

Mark Connor
President
NZ Sport Fishing Council
PO Box 93
Whangarei
secretary@nzsportfishing.org.nz



Environmental Protection Authority
Private Bag 63002
Waterloo Quay
Wellington 6140
TTRapplication@epa.govt.nz

Andrew Beatson
Trans-Tasman Resources
c/o Bell Gully
PO Box 1291
Wellington 6140
TTRsubmissions@bellgully.com

28 January 2014

NZ Sport Fishing Council supplementary submission on the Trans-Tasman Resources Marine Consent Application

- The New Zealand Sport Fishing Council re-submits the Environmental Protection Authority **must decline** the Trans-Tasman Resources Limited marine consent application to mine iron sand in the South Taranaki Bight.
- The New Zealand Sport Fishing Council lodged a primary submission 19 December 2013.

NZ Sport Fishing Council

1. The New Zealand Sport Fishing Council (NZSFC) appreciates the opportunity to re-submit on the Trans-Tasman Resources Ltd (TTR) application for a marine consent to undertake an iron sand mining project in the South Taranaki Bight, within New Zealand's Exclusive Economic Zone. TTR released their application on 21 November 2013 with submissions due by 19 December. The application was re-notified on 20 December, with submissions due by 28 January 2014.
2. NZSFC representatives are available to discuss this submission in more detail if required. We look forward to positive outcomes from this review and would like to be kept informed of future developments. Our contact is Roz Nelson, secretary@nzsportfishing.org.nz.
3. The NZ Sport Fishing Council is a national sports organisation with over 32,000 affiliated members from 55 clubs nationwide.
4. The New Zealand Sport Fishing Council has initiated LegaSea, a public outreach organisation, to generate support for the ongoing effort to protect and enhance the public's access to abundant fisheries in a healthy marine environment. www.legasea.co.nz
5. The intention is to broaden NZSFC involvement in marine management advocacy, research, education and working together on behalf of our members and LegaSea supporters.
6. We are committed to ensuring that sustainability measures and environmental management controls are designed and implemented to achieve the Purpose and Principles of the Fisheries Act 1996, including "maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations..." [s8(2)(a) Fisheries Act 1996]

Background

7. Trans-Tasman Resources Ltd (TTR) has lodged an application with the Environmental Protection Authority (EPA) to mine the seabed for iron sand off the coast of Patea, South Taranaki, pursuant to the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.
8. The EPA is a Crown agent responsible for deciding marine consents. The EPA Board has appointed a committee of experts to decide on the TTR marine consent application.
9. The marine consent would allow for the mining of 65 square kilometres of seabed for a period of 20 years. It is the first application made under the recent Exclusive Economic Zone legislation.
10. The EPA advises Trans-Tasman Resources Ltd intends to extract a maximum of 50 million tonnes of the seabed each year in depths ranging from 19 to 42 metres. The proposal area covers 65.76 square kilometres of seabed between 22 to 36 kilometres offshore of Patea.
11. EPA re-notified the application because some relevant documents were not available on the EPA website for the full 20-day submission period, between November and December 2013.

NZSFC Submission

12. Further to the submission lodged on 19 December 2013, the New Zealand Sport Fishing Council (NZSFC) **submits EPA must decline the application.**
13. In addition to the Council's three major concerns of:
 - a. The enormous scale of the proposal for a process that has not been used or understood in the context of the New Zealand continental shelf.
 - b. The unknown consequences of releasing sediments taken from depths of up to 15 metres or more below the sea floor.
 - c. The precedents set in relation to any granting of a licence to mine the seabed, particularly in respect of environmental standards that apply to any such licence.

A further concern arises when considering the legal framework within which the TTR application will be decided.

Legal framework

14. The Exclusive Economic Zone (EEZ) extends to 200 nautical miles from the coastal state's baseline, unless there is a proximate neighbouring state, in which case the EEZ runs down the mid-line.
15. The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (the Act) is the primary legal framework, and the application for a marine consent by TTR will be tested against provisions within this Act.
16. Part 3 of this Act deals with making regulations that give effect to the Act's purpose. It is through regulations (s.27) that applications for a marine consent will be determined as prohibited, permitted or discretionary, terms and conditions applied and/or standards set.
17. The Act explicitly acknowledges New Zealand's wider international commitments to the United Nations Convention on the Law of the Sea 1982 (UNCLOS) and other Conventions at s.33(3)(h), where it requires a Minister to take into account New Zealand's international obligations when developing regulations.
18. Section 11 gives the Minister enabling authority, via the Act, to implement New Zealand's obligations under various international treaties and conventions, including:
 - i. UNCLOS 1982; and
 - ii. The Convention on Biological Diversity 1992.

19. We draw attention to this intersection between the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 and New Zealand's obligations as a signatory under UNCLOS and other international conventions. The Act gives **no discretion for making regulations that breach international conventions and treaties**.
20. A coastal state, such as New Zealand, has sovereign rights for the purpose of exploring, exploiting, conserving and managing the natural resources, whether living or non-living, of the waters adjacent to the seabed and of the seabed and its subsoil. It also has jurisdiction for the purposes of *inter alia* (amongst other things) the protection of the marine environment.
21. When the provisions of a coastal state's law conflicts with the conditions of UNCLOS, UNCLOS prevails.
 - It is not within a coastal state's jurisdiction to enact laws that weaken or breach the conditions of UNCLOS, or other treaties to which it is a signatory.
22. The obligations arising from New Zealand being a signatory to UNCLOS must be enacted as directed by ss 11 and 33(3)(h) of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.
23. The additional rights that UNCLOS acknowledge as belonging to coastal states bring with them the duty to create meaningful regulations. The principles and practices of caution, risk-averse decision-making, maintenance of very high ecosystem function, protection of habitats of endangered species, and many more, must be encapsulated in a coastal state's regulations.
24. The rights to enact regulations by the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (the Act) only exist within the overarching rights granted by UNCLOS. Section 33(3)(h) of this Act threatens to be a primary test for the legality of any regulations proposed.

Would a regulation granting marine consent to TTR conform with New Zealand's international obligations?

25. New Zealand must **ensure**, through proper conservation and management measures, that **the maintenance of the living resources in the Exclusive Economic Zone is not endangered by over-exploitation**. New Zealand has international obligations in respect of biodiversity and ecosystem function under UNCLOS that, if ignored, threaten to make regulations made under the Act *ultra vires* (beyond power or authority).
26. International instruments, especially those contained in UNCLOS, predominantly foresee conservation obligations, including, among other things, the obligations to take conservation and management measures designed to maintain or restore marine resources at levels which can produce the maximum sustainable yield, both within sea areas under national jurisdiction and on the high seas, and to maintain functioning ecosystems delivering high level services, cooperate with other states to this end, obligations to apply the precautionary approach widely to conservation, management and exploitation of fish stocks or minerals. Regulations made under the Act should therefore contribute to New Zealand's implementation of its international obligations under these international instruments.
27. It is easy to see how a coastal state like New Zealand can misinterpret those sovereign rights to equate to the EEZ forming part of its territory, but there is a subtle and important legal difference between the EEZ and territorial waters -
 - i. While New Zealand has sovereignty in territorial waters, it only has sovereign rights in the EEZ.
 - ii. Those rights can only be exercised in a manner compatible with UNCLOS and the fundamental terms and conditions that dictate their use.

- iii. Compliance with **all** terms and conditions is a *prima facie* (factual) duty of any regulations passed under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act.
28. The coastal state has the same environmental obligations as those within its territorial waters:
- i. The coastal state is obliged to protect and preserve the marine environment;
 - ii. The coastal state is obliged to preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life, but there are some additional requirements: *The coastal state must ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation.*
 - iii. Can New Zealand **ensure** the ecosystem disruption from seabed mining will not further endanger Maui Dolphin?
29. It is impossible to ensure New Zealand will conform to our international obligations under UNCLOS considering we cannot anticipate -
- i. the degree of benthic disturbance;
 - ii. the degree of ecosystem disruption;
 - iii. the extent and magnitude of systems failures;
 - iv. the unknown composition of discharges;
 - v. the unknown cumulative effects of 20 years of discharge of unknown quantities of metal contaminants into the foodweb; and
 - vi. the unknown disruption caused between the coast and the adjacent seabed.
30. The precautionary principle applies, and granting a permit for an untried process with potentially catastrophic environmental disruption in the South Taranaki Bight and beyond would demonstrably breach our international obligations and be in breach of s33(3)(h) of the Act.
31. Three key findings in a recent UK government report¹ are that:
- i. The major drivers of change, degradation, or loss of marine and coastal ecosystems and services are mainly anthropogenic (human induced);
 - ii. Marine and coastal ecosystems are among the most productive, and provide a range of social and economic benefits to humans; and
 - iii. Most services derived from marine and coastal ecosystems are being degraded and used unsustainably and therefore are deteriorating faster than other ecosystems.
32. This UK report represents a powerful and well-informed prospectus for far-sighted policies and actions to manage and exploit marine waters and our fisheries and minerals in more sustainable ways. We need to do more than just pay lip service to balancing exploitation with conservation.
33. As highlighted, we need to be mindful of the wider impacts on ecosystem integrity, functioning, and the provision of all ecosystem services. The economic and social implications of continuing to overlook ecosystem services, essential to the wellbeing of diverse constituencies of society including future generations, are as clear as they are often neglected.
34. Again, the NZSFC submits that the application must be declined on the grounds of non-compliance with our international obligations, as well as defying common sense by taking such huge environmental risks for effectively little recognisable public benefit.

Unknown sediment risks

35. The Review of Technical Reports posted on the EPA website include a review of technical reports on physical environment by Sinclair Knight Merz. This report draws attention to the inadequate

¹ Plenty more fish in the sea? A working paper on the legal issues related to fishing beyond maximum sustainable yield: A UK case study. Working Paper. University of the West of England. Appleby, T., Everard M., Palmer, R. and Simpson, S. (2013). <http://eprints.uwe.ac.uk/22111/>

understanding of the effects of sediment plumes and contaminants, the basis of our original objection.

36. The concerns at fine suspended particulates being discharged via the waste plume, with ability to transport contaminants and suffocate biota over long distances is a matter of critical importance.
37. As previously identified, maintaining high environmental standards and ecosystem function is a primary responsibility of New Zealand's under UNCLOS, and again we see realistic and high probability threats to the ecosystem clearly identified.
38. We note the confirmation that the distance and frequency of sites analysed and modelled are inadequate. No real sense of the likely benthic disruption or increased sediment load can be drawn from the studies done to date.

Conclusions

39. There remains far too much uncertainty in the studies undertaken to support the TRR application to mitigate environmental risks to the standard required by UNCLOS.
40. New Zealand simply has no jurisdictional authority to approve seabed mining within the EEZ unless to do so complies in *all regards* to our international obligations as signatories to Treaties and Conventions.
41. The maintenance of ecosystem function and all its services and products is absolutely binding on any Minister making regulations within the Exclusive Economic Zone. The TTR application and supporting documents fail when tested against existing obligations.
 - The New Zealand Sport Fishing Council again **submits** the Trans-Tasman Resources Limited **marine consent application** to mine iron sand in the South Taranaki Bight **must be declined**.