that they made an error of law in not doing so.

[51] On 6 September 2016, the EPA issued a memorandum recording its reasons for not returning TTR's application as incomplete under s 41 of the EEZ Act. It noted (at [85] and [87]) that the applications had been made in the prescribed form, containing full descriptions of the proposal in accordance with the EEZ Act's requirements. As to the impact assessment, the DMC concluded that it complied with the s 39 requirement as it was in:

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24 EEZ Act, s 41(3).

(a) such detail as corresponded to the scale and significance of the effects that the activity may have on the environment and existing interests; and

(b) sufficient detail to enable the EPA and persons whose existing interests are or may be affected to understand the nature of the activity and its effects on the environment and existing interests.

[52] However, the DMC identified 15 information gaps such as the final particle size range of the discharged material compared to the material extracted, the bioaccumulation of metals other than mercury within marine biota, the effects on Māori who had statutory acknowledgement areas near the project area, and when monitoring was to commence.[25]

[53] However, it noted that:[26]

> [A]lthough some gaps in the information may remain, we consider that the information provided regarding the effects of the activity on the environment and existing interests does meet the requirements of making a reasonable effort to identify the effects of the activity.

[54] The Māori and fisheries appellants, in their submissions, noted that throughout the public submissions and hearing process, the DMC "identified areas where further information was required" and commissioned further reports. They argued that the application filed by TTR was therefore deficient at the outset and that it was not legitimate to seek to address these deficiencies during the hearing process.

[55] Mr Salmon, counsel for KASM and Greenpeace, took a slightly different approach and criticised the fact that the DMC allowed TTR to call fresh evidence late in the hearing. He submitted that the content of this late evidence included information that had been identified by the first DMC as being absent from the application in the 2014 decision, and also identified by the submitters as being missing and raised by the submitters in questioning during the hearing process.

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25 As to the statutory acknowledgement areas, see Sch 4 of the Ngāti Ruanui Claims Settlement Act 2003, and ss 40-47 of the Ngā Rauru Kītahi Claims Settlement Act 2005.

26 Environmental Protection Authority, above n 3, at [75].

[56] It was submitted that late evidence created an unfairness to the other parties who relied on the application being complete subject to any unforeseen issues.

[57] Mr Salmon asserted, "There comes a time in a hearing where it is too late to accept fresh evidence without prejudicing parties to the hearing". However, as I have noted at [26], a consenting decision of this nature is not a normal *inter partes* dispute. There are inquisitorial aspects of the EPA's function. If a party believes they have been prejudiced by the late calling for, or acceptance of, evidence, then their remedy should be to seek leave to file evidence in reply or to seek an adjournment. That did not occur. Given the inquisitorial nature of the DMC's function, it did not err in law by calling further evidence, even late in the hearing.

[58] Mr M Smith, counsel for Forest and Bird, submitted that the EPA erred in law in:

> … not returning the application as incomplete when the impact assessment did not describe the current state of the area and the effects of the proposed activity in the required level of detail …

[59] Although the Conservation Board did not expressly submit that the DMC should have refused the application, that was implicit in its submissions. It referred to the decision of the High Court in *R J Davidson Family Trust v Marlborough District Council* which dealt with the equivalent provision in the RMA to s 62(2) of the EEZ Act.[27] That case held that, under s 104(6) of the RMA there was an onus on the applicant for a resource consent to supply enough relevant information to the consent authority to enable it to determine the application. In that case, the High Court upheld the Environment Court's approach where it had said:[28]

> In particular, the decision-maker must be able to reasonably assess a credible region of probabilities of the relevant adverse effect even if only qualitatively.
>
> However, in some situations there may be inadequate information to even assess the likelihood of the effects of a stressor, and it is then that section 104(6) RMA may come into play. Clearly the power to decline on the basis of inadequate information should be exercised reasonably and proportionately in all the circumstances of the case.

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27 *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52, [2017] NZRMA 227.

28 *R J Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81 at [25]-[26].

[60] The reasons why the EPA did not return the application as incomplete under s 41 are recorded in a memorandum. The relevant paragraphs in the memorandum state:[29]

> [88] We have assessed TTRL's IA against the requirements of section 39 of the EEZ Act. For the discharges of sediment for which marine discharge consent is sought, we have assessed TTRL's IA against the requirements of Regulation 35 of the DD Regs 2015.
>
> [89] We have concluded that TTRL's IA complies with these requirements because the information provided in the IA is in:
>
> (a) such detail as corresponds to the scale and significance of the effects that the activity may have on the environment and existing interests; (section 39(2)(a) EEZ Act); and
>
> (b) sufficient detail to enable the EPA and persons whose existing interests are or may be affected to understand the nature of the activity and its effects on the environment and existing interests (section 39(2)(b) EEZ Act).
>
> [90] We are also satisfied that TTRL has made a reasonable effort to:
>
> (a) identify the effects of the activity on the environment and existing interests (including cumulative effects and effects that may occur in NZ or in the sea above of beyond the continental shelf beyond the outer limits of the EEZ) (section 39(1)(c) EEZ Act); and
>
> (b) identify the persons whose existing interests are likely to be adversely affected by the activity (section 39(1)(d) EEZ Act).

[61] In relation to the 15 "information gaps", the memorandum concluded:[30]

> We are of the view the nature of the missing information is not of such significance or importance as to be considered "essential" information in terms of the completeness consideration under section 39 of the EEZ Act. The DMC may request this information from TTRL by way of a further information request under section 42 of the EEZ Act. Further details of the information which we recommend the DMC could request from TTRL will be included in the Key Issues Report and the DMC will then need to decide if it needs this information, or any other information for that matter, before a decision on the application can be made.

[62] TTR's response to the submission that the application should have been returned because it was not complete was to say, "A challenge to the completeness decision is not a question of law which is challengeable on appeal."

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29 Environmental Protection Authority *Completeness Assessment Memorandum* (6 September 2016).
30 At [91].

[63] This submission was supported by a reference to s 41(5) which provides a review or objection right only to the applicant, not to would be or actual submitters. Attention was also drawn to the fact that the word "may" appears in s 41(1), giving the EPA a discretion as to whether or not to return an application not containing all the required information.

[64] TTR also referred to the evidence of an independent witness for the EPA (Donald Allan Robertson) who suggested that:

> [T]he scale and extent of preparation for the particular environmental impacts of this TTR mining process … far exceeds anything I have seen in relation to comparable environmental assessments of the effects of bottom trawl fishing in the NZ Territorial Seas and Exclusive Economic Zone in the last 45 years.

[65] TTR also submitted that the s 41 process was merely a screening process designed to stop incomplete applications going further so as to avoid the time and cost of a full consideration of such applications.

[66] Ms Casey, for the EPA, submitted that a decision not to return an application as incomplete under s 41 is a separate decision from the consent decision under ss 62 and 87F and forms no part of the decision under appeal. She noted that a decision under s 41 has its own separate appeal regime in the Act but it is the applicant that has a right of objection to a decision to return an application as incomplete, and that there is no direct right of appeal, and no right of objection or appeal, by a potential submitter.

[67] I accept that a decision as to whether or not to return an application as incomplete under s 41 is a discretionary procedural decision to be taken by the EPA. It is a separate and discrete decision to the ultimate decision on the consent itself. Potential submitters do not have a right of objection or appeal in relation to such a decision. The DMC made a reasoned and considered decision that there was no basis for returning the application.

[68] The High Court in *Greenpeace of New Zealand Inc v Environmental Protection Authority*, which was an application for judicial review, confirmed the nature of the EPA's evaluation under s 41:[31]

> EPA's role under s 41 does not involve any assessment of the merits of the content of the impact assessment. Its role is limited to assessing whether the application contains information about the required matters. The purpose of that preliminary evaluation of the content is to ensure that, when … the next stage of public notification and consideration of the application by EPA is reached, the public and EPA will have sufficient information to ensure meaningful participation in the hearing and evaluation processes.

[69] The decision of the EPA not to return the application cannot be described as unreasonable and, even if it were able to be challenged in this appeal, there would be no basis for overturning it.

What are the relevant purposes of the EEZ Act?

Legislative history relating to discharges

[70] The EEZ Act is a relatively recent piece of legislation but even in its short life it has been amended in aspects that are relevant to this case. When the EEZ Bill was introduced on 24 August 2011, marine discharging and dumping were, at that time, regulated by a separate regime under the Maritime Transport Act 1994 and the Maritime Protection Rules.

[71] At the time the EEZ Bill was introduced, the controlled discharge of sediments or tailings from a seabed mining activity was not included in the Maritime Protection Rules and such sediments or tailings did not fall within the definition in the rules of "harmful substance".

[72] Early cases under the EEZ Act (for example the first TTR consent application and the *Chatham Rock Phosphate* application) addressed the effects of sedimentary plumes created by undersea mining as part of the marine consent for the mining activity.

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[31] *Greenpeace of New Zealand Inc v Environmental Protection Authority* [2013] NZHC 3482, [2014] NZRMA 112 at [28].

[73] The initial Regulatory Impact Statement accompanying the EEZ Bill anticipated that the regulation of discharge and dumping activities that were associated with consents for marine activity should be transferred from the Maritime Transport Act 1994 (MTA) to the EEZ Act.[32]

[74] The justification for such transfer appears to have been the economic and efficient processing of consents and the avoidance of having the EPA assess the environmental effects associated with consent activity and Maritime New Zealand assess the environmental effects of discharge and dumping.[33]

[75] However, the plans to include regulation of discharge and dumping in the original EEZ Bill did not proceed.

[76] The EEZ Bill had its Third Reading on 30 August 2012 and came into effect in June 2013. While the EEZ Bill was still proceeding through the House, the Marine Legislation Bill was introduced. It proposed a variety of amendments to the MTA and included among them was the proposal to transfer the discharge and dumping regulatory powers to the EEZ Act to enable "discharges and dumping to be assessed within the same consenting regime as other activities relating to the wider operation".[34]

[77] The Regulatory Impact Statement confirmed that the purpose of the transfer was to increase efficiency and certainty for resource users and applicants. There was no obvious intention to alter the barriers to the exploitation of natural resources.

[78] The disposal or storage of waste or other matter directly arising from or related to a mining activity was excluded from the definition of "dumping" in the Marine Legislation Bill. The scope of "discharges" to be covered by the Act was to be determined by the definition of "harmful substance" which was to be set by regulation.

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32 Ministry for the Environment *Regulatory Impact Statement: Transfer of Discharge and Dumping Regulatory Functions from Maritime New Zealand to the Environmental Protection Authority* (14 September 2011).

33 At 5-7.

34 Marine Legislation Bill 58-1, Explanatory Note. See also Ministry for the Environment, above n 32.

[79] The distinction between dumping and discharges is important. It is clear that the proposed provisions of the Bill in relation to dumping were to ensure that New Zealand acted consistently with MARPOL and the London Convention. Neither of these international instruments were relevant to the discharge of mining sediments into the marine environment. The London Protocol 1996 (which was agreed to modernise and eventually replace the Convention) states:[35]

> The disposal or storage of wastes or other matter directly arising from, or related to the exploration, exploitation and associated off-shore processing of seabed mineral resources is not covered by the provisions of this Protocol.

[80] The Bill effectively excluded an adaptive management approach for both discharges and dumping. Although neither the London Convention nor associated protocol prohibited adaptive management in relation to dumping, the Departmental report to the Select Committee, indicates that the reason adaptive management was prohibited was to "… ensure New Zealand continues to act consistently" with MARPOL and the London Protocol.[36]

[81] As the International Instruments related to dumping rather than discharge, it was not obvious that, at the time the Bill was introduced, the discharge of sediments from marine mining would be caught by this provision. That is because the definition of "harmful substance" had not yet been set by regulation, and sediments from seabed mining had not been included as "harmful substances" under the prior regime under the MTA.

[82] The Marine Legislation Bill was itself split, with the relevant part becoming the EEZ Amendment Bill which received the royal assent on 22 October 2013.

[83] The first proposal to include sediments from seabed mining in the definition of "harmful substances" came in a Ministry for the Environment discussion document in August 2013.[37]

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35 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 (the London Protocol), Art 1(4)(3).

36 Report of the Ministry of Transport and the Ministry for the Environment *Marine Legislation Bill 2012* at 111.

37 Ministry for the Environment *Activity classifications under the EEZ Act: A discussion document on the regulation of exploratory drilling, discharges of harmful substances and dumping of waste in the Exclusive Economic Zone and Continental Shelf* (Wellington, August 2013).

[84] There is no indication in any of the explanatory material that a purpose of including mining sediments within the definition of harmful substances was to alter the standard of environmental protection available in respect of such discharges.

[85] The new regulations (and the EEZ Amendment Bill) came into effect on 31 October 2015.

[86] The EEZ Act was amended as part of the Resource Legislation Amendment Act 2017. This moved the dumping and discharge consent provisions into Subpart 2 of Part 3 but did not substantively alter them.

[87] Section 4 of the EEZ Act defines discharge as being:

> **Discharge**
>
> (a) includes any release, disposal, spilling, leaking, pumping, emitting, or emptying; but
>
> (b) does not include dumping.

[88] Dumping is also defined and it is specified that it does not include the disposal or storage of waste or other matter directly arising from, or related to, a mining activity.[38]

[89] I have set out the background to the structure of the EEZ in some detail as it is relevant to an understanding of how adaptive management ended up as a technique that was not available in relation to marine discharges.

Purpose

[90] Section 10 of the EEZ sets out the purpose of the Act:

> (1) The purpose of this Act is–
>
> (a) to promote the sustainable management of the natural resources of the exclusive economic zone and the continental shelf; and
>
> (b) in relation to the exclusive economic zone, the continental shelf, and the waters above the continental shelf beyond the

[38] EEZ Act, s 4.

outer limits of the exclusive economic zone, to protect the environment from pollution by regulating or prohibiting the discharge of harmful substances and the dumping or incineration of waste or other matter.

(2) In this Act, **sustainable management** means managing the use, development, and protection of natural resources in a way, or at a rate, that enables people to provide for the economic well-being while–

(a) sustaining the potential of natural resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) safeguarding the life-supporting capacity of the environment; and

(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

(3) In order to achieve the purpose, decision-makers must–

(a) take into account decision-making criteria specified in relation to particular decisions; and

(b) apply the information principles to the development of regulations and the consideration for applications for marine consent.

[91] The relevant regulations define harmful substance as:[39]

4 Meaning of harmful substance

For the purposes of the Act, unless the context otherwise requires, **harmful substance** means any of the following:

(a) a substance that is ecotoxic to aquatic organisms and is hazardous for the purposes of the Hazardous Substances (Minimum Degrees of Hazard) Notice 2001:

(b) oil:

(c) garbage:

(d) sediments from mining activities other than petroleum extraction.

[92] The EEZ Act therefore has two purposes:

(a) to promote the sustainable management of natural resources; and

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[39] Exclusive Economic Zone and Continental Shelf (Environmental Effects – Discharge and Dumping) Regulations 2015, reg 4.

(b) to protect the environment from pollution by regulating or prohibiting the discharge of harmful substances.

[93] The use of the alternatives "regulating or prohibiting" in s 10(1)(b), indicate that the Act envisages circumstances where the discharge of a substance classified as being "harmful" need not be prohibited but can appropriately be regulated.

[94] It is also clear that the purpose is not to exclude the extraction of some mineral resources, but requires the use and development of such natural resources while safeguarding the life-supporting capacity of the environment and avoiding, remedying or mitigating any adverse effect of activities on the environment.[40]

[95] In relation to the use of the word "while" in s 10(2), the decision of the Supreme Court in *Environmental Defence Society v New Zealand King Salmon Co Ltd (King Salmon)* is of assistance.[41] It indicates that the word "while" in this context, means "at the same time as".

[96] There is a significant difference between the definition of sustainable management in s 10(2) of the EEZ Act, and the definition of the same words in s 5(2) of the RMA. This is because the word "environment" used in s 10 is defined differently:[42]

> **environment** means the natural environment, including ecosystems and their constituent parts and all natural resources, of–
>
> (a) New Zealand:
>
> (b) the exclusive economic zone:
>
> (c) the continental shelf:
>
> (d) the waters beyond the exclusive economic zone and above and beyond the continental shelf.

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40 See EEZ Act, s 10(2).

41 *Environmental Defence Society v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 [*King Salmon*] at [24(d)].

42 EEZ Act, s 4.

[97] The equivalent definition in the RMA is much broader and includes:[43]

> (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.

[98] The difference in the definitions means the decisions on sustainable management of natural resources made under the RMA may not always be relevant.

[99] Perhaps unsurprisingly, the appellants focus on the purpose of protection from pollution purpose set out in s 10(1)(b). Mr Gardner-Hopkins goes so far as to submit that this purpose "… must over-ride the Act's sustainable management purpose if necessary".

[100] Mr Cooke QC, for the iwi and fisheries interests, asserts: "So the discharge of such harmful substances is directly identified by s 10 as something to be prohibited as part of the purposes of the Act."

[101] That statement goes too far. Indeed, in the same paragraph, Mr Cooke effectively concedes this by acknowledging:

> What the provisions specify is that such discharge of harmful substances is a form of marine environment pollution that is controlled by the Act. This does not mean that TTL's application is automatically non-compliant, however. That is because:
>
> > … The purpose of s 10(1)(b) includes "regulating" as well as "prohibiting" such discharges; and
> >
> > … The additional purpose of sustainable management in s 10(1)(a), as defined in s 10(2), also needs to be addressed.

[102] I do not accept the submission that the protection from pollution purpose overrides the sustainable management of natural resources purpose. There is no absolute prohibition on the discharge of a harmful substance. Section 10 clearly

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[43] RMA, s 2.

anticipates that there will be cases where this is appropriate, otherwise the reference to regulating such a discharge would be meaningless.

[103] The definition of sustainable management also incorporates the management of natural resources in a way that enables people to provide for their economic wellbeing. The exclusion of minerals from the obligation of "sustaining the potential of natural resources" clearly envisages that, in appropriate circumstances, non-renewable minerals may be extracted and discharges regulated provided that it is done in a way that avoids, remedies or mitigates any adverse effects of such activities on the environment.

[104] Section 10 contains, in subs (3), a provision not found in the corresponding section of the RMA. Subsection (3) specifies what a decision-maker must do in order to achieve the purposes set out in subs (1) and (2). The two obligations are to:

(a) take into account decision-making criteria specified in relation to particular decisions; and

(b) apply the information principles to the development of regulations and the consideration of applications for marine consent.

[105] Whether or not the DMC has discharged its obligations in respect of s 10(3) is dealt with subsequently at [276]-[312].

The appellants' argument

[106] Mr Cooke, for the iwi and fisheries interests, argued that the DMC did not follow the framework established by s 10. His specific complaint was that the DMC did not apply the information principle set out in s 10(3)(b). He said that the DMC was obliged to favour caution and environmental protection when the information available was uncertain or inadequate and had not done so. He said that the information before the DMC was indirect and incomplete, and criticised the use of sampling and modelling to establish possible effects, particularly in relation to the sediment plume.

[107] He argued that the Impact Assessment required by s 39 was obliged to describe both the current state of the area and the environment close to the area, and the effects of the activity on the environment and existing interests, and asserted that this obligation could not be discharged by a sampling/modelling exercise.

[108] Mr Cooke also submitted that, although the DMC found that the proposed activities would have adverse effects on the environment and existing interests, the DMC did not consider whether the activities could nevertheless be allowed by applying the standard set by the Act for granting consent. It was claimed that no tests/standard was applied. This last point was developed as follows:

> At no point do the majority properly address the assessed implications of the activities to determine whether they are justified in accordance with the "test" established by the Act. Indeed no such "test" is ever articulated. The majority do no more than identify a series of factors that they say they take into account, but without explaining how, or what ultimate standard is applied to decide whether the application should be granted.

[109] It was submitted that compliance with s 10 would have required the DMC to assess the economic benefits of the application, together with the effects on the environment and existing interests, and it was claimed that this was also not done.

[110] It was submitted that, instead, the DMC had adopted "an overall balancing approach" of the type held by the Supreme Court to be inappropriate.[44]

[111] Mr M Smith, for the Royal Forest and Bird Protection Society, submitted that the DMC did not directly address "protecting the environment from pollution" and wrongly conflated it with avoiding, remedying, or mitigating adverse effects.

[112] TTR's response to the reliance by the appellants on the decision of the Supreme Court in *King Salmon* in support of the claim that the EEZ imposed an environmental bottom line which had not been considered by the DMC was to submit:

> The *King Salmon* decision is easily distinguishable. It was a plan change case, which turned on a specific RMA requirement that lower-order Plans are to "give effect to" the New Zealand Coastal Policy Statement (NZCPS), and

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44 See above n 41, [106]-[153]; and *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673, at [70]-[74].

> specific NZCPS policies that required certain effects to be "avoided". It has little relevance to a marine consent application under different legislation.

[113] A different approach to compliance with the purposes of the EEZ Act was taken by Mr Salmon, counsel for KASM and Greenpeace. He noted that pursuant to s 59(2)(a), when considering an application for a marine consent, the DMC was obliged to take into account effects on the environment which were defined as including "the economic benefit to New Zealand of allowing the application".[45] He conceded that the DMC had acknowledged that it was required to take such economic benefits into account but criticised their conclusion that a benefit/cost analysis was not required. He submitted that such a consideration was necessary, as was a consideration of environmental, social and cultural costs.

[114] He submitted that an assessment of the "economic benefit to New Zealand" necessarily involved a consideration of both costs and benefits, and that if the economic cost of allowing the application outweighed the economic benefits, there would be no economic benefit to New Zealand from allowing the application. He also argued that the DMC was wrong not to take into account potential economic benefits from other activities that might be precluded or harmed by the activity for which consent was granted on the basis that they were not "imminent".

[115] TTR's response was to assert that the Act sought to *enable* economic use to be made of the EEZ, provided the environment was protected and adverse effects were managed.

[116] In response to the submission that the DMC did not identify or apply any tests/standard to be met in relation to the implementation of s 10, TTR pointed out that the DMC considered in extensive detail the extent of any adverse effects on the environment, and the extent to which such effects could be avoided, remedied or mitigated. Mr J Smith noted that the DMC specifically identified the analysis in Chapter 7 as having been undertaken for the purposes of s 10, and in particular to comply with the requirements under s 10(3).

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45 EEZ Act, s 59(2)(f).

Analysis

[117] The DMC was clearly aware of the EEZ Act's statutory purpose. They set s 10 out in full on pages xi and xii, and acknowledged:[46]

> Section 10 requires that the environment is protected from pollution and dumping of harmful substances and waste such as the residual material that will be returned to the seabed after processing and the extraction of iron ore.

[118] Immediately after that they said:[47]

> The use of the resource must be regulated and controlled in such a way that meets the Act's purpose of sustainable management. We are obliged to identify and to manage effects on the environment to achieve that purpose.

[119] At [117] of the Majority Decision, the DMC specifically acknowledged it was required to give effect to the EEZ and needed to consider whether the application met the purpose of the Act and the framework for assessing that, as set out in ss 59 and 87D of the Act. There is no doubt that the DMC correctly identified the purposes of the Act and the relevant criteria to apply in assessing whether the purposes were met.

[120] The DMC's reasoning as to how the purposes of the Act would be met was:[48]

(a) the impact of most effects will be felt at a localised scale, for example the mining operation would not have significant effects on fish at a population level, although there would be impacts at particular locations within the CMA and the EEZ;

(b) the expert evidence established that the impacts on kaimoana, including shellfish, would be negligible;

(c) the discharge of residual material to the seabed would create a plume of suspended material and the effects of that plume would be felt within the CMA to the South East of the mining site itself;

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46 *Decision*, Summary of Decision at [12].
47 At [13].
48 At [15]-[25].

(d) potential effects of the plume and the deposition of suspended sediment had been assessed by the applicant using modelling of the plume itself;

(e) they imposed conditions that they believed would limit the intensity of the plume and its effects on the environment;

(f) they acknowledged that the mining site itself would incur "catastrophic destruction of existing benthos on the seabed on the mining site itself", but they accepted the evidence that the benthos would recolonise the area and it would recover to perform a similar ecological function;

(g) noise generated by the mining operation was an adverse effect but this was addressed by the imposition of noise threshold limits;

(h) although the effects on the environment would, in many cases, be of considerable duration, most of them would come to an end when the extraction of the material from the seabed ceased.

[121] I deal separately at [265]-[275]; [339]-[343]; [178]-[191] with issues such as the adequacy of the impact assessment, the reliance on sampling and modelling the effects on existing interests, whether a cost/benefit analysis was required in relation to assessing economic benefits, and whether there was an inappropriate conflation of protection of the environment with avoiding, remedying or mitigating adverse effects, but, subject to my findings on these specific topics, it is clear that the DMC correctly identified the statutory purposes and, particularly in Chapter 7, explained how they had taken the Act's purposes into account in reaching their decision to grant the consents.

Other marine management regimes

[122] A number of the appellants advanced an argument based on s 59(2)(h) of the EEZ Act which obliges a consent authority, in assessing the effects on the environment, to consider "the nature and effect of marine management regimes".

[123] Mr Salmon submitted that the DMC had misdirected itself in holding:

> We have assessed effects within the [coastal marine area] in the same way as if the consent were applied for in that area … [but that] … we have not regarded the NZCPS as in any way a replacement for the EEZ Act … our duty and powers lie only under the Act, and there is no relevant topic covered by the NZCPS which is also not able to be considered in the same way under the EEZ Act.

[124] Mr Salmon argued that the DMC had misinterpreted the nature and effect of the RMA and NZCPS with respect to the coastal marine area and this amounted to an error of law. He acknowledged that the EEZ Act did not treat the effects of an activity in the coastal marine area in the same way that the RMA and NZCPS did. He went so far as to submit that the scheme of the EEZ Act was such that it required "the DMC to give effect, or at least significant weight, to the substantive requirements of the RMA and NZCPS when considering cross-boundary effects in the CMA." He urged upon the Court the view of the DMC minority which, unlike the majority, had concluded that "significant weight must be given to such prohibitions where discharge activities occur in close proximity to the CMA and the effects predominantly occur in the CMA …".

[125] Mr Salmon noted that the EEZ Act contemplated applications relating to cross-boundary activities (that is, activities regulated by both the EEZ Act and the RMA) being considered both by the EPA and the relevant consent authority.[49] He then said:

> The EPA/DMC could have decided not to continue with the hearing until matters within the CMA were addressed by a resource consent application, or at an earlier stage returned the application as incomplete.

[126] He submitted, "The extensive provisions concerning joint applications under the RMA and the EEZ/CS Act underline the intention of the legislature to harmonise the two regimes."

[127] He then suggests, "Given the cross-boundary effects of the activity, the EPA ought to have required a joint process, and erred in failing to do so."

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[49] EEZ Act, s 91.

[128] This submission appears to overlook the fact, that although there were some effects (particularly the sediment plume) in the CMA, the activity for which the consents were required was located exclusively beyond the CMA. It therefore did not fall within the category of "cross-boundary activity" regulated by ss 90-100 of the EEZ Act. There was no error of law in the DMC not holding a joint hearing and the EEZ Act does not require the DMC to give effect to either the RMA or NZCPS as would be required if consent for an activity taking place in the CMA was being sought.

[129] Mr Gardner-Hopkins, for the Conservation Board, took a slightly different approach. He said that the requirements of s 59(2)(h) was that the DMC was required to analyse the provisions of the NZCPS or "seek to understand" the nature and effect of the NZCPS. He criticised the DMC's consideration of the NZCPS at [1019] as being "cursory" and claimed that the DMC regarded its obligations under s 59(2)(h) as being to "be aware of" relevant issues and to "avoid conflict with" other marine management regimes.

[130] He submitted that the obligation to take into account "the nature and effect of other marine management regimes" meant more than being aware of the issues and avoiding conflict. He submitted, "In terms of the RMA, section 59(2)(h) required the DMC to fully understand the nature and effect of the NZCPS …".

[131] He expanded on this view by submitting, "This required the DMC to consider, if the activity had required a consent under the RMA, what the likely outcome would be."

[132] Mr Cooke, for the fisheries and iwi interests, made a parallel submission. He acknowledged that, in [1010] the DMC confirmed they had assessed effects with the CMA in the same way as if the consent were applied for in that area but stated:

> It was inadequate to just address the topics under the requirements relating to the EEZ area, and not to separately address the different, and more specific, requirements within the CMA arising under the NZCPS.

[133] He stated:

> The Supreme Court found in *EDS v King Salmon* that the NZCPS created environmental bottom lines that had to be applied, and could not be satisfied

> by more general lines of inquiry, or balancing the relevant considerations under the RMA.

[134] However, this submission fails to recognise that what the Supreme Court was considering in *King Salmon*, was the RMA itself. The application was for consents within the CMA and therefore both the RMA and the NZCPS were controlling.

[135] Because the present consent application related to activities in an area beyond the CMA, it overstates the position to imply that the NZCPS creates environmental bottom lines that must be applied.

[136] The appellants' real challenge was to the finding of the DMC at [1023] where it said:

> The NZCPS is a national policy document, and therefore differs from the EEZ Act in the detail of direction that it provides. That detail provided us with a useful framework that gave additional context to our deliberations. That said, we have not regarded the NZCPS as in any way a replacement for the EEZ Act. We are clear that our duty and powers lie only under the Act, and there is no relevant topic covered by the NZPS [sic] which is also not able to be considered in some way under the EEZ Act. We were mindful of avoiding duplication related to the Act's requirement for caution, as opposed to the NZCPS direction on the "precautionary principle".

[137] The DMC have therefore set out the reasons why they chose not to undertake a detailed analysis of the NZCPS of the type that the appellants have submitted was necessary.

[138] In submitting that a greater depth of analysis and exposition of reasons was required by s 59(2)(h), the appellants are overstating the obligation.

[139] As Baragwanath J said in the case of *Murphy v Rodney District Council*:[50]

> … the duty to give reasons requires the decision maker to outline the intellectual route taken, which provides some protection against error. The reasons may be succinct; in some cases they will be evident without express reference.

[140] Ms Casey, for the EPA, pointed out that the provisions of the EEZ Act which address what should occur where an activity may overlap between the territory

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50 *Murphy v Rodney District Council* [2004] 3 NZLR 421 at [25].

regulated by the EEZ Act and that of other consenting regimes, were primarily procedural. She noted that the process did not establish the DMC as a decision-maker under the RMA, nor give it any role in determining whether an applicant for a marine consent is also required to seek resource consent under the RMA, nor empower it to predict the likely outcome of an RMA application process.

[141] She submitted that the process regulating joint applications for cross-boundary activities does not provide for alignment of policies, planning approaches or decision-making criteria between the two regimes. She submitted that the only substantive (as opposed to procedural) direction in the EEZ Act is s 59(2)(h) where the DMC is directed to "take into account" the nature and effect of other marine management regimes.

[142] She submitted that marine management regimes were defined in s 7 and covered a wide range of legislative regimes including the Fisheries Act, the Marine Reserves Act, the Submarine Cables and Pipelines Protection Act, and the RMA, and noted that the NZCPS was not specifically referred to and that the coastal marine provisions of the RMA had no special statutory weighting compared to the other marine management regimes listed there.

[143] She concluded that there was no statutory basis for the submission that the DMC was obliged to assess the application in accordance with the NZCPS and/or give direct effect to the NZCPS in its decision.

[144] Mr J Smith, for TTR, submitted that the DMC was not required to apply the provisions of the RMA relating to the grant of discharge permits in the CMA. He acknowledged that under s 59(2)(h), the DMC was obliged to take other marine management regimes into account and said that it did so. He pointed out that the DMC acknowledged that some effects of the discharge would occur in the CMA and noted that the DMC had imposed conditions relating to the management of those effects both within the EEZ and the CMA.

[145] Section 107 of the RMA prohibits the grant of a discharge consent within the CMA if, after reasonable mixing, the contaminant or water the discharge would be

likely to give rise to a conspicuous change in colour or visual clarity of the water, or significant adverse effect on the aquatic life within the CMA. As to this section, Mr J Smith submitted that the RMA applied only to the outer edge of the territorial sea – being 12 nautical miles offshore, and did not apply in the EEZ.[51] He noted that therefore, even if the discharge were to result in a conspicuous change in colour or visual clarity of water, or significant adverse effects on aquatic life within the CMA, s 107 of the RMA could not prevent the DMC granting consent to the discharge within the EEZ. He also noted that the DMC had no authority to consider and determine whether any RMA consents were required, or to make determinations in relation to whether any RMA tests were met. He submitted that, while consents were required at the point of a discharge, they were not required once the material had left the effective control of the discharger.[52]

[146] On the NZCPS, Mr J Smith's submission was:

> However, the requirement (under s 59(h)) to take into account, "the nature and effect of other marine management regimes", does not bind the decision-maker to follow the NZCPS, and nor does it require a detailed evaluation against the NZCPS.

[147] He submitted that EEZ activities are not required to "give effect to" RMA instruments and that all that was required is that the NZCPS was taken into account.

[148] He submitted that the real issue in this case was not whether the DMC took the NZCPS into account, but that the appellants were unhappy with the weight applied to it. He noted that the issue of weight was not a question of law.

[149] The DMC addressed its obligations under s 59 in Chapter 7, in particular at [934] and [935]. It expressly acknowledged that it was obliged to take into account effects that extended beyond the boundaries of the EEZ. At [935], it said of s 59(2):

> This section of the Act is highly relevant to our assessment of the effects, especially in respect of the sediment plume. The plume will extend into the coastal marine area (CMA) which is subject to the Resource Management Act. In considering "effects", we have applied the definition in section 6 of the Act and considered potential effects of low probability but high potential impact.

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51 RMA, s 2; and Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, s 3.
52 Relying on *Re Contact Energy Ltd* [2009] NZRMA 97.

[150] The minority took a different approach to the assessment of effects within the CMA and the regard that should be given to the NZCPS. They said at [43]:

> In our view, given the proximity of the activity to the CMA and the fact that the effects of the sediment plume predominantly occur in the CMA, the objectives and policies of the NZCPS should be given significant weight.

[151] They were also of the view that s 107 of the RMA effectively created an environmental bottom line which must not be crossed by allowing activities with such environmental effects to occur in the CMA. They said at [45]:

> We consider significant weight must be given to such prohibitions where discharge activities occur in close proximity to the CMA and the effects predominantly occur in the CMA.

[152] The obligation in s 59(2) on the DMC was to "take into account" other marine management regimes. The DMC expressly acknowledged that obligation.[53] It explained why it regarded the RMA as applying to the CMA but not beyond, and said that it had considered the effects within the CMA as if they were effects under the EEZ.[54]

Analysis

[153] The obligation to take something into account, is something different to the obligation "to apply".

[154] Some 40 years ago, in a criminal case, Somers J expressed the view that there was a difference between the words "shall have regard to" and "shall take into account".[55]

[155] More recently, the Supreme Court in *King Salmon*, in the context of interpreting s 8 of the RMA, considered that the words "take into account" imposed a different and lesser standard than the words "have particular regard to" in s 7.[56]

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53 *Decision* at [1001] and [1003].

54 *Decision* at ss 24.11.2 and 24.11.3, pp 208-212.

55 *R v CD* [1976] 1 NZLR 436 at 437, line 6, applied also in *Te Runanga o Raukawa Inc v The Treaty of Waitangi Fisheries Commission* HC Wellington CP 322/96, 7 August 1997, per Gendall J.

56 *King Salmon*, above n 41, at [27].

[156] The Court also held that neither concept was as strong as the obligation in s 6 that decision-makers "shall recognise and provide for" matters of national importance.

[157] This approach was consistent with that taken by the Environment Court in *Minister of Conservation v Southland District Council* where the Court said:[57]

> …the duty to take into account the principles of the Treaty does not necessarily prevail over the duties to have regard to other contents of Part II of the Act. All relevant matters have to be identified and weighed so that a balanced judgment can be made for achieving the statutory purpose of promoting sustainable management of natural and physical resources as defined.

[158] In a more recent case, Brown J discussed the earlier cases and expressed the view that the phrases "shall have regard to" and "take into account" could be regarded as synonymous.[58] He said:[59]

> In my view, the expression "to take into account" is susceptible of different shades of meaning. I consider that the two phrases can be viewed as synonymous if the phrase "to take into account" is used in the sense referred to by Lord Hewart CJ in *Metropolitan Water Board v Assessment Committee of the Metropolitan Borough of St Marylebone* "of paying attention to a matter in the course of an intellectual process". The key point is that the decision-maker is free to attribute such weight as it thinks fit to the specified matter but can ultimately choose to reject the matter.

[159] I accept and adopt that reasoning. Brown J also noted that the phrase "shall have particular regard to" was a stronger direction than merely "to have regard to".[60]

[160] For the purposes of s 59(2)(h) of the EEZ Act, my conclusion is that the obligation to take into account the nature and effect of other marine management regimes was not an obligation to implement or give effect to those regimes, but to pay attention to those regimes and to weigh the nature and effect of them in addressing any effects on the environment or existing interests of allowing the activities for which consent was sought.

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57 *Minister of Conservation v Southland District Council* NZEnvC Auckland A39/01, 19 April 2001 at [108].

58 *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991, [2015] NZRMA 375.

59 At [63] (citations omitted).

60 At [64].

[161] Although the appellants urge upon the Court the approach taken by the minority to the marine management regimes, particularly the NZCPS and s 107 of the RMA, the real difference between the approach of the majority and the minority is the weight which they gave to other marine management regimes.

[162] In circumstances where the DMC clearly considered (and to that extent took into account) both the RMA and NZCPS, but differed from the minority in the weight that they applied to these regimes, it cannot be said that they made an error of law.

International law obligations

[163] Section 11 of the EEZ Act provides:

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

[164] Section 59(2)(l) requires a consent authority to take into account "any other applicable law".

[165] In relation to the EEZ Act, Mr Salmon submitted, "the Act exists because of international law. The continental shelf and the exclusive economic zone, and New Zealand's authority therein, are entirely products of international law/"

[166] Mr Salmon then submitted that the DMC had failed to consider New Zealand's international obligations and that amounted to an error of law.

[167] Mr Salmon also referred to s 11 in the context of the obligation on the DMC to apply the precautionary principle. That topic is dealt with subsequently at [313]-[346].

[168] After referring to s 11, Mr Cooke set out four articles from the United Nations Convention on the Law of the Sea (UNCLOS). These were:

(a) Article 55 (which defined the Exclusive Economic Zone as an area beyond and adjacent to the territorial sea under which the rights and jurisdictions of the coast State and the rights and freedoms of other States are governed by this Convention);

(b) Article 192 (which imposes general obligations on States to protect and preserve the marine environment);

(c) Article 193 (which records that States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment); and

(d) Article 194 (which obliges States to take "all measures consistent with the Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities …").

[169] Mr Cooke did not go as far as Mr Salmon as to the asserted significance of the international conventions referred to in s 11 but said, "They have a relevant interpretive influence on the EPA's application of the provisions that regulate when particular activities, and especially marine discharge activities in the EEZ, will be allowed."

[170] The effect of international obligations on New Zealand legislation and the differing approaches that Parliament can take to it were discussed by McGrath J in *Helu v Immigration and Protection Tribunal*. He said:[61]

> [143] Parliament takes differing approaches to the implementation of international obligations. It sometimes gives them effect by incorporating their exact terms into New Zealand law. At other times, it enacts legislation,

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61 *Helu v Immigration and Protection Tribunal* [2016] 1 NZLR 298 (citations omitted).

> with the purpose of giving effect to such obligations, using language which differs from the terms of substance of the international text. In such cases, the legislative purpose is that decision-makers will apply the New Zealand statute rather than the international text. Resort may still be had to the international instrument to clarify the meaning of the statute under the long-established presumption of statutory interpretation that so far as its wording permits, legislation should be read in a manner consistent with New Zealand's international obligations. But the international text may not be used to contradict or avoid applying the terms of the domestic legislation.
>
> [144] … [If] Parliament has provided that a decision-maker is to have regard to specific considerations drawn from international obligations, the legislation must be applied in its terms, although they may be clarified by reference to the international instrument.

[171] The particular way that Parliament has determined how New Zealand's relevant international obligations will be applied in relation to marine activity and discharge consents is to refer to them in s 11 and indicate that compliance with the Act is the way that the legislature has decided to discharge New Zealand's obligations under the various international conventions. None of the international conventions are incorporated directly into New Zealand's domestic law.

[172] These observations also apply to the submission by Mr Cooke in relation to the United Nations Declaration on the Rights of Indigenous People (UNDRIP), which I address at [234]-[237] below.

[173] In that context, Mr Cooke submitted:

> Mining activity in the EEZ causing a sediment plume which will intrude into coastal waters directly affects the rights of the iwi that New Zealand has committed to protect in accordance with UNDRIP.

[174] Just as s 11 of the EEZ Act is the manner in which the legislature has chosen to implement New Zealand's obligations pursuant to international conventions relating to the marine environment, s 12 of the EEZ Act is the manner in which the legislature has chosen to respect and give effect to Māori rights and to take those into account in relation to the effects of activities on existing interests.[62]

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62 Along with s 60.

[175] In relation to the use of the term "any other applicable law" in s 59(2)(l), in so far as those words relate to New Zealand's international obligations, s 11 makes it clear that it is the provisions of the EEZ Act itself and not the wording of the conventions that the DMC is required to take into account. The DMC did not misunderstand its obligations under s 11.

[176] In reaching the conclusion that the DMC did not fail to have regard to any other applicable law under s 59(2)(l), I have also considered whether tikanga Māori could be said to be such a source of law. Two different worlds collide in the South Taranaki Bight in relation to Pakeha law and Māori tikanga. Concepts such as the Exclusive Economic Zone, Territorial Limits and Coastal Marine Area simply do not fit with tikanga. To summarise the evidence that Ms Ngariwa Packer gave to the DMC (p 1107), "our maunga travelled out to the sea", "we sprung from our maunga", "our seaward boundary has no end."

[177] It is difficult to reconcile these two different perspectives. Ultimately, the Court has to be guided by s 12 as to how the EEZ Act directs that the principles of the Treaty are to be accommodated. The EEZ Act also does not contain any provisions that parallel ss 6(c) or 7(a) of the RMA. I therefore conclude that although tikanga Māori is a matter for the DMC to consider under s 59(2)(m),[63] it was not required to be considered under s 59(2)(l).

Section 59(2)(f) – economic benefit

[178] Under s 59(2)(f), the DMC must take into account "the economic benefit to New Zealand of allowing the application". The DMC acknowledged this.[64] However, the appellants (particularly KASM and Greenpeace) took issue with their statement that:[65]

> We do not think that taking economic benefit into account requires us to consider a benefit cost analysis. Understanding that there is an economic benefit is all that is necessary and is consistent with the purpose of the Act.

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63 Dealt with below [194]–[228].
64 *Decision* at [805]-[811].
65 At [805].

[179] The DMC also indicated that, while they had considered the potential environmental social or cultural "costs" (or benefits), that might arise from granting the application, they did not consider that there was a need to ascribe a monetary value to those things. This was also challenged by KASM and Greenpeace. Their submission was:

> The "economic benefit to New Zealand" necessarily involves consideration of both costs and benefits – if the economic costs of allowing the application outweighed the economic benefits, there would be no "economic benefit to New Zealand" from allowing the application. The DMC ought to have considered both explicit economic costs of allowing the application, and also the environmental, social and cultural costs and benefits.

[180] They also challenged the DMC's finding that it was not appropriate for the DMC to have regard under s 59(2)(f) to the financial benefits from activity that might potentially be undertaken in the future but which could be impacted upon by the granting of the consents. The DMC had concluded that such activity could only be considered under s 59(2)(m), "any other matter the EPA considers relevant and reasonably necessary to determine the application".

[181] The idea that the DMC was required to monetise the environmental, social and cultural benefits of the granting of consents, and to undertake some kind of balancing exercise to establish the net economic benefit to New Zealand, is a novel one.

[182] As was pointed out by counsel for TTR, there is no authority that would support such a proposition. It is difficult to see how, in any sensible way, economic values of any precise nature could be put on things like environmental, social and cultural costs.

[183] In the case of *Contact Energy Limited v Waikato Regional Council*, Woodhouse J indicated that the loss of an eco-system such as a wetland hosting a large bird population, which is going to be overwhelmed by land reclamation, may not be capable of expression in dollar terms.[66]

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[66] *Contact Energy Limited v Waikato Regional Council* (2007) 14 ELRNZ 128 at [47]-[51] and [88]-[92].

[184] A full Bench of the High Court in *Meridian Energy Limited v Central Otago District Council* echoed a similar view.[67] They indicated that while some qualitative value may be able to be put on things such as the maintenance and enhancement of amenity values, or the intrinsic values of eco-systems, or the quality of the environment, it was not possible to put quantitative values on them, and they declined to engage in such an exercise in relation to the exercise of assessing the efficient use and development of natural and physical resources under s 7 of the RMA.

[185] In that case, the High Court overturned the decision of the Environment Court which had held that a comprehensive and explicit cost benefit analysis, of the type urged by KASM and Greenpeace in this case, was required.

[186] Section 59(2)(f) requires the DMC to take into account the economic benefit to New Zealand of allowing the application. That is something fundamentally different to requiring it to undertake a detailed cost benefit analysis, and of monetising interests and values that are simply not susceptible of being calculated in precise economic terms.

[187] The specific conclusions of the DMC in relation to s 59(2)(f) are set out at [995]-[999]. They recognise that economic dis-benefits must be taken into account including effects on existing interests.[68]

[188] They went on to say:[69]

> We are required to take into account the economic benefit to New Zealand of allowing the application. We do not think that taking economic benefit into account requires us to consider a benefit cost analysis. Understanding that there is an economic benefit is all that is necessary and is consistent with the purpose of the Act. There will be an annual direct benefit of $59 million in terms of GDP, or $159 million if indirect and induced effects are taken into account. There will also be royalties of about $6.15 million per year, $310 million in export earnings, and government taxes.

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67 *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 at [108].

68 At [947], for example, they conclude that there may be some degree of economic impact on commercial fisheries, but that would not be significant in the context of the overall fisheries.

69 *Decision* at [996].

[189] At [998], the DMC said: "We have taken no account of the potential for adverse effects on businesses or attractions which have not yet been established, such as whale watching."

[190] And at [999], they said: "We have taken into account the views of MBIE that it considers the project to be economically feasible, and an activity that will contribute positively to the country's broader economic development strategy".

[191] I am satisfied that the DMC were aware of the obligation arising from s 59(2)(f) and that they have appropriately taken it into account, and explained in a rational way why they regarded it as neither possible nor necessary to engage in the type of quantitative cost benefit analysis submitted by KASM and Greenpeace as being required. There is no error of law in that approach.

Did the DMC properly assess the effects on existing interests correctly?

[192] Section 59(2)(b) requires a DMC to take into account:

> The effects on the environment or existing interests of other activities undertaken in the area covered by the application or in its vicinity, including–
>
> (i) the effects of activities that are not regulated under this Act; and
>
> (ii) effects that may occur in New Zealand or in the waters above or beyond the continental shelf beyond the outer limits of the exclusive economic zone …

[193] Section 60 provides further guidance in relation to matters to be considered in deciding the extent of adverse effects on existing interests. It says:

> In considering the effects of an activity on existing interests under section 59(2)(a), the Environmental Protection Authority must have regard to–
>
> (a) the area that the activity would have in common with the existing interest; and
>
> (b) the degree to which both the activity and the existing interest must be carried out to the exclusion of other activities; and
>
> (c) whether the existing interest can be exercised only in the area to which the application relates; and
>
> (d) any other relevant matter.

[194] A number of the appellants focused on the existing interests of Māori. The submissions give rise to some five specific issues, namely:

(a) Were only physical effects on the existing interests of iwi considered?

(b) Was a cultural impact assessment necessary?

(c) Did the DMC need to consider claims of customary title under MACA?

(d) What is the relevance of New Zealand's obligations under UNDRIP?

(e) Was proper regard given to the Treaty of Waitangi?

Were only physical effects on the existing interests of iwi considered?

[195] On behalf of Ngāti Ruanui and Ngā Rauru Kītahi, it was submitted that their customary and commercial interests were not recognised and respected, and that the activities for which consent was sought, offended against their mana whenua.

[196] Mr Cooke acknowledged that, in Chapter 5 of the decision, [714]-[729], the DMC set out its findings in relation to what were described as "Tangata Whenua Matters" but sought to persuade the Court that the minority view on these matters was preferable.[70]

[197] The conclusion of the minority was:[71]

> Tangata whenua will be particularly affected by adverse effects on their existing customary rights. Māori have statutory acknowledgement over the coastal marine area that will be directly and indirectly affected by the sediment plume. This will significantly impact the ability of tangata whenua to exercise kaitiakitanga over their rohe and marine resources and will in their view adversely affect the mauri of the marine environment. We accept that fish may avoid the sediment plume and move elsewhere. However, Ngāti Ruanui and Ngā Rauru Kītahi cannot move their rohe.

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70 The minority view is set out in the *Decision* at p 231 [27]-[28].
71 At [28].

[198] Mr Cooke submitted that the DMC had conflated its analysis of "the environment" and "existing interests" and said that these concepts were "distinct matters that require consideration independent of one another under s 59(2)(a)". He submitted that as a result of what he described as "conflation", the scope of consideration of Māori existing interests was narrowed to only physical matters.

[199] He claimed that the DMC's conclusions in Chapter 17.5 on tangata whenua matters were "formalistic" and that the DMC "did not explain what implications this had, or precisely how it was being taken into account".

[200] Mr Cooke's submission was that the DMC's ultimate conclusion relied on the final paragraph of its findings that:

> [729] Condition 80 requires the Consent Holder to continue efforts to engage with and inform iwi. Condition 77 requires the kaimoana monitoring programme to proceed regardless.

[201] This was described by Mr Cooke as being "hollow assessments" of these interests, which Mr Cooke submitted had "elevated status" as existing interests pursuant to s 59(2).

[202] In response to the suggestion that the DMC, when considering Māori existing interests, had "addressed only physical matters", Ms Casey pointed to Chapter 5 of the decision where the DMC considers a range of matters, including social and cultural impacts, that had been raised by the submitters. That chapter contains a section devoted to the Ngā Kaihautū Tikanga Taiao (Ngā Kaihautū) Report.

[203] Ngā Kaihautū is the statutory Māori Advisory Committee to the EPA. It has the responsibility of providing advice and assistance from a Māori perspective to the EPA on policy, process and decision-making. The DMC had requested and considered a report from this body.

[204] Ms Casey also took issue with a submission made by Mr Cooke. He had submitted that:

> [The DMC] relied on advice from counsel assisting that, unlike the RMA, existing interests were not defined to be part of the environment itself which are to be directly addressed (majority para 648). The advice was that existing interests were only relevant as "cultural perspectives of effects on the natural environment, alongside scientific or technical information". That is, that the existing interests were only relevant as perspectives on the effects on the physical environment.

[205] Ms Casey referred to the fact that the full quotation in [648] was more extensive than had been set out in Mr Cooke's submission but, more importantly, it focuses specifically on how cultural perspectives could be taken into account in relation to the concept of "environment" under the EEZ Act given its narrower definition than the same term in the RMA. She submitted that the material set out in [648] related only to that narrow issue and submitted that the analysis in Chapter 5 as a whole indicated that separate consideration had been given to the effects on the environment and existing interests. I accept Ms Casey's submissions and conclude that the DMC did not limit their consideration of existing Māori interests just to physical matters.

Was a cultural impact assessment by tangata whenua necessary?

[206] A particular challenge raised by Mr Cooke was that there was no cultural impact assessment.

[207] Section 39(1) and (2) require an impact assessment which, amongst other things, identifies persons whose existing interests are likely to be adversely affected by the activity.

[208] Mr Cooke referred to, and was critical of, [691] of the Decision where the DMC said:

> A cultural impact assessment by tangata whenua is good practice for applications such as this and is highly desirable, but it is not a statutory requirement for applications under the Act. The absence of such an assessment in the documentation accompanying the application is not a fatal flaw.

[209] Mr Cooke submitted that it was incorrect to say that this is not a requirement of the EEZ Act and that it arose under s 39(1) and (3) and through s 12.

[210] The Ngā Kaihautū report had recommended that the DMC obtain a cultural impact assessment.

[211] The Ngā Kaihautū report, at [4.10], explained that TTR had unsuccessfully attempted to engage with Ngāti Ruanui, the iwi with mana whenua in the application area, and it was only because of their unwillingness to engage that they commissioned an independent consultant, Tahu Potiki (Ngāi Tahu and Ngāti Mamoe), to produce a Cultural Values Assessment which was submitted with the application. Expert cultural evidence was also called from Mr Buddy Mikaere.

[212] Mr J Smith, for TTR, submitted that there was no requirement in the EEZ Act that a cultural impact (or values) assessment be produced but that the requirement instead was, under s 39, to take reasonable efforts to identify the effects of the activity on existing interests, and the persons whose existing interests are likely to be adversely affected, and to describe any consultation undertaken and the measures the applicant intends to undertake to avoid, remedy or mitigate any adverse effects. He noted that under s 59(3)(c), the obligation was to "have regard to" any advice received from the Māori Advisory Committee.

[213] Mr J Smith submitted that the requirement "to have regard to" a matter requires that general attention and thought is given to the matter but it does not necessarily require that the matter be accepted, or that it influence the decision.[72]

[214] Mr J Smith submitted that if Mr Cooke's submission that a cultural impact assessment from tangata whenua was mandatory, then that would effectively confer a right of veto on mana whenua who, by choosing not to engage, or by refusing to provide a cultural impact assessment, could stymie an application.

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[72] Relying on *Sanford Ltd v New Zealand Recreational Fishing Council* [2008] NZCA 160 at [94]-[95]; and *Foodstuffs (South Island) Ltd v Christchurch City Council* [1999] NZRMA 481 at 487.

[215] I conclude that Mr Cooke's submission that the obtaining of a cultural impact assessment from the tangata whenua, is a mandatory requirement flowing from s 39(1) and (2), and s 12, overstates the legal obligation. There is no reference at all in s 39 to a cultural impact assessment prepared by tangata whenua.

[216] While the DMC acknowledged that obtaining a Cultural Impact Assessment by tangata whenua is good practice and highly desirable, in the circumstances, given the unwillingness of Ngāti Ruanui to participate in that process, of necessity, they had to discharge the obligations created by s 39 and s 12 in a different way. They clearly had available to them and considered both the Ngā Kaihautū report and the report from Tahu Potiki. The fact that Tahu Potiki was not from Ngāti Ruanui, did not mean that his report could not be an adequate assessment of the effects of the activity on Māori. The DMC was not obliged to follow Ngā Kaihautū's recommendation that they obtain a Cultural Impact Assessment from Ngāti Ruanui and, on the facts of this case, it would have been impossible for them to have done so given Ngāti Ruanui's unwillingness to participate.

[217] I also do not accept Mr Cooke's submission that the analysis by the DMC of the iwi's existing interests were "hollow assessments", and that the DMC failed to explain why effects should be allowed to take place in light of the requirements of the Act.

[218] [729] of the Decision, quoted by Mr Cooke, was only one of some 16 paragraphs in Chapter 5 of the Decision setting out the findings on Tangata Whenua Matters. The preceding 15 paragraphs explained why, notwithstanding the fact that the granting of the consents would generate some adverse effects, the DMC considered it was appropriate that the consents be granted.

[219] The DMC articulated an approach based on effects. They said:

> [720] Māori interests in general, and Te Tiriti principles in particular, are important and relevant "other matters" under section 59(2)(m) of the Act. Our approach in this regard is also consistent with the advice of counsel assisting the DMC; that principles of Te Tiriti should "colour" our assessment. As an example, we have taken into account the potential physical and biological effects of the sediment plume on kaimoana.

> [721] On physical and biological questions, our consideration is based on effects. However, we also acknowledge and have had regard to the Māori worldview, including cultural and metaphysical aspects that go beyond western physical science. This includes the focus of iwi on kaitiakitanga, and potential effects on the mauri of any impacted part of the environment. …

[220] This part of Chapter 5 also dealt separately with each of the three iwi. In respect of Ngāruahine, the DMC concluded that:[73]

> … the predicted level of suspended sediment concentrations will be small increments on background levels inshore and will be less than the levels at which potential adverse effects on marine life might occur.

[221] In respect of Ngā Rauru Kītahi's rohe, their conclusion was:[74]

> Kaimoana gathering sites on nearshore reefs are likely to be subject to minor or negligible impacts given that background SSC is typically elevated in the nearshore area. Impacts may be moderate towards the western end of the rohe, but minor or negligible elsewhere.

[222] And in respect of Ngāti Ruanui's rohe, they said:[75]

> The highest levels of suspended sediment concentration will occur in the coastal marine area offshore from Ngāti Ruanui's whenua. There will be severe effects on seabed life within 2-3 km of the project area and moderate effects up to 15 km from the mining activity. Most of these effects will occur within the CMA. There will be adverse effects such as avoidance by fish of those areas. Kaimoana gathering sites on nearshore reefs are likely to be subject to minor impacts given background suspended sediment concentrations nearshore.

[223] The section on "Findings on Tangata Whenua Matters" was cross-referenced to other chapters which dealt with issues such as human and environmental health, and it is clear that the DMC felt that the conditions they imposed were sufficient to minimise the adverse impacts.

[224] The DMC's analysis was not just restricted to physical conditions. At [727], they said:

> We acknowledge that there will be some impact on kaitiakitanga, mauri, or other cultural values. A significant physical area will be affected, either within the mining site itself, or through the effects of elevated SSC in the discharge.

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73 *Decision* at [723].
74 At [725].
75 At [724].

> Iwi identified other relevant effects such as the impact of noise on marine mammals as being of concern.

[225] Again, it is clear that the DMC felt that the imposition of conditions adequately addressed these issues and, at [728] they expressly said:

> We consider that the conditions (especially Conditions 73-80) will provide an opportunity for iwi to exercise kaitiakitanga through engaging in monitoring, and other scientific and operational aspects of the project.

[226] The obligation in s 59 was to take matters such as existing Māori interests into account. As discussed above, such an obligation involves considering these matters but does not go as far as having to adopt them or expressly incorporate them into the decision.

[227] Mr Cooke complains that "Tangata Whenua Matters" were addressed in a separate chapter to the chapter that addressed other "existing rights". However, the important point is not the chapter that these matters were addressed in, but the fact that they were considered. It is clear that the DMC specifically considered existing Treaty settlements, existing marine and coastal area titles and rights, customary uses and Māori commercial fisheries interests.[76]

[228] Under s 59(3)(c), the DMC's obligation was to "have regard to" any advice received from the Māori Advisory Committee. They clearly did that.

Did the DMC need to consider claims of customary title under MACA?

[229] Mr Cooke criticised the fact that the DMC at [719] stated that they could not take into account recent applications by the three iwi for customary marine title under the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA). It was claimed that this was an error of law and that s 4 of the EEZ Act defined "existing interest" as including an "interest" in a right recognised under MACA. The specific definition in the Act of "existing interest" defines that term as including:[77]

> The interest a person has in … a protected customary right or customary marine title recognised under the Marine and Coastal Area (Takutai Moana) Act 2011.

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76 *Decision*, Part 1, Chapter 5, pp 144-149, ss 17.3.5, 17.3.6, and 17.3.7.
77 EEZ Act, s 4(1) existing interest (f).

[230] It was submitted that a mere claim, as opposed to a right or customary marine title recognised under MACA, could amount to "an interest".

[231] The DMC were clearly aware of the claims that the iwi made under MACA.

[232] At [696], the DMC explained why they felt unable to regard as an "existing interest" a claim made by the iwi under MACA. They said:

> We cannot take future Treaty or MACA Act settlements into account in respect of TTRL's application, as this would be a preemption of decisions yet to be made. These future possibilities are not existing interests under section 59(2)(a), and we have decided that they are not exceptional matters we should take into account under section 59(2)(m).

[233] The interpretation of the term "existing interest" in s 4 that Mr Cooke has advanced, would do violence to the words of that Act. The definition sets out five types of specific rights or statutory entitlements which are incorporated within the term "existing interest". It does not identify a claim under MACA as one of those interests but only a "protected customary right or customary marine title recognised" under MACA. None of the iwi have that yet. The DMC did not err in law in its interpretation of the concept of "existing interest" in s 4.

What is the relevance of New Zealand's obligations under UNDRIP?

[234] Mr Cooke also argued that the DMC was obliged to consider, under the category of existing interests, rights conferred by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

[235] Mr Cooke acknowledges that, at [716], the DMC has said "it would be wrong to base our decision solely on UNDRIP as that would duplicate consideration under New Zealand legislation including the EEZ Act".

[236] Mr Cooke complains that elsewhere the provisions of UNDRIP were not addressed and this was an error.

[237] For the same reasons I have earlier expressed in relation to other international conventions such as UNCLOS and MARPOL, the DMC was not obliged to separately consider that convention. Section 12 of the EEZ Act indicates how the legislature has

required a consent decision-maker to have regards to the interests of Māori. Contrary to Mr Cooke's submission that:

> Mining activity in the EEZ causing a sediment plume which will intrude into coastal waters directly affects the rights of the iwi that New Zealand has committed to protect in accordance with UNDRIP.

and therefore, the DMC was obliged to consider that convention separately, I conclude that the DMC correctly regarded this obligation as being subsumed within the express provisions of the EEZ Act.

Was proper regard given to the Treaty of Waitangi?

[238] Mr Cooke also submitted that the DMC had made an error because it did not adopt the same approach as the previous DMC in relation to s 12 and the Treaty of Waitangi. He set out in his submissions [95] and [97] of the analysis from the June 2014 DMC decision as supporting his submission that the Treaty principles were obliged to be taken directly into account in the DMC's decision-making, and that the DMC erred in not doing this.[78] However, he omitted [96] from the prior decision which says:

> The RMA makes reference to matters of particular concern or interest to Māori in sections 6 and 7. In the context of the EEZ Act, particularly in relation to decisions on marine consent applications, those matters of cultural relevance are addressed through the EPA's obligation to notify relevant Māori groups of consent applications, the ability for the DMC to receive specialist advice on matters pertaining to Māori from the Ngā Kaihautū Tikanga Taiao (the Māori Advisory Committee) and the requirement to take into account the effect of activities on existing interests, which includes the interests of Māori.

[239] When this paragraph is read with the two paragraphs quoted by Mr Cooke, it is apparent that the approaches taken by the two DMCs were in fact consistent.

[240] However, of more importance, is the fact that the same principles apply to the incorporation of the Treaty into the EEZ Act as apply to the incorporation of conventions such as UNCLOS, MARPOL and UNDRIP.

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[78] Environmental Protection Agency *Trans-Tasman Resources Ltd Marine Consent Decision* (EEZ000004, 17 June 2014).

[241] The statute itself defines how the Treaty is to be incorporated. As Ms Casey noted in her submissions, the report back from the Select Committee confirmed this intention.[79]

[242] The Green Party minority view had argued that the Bill should be amended to "impose a general obligation on the Crown to administer and interpret the Act so as to give effect to the Treaty/Te Tiriti principles as legislation such as the Conservation Act 1987 does.[80] However, that approach was rejected and Supplementary Order Papers 96 and 101 proposing amendments to that effect were not agreed to.

[243] I am satisfied that the obligations on the DMC in relation to existing interests, including the interests of the iwi under the Treaty, were considered by the DMC in accordance with s s12, 59 and 60, and that the DMC did not make an error of law in not directly incorporating the principles of the Treaty into their decision separately.

Did the DMC apply the information principles correctly?

[244] As already discussed in the context of whether or not the DMC was obliged to return the application for resource consent as incomplete, s 10(3) of the Act requires the DMC to take into account decision-making criteria specified in relation to particular decisions.

[245] Section 61(1) sets out the information principles relevant in connection with marine consent applications. The section says:

> When considering an application for a marine consent, the Environmental Protection Authority must–
>
> (a) make full use of its powers to request information from the applicant, obtain advice, and commission a review or a report; and
>
> (b) base decisions on the best available information; and
>
> (c) take into account any uncertainty or inadequacy in the information available.

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79 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011 (321-2) (Select Committee report).

80 At 14.

[246] The second of the information principles is:[81]

> If, in relation to making a decision under this Act, the information available is uncertain or inadequate, the EPA must favour caution and environmental protection.

[247] There is a further direction in s 61(3) that in this case is contentious. This subsection says:

> If favouring caution and environmental protection means that an activity is likely to be refused, the EPA must first consider whether taking an adaptive management approach would allow the activity to be undertaken.

[248] However, s 61(4) specifically excludes the operation of s 61(3) in relation to applications for marine discharge consents.

[249] Section 61(5) defines the concept of "best available information". It says:

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

[250] This section, along with s 87E (since repealed), which provided for similar obligations in relation to discharges and dumping consents, are contentious in the present case.

[251] All of the appellants raised issues as to whether information principles were applied correctly. Some aspects of those submissions have already been dealt with. I will now address the remaining matters.

(1) Did the DMC make "full use of its powers"?

(2) Was the impact assessment adequate?

(3) Did the DMC act on the best information available?

(4) Was there a lack of information on the proposal's impacts?

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81 EEZ Act, s 61(2).

(5) Did the DMC err in failing to consider requiring a bond for performance of conditions?

Did the DMC make "full use of its powers"?

[252] The concept of making "full use of its powers" set out in s 61(1)(a) is not further defined in the EEZ Act. No guidance from caselaw is available as this appears to be the first time such a requirement has been included in legislation.

[253] The specific activities that the DMC was obliged to "make full use of its powers" to do was "… to request information from the applicant, obtain advice, and commission a review or a report".

[254] At [21] of the Decision, the DMC details the requests that it made of TTR for the provision of information. These were contained in four minutes: 8 September 2016; 13 October 2016; 22 February 2017; and 10 April 2017.

[255] The Decision notes at [22] that some of the submitters interpreted the DMC's requests for further information as the DMC working too closely with the applicant or rectifying inadequacies in the application.

[256] The real focus of the attack by KASM and Greenpeace seem to be in relation to the DMC's powers to "obtain advice and commission a review or a report" rather than its powers to request information from the applicant.

[257] Likewise, Mr Cooke's submissions did not focus on the power to request information from the applicant but was critical of the fact that evidence produced by iwis and fisheries was used to fill evidential gaps. It was specifically submitted: "For example, the experts called by the fishing industry were required to engage in expert caucusing with TTL's [sic] experts, and required to produce joint expert statements."[82]

[258] Mr Cooke submitted:

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82 Mr Cooke's submissions on this point were expressly adopted by Mr Salmon.

> When submitters appeared to contend that the application was deficient because it did not properly address the existing environment, their evidence on what was deficient was then used to bolster the application.

[259] He then submitted, "This is not what the Act contemplates. Or at least it extends the power to obtain further information beyond the bounds contemplated by the Act."

[260] So, in relation to the power given by s 61(1)(a) to request information from the applicant, the appellants' complaint appears to be that this was overused or misused rather than not used.

[261] The complaint in relation to the power to "obtain advice and commission a review or a report" is slightly different.

[262] The DMC set out, at [26(n)] of the Decision, the reports it had commissioned. Mr Gardner-Hopkins' challenge was expressed as being:

> The issue is whether that was sufficient, together with the evidence it received, to ensure that the DMC had a "best available information" before it. If it did not, then it cannot have made full use of its powers as required.

[263] Mr Gardner-Hopkins also referred to the task of the DMC as being more in the nature of an inquiry than adjudication on a dispute between the parties and said that this heightened the extent to which the DMC had to make full use of its powers under s 61.

[264] All the appellants connected their claim of failure by the DMC to exercise its powers under s 61(1)(a) with the obligation in s 61(1)(b) that the DMC "base decisions on the best available information". They said that the information was not the "best available" because there were gaps or uncertainties.

Was the impact assessment adequate?

[265] In order to assess whether the DMC made an error of law, and failed to make full use of the powers given to it by s 61(1)(a) to request information from the applicant, obtain advice and commission a review or a report, the starting point is to

understand why the information principles set out in s 61 were included in the EEZ Act.

[266] They seemed to be in a response to the acknowledged lack of information and consequent uncertainty about the exact nature of the deep-water environment surrounding New Zealand. They seem to be designed to facilitate the making of consents in circumstances where the absence of hard information might otherwise mean no consents would be granted.

[267] It is significant that the only other piece of legislation with some similarities to s 61 is s 10 of the Fisheries Act 1996 (although it lacks the specific obligation set out in s 61(1)(a)).

[268] The equivalent provision in s 10 of the Fisheries Act requiring "the best available information" has been acknowledged as being directed to the problem of decision-making in conditions where there is a significant degree of uncertainty, with Elias CJ saying, "Imperfect information is not, however, a reason for postponing or failing to take measures to achieve the purpose of the Act."[83]

[269] The need for decision-making to take place in an environment where information was uncertain or incomplete was specifically referred to in the Cabinet Paper recommending the EEZ Bill:[84]

> The decision-making framework for the legislation needs to acknowledge that there is little information about the EEZ and ECS environment and new technologies which may be implemented there. In order to manage this, I propose that decision-makers under the legislation be required to:
>
> (a) take into account the best available information;
>
> (b) consider any uncertainty or insufficiency in the information available;
>
> (c) exercise caution when information is uncertain or insufficient.
>
> Where there is a reasonable chance of adverse effects but scientific uncertainty, or insufficiency of information, any burden of proof that adverse effects are acceptable should rest with the applicant. The lack of certainty

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83 *New Zealand Recreational Fishing Council Inc v Sanford Limited* [2009] NZSC 54, [2009] 3 NZLR 438 at [9].

84 Cabinet Economic Growth and Infrastructure Committee *Proposal for Exclusive Economic Zone Environmental Effects Legislation* (4 May 2011) at [57]-[59].

> shall not prevent measures being taken to avoid, remedy or mitigate potential adverse effects.

[270] The DMC was clearly aware of the obligations set out in s 61(1) and in [2.2.1] and [2.2.2] of Chapter 1 of the Decision has described the way in which it exercised these powers.

[271] The DMC clearly exercised its power to request further information from the applicant to the point where those requests were being criticised by the submitters. The DMC also, as it details in Chapter 1 of the decision, commissioned its own reports and requested information from the submitters.

[272] There is no basis for Mr Cooke's criticism that it was inappropriate for the DMC to obtain information from submitters on issues where there were gaps in the information provided by the applicant. The Act does not impose any restrictions on the sources from which information can be obtained. As some of the appellants (and the DMC itself) noted, the DMC's function was inquisitorial or investigative rather than purely to act as an adjudicator.

[273] The DMC also applied their minds to the issue of whether or not there was a need for further information.

[274] Minute 46 of 31 May 2017 records the unanimous decision of all members of the DMC that, "they have received sufficient information to make a decision and will not be seeking further information from any party."

[275] It cannot be said that the DMC used its powers under s 61(1)(a) in an irrational or unreasonable manner. Accordingly, there is no error of law that would provide the basis for an appeal.

Did the DMC act on the best information available?

[276] Mr Gardner-Hopkins raised two concerns as to whether the DMC had based its decision on the "best available information". He referred to a passage at [25] of the decision where the DMC had said:

> … the best available information is not necessarily "all information". We have relied on the parties to put the best available information before us and have sought additional advice where necessary. We have exercised our judgment about what information is the best available information for this application, having regard to issues of cost, effort and time.

[277] Mr Gardner-Hopkins' concern was the DMC had relied on the parties to put the best available information before it. However, he acknowledged that the DMC went on to say that it had sought additional advice where necessary, but he claimed "that does not suggest the DMC was committed to making full use of its powers to obtain the best available information outside that provided by the parties".

[278] As discussed above, in the context of s 61(1)(a), the DMC exercised its powers to commission reviews or reports and obtain further information both from the applicant and submitters. The DMC unanimously reached the conclusion that it had "sufficient" information. There is no basis for the suggestion that it was not committed to making full use of its powers.

[279] Mr Gardner-Hopkins also submitted that the DMC did not provide a clear analysis about what information it might have considered relevant but that it discounted seeking because of "issues of cost, effort and time". He noted that the DMC had identified time periods for studies of two years and 10 years respectively as being unreasonable yet, as a condition of consent, required baseline information to be gathered by TTR over a period of two years before seabed mining could commence.

[280] He noted that further information on topics such as sediment plume modelling, baseline information on affected sites, survey work to identify currently unidentified reef habitats in the Patea Shoals, and information about ambient noise levels could be obtained without unreasonable cost, effort or time, and referred to the conclusion of the minority that "Many of the gaps in baseline information could have been addressed without unreasonable time and cost."

[281] Mr Cooke submitted that where baseline information was inadequate it would never be appropriate for the DMC to rely on "information to hand". He said:

> If the deficiency in the information applies to the baseline information – so that there is no comprehensive knowledge about the existing environment –

> then the application cannot be properly assessed in a way that satisfies the purpose of the Act set out in s 10.

[282] Mr Cooke also submitted that the imposition of a condition that TTR is to spend two years gathering information must mean that the information was available without unreasonable cost and therefore the DMC had failed to comply with s 61(5) which defines best available information as meaning information that, in a particular circumstance, is available without unreasonable cost, effort or time.

[283] Mr Cooke acknowledged that the question of whether relevant decisions are based on the best available information is highly fact specific. But submitted that "whether the standard has been applied is ultimately a legal question" and referred to a number of successful judicial review challenges in relation to the similar provisions in the Fisheries Act.[85] The courts had upheld challenges to decisions of the Minister of Fisheries.

[284] Mr Cooke sought to distinguish the decision in *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd*, on the basis that, in that case, there was no requirement for the decision-making Board to base its decision on the best available information as so defined, and that the Court accordingly accepted the gathering of further information on water quality imposed as part of an adaptive management regime.[86]

[285] The problem with the submission that, because the DMC imposed a two-year information gathering requirement as a condition, this information must therefore have been "available" at the time of the consent hearing, is that one of the criteria set out in s 61(5) is that the information be available without unreasonable time delay.

[286] The DMC was obliged to process the application for consents within the timeframes imposed by the Act.[87]

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85 *Squid Fishery Management Co Ltd v Minister of Fisheries* CA39/04, 13 July 2004; and *Anton's Trawling Co Ltd v The Minister of Fisheries* HC Wellington CIV-2007-485-2199, 22 February 2008.

86 *Sustain Our Sounds Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 40, [2014] 1 NZLR 673 at [135].

87 EEZ Act, ss 41, 45, 47, 51, 52 and 68.

[287] It did not have the option of adjourning the hearing for two years to allow the information in question to be gathered.

[288] At [25] of the Decision, the DMC noted that the "best available information" is not necessarily "all information" and that in exercising their judgement about what the best available information was, they had regard to issues of cost, effort and time.

[289] Leaving aside for the moment the question of whether the pre-commencement monitoring was available to the DMC, or was part of an impermissible adaptive management exercise, the fact that the DMC imposed a condition requiring pre-commencement monitoring does not necessarily mean that the information that might be gained from that monitoring was therefore information that was available at the time of the hearing without unreasonable cost, effort or time.

[290] The DMC issued a number of minutes in relation to further information and said:[88]

> … we always considered whether the information we sought was relevant, reasonably necessary and available without unreasonable cost, effort, or time – an approach made clear in several of the Minutes we issued.

[291] In relation to the argument that the DMC were obliged to articulate the information that they felt was unreasonable to be obtained on grounds of cost, effort or time, there is no provision in the EEZ Act to that effect.

[292] As noted earlier, the Court in *Murphy v Rodney District Council*, held that the duty to give reasons requires a decision-maker to outline the intellectual route taken but "[t]he reasons may be succinct; in some cases they will be evident without express reference."[89]

[293] It is apparent, both from the specific comments in the decision and the various minutes issued, that the DMC was evaluating and re-evaluating requests for information and balancing the concerns of some submitters that it was unreasonably asking for too much information.[90]

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88 *Decision* at [19].
89 *Murphy v Rodney District Council*, above n 50, at [25].
90 See, for example, *Decision* at [31].

[294] In the present case, the issue of whether or not the DMC had the "best available" information subject to issues of unreasonable cost, effort or time, remains a question of fact. It has not been established that the DMC misunderstood the test in s 61(5), or applied some other criteria in determining whether or not to request further information under s 61(1)(a). No appealable error of law has been identified.

[295] Mr Salmon advanced an argument additional to those of the other appellants. He alleged that the DMC made an error of law in failing to make its "Decision-Making Committee Procedures" (which were included in Appendix 5 of the DMC decision) available to participants before or during the hearing. The copy alleges that this was a breach of the requirements of s 17 of the Act which requires the EPA to make available information relevant to its functions and to enable the public to participate effectively. He alleged that the procedure to be followed where there was no clear majority was not on the EPA's website and should have been. He says that the "tie breaking decision rule was crucial" and the failure to publish the Decision-Making Procedures prior to or during the hearing breached the statute and principles of natural justice.

[296] Ms Casey, for EPA, confirmed that the Decision-Making Procedures were not on the website. However, she says that the procedures are the EPA's "standard decision-making procedures" and that they were available on request. She submits that this was sufficient compliance with the obligation in s 17(3) that it "make available" information relevant to the performance of its functions under the Act to enable the public and persons undertaking, or proposing to undertake, activities in the exclusive economic zone, or on the continental shelf, to be better informed of their duties and of the functions, powers and duties of the EPA, and to participate effectively under the Act.

Analysis

[297] Section 17(3) defines what "make available" in s 17 means. It says that:

> … the information must be kept at the offices of the EPA and made available to members of the public on request and may be kept on an Internet site maintained by, or on behalf of, the EPA.

[298] The critical component of this is that information is to be made available to members of the public on request. Such information *may* be kept on an Internet site but that is not mandatory.

[299] If KASM and Greenpeace had any query about the decision-making process, they could and should have requested clarification from EPA. Similarly, it was obvious to all participants in the hearing before the DMC that there were four members and that there would have been a procedure in place to deal with a situation where the members split evenly. It is also not clear what prejudice KASM and Greenpeace suffered as a result of them not knowing that the chairperson had a casting vote. It is not suggested on their behalf that they would have in any way altered their submissions. The DMC made no error of law in relation to this matter.

Was there a lack of information on the proposal's impacts?

[300] The appellants all submitted that there was inadequate information about the proposal's impacts on matters such as benthic ecology; marine mammals; fish and shellfish; seabeds; ocean productivity; and the effect of the sediment plume generally. However, as most of these matters overlap with the appellants' arguments that the conditions imposed by the DMC to address these issues amount to the implementation of a prohibited "adaptive management" regime, I will address them in the part of this decision that focuses on that topic.

Did the DMC err in failing to consider requiring a bond for performance of conditions?

[301] KASM and Greenpeace advanced, as an appeal ground, an argument that the DMC should have imposed a bond in order to ensure performance of the conditions of the consent, and that they wrongly conflated the purpose and effect of a bond with the effect of public liability insurance.

[302] Section 63(2)(a)(i) authorises a DMC to grant a marine consent on such conditions that it considers appropriate to deal with the adverse effects of the activity including a condition requiring the consent holder to "provide a bond for the performance of any 1 or more conditions of the consent".

[303] The power conferred by s63(2)(a)(i) is discretionary. A DMC is never obliged to impose a bond. It is one of five different options listed in s 63(2)(a). Another one of the options listed is to require the consent holder to "obtain and maintain public liability insurance of a specified value".

[304] Section 65(1) provides that a bond required under s 63(2)(a)(i) may be given for the performance of any one or more conditions of a marine consent that the EPA considers appropriate.

[305] It is clear that the legislature, in s 63, sees both the requirement for a bond and public liability insurance, as acceptable alternatives to be imposed by way of condition where deemed necessary. The suggestion that the Act envisages that the two will be imposed, for different purposes, is unjustified. They are both clearly related to conditions that the marine consent authority may impose to deal with adverse effects of an activity authorised by the granting of a consent. There is nothing in either ss 63 or 65 of the Act that indicates that bonds are regarded differently to public liability insurance as a means of providing a safeguard to ensure compliance with conditions.

[306] The DMC took advice as to whether or not it was appropriate to impose a bond. The summary of the advice received and the reasons given by the DMC for not imposing a bond is set out in Chapter 8, Part 25.5 [1071]-[1074].

[307] The DMC concluded at [1074]:

> Having regard to the circumstances of the application, then taking into account the legal and technical advice that we received, we concluded that the bond is not necessary in addition to the $500 million insurance offered by TTRL (Condition 107).

[308] Obviously, bonds and public liability insurance operate in different ways. However, they can both be valid mechanisms for ensuring that conditions imposed to regulate adverse effects of an activity are effective.

[309] Counsel for TTR points out that, as a result of s 9(4) of the Insurance Law Reform Act 1936, on the insolvency of TTR, the proceeds of public liability insurance would still be available to a third party who suffered damage or loss as a result of a

breach of a condition, and that accordingly, it was reasonable for the DMC to see insurance as an appropriate alternative to a bond.

[310] That may be so, but the more important point is that the requirement for a bond, or for the maintenance of public liability insurance, is discretionary. The Act does not articulate any basis upon which the DMC would be obliged to require one over the other. Indeed, there is no requirement that either be imposed.

[311] The DMC chose to impose a requirement for public liability insurance rather than a bond. Condition 107 provides:[91]

> The Consent Holder shall, while giving effect to these consents, maintain public liability insurance for a sum not less than NZ$500,000,000 (2016 dollar value) for any one claim or series of claims arising from giving effect to these consents to cover costs of environmental restoration and damage to the assets of existing interests (including any environmental restoration as a result of damage to those assets), required as a result of an unplanned event occurring during the exercise of these consents.

[312] Its decision to exercise its discretion under s 63(2)(a)(ii) rather than s 63(2)(a)(i) was neither irrational nor unreasonable. It did not amount to an error of law.

Was the DMC required to apply a precautionary approach?

[313] At [40] of the Decision, the DMC stated:

> There is no requirement on the DMC to apply a precautionary approach. When faced with uncertainty, we are required to favour caution. We have done that. The Consent Holder will not be handed a carte blanche in respect of this mining operation. They will have to conduct the operation in such a way that they avoid adverse effects, remedy adverse effects, or mitigate them. We have imposed conditions which manage the potential for effects on the environment in each of these three ways.

[314] The DMC made clear the basis upon which they reached this conclusion. They relied on the advice of counsel assisting the DMC and in [41] of the decision set out the relevant passage of that advice which was:

> We therefore agree with the view expressed by counsel advising the DMC considering Chatham Rock Phosphate Limited's application that "there

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91 *Decision* at 322.

> appears to be no compelling reason to complement section 61(2) with an extraneous precautionary ideal". That is, in our view there is no requirement on the DMC to apply a precautionary approach, in addition to the requirement to favour caution under section 61(2). Nor is it clear to us what distinction there is in practice between the section 61(2) requirement and the precautionary principle or approach as it is generally understood.

[315] Essentially, what the DMC was saying was that the obligation in s 61(2) to "favour caution and environmental protection" where the information available was uncertain or inadequate, was the way in which the legislature had chosen to define, for the purpose of consideration of marine consents, what has been referred to in the context of the RMA as the precautionary approach or principle.

[316] Although the precautionary principle is not defined in the RMA, the Supreme Court has held that it is implicit in ss 5 and 39 of the RMA.[92]

[317] The appellants argued that the DMC did not "favour caution" and, also, that the obligation to apply a precautionary approach is different to simply favouring caution. Mr Gardner-Hopkins submitted:

> The Conservation Board submits that a precautionary approach or principle infuses the EEZ Act as a whole – not just the requirement under section 61(2) to "favour caution".

[318] However, he then undermines that proposition somewhat by submitting:

> It [sic] terms of terminology, as noted in Department Report [sic] prepared to assist the Select Committee considering the EEZ Bill in 2012 stated that the two terms are considered interchangeable.

[319] Mr Salmon, for KASM and Greenpeace, expressed the proposition slightly differently submitting:

> DMC erred in law by failing to apply the precautionary approach as mandated by (a) the Act; (b) international law; (c) the NZCPS; and (d) the RMA.

[320] He submitted that the word "caution" in the phrase "favour caution", "in this context is a reference to the precautionary approach embodied in New Zealand's international commitments, and s 61 is an implementation of the precautionary approach they contain."

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92 *King Salmon*, above n 41, at 598.

[321] The specific international conventions he relied on were UNCLOS and the Convention on Biological Diversity, both of which are referred to in s 11 of the EEZ Act.

[322] Ms Casey, for the EPA, submitted that, just as the express provisions of the EEZ Act were the legislature's means of enforcing New Zealand's international obligations in relation to issues relating to indigenous peoples or the law of the sea, so too did it contain New Zealand's obligations in relation to the manner in which New Zealand would comply with the precautionary principle. She referred to the legislative history of the EEZ Act in support of her submission that the obligation to favour caution was different to the obligation to apply the precautionary principle. She submitted:

> The deliberate choice to use "favour caution" instead of the "precautionary approach" or "precautionary principle" was debated at select committee and in the Committee of the Whole House. For example, Supplementary Order Paper 103 (New Zealand Labour Party) proposed replacing "caution" in what is now s 61(2) with "a precautionary approach", explaining replacing the proposed amendment in the following terms: "… is amended to remove the new terms 'favour caution' and replace it with the more widely understood 'precautionary approach'. While it has been stated that the Bill is consistent with the precautionary approach without explicit reference, to avoid doubt and unnecessary confusion, the term should be adopted."

[323] Mr Smith, for TTR, submitted that the phrase "favour caution and environmental protection" is not defined in the Act, nor are the words "uncertain or inadequate". He acknowledged that the meaning of an Act must be discerned from its text and in light of its purpose,[93] but said that the Act's purpose included enabling economic use of the EEZ resources, provided the environment is protected (to the extent required) and effects are managed.

[324] He further submitted that "protection", in this context, is not an absolute, absent the achievement of which a consent must be declined.

[325] He submitted that "To favour caution and environmental protection is to prefer a careful approach which reduces the likelihood of harm to natural resources."

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93 Interpretation Act 1999, s 5.

[326] Mr Smith also pointed to the fact that Parliament, in enacting s 61(2), had deliberately chosen to use the words "favour caution" rather than "precautionary principle". He set out the following statement from the Hon. Dr Nick Smith during the debate on the EEZ Bill:[94]

> … You actually look through Court decisions on those who have chosen to put that precautionary principle, it creates huge uncertainty.

[327] He also referred to the Departmental Report on the EEZ Bill which said:[95]

> The use of the term "precautionary approach" or "precautionary principle" will not aid interpretation or offer certainty in the Bill.

[328] He dismisses the case law under the RMA relied on the appellants, saying that none of the legislation in the cases cited has the same wording as the EEZ Act.

[329] He acknowledged that s 59(m) required a marine consent authority to take into account "any other matter the marine consent authority considers relevant and reasonably necessary to determine the application" but said that the precautionary principle could not be brought in that way as it would conflict with Parliament's intention and the clear words of the Act. He submitted that:

> The precautionary approach/principle is *not* an international Treaty, Declaration or Convention (even though its genesis was in such instruments) – and is not a mandatory, nor indeed a permissible, consideration.

[330] He submitted that whether "favour caution and environmental protection" is a different standard to applying the "precautionary approach" is irrelevant to determining the meaning of the term "favour caution and environment protection", and the meaning of that term must be ascertained from the Act itself.

Analysis

[331] The term "precautionary approach" or "precautionary principle" had its genesis in the Rio Declaration.[96]

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94 (2 August 2012) 683 NZPD 4601.

95 Departmental Report on the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill, 19 March 2012, at 12.

96 1992 Rio Declaration on Environmental and Development A/Conf 151/26 V1 (1992).

[332] Principle 15 of the Rio Declaration reads:

> Principle 15–-
>
> In order to protect the environment, a precautionary approach shall be widely applied by States according to their capability. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental declaration.

[333] The Supreme Court in *Sustain our Sounds Inc v The New Zealand King Salmon Co Ltd* discussed the concept of the precautionary principle but did not attempt to define it.[97] At [122], the Court referred to a Canadian case where the Federal Court of Appeal had said that the precautionary principle states that:[98]

> … (a) a project should not be undertaken if it *may* have serious adverse environmental consequences, even if it is not possible to prove with any degree of uncertainty that these consequences will in fact materialise.

[334] The courts have consistently held that, notwithstanding that the RMA does not expressly require the adoption of a precautionary approach, that the precautionary principle is inherent in the Act's provisions.[99] It is also clear that Parliament considered whether or not there should be an express requirement in s 61(2) to apply the precautionary principle but decided because of a lack of certainty around exactly what that concept meant, to use the words "favour caution and environmental protection" instead.

[335] Those words must be taken as being the means by which the legislature chose to comply with its international obligations, including the Rio Declaration. Indeed, as some of the appellants contended, those words import a higher obligation than that contained in the Rio Declaration. That is because Principle 15 in the Rio Declaration limited the obligation on states to comply with the precautionary principle with the qualifying words "according to their capability".

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97 *Sustain our Sounds Inc v The New Zealand King Salmon Co Ltd*, above n 86.

98 *Canadian Parks and Wilderness Society v Canada (the Minister of Canadian Heritage)* 2003 FCA 197, [2003] 4 FC 672.

99 See, for example, *Shirley Primary School v Christchurch City Council* (1999) NZRMA 66 at [114]; *Rotorua Bore Users Association Inc v Bay of Plenty Regional Council* NZEnvC Auckland A138/98, 27 November 1998 at 49.

[336] Therefore, the DMC did not err in deciding that their obligation was to comply with s 61(2) and not to incorporate "an extraneous precautionary ideal" in addition to the clear requirement there to "favour caution".

[337] The DMC therefore did not make an error or law in the way they formulated the test that they were to apply. However, that is a different question to whether or not they actually applied an approach which "favoured caution and environmental protection".

[338] The appellants submit that there were certain environmental bottom lines that were required to be met before consents could be granted.

[339] A particular complaint of the appellants was that TTR's impact assessment had relied on modelling, especially in relation to the sediment plume.

[340] KASM and Greenpeace submitted that:

> The Applicant failed to carry out necessary benthic investigations, marine mammal surveys, and ambient sound measurements despite these inadequacies resulting in the refusal of the consents sought in its first application.

[341] The iwi and fisheries interests submitted:

> At several places, the majority accepted that the information provided by TTL did not provide baseline information about the existing environment, or the effects of the proposed activities on that environment and existing interests. The majority proceeded on the basis that this could be addressed by considering a model of their activity, and then requiring conditions mandating the gathering of actual information about the environment, then monitoring the effects on it, and the discontinuance of the activities if problems were identified.

[342] Particularly in relation to the sediment plume, the criticism of the DMC relying on modelling appears to be misplaced. In a situation where the activity generating the sediment plume does not exist, and will not exist unless a consent is granted for the activity, modelling seems to be the only realistic way of establishing what the effects on the environment of such a sediment plume would be.

[343] Ms Casey submitted that the International Marine Organisation's *Waste Assessment Guidelines Under the London Convention and Protocol* assume that dumping consents for inert geological material will be based on modelling, and emphasised the importance of how the "impact hypotheses" are generated and assessed and then confirmed through monitoring conditions.[100]

[344] The way that the DMC proposed to address the fact that the baseline information necessary for it to be able to "favour caution and environmental protection" was not available, was to impose conditions, particularly conditions involving monitoring. The DMC said:[101]

> The other supporting aspect that leads to the need for consent is environmental monitoring. TTRL proposes to undertake a range of monitoring for baseline establishment and understanding subsequent effects. The nature of monitoring will be largely set by conditions to be imposed on the consent. Some, but by no means all, of the monitoring will require consent due to structures on, or disturbance of, the seabed.

[345] There is nothing novel about the imposition of conditions involving the gathering of baseline information in relation to a marine consent. This is what occurred in the case of *Sustain Our Sounds v King Salmon*. However, there is one significant difference between that case and the present case. That case involved an activity governed by the RMA and NZCPS. That legislation does not prohibit adaptive management as the Supreme Court in *Sustain Our Sounds v King Salmon* noted.[102]

[346] There have been a number of cases where adaptive management techniques have been applied in New Zealand in order to address the uncertainty associated with marine activity.[103]

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100 See, Convention on the Prevention of Marine Pollution and Dumping of Wastes and Other Matter, 1972 (the London Convention), Protocol 1996 (signed by New Zealand in 1997 and entered into force in 2006); 2014 IMO (International Marine Organisation) *Waste Assessment Guidelines Under the London Convention and Protocol*, p 87 [6.7]-[6.8], continuing to p 88 at [7.1]-[7.11].

101 *Decision* at [155].

102 *Sustain Our Sounds v King Salmon*, above n 86, at [105].

103 See, for example, *Golden Bay Marine Farmers v Tasman District Council* EnvC Wellington W19/2003, 27 March 2003; *The Minister of Conservation v Tasman District Council* HC Nelson CIV-2003-485-1072, 9 December 2003; *Clifford Bay Marine Farms Ltd v Marlborough District Council* EnvC Christchurch C131/2003, 22 September 2003.

Adaptive management approach

[347] There can be no doubt that the DMC was not permitted to use an adaptive management approach, notwithstanding that such an approach is available in relation to marine consents applying to activities undertaken within the territorial waters, and therefore governed by the RMA and NZCPS, and that an adaptive management approach would seem to be ideally suited in cases where there was uncertainty as to the effects on the environment of a marine discharge consent.

[348] As mentioned above, it is not obvious why Parliament chose to classify the discharge of the residue of seabed mining activities as the discharge of a hazardous substance (and thereby to make adaptive management unavailable). It cannot have been to further in New Zealand's international obligations because the relevant international conventions restrict the prohibition of adaptive management to dumping rather than discharge.

[349] The DMC was aware that, because one of the consents applied for was a discharge consent, that an adaptive management approach was not available to them.[104]

[350] They did not believe that they were applying such an approach. It is therefore necessary to analyse the basis of the DMC's claim that the various conditions they imposed did not amount to an adaptive management approach; whether their interpretation of what constitutes an adaptive management approach, was too narrow; and whether the conditions imposed improperly addressed the failure by TTR to provide adequate baseline information.

What is "adaptive management"?

[351] Section 64(2) of the EEZ Act defines adaptive management in these terms:

> **An adaptive management approach** includes
>
> (a) allowing an activity to commence on a small scale or for a short period so that its effects on the environment and existing interests can be monitored;

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104 *Decision* at [41] and [60].

(b) any other approach that allows an activity to be undertaken so that its effects can be assessed and the activity discontinued, or continued with or without amendment, on the basis of those effects.

[352] Section 64(3) also provides:

> In order to incorporate an adaptive management approach into a marine consent, the EPA may impose conditions under section 63 that authorise the activity to be undertaken in stages, with a requirement for regular monitoring and reporting before the next stage of the activity may be undertaken or the activity continued for the next period.

[353] Section 64(4) provides:

> A stage may relate to the duration of the consent, the area over which the consent is granted, the scale or intensity of the activity, or the nature of the activity.

[354] Mr M Smith, for Forest and Bird, acknowledged that the EEZ Act did not attempt to define adaptive management but gave examples of what might be included in that concept. He submitted:

> The essence of adaptive management as appears from these examples is that a consent is granted so that the effects of the activity can be monitored and assessed and a decision then made on whether and how the activity can continue, in light of the improved understanding of its effects obtained from the monitoring and assessment work.

[355] He submitted that the Supreme Court in *Sustain Our Sounds v New Zealand King Salmon*, had emphasised that before adaptive management can be considered, there must be adequate baseline information about the receiving environment. He also referred to the observation of the Court in *Sustain Our Sounds* that adaptive management was not a "suck it and see" approach.

[356] He categorised the prohibition of use of an adaptive management approach in relation to discharge consents as being:

> … an embodiment of the second statutory purpose of environmental protection applying particularly to discharge activities. Parliament has prescribed that a more cautious approach must be taken to discharges.

[357] In addition to the examples of an adaptive management approach set out in s 64(2), the Supreme Court in *Sustain Our Sounds* summarised what courts in several

jurisdictions including New Zealand, Australia and Canada had determined an adaptive management approach to be.[105]

[358] The Supreme Court noted that the International Union for Conservation of Nature had approved a set of guidelines on the application of the precautionary principle and these included a guideline on using an adaptive management approach which said that such an approach should include the following elements:[106]

> (a) monitoring of impacts of management or decisions based on agreed indicators;
>
> (b) promoting research, to reduce key uncertainties;
>
> (c) ensuring periodic evaluation of the outcomes of implementation, drawing of lessons and review and adjustment, as necessary, of the measures or decisions adopted; and
>
> (d) establishing an efficient and effective compliance system.

[359] The Court referred to New Zealand cases which said that an adaptive management plan should set reasonably certain and enforceable objectives, plan and design a process for meeting those objectives, establish a monitoring regime and a process for the evaluation of monitoring results leading to the review and refinement of hypotheses.[107]

[360] The Supreme Court also referred to a Canadian decision *Pendina Institute for Appropriate Development v Canada (Attorney General)*, where the Court had said that adaptive management allows projects to proceed, despite uncertainty and potentially adverse environmental impacts, based on flexible management strategies capable of adjusting to new information regarding adverse environmental impacts, where sufficient information regarding those impacts and potential mitigation measures already exists.[108]

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105 *Sustain our Sands v King Salmon*, above n 86, at [109]-[140].
106 At [109].
107 Such as *Quest Energy Kaipara Ltd v Northland Regional Council* EnvC Auckland A132/2009, 22 December 2009.
108 *Pendina Institute for Appropriate Development v Canada (Attorney General)* [2008] FC 302.

[361] The DMC, relying on the legal advice that it had received, adopted a narrow view of what the concept of "adaptive management involved". At [54] of the Decision, they quoted conclusions reached by counsel assisting the DMC:

> … in our view a relatively narrow interpretation of "adaptive management approach" is supported by the text of section 64 itself, read in light of the EEZ Act's purpose. Adopting such an approach, "adaptive management approach" would mean:
>
> (a) allowing an activity to commence on a small scale or for a short period, or in stages otherwise contemplated by subsection (64)(4), with its effects monitored, and where a possible conditioned outcome is the activity being discontinued on the basis of the observed effects; or
>
> (b) any other approach reflecting, through conditions, that an appropriate possible response to the activity's effects, following ongoing assessment, is the consented activity being discontinued altogether.

[362] In the decision, the DMC also referred to advice received from Crown Law on this point. The relevant extract from that advice set out in the Decision reads:[109]

> Under this interpretation, monitoring conditions designed to verify that conditions are met or test the validity of the assumptions made as part of the environmental assessment are not prohibited simply because monitoring may result in an adjustment of activities. However, where the effects of the activity are so uncertain and potentially significant that the conditions of consent need to provide, on the basis of observed effects, for discontinuance of the activity altogether, this will amount to an adaptive management approach for the purposes of s 87F(4) of the Act.

[363] The appellants took slightly different views as to what amounted to adaptive management. KASM and Greenpeace submitted:

> [T]he DMC incorrectly treated adaptive management as only applying when the activity may be discontinued altogether. The DMC ignored the second part of s 64(2)(b), which states that (emphasis added): "any other approach that allows an activity to be undertaken so that its effects can be assessed and the activity discontinued, **or continued with or without amendment**, on the basis of those effects". Those words cannot be ignored, though that is what the DMC did.

[364] Among the errors that KASM and Greenpeace said the DMC fell into as a result of its narrow interpretation of the concept of adaptive management was:

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109 *Decision* at [55].

> … to provide, in the conditions, that decisions could be changed on the basis of monitoring (a classic characteristic of adaptive management, that is, "continued with or without amendment").

[365] In submissions for KASM and Greenpeace, Mr Salmon went through some 12 conditions in detail explaining why they were said to amount to adaptive management.[110]

[366] Mr Gardner-Hopkins submitted that the definition adopted in [54] of the Decision requiring that a consented activity be discontinued altogether before the condition could be said to be adaptive management approach was inconsistent with the second limb of s 64(2) which refers not just to the effects of activities being assessed, and the activity discontinued, but also to an assessment of effects which results in the activity being "continued with or without amendment on the basis of those effects."

[367] Mr Cooke advanced a similar argument and referred to s 63(2)(b) which refers to conditions which "together amount or contribute to an adaptive management approach". He also submitted that the description of the approach set out in [36] of the Decision, effectively described an adaptive management approach. In particular, he submitted that the Pre-Commencement Monitoring Plan which required TTR to collect two years of data before mining commences contributed to an arrangement amounting to an adaptive management approach.

[368] Mr Cooke also submitted that, even if an adaptive management approach had been available, here the lack of baseline information in relation to the receiving environment meant that one of the necessary prerequisites for the implementation of an adaptive management approach (adequate baseline information) was not present.

[369] KASM and Greenpeace adopted the submissions on this point made by the fisheries and iwi appellants, and also submitted that as a result of the DMC using an inappropriately narrow definition of adaptive management approach, they failed to apply the obligations in s 61(2) to favour caution and environmental protection.

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110 Conditions 5, 48, 49, 50, 51, 53, 56, 61, 66, 67, 73, and Sch 3.

[370] The approach taken by Mr M Smith, for Forest and Bird, was similar. Of the two examples given in s 64(2), he said:

> The essence of adaptive management as appears from these examples is that a consent is granted so that the effects of the activity can be monitored and assessed and a decision then made on whether and how the activity can continue, in light of the improved understanding of its effects obtained from the monitoring and assessment work.

[371] He also made the point that, in order to be able to utilise an adaptive management approach (where permitted by the statute), a consent authority must have reasonable assurance that even the limited scope of the activity approved, for the purposes of adaptive management, will not itself risk unacceptable effects.

[372] Ms Casey correctly noted, in her submissions, that most of the caselaw has addressed the issue of whether an adaptive management approach is appropriate rather than focusing on a definition of the term. She drew the Court's attention to the fact that the EEZ Bill, as originally introduced, contained a definition of adaptive management in s 4, but that the Bill was amended to introduce what is now ss 63(2)(b) and 64. Section 64 was not drafted to be a definition as, at the time the amendment containing what was to become s 64 was introduced, the definition sat in s 4.

[373] Ms Casey's submission was that s 64, "… was intended to provide an expansive permission to the EPA to set effective consent conditions." At the time of the report back from the Committee of the whole House on 22 August 2012, the definition in s 4 had been changed to refer to what is now s 64, presumably on the basis that a separate definition was no longer necessary. Unfortunately, that has resulted in the Act containing no definition of adaptive management but only two examples illustrative of what the concept includes.

[374] The absence of a particular definition of adaptive management assumed much greater significance upon the subsequent amendment incorporating into the definition of harmful substance the discharge of the residue from undersea mining. It appears that the possibility that this might subsequently occur had not been adverted to by the legislature when they removed the original definition from the Bill.

Was the DMC's interpretation of what amounted to an adaptive management approach too narrow?

[375] The DMC were alive to the issues raised by the prohibition of the use of an adaptive management approach in relation to a discharge and the lack of a statutory definition of adaptive management.[111]

[376] The DMC issued a number of minutes seeking submissions from the parties on the concept of "adaptive management approach".[112] They also obtained a detailed opinion from counsel assisting the decision-making Committee. An EPA expert, Dr Robert Lieffering, also addressed this question and provided an opinion concluding that the conditions proposed by TTR, at the time, did not amount to adaptive management.

[377] Both the opinion of counsel assisting and of Dr Lieffering supported a narrow interpretation of s 64(4) and, in particular, a conclusion that a necessary constituent of an adaptive management approach was an approach which, through conditions, provided that an appropriate response to the activity's effects, following ongoing assessment, was that the consented activity would be discontinued altogether.[113] This opinion, which is reflected in the DMC's decision, is at the heart of the contention between the parties in this case.

[378] The DMC imposed 109 separate conditions to the grant of the consent. Between them, the appellants challenged almost a third of those conditions as amounting to, or contributing to, an adaptive management approach. Each of the appellants challenged different conditions although there was some overlap. The main types of conditions being challenged can be summarised as being:

(a) those relating to the two-year Pre-Commencement Monitoring of some 16 different matters;[114]

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111 EEZ Act, s 87F(4).
112 Minutes 17, 28, and 34.
113 Dr Phil Mitchell, an expert for TTR, gave evidence to the effect that, in all the cases he was aware of where adaptive management had been required, staging and the prospect of shutting down the operation were fundamental to the consents being granted.
114 Conditions 48-51.

(b) the condition which provided that, no later than five years following the completion of all seabed material extraction within 2km of the location where the extraction first occurred, the consent holder was required to demonstrate that recovery of the macroinfauna benthic community at that location had occurred;[115]

(c) the condition that stipulated that, in the event that monitoring of Suspended Sediment Concentration (SSC) limits show that the limits had been exceeded, or that the significance of change in relation to SSC was more than 10 per cent, "then extraction activities shall cease until the Consent Holder can demonstrate compliance with those conditions, to the satisfaction of the EPA"; and

(d) the various conditions which required an operational response from the Consent Holder as a result of information obtained from monitoring.[116]

[379] Broadly, such conditions require the Consent Holder to prepare plans setting out indicators of adverse effects revealed by monitoring or identifying potential operational responses to such adverse effects.

[380] In the decision itself, the DMC identified why it had imposed the various conditions complained about by the appellants, and why it thought they did not amount to an adaptive management approach.

[381] Key to the DMC's reasoning is their acceptance of the advice they had received that an adaptive management approach was one which could result in a permanent cessation of consented activities as a result of the obtaining of new information about effects.

[382] In Chapter 25.2, headed "Operational Response Conditions" at [1054] of the Decision, the DMC stated, "There will be a range of circumstances in which the Consent Holder will need to put day to day operations on hold for a period of time."

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115 Condition 8.
116 For example, Conditions 55g, 61, 66, 67, 68, 69 and 70.

[383] At [1055], it said:

> The condition proffered by the applicant dealing with benthic recovery required them to cease operations until recovery is back on track. Dr Lieffering said that "I think it's an environmental bottom line. It's a compliance matter. It's not an adaptive management, as I understand it."

[384] And in [1056] in relation to condition 8, they said, "We agree with Dr Lieffering that this condition is unlikely to lead to a permanent cessation in the mining activity."

[385] In response to the claims of the appellants that the DMC had in fact adopted an adaptive management approach, Mr Smith submitted that monitoring of effects was a common feature of all but the most simple consents. He submitted that while it is also always present in an adaptive management approach, it cannot have been Parliament's intention to prohibit monitoring conditions from being applied to marine discharge consents merely because monitoring could contribute to adaptive management.

[386] He noted that, s 76(1)(c) permitted the EPA to review the duration of a resource consent and the conditions imposed to deal with adverse effects that were unanticipated when the consent was granted, or were of a scale or intensity that was not anticipated when the consent was granted.

[387] He noted that under s 81(3), the EPA may cancel a consent where a review initiated under s 76(1) has indicated that the activity authorised by the consent has significant adverse effects on the environment or existing interests.

[388] However, this submission is not entirely apposite to the types of conditions imposed in the present case. These conditions do not simply relate to unanticipated developments (which is what s 76(1)(c) is restricted to). The need for them arises from the fact that, because of a lack of certainty about what could be described as the environmental bottom line, the DMC is not able to accurately predict what the effects will be, so it cannot be said with any certainty that particular effects are "unanticipated".

[389] Mr Smith submitted that because what he described as the "orthodox tools" of monitoring and reporting had not been excluded by the statute, an adaptive management approach must mean an approach that achieves something different from such standard management tools. I do not accept this submission.

[390] Imposing conditions such as reporting and monitoring, of itself, will not amount to an adaptive management approach. Adaptive management is a tool to be implemented in circumstances where a resource consent would not otherwise be granted because of inadequate or uncertain information. If the tools such as monitoring and reporting are used as part of a regime which is designed to address the fact that, at the time the consent is granted, there is inadequate information about the receiving environment, or the potential effects, then they can be part of an adaptive management approach or contribute to such an approach.

[391] Mr Smith submitted that:

> The only feature of the scenario as described in s 64(2)(a) that is materially different from standard monitoring, reporting, compliance or review conditions, is that they make provision for the authorised activity to cease altogether, or for some new limit to be applied to the continuation of the activity, without relying on the exercise of the Act's review processes. Those then, are the defining elements of an "adaptive management approach".

[392] This submission overlooks a further example of such an approach given in s 64(2)(b) which refers to "any other approach that allows an activity to be undertaken so that its effects can be assessed, and the activity discontinued, *or continued with or without amendment, on the basis of those effects.*" (emphasis added).

[393] Addressing the argument that what had been imposed was a staged activity,[117] and that was a constituent component of an adaptive management approach, Mr Smith submitted that Pre-Commencement Monitoring and the sand mining were not the same activity. He further submitted that, "None of the Pre-Commencement Monitoring conditions allow the sand mining to occur on a small scale or for a short period." This latter submission addresses the example of adaptive management approach given in s 64(2)(a).

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[117] Referring to s 64(3) and (4).

[394] However, the thrust of the appellants' arguments was not that the approach taken by the DMC fell within the example given in s 64(2)(a), but within s 64(2)(b).

[395] Mr Smith refers to s 20 and subpart (2) of Part 2 of the EEZ Act as supporting his submission that the monitoring preceding the sand mining was different to the activity of the sand mining and discharge of sediments itself. There is nothing in either s 20 or subpart (2) of Part 2 of the Act that would support such a contention. The relevant consent applied for was a discharge consent. The set of conditions imposed by the DMC, at least in relation to the two-year pre-commencement period, can be regarded as stages of the discharge consent. The reference in s 64(3) to activities being undertaken in stages with a requirement for regular monitoring and reporting before the next stage of the activity may be undertaken supports an interpretation that the conditions imposed amount to an adaptive management approach.

[396] Mr Smith alternatively argued that, even if the pre-commencement monitoring and mining could be regarded as one aggregated activity, the pre-commencement monitoring would still not constitute a staging approach because it did not provide for the mining to not commence based on the monitoring data. This proposition is based on the assumption that, in order for an adaptive management approach to exist, there must be the possibility of the activity being discontinued. However, as indicated above, this ignores the last phrase in s 64(2)(b) referring to the activity continuing with or without amendment on the basis of the effects revealed by the monitoring.

Analysis

[397] In determining the meaning of an adaptive management approach in the EEZ Act, the starting point is to consider the words used in s 64 in light of the purpose of the Act. The Act, of course, has two purposes, namely, the promotion of the sustainable management of the natural resources of the exclusive economic zone and continental shelf, and to protect the environment from pollution by regulating or prohibiting the discharge of harmful substances. Those two purposes sit uneasily one with the other.

[398] TTR, in its submissions, emphasised the purpose of promoting sustainable management of the natural resources and the appellants emphasised the purpose of

protecting the environment from pollution by regulating or prohibiting the discharge of harmful substances. Both purposes are of equal value and neither can be ignored.

[399] The critical features of the regime established or contributed to by the conditions discussed above are that the conditions provide for:

(a) the gathering of baseline information, then the monitoring of the effects of the activities on the environment;

(b) the making of further formal decisions in stages, with the first stage being the period of two years prior to mining commencing, the second stage involving the first five years of operation, and the final stage being the balance of the life of the consents. In relation to condition 5, a potential outcome is that "extraction activities shall cease until the Consent Holder can demonstrate compliance with those conditions, to the satisfaction of the EPA". To that extent, this condition would fall within even the narrow definition of adaptive management approach adopted by the DMC, and the other conditions fall within the second concept set out in s 64(2)(b) in that, depending on the results of the monitoring, the activity may be continued with or without amendment on the basis of the effects revealed by the monitoring;

(c) thresholds being set to trigger remedial action, and decisions must be made at each stage by the EPA and technical experts to allow the activities to continue, or be modified; and

(d) the consenting activities must either cease or be modified if the information gathered demonstrates that environmental standards are not sustained.

[400] A broad reading of the examples given in s 62(2)(b) is justified because it is consistent with the purpose of environmental protection and the statutory obligation to favour caution.

[401] What distinguishes the monitoring and reporting conditions in the present case from "normal monitoring conditions" is that, it is not just monitoring to ensure compliance with environmental standards, it is monitoring to establish what the environmental baselines are, because of uncertainty or inadequate information coupled with a potential modification or cessation of the activity, depending upon the circumstances revealed by the information.

[402] I accept the submission of Mr M Smith, for Forest and Bird, that "… the key to adaptive management is that it involves allowing an activity to be carried out so that its effects can be monitored and assessed and the activity modified or discontinued accordingly".

[403] While the Supreme Court in *Sustain Our Sounds* did not purport to define the concept of adaptive management, they described the indicia of the concept as recognised in the New Zealand and overseas caselaw, and in the International Union for Conservation of Nature Guidelines.[118]

[404] Here, the conditions imposed by the DMC and discussed above, either constitute or contribute to an adaptive management approach and have been used as a tool for managing uncertainty. Although such an approach is permitted, and indeed very sensible, in relation to activities taking place in the marine environment covered by the RMA and NZCPS, it is simply not available (in relation to the discharge consent) in an area governed by the EEZ Act.

[405] Even if the activities were to take place in an area governed by the RMA, there is doubt as to whether the adaptive management approach in this case would be valid because one of the prerequisites for using an adaptive management approach is to have sufficient baseline information so that appropriate conditions can be drafted. There must be real doubt that this is the case here.

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118 Discussed at [358] above.

Did the DMC observe the principles of natural justice?

[406] A number of the appellants phrased their criticisms of decisions made by the DMC as to the conduct of the hearing as breaches of the principles of natural justice. KASM and Greenpeace, in particular, submitted that s 27(1) of the NZ Bill of Rights Act 1990 (NZBORA) had been breached. The particular breaches referred to were:

(a) calling for fresh evidence late in the hearing;

(b) a wrong approach to evidence from the first hearing; and

(c) failure to provide Decision-Making Committee procedures to the applicants.

[407] I have dealt with (a) and (c) previously, finding no error of law.

[408] It was alleged that the majority took into account evidence from the prior hearing despite stating:[119]

> We considered only the evidence and information put before us. We did not evaluate the quality of the evidence put before the other DMC in respect of the earlier application, nor did we critique the decision of that earlier DMC. The two applications are different and we were obliged to deal with the current application as a *de novo* hearing. We have granted consent based on the evidence put in front of us.

[409] Mr Salmon gave only one example in support of his claim that the DMC had taken into account evidence that had "not been introduced in evidence before it". This was set out as an extract from [498] of the decision where the DMC had said:

> Dr Childerhouse told us that expert conferencing during the previous application had included a review of international literature, including Department of Conservation regulations and the Southall study, which he considers is the benchmark study for acoustic impacts on marine mammals.

[410] Mr Salmon says that the DMC took this evidence into account in deriving conditions to address noise effects on marine mammals. He says that the DMC was wrong to consider evidence from one participant in the earlier expert conference

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[119] *Decision* at [116].

without considering the report from the expert conference, and questioning other participants to that conference on that evidence.

[411] This complaint is misconceived. Dr Childerhouse, during the course of his evidence in this DMC hearing, referred to the fact that during the prior hearing, the experts had reviewed international literature. There was nothing inappropriate in him doing that and the DMC did not rely on what had happened at the earlier hearing as a basis for this part of their decision.

[412] The issue of the literature, international and otherwise, about acoustic impacts on marine mammals, was extensively traversed by all of the experts who gave evidence on this topic. Indeed, Mr Salmon omits to set out the balance of [498] which records the discussions between the experts in this case, including the discussion about the Southall study. The passage omitted reads:

> The experts also had direct discussions with international experts, including from the USA. He noted that the NOAA interim threshold for behavioural disturbance from continuous noise is 120 dB, and is the same level as described by Southall et al.

[413] The DMC did not depart from the approach it had outlined at [116].

[414] Even if there had been some inconsistency, given the extensive evidence from the various experts on local and international standards and studies on acoustic impacts on marine mammals, the effect of any error would not have been material.

[415] Mr Cooke also criticised the statement of the DMC in [116]. However, his attack was on the basis that, although the DMC was not bound by its previous decision, and no question of *res judicata* or issue estoppel arose, the DMC should not lightly have taken an approach inconsistent with that taken by the previous DMC. He then set out [116] asserting that it meant that the problems identified by the earlier DMC were not addressed at all, and that no consideration was given to whether the decisions were consistent.

[416] Mr Cooke submitted that the prior DMC had held that there was insufficient baseline information to grant the application, even with adaptive management and said:

> It was necessary, therefore, for the DMC to consider the application by virtue of the deficiencies identified by the earlier decision in order to reach a decision that was not inconsistent with its earlier decision.

[417] He supported that submission by referring to the DMC decision which said:[120]

> We considered whether the concept of an existing environmental or activities "baselines" are relevant. We decided they were not. We considered whether precedent had any value in our deliberations. We determined that there was little of relevance in prior experience or case law to draw on for this application.

[418] Given the DMC's conclusion that the concept of an existing environmental baseline was not relevant, it is hardly surprising that they did not examine the prior DMC's conclusion to the contrary. As the DMC noted, the prior application was not exactly the same as the current application on the basis of the evidence placed before it.

[419] This was a new application where some of the evidence was different. The Act had also been amended in significant respects since the earlier DMC decision. In those circumstances, the DMC did not make an error of law in failing to give weight to the prior DMC decision.

Outcome

[420] The narrow interpretation of the concept of adaptive management approach, applied by the DMC, is inconsistent with the meaning of that term derived from s 64 of the EEZ Act. The interpretation adopted is inconsistent with the purpose of the Act in s 10(1)(b) of protecting the environment from pollution by regulating or prohibiting the discharge of harmful substances. It was also inconsistent with the obligation set out in s 61(2) that, where information available is uncertain or inadequate, a marine consent authority must favour caution and environmental protection. The error was material and may well have influenced the outcome of the consent application.

[421] The appeal is allowed and the decision of the DMC is quashed. The matter is referred back to the DMC for reconsideration, applying the correct legal test in relation to the concept of adaptive management approach.

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120 At [1042].

[422] I invite the parties to agree costs but in the absence of agreement, the appellants shall have 15 working days within which to file submissions, and the respondents 15 working days thereafter to reply.

Churchman J

Solicitors:
Duncan Cotterill (Nelson) for Taranaki-Whanganui Conservation Board
Dawson and Associates Ltd for Fisheries Interests
Oceanlaw New Zealand (Nelson) for Ngāti Ruanui
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