

**BEFORE THE ENVIRONMENTAL COURT
AT THE WELLINGTON REGISTRY**

ENV 2016 WLG 00041

IN THE MATTER

s 279 of the Resource Management Act 1991 (the
“RMA”) and s 158 of the Exclusive Economic Zone
and Continental Shelf (Environmental Effects) Act
2012 (“the Act”)

BETWEEN

Kiwis Against Seabed Mining Incorporated (KASM)

Applicant

AND

The Environmental Protection Authority
First Respondent

AND

Trans-Tasman Resources Limited
Section 274 Party

Submissions for KASM

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MAY IT PLEASE THE COURT

Introduction

1. These are submissions of KASM in response to the Minute of the Court of 7 October. They supplement the Memorandum by KASM of 3 October. That Memorandum is varied to the extent that the date for submissions have been extended to 14 November as was noted in the Submissions for the EPA.
2. KASM is a non-profit incorporated association. The Affidavit of Phil McCabe set out the involvement of KASM in the first two seabed mining applications under the Act. Its involvement has been extensive at all stages. It was noted by the first TTR Decision-Making Committee.”

36. We are grateful for the efforts of the overwhelming majority of experts, other witnesses and submitters for doing their very best to respond constructively to the challenges presented by the Act’s process. We wish to particularly record our appreciation for the work of the experts who met in the various expert conferencing sessions we established early in the hearing sequence. The work that was completed by those experts, including the joint witness statements they produced, has been invaluable.

37. We also need to note the effort that has been put in by some submitters who have spent hours and hours reading and discussing the material produced by the applicant and others so that they were in a position to talk knowledgeably to us about their concerns. In that regard, we wish to single out Mrs Karen

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Pratt whose extraordinary eye for detail has been of considerable assistance to us in a number of areas.

38. It was brought to our attention by submitters at the hearing that there was no legal or financial assistance available to any members of the public. In this respect, we again acknowledge the effort put in by a number of submitters, including Kiwis Against Seabed Mining (KASM) and the Environmental Defence Society (EDS).

3. KASM performed a similar role in the second seabed mining application under the Act, by Chatham Rock Phosphate. As is shown in affidavit of Phil McCabe, KASM both makes submissions and in doing so engages experts and counsel ,and also acts on a community level, holding public meetings and liaising with the public and submitters (potential and actual). It is this latter function which prompted this application: KASM encountered widespread concern at the extensive redactions and confidentiality surrounding this application.
4. KASM submits that the proposed redacted information if disclosed with the rest of the application documents (1) do not unreasonable prejudice to the commercial position of TTR; and (2) the public interest in making the proposed redacted information available outweighs the importance of avoiding such prejudice.

KASM has applied under section 158(6) of the Act for Court Orders under section 279(3)(a) of the Resource Management Act 1991 to:

- (a) Set aside directions of the Decision-Making Committee (DMC) of Environmental Protection Authority which is considering the application of Trans-Tasman Resources Limited for a marine and discharge consent to extract and process iron ore. The relevant directions of the DMC are found in

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Minute 3, dated 14 September 2016 of the DMC; and

- (b) Order that the information listed in paragraph 4 of Minute 3 of the DMC be made publically available; and
- (c) Order that the public submission period be re-started to allow submitters to consider the further information previously unavailable due to directions of the DMC in Minute 3.

5. KASM has filed three affidavits in support of its position. They are:

- (a) Affidavit of Philip McCabe of 30 September
- (b) Affidavit of Dougal Greer of 25 October
- (c) Affidavit of Karen Jane Pratt of 25 October

The Law

6. Section 158 provides as follows:

158 Protection of sensitive information

(1) The Environmental Protection Authority may, on its own initiative or on the application of any party to any proceedings or class of proceedings, give a direction described in subsection (3) where it is satisfied that the order is necessary—

(a) to avoid causing serious offence to tikanga Māori or to avoid disclosing the location of wāhi tapu; or

(b) to avoid disclosing a trade secret or to avoid causing unreasonable prejudice to the commercial position of the person who supplied, or is the subject of, the information.

(2) Despite subsection (1), the EPA may not give a direction described in subsection (3) if, in the circumstances of the particular case, the public interest in making the information available outweighs the importance of avoiding such offence, disclosure, or prejudice.

(3) The EPA may give a direction for the purpose of subsection (1)—

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(a) requiring the whole or part of any hearing or class of hearing at which the information is likely to be referred to be held with the public excluded:

(b) prohibiting or restricting the publication or communication of any information supplied to it, or obtained by it, in the course of any proceedings, whether or not the information may be material to an application.

(4) A direction given under subsection (3)(b) in relation to—

(a) any matter described in subsection (1)(a) may be expressed to have effect from the commencement of any proceedings to which it relates and for an indefinite period or until such date as the EPA considers appropriate in the circumstances:

(b) any matter described in subsection (1)(b) may be expressed to have effect from the commencement of any proceedings to which it relates but will cease to have any effect at the conclusion of those proceedings.

(5) On the date that a direction prohibiting or restricting the publication or communication of information is given under subsection (3)(b), the provisions of the [Official Information Act 1982](#) cease to apply to the information while the direction remains in effect.

(6) Any party to any proceedings or class of proceedings before the EPA may apply to the Environment Court for an order under [section 279\(3\)\(a\)](#) of the Resource Management Act 1991 cancelling or varying any direction given by the EPA.

(7) Where, on the application of any party to any proceedings or class of proceedings, the EPA has refused to give a direction described in subsection (3), that party may apply to the Environment Court for an order under [section 279\(3\)\(b\)](#) of the Resource Management Act 1991.

(8) In this section, *information* includes any document or evidence.

7. In our submission, there are two relevant key tests in section 158(1)(b).
 1. It must be necessary to avoid causing unreasonable prejudice to the commercial position of the person who supplied, or is the subject of, the information. (TTR does not appear to be claiming ‘trade secret’ but rather unreasonable prejudice to their commercial position).
 2. The EPA may not give a direction described in subsection (3) if, in the circumstances of the particular case, the public interest in making the

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information available outweighs the importance of avoiding such offence, disclosure, or prejudice.

8. In our submission, the test of “unreasonable” prejudice must be read in light of the provisions of the Act and in particular the public interest test in section 158(2).
9. In particular, KASM concurs with counsel for EPA (paragraph 32) that the Court may consider the *"information principles"* to be directly relevant to this proceeding.

61 Information principles

(1) 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.

(2) 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.

(3) 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.

(4) Subsection (3) does not limit section 63 or 64.

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

10. Important here are the requirements to make full use of its powers to request information from the applicant, obtain advice, and commission a review or a

report; and to base decisions on the best available information

The importance of public participation is highlighted in section 17(1)(b), which provides that the EPA must keep records and make available information “in particular, to enable the public and persons undertaking or proposing to undertake activities in the exclusive economic zone or in 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 this Act.”

The public notification provisions of section 45 and public hearing provisions of section 53 further underline the importance under the Act of public participation.

11. The equivalent provision of the RMA is in section 42 which reads in part:

42 Protection of sensitive information

(1) A local authority may, on its own motion or on the application of any party to any proceedings or class of proceedings, make an order described in subsection (2) where it is satisfied that the order is necessary—

(a) to avoid serious offence to tikanga Maori or to avoid the disclosure of the location of waahi tapu; or

(b) to avoid the disclosure of a trade secret or unreasonable prejudice to the commercial position of the person who supplied, or is the subject of, the information,—

and, in the circumstances of the particular case, the importance of avoiding such offence, disclosure, or prejudice outweighs the public interest in making that information available.

12. Section 277 is also important in this context:

277 Hearings and evidence generally to be public

(1) All hearings of the Environment Court shall be held in public except as provided in subsection (2).

(2) The Environment Court may—

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(a) order that any evidence be heard in private:

(b) prohibit or restrict the publication of any evidence—

if it considers that the reasons for doing so outweigh the public interest in a public hearing and publication of evidence.

13. The wording in section 42 in our submission virtually mirrors the wording in section 158.

RMA Section 42	EEZ/CS Act Section 158
41(1)(b) to avoid the <i>disclosure of a trade secret or unreasonable prejudice to the commercial position of the person who supplied, or is the subject of, the information,</i>	158(1)(b) to avoid <i>disclosing a trade secret or to avoid causing unreasonable prejudice to the commercial position of the person who supplied, or is the subject of, the information.</i>
and, <i>in the circumstances of the particular case, the importance of avoiding such offence, disclosure, or prejudice outweighs the public interest in making that information available.</i>	158(2) Despite subsection (1), the EPA may not give a direction described in subsection (3) if, <i>in the circumstances of the particular case, the public interest in making the information available outweighs the importance of avoiding such offence, disclosure, or prejudice.</i> <i>[italics added]</i>

14. We submit that for all material reasons the provisions are virtually identical. It can be inferred that the considerations, including the public interest considerations, underpinning the RMA s 42 are the same: the Court must weigh the public interest in making the information available against the importance of avoiding such offence, disclosure, or prejudice.

15. However there is in our submission another consideration relevant to the current application: the requirement in section 61 for the EPA to make full use of its powers to request information from the applicant, obtain advice, and

commission a review or a report; and base decisions on the best available information. In simple terms: the public interest in environmental protection versus trade secrets and unreasonable prejudice to the commercial position of the applicant.

The Confidentiality Agreement

16. It remains to be discussed whether the proposed confidentiality agreement addresses the public interest balance so as to swing it towards redaction. In our submission it does not. The order forces a submitter or expert to choose between not accessing the information and signing the agreement. The agreement commits them to civil and potentially criminal (as is discussed below) legal liability. Mr McCabe in his affidavit set out some objections to signing the agreement (para 35):

Many people I have spoken to on this redaction issue, in public meetings in the last two weeks, have variously expressed reluctance and hesitation to sign a confidentiality agreement, feel concerned that if they said the wrong thing they may be exposed to legal consequences, and have expressed concerns that they may not be allowed to speak on an issue if it is hidden, or subject to a confidentiality order or issue, or may even have to engage a lawyer to decide whether to sign the agreement and to find out what they can and cannot say. In other words, they feel they may be gagged if they sign the agreement, and the idea of signing it has put people off and inhibited them from engaging in the issue.

17. Mr Greer, an expert is one such person: he said in his affidavit that “[a]s an expert, I do not feel comfortable signing the proposed confidentiality agreement, as I would be concerned that it would constrain me in my conversations with my client, with other experts and with the public.”
18. Karen Pratt in her affidavit gives two different reasons: (1) she would need to obtain legal advice as to it and (2) she is concerned about the degree of

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precedence it would set for future submitters, should information only be obtainable by signing confidentiality clauses, which are intimidating, as well as incurring legal costs.

19. The Agreement is a highly legalistic 12 page agreement which reverses the onus or proof:

1.1 Information means all information (including all projections, scientific data or methodology, business plans or concepts, forecasts and financial statements of any nature and in any form, whether oral, digital or written, other statements, opinions, estimates and projections (including assumptions implicit in the same)) of all kinds and howsoever expressed:

- (a) supplied at any time to or for the benefit of Recipient by or on behalf of any of the Information Providers; or
- (b) which is prepared by or on behalf of Recipient or at the request of Recipient using information coming within the ambit of paragraph (a) of this definition if that information could be identified and extracted by a third party from the information so prepared;

Confidential Information means *all the Information other than Information which:*

- (a) at the time of disclosure to Recipient is generally available to, and known by, the public (other than as a result of a disclosure directly or indirectly by Recipient or its Affiliates in breach of its or their obligations under this agreement or other obligation of confidentiality); or
- (b) was available to, and legally and properly obtained by, Recipient on a non-confidential basis from a source other than an Information Provider provided that such source was not bound by an obligation or duty of confidentiality to any Information Provider; or
- (c) has been independently acquired or developed by without violating any of its obligations under this agreement or by law and without the use of any Confidential Information
- (d) information which is required to be disclosed by applicable law, regulation, supervisory authority or a valid court or governmental order, provided that the Recipient shall provide the Company with reasonable prior written notice of the required disclosure and the disclosure shall be limited

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to the extent required by such law, regulation, supervisory authority, court order or governmental order.

(Emphasis added)

20. Therefore, confidential information is not restricted to the redacted information. Someone who has signed the agreement may not even know what information they are meant to be keeping secret.
21. The obligations are similarly extremely broad.

2. Confidentiality

- (a) In consideration of Disclosing Entity agreeing to disclose Confidential Information to Recipient in accordance with the terms of this agreement, Recipient agrees to comply strictly with the terms of this agreement.
- (b) Recipient will *keep strictly confidential and secret all the Confidential Information*, will keep the Confidential Information under Recipient's control and *will effect and maintain adequate security measures to safeguard the Confidential Information from access or use by unauthorised persons.*
- (c) Recipient *will not disclose any of the Confidential Information other than:*
 - (i) *subject to and in accordance with the express terms of this agreement; or*
 - (ii) *with the prior written consent of Disclosing Entity.*
- (d) Recipient *will only use the Confidential Information for the purpose for which it was disclosed, but for no other purpose.*
- (e) Recipient will, where Confidential Information is made available subject to the condition that *such Confidential Information is not copied, reproduced or electronically stored, comply strictly with that condition.*

(emphasis added)

22. The agreement is also one sided: TTR attempts to exempt itself from liability:

7. No Liability in Respect of Information

(a) Recipient acknowledges, for itself and its Affiliates, that:

(i) it will be solely responsible for its own assessment and evaluation of the Information and shall make such enquiries and obtain such advice as it considers necessary in connection therewith;

(ii) none of the entry into this agreement, the provision of the Information to or for the benefit of Recipient, nor anything contained in the Information, shall constitute a warranty or representation as to:

(A) the accuracy, adequacy or completeness of the Information;

(B) the materiality of the Information to any decision made or to be made;

(C) the future prospects or performance of Disclosing Entity;

(iii) no responsibility is accepted for and no person is authorised to make, any representations or warranties on behalf of Disclosing Entity or any member of Disclosing Entity's related companies as to any of the matters referred to in clause 7(a)(ii).

(b) In receiving the Information Recipient acknowledges and agrees that none of the Information Providers:

(i) makes any representation or warranty (express or implied) as to the accuracy or completeness of the Information;

(ii) will have any responsibility or liability for any statements or matters (express or implied) contained in, arising out of, or derived from any Information; and

(iii) will have any liability for any omissions from, or failure to correct, the Information.

23. The agreement is also one sided: TTR makes it clear that there are financial and other consequences:

10 Remedies

(a) Recipient agrees that, in the event of any breach of any of the provisions of this agreement, money damages may not be an adequate remedy and that accordingly

Disclosing Entity (and its related parties) will be entitled to equitable relief, including injunction and specific performance,

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in the event of any such breach, in addition to all other remedies available to them at law or in equity.

24. In short, in our submission, this is an extremely intimidating and one sided document. In our submission, submitters and experts would be rightly concerned about signing it.
25. Case law supports their concerns. In *Simons Hill Station Limited v Royal Forest & Bird Protection Society of New Zealand Incorporated* [2013] NZHC 2262 (2 September 2013), Forest and Bird signed a confidentiality agreement which had been required by a landowner as a precondition for access, as part of an Environment Court case. A later dispute over the terms of the agreement led to the landowner applying to the High Court for a declaration. The Court noted that:

[24] I acknowledge the accepted processes for evidence preparation in the Environment Court and understand how those processes operate and the sound reasons for them. The Environment Court hears and is required to assess a substantial amount of opinion evidence. Procedures by which experts consider each other's views are essential to distilling areas of agreement and crystallising areas of disagreement, and establishing the views of experts on the views of other experts, where they disagree. I have no doubt, given its experience with Environment Court processes, that Forest & Bird was well aware of these procedures at the time it sought access to the land owners' properties and agreed to their terms, as recorded in the deed. If those terms do not allow them to proceed as they may wish in making available information they intend to produce at the Court hearing to others who are also involved, that is a limitation they freely accepted as the basis upon which they could enter the land owners' property, and they cannot now demur.

26. However despite their acknowledgement of the normal Environment court processes such as caucusing, the Court ruled that due to the agreement, Forest and Bird were restricted in what they could do: "The declaration would certainly preclude Forest & Bird from giving the information to any other

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party without an order of the Court, for example pursuant to the Environment Court's usual practices" (Paragraph 30). The Court issued a Declaration that "Clause 3.2 of the Site Access Agreement does not permit Forest & Bird to make the information gathered pursuant to the Site Inspection Agreement available to any other party without the prior agreement in writing of the plaintiffs or the direction of the Environment Court." In other words, by virtue of signing the Confidentiality Agreement, Forest & Bird restricted itself from engaging in what it the High Court described as usual practices, such as expert collaboration.

27. The EPA has, it seems, attempted to ameliorate some of the consequences of this with respect to caucusing by Direction (Paragraph 10 of its Minute 3 (Exhibit B of McCabe Affidavit):

c. Relevant expert witnesses who have entered into a confidentiality agreement and considered the information may be asked to conference in accordance with the Environment Court of New Zealand's Practice Note 2014, at a time to be arranged, and prepare a joint witness statement or statements recording the outcomes of conferencing, including any matters that were agreed, any matters that were not agreed, and reasons why. If appropriate, multiple witness statements covering multiple disciplines or aspects of the information are to be prepared.

d. If any content of the statement or statements would disclose the sensitive information then publication or communication of that aspect of the joint witness statement (or statements) will be restricted to TTRL, the DMC, EPA staff dealing with TTRL's application, parties' legal counsel, and persons who enter into a confidentiality agreement with TTRL and are provided with the information that is the subject of the statement. Otherwise, the joint witness statement or statements are to be made publicly available.

28. In practice, this would seem to mean at the very least, that parts of the joint witness statement(s) are likely to be either redacted or withheld. It is also

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noted that while paragraph (c) contemplates experts will, notwithstanding the Agreement, be able to disclose the Confidential Information in caucus, they still will not be able to discuss it before or after any caucus, or with any colleagues. It would preclude any peer review or broader discussion. And it would prevent experts from discussing it with others who have not discussed the confidential information, including other experts who have not signed the agreement, including experts from other disciplines, except for 'Affiliates' of the same party, and including clients and other submitters.

29. The Agreement is not even clear about the circumstances in which the experts can discuss the Confidential Information: it is presumably by consent of TTR, or disclosure required by law under Clause 5, which requires written notice by each expert to TTR and a legal opinion of counsel; alternatively it is by exception under Clause 1.1(d), which again requires notice and is restricted.
30. In conclusion, with the sole exception of the expert caucus, and even that is subject to conditions and restrictions, the kind of restrictions on expert consultation noted by the High Court in *Simons Hill* would exist under this Agreement and Direction, and more.
31. Another relevant case is a very recent decision of the Environment Court. Counsel wish to note that counsel to this case were also counsel to Applicants in that case, but the similarity between the two cases, principle aside, is pure coincidence. In *Rosehip Orchards v Canterbury Regional Council* Decision No. [2016] NZEnvC207, at issue was a site visit. In a matter very similar to the *Simons Hill* situation, experts for the Applicant, Mackenzie Guardians, were asked to sign a confidentiality agreement as a precondition for a site

visit. Following concerns about this requirement, Mackenzie Guardians applied to the Court for orders. The Court responded by issuing a Minute “which indicated that its preliminary thoughts were that the confidentiality agreement was unusual particularly when it concerns an expert witness, given the expert's duties under the Code of Conduct for Expert Witnesses and the ability of the appellants to seek orders from the court to protect confidential information.” (para 7)

“10 The court accepts the grounds for Mackenzie Guardian's application. The confidentiality agreement is unnecessary given the provision in the RMA for confidentiality orders and the Code of Conduct experts are subject to. More importantly, the agreement has the potential to restrict their right to justice which is a right affirmed under the New Zealand Bill of Rights Act 1990 particularly in the context of the future resource consent applications and/or policy under future statutory planning documents where this information may be relevant. The agreement is also in tension with the value which the RMA places on public participation and transparency of process.”

The Court ordered the inspection of the properties by the Mackenzie Guardian experts and authorised entry accordingly.

32. In our submission, this decision is strong support for the orders sought:
- (a) Section 158, like section 42 of the RMA, provides for an adequate remedy;
 - (b) the restriction unduly restricts the rights of the public and experts; and
 - (c) the proposed agreement is also in tension with the value which the EEZ, as well as the RMA, places on public participation and transparency of process.

Powers of the EPA

33. There is also a question whether the EPA have the jurisdiction to make the order they did. Section 158(3) gives them the power

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(3) The EPA may give a direction for the purpose of subsection (1)—

(a) requiring the whole or part of any hearing or class of hearing at which the information is likely to be referred to be held with the public excluded:

(b) prohibiting or restricting the publication or communication of any information supplied to it, or obtained by it, in the course of any proceedings, whether or not the information may be material to an application.

34. However, the order made goes further and requires the submitters and experts to enter into a private agreement: it in effect requires submitters to expose themselves to the gagging orders of the Confidentiality Agreement far broader than the material intended to be covered. It also exposes them (per the DMC's Order) to criminal liability under s 134G(1)(c) of the Act.

35. The Order itself made in DMC Minute 3 is as follows:

10. Therefore in accordance with section 158(3) of the Act the DMC issues the following direction:

a. The publication or communication of the information described in paragraph 4 above is restricted to the DMC, EPA staff dealing with TTRL's application, EPA experts, and persons who enter into a confidentiality agreement with TTRL.

b. TTRL shall, as soon as reasonably practicable, advise the EPA in writing of the names of all experts and other individuals who have entered into a confidentiality agreement in respect of the information, and shall continue to advise the EPA in writing when any additional experts or other individuals enter into a confidentiality agreement.

c. Relevant expert witnesses who have entered into a confidentiality agreement and considered the information may be asked to conference in accordance with the Environment Court of New Zealand's Practice Note 2014, at a time to be arranged, and prepare a joint witness statement or statements recording the outcomes of conferencing, including any matters that were agreed, any matters that were not agreed, and reasons why. If appropriate, multiple witness statements covering multiple disciplines or aspects of the information are to be prepared.

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d. If any content of the statement or statements would disclose the sensitive information then publication or communication of that aspect of the joint witness statement (or statements) will be restricted to TTRL, the DMC, EPA staff dealing with TTRL's application, parties' legal counsel, and persons who enter into a confidentiality agreement with TTRL and are provided with the information that is the subject of the statement. Otherwise, the joint witness statement or statements are to be made publicly available.

e. Attendance at any part of the hearing that addresses the sensitive information or the restricted aspects of any joint witness statement (or statements), including through questioning of the signatories to that joint witness statement about the information, will be restricted to TTRL, the

DMC, EPA staff dealing with TTRL's application, parties' legal counsel, and persons who enter into a confidentiality agreement with TTRL and are provided with the information that is the subject of the witness statement.

11. In accordance with section 158(5) of the Act, the provisions of the Official Information Act 1982 cease to apply to the information while, and to the extent that, the direction remains in effect.

12. Breaching (or permitting a breach of) this direction is an offence under section 134G(1)(c) of the Act.

The operative parts of that Order are “a. The publication or communication of the information described in paragraph 4 above is restricted to the DMC, EPA staff dealing with TTRL's application, EPA experts, and persons who enter into a confidentiality agreement with TTRL.”

36. KASM submits that the EPA had no jurisdiction to restrict information to “persons who enter into a confidentiality agreement with TTRL.” The proper order would have been to directly bind persons to specific requirements. The effect of the Order is that persons who enter into the agreement are potentially liable not only to the civil penalties therein but to the criminal provisions of the Act:

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134G A person commits an offence against this Act who breaches, or permits a breach of, any of the following: (c) a direction given by the EPA under section 158 in relation to the protection of sensitive information:

37. Under s 134J (1), a person who commits an offence against section 134G(1) is liable on conviction to a fine not exceeding \$10,000 and, if the offence is a continuing one, to a further fine not exceeding \$1,000 for every day or part of a day during which the offence continues. The plain meaning of the DMC's order is that breach of the agreement could therefore entail these fines as well as civil penalties. In our submission, the DMC had no jurisdiction to make the order it did. Instead, if it was minded to protect the information, it should have made orders such as closed hearings as were necessary.
38. In our submission, submitters and experts described by Mr McCabe who have expressed concern about signing the confidentiality agreement are right to do so. They would be right in thinking that discussing with anyone not only the redacted information but potentially any information related to it may expose them to civil and criminal liability. Naturally that would dissuade any reasonable submitter from signing the Confidentiality Agreement.
39. In fact this seems to be the real outcome of the confidentiality agreement rather than the protection of commercial sensitivity. Looked at in its plain meaning, anyone who submits could sign the confidentiality agreement and be bound by it. The sheer number of submitters (over 4,600 last time) who could also be signatories to a confidentiality agreement could defeat the purpose of the agreement altogether. However, this will be unlikely to happen in practice because the consequences and liability to which a lay person is unable to estimate will (and we submit already has) dissuade most lay persons from

signing, even where they have the technical knowledge and analytical skills to assess the redacted information and give helpful submissions to the EPA as did Karen Pratt.

The Redacted Information

40. Applying this to the facts of the case, the Court needs to balance the public interest in environmental protection versus trade secrets and unreasonable prejudice to the commercial position of the applicant.
41. KASM submits that not part but all of the information sought to be protected relates entirely to environmental effects: it relates to the plume which is created after the sand has been processed and the ironsand removed. It is about environmental effects, and environmental effects alone. As such, the argument boils down to the money spent by TTR on designing the mitigation. If the Information can be protected in this case, it can be protected in an unlimited class of applications involving environmental mitigation.
42. TTR's evidence is given by way of an affidavit of Mr Shawn Thompson and one of Mr Mitchell.

The essence of the evidence by the Project Director, Mr Thompson, is that:

10. The particle characteristics of the TTR process derived sediment particularly the particle diameter, particle size distribution, and percentage of remaining magnetic content, will provide valuable information to TTR's competitors enabling them, by analysis, to obtain tested process related information without having to undergo the significant cost and effort that TTR has expended in the collection, processing and analyses of the process derived sediment.

11. The information contained within each of the documents provides critical information into TTR's design basis crucial for the planned detailed design and development of its redeposition

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equipment and supporting operational models, both of which will have a significant commercial value to TTR and its shareholders. It is envisaged that further detailed development and design of each of these components will result in valuable New Zealand owned and led design patents and licensing arrangements, all of which will be put at risk by the uncontrolled distribution of the sensitive information.

12. The information within these documents does not define or address the environmental effect or impact of the TTR proposed operation but has been compiled to inform the subsequent modelling work. Its informative value to the general public is limited and its review will only serve an expert commissioned to evaluate the effectiveness of the inputs into the sediment transport and optical models.

43. This is information not directly about the metal content of the sand, for instance, but about the particle composition and dispersion of the plume, which is a critical issue. If the DMC, and in this case the Environment Court, can apply section 158 provisions to this information, it can apply it to virtually any information about the environmental effects of the project. The plume is not mainly, but entirely, about the environmental effects of the mining. By the time the plume is created, the metal has been extracted. Mr Greer for KASM said that in the first TTR hearing, plume was a central issue with regards to environmental effects, that outside of the direct effects within the mining area from the mining activities the plume is the single biggest environmental effect of the activity, that evidence of the majority of other experts relied on the findings of the plume modelling in their analysis of effects to other marine species, including whales, seabirds, benthic and zooplankton, that there is nothing in the TTR 2016 application that he has read so far which leads him to believe that the plume will not be as central to this application as it was to the TTR 2013 application. But further, the updated modelling includes flocculation and this has dramatically altered the plume model results and

much of the information surrounding flocculation can only be accessed by signing the confidentiality agreement. This requirement means that information around flocculation cannot be summarized for the public by experts. Crucially, “7, Assessing the composition, extent and effects of the plume will require access to the evidence which is currently redacted.”

The DMC in the first application found that

3. The deposition of the de-ored sediment would create a sediment plume with a median extent of approximately 50 kilometres long and up to 20 kilometres wide, predominantly east south-east from the mining site. In addition to the direct effects at the mining site many of the effects of the proposal would result from the plume and accordingly we address them in some detail below. One of the more significant impacts would be on the primary productivity. Modelling of the optical properties and primary production indicated a reduction of total primary production in the 12,570 square kilometres of the STB could be in the order of 10%, and a reduction in energy input into the seabed ecosystem of up to 36%.

44. Mr Philip Mitchell has expressed the view in his affidavit that “In my opinion the only reason why any person would need to access the referenced technical documents would be for the purpose of undertaking a detailed technical peer review” and “In my opinion, they would not need to access the referenced technical documents (be they redacted or otherwise) in order to gain that understanding, as all the relevant information (including in relation to the sediment plume) is contained in the Impact Assessment.” In essence, his opinion is that submitters should ‘take TTR’s word for it’ with respect to the extent, composition and nature of the plume. That opinion flies in the face not only of the (1) crucial nature of the extent, composition and nature of the plume, (2) effect of the plume, (3) importance of the plume and (4) public interest in the application. Furthermore, a reason that the TTR application for

marine consent in June 2014 was declined was due to the effect of the plume and concerns with the plume modelling.¹ In effect, the public now is being required to trust TTRs claim that its reviewed estimates should now be trusted, or else sign the confidentiality agreement with all the attendant consequences.

45. The claim also flies in the face of the decision by the first TTR DMC, which praised Karen Pratt's "extraordinary eye for detail [which] has been of considerable assistance to us in a number of areas." As Ms Pratt notes in her affidavit, throughout the Decision, her submissions are noted numerous times, including in relation to particle size:

Paragraph 522: "Mrs Pratt noted in her submission that Dr Green used a different particle size from that representative of the mining area. Dr Green stated in his evidence that this will have led to an overestimation of time it takes for the mounds to deflate."

46. Karen Pratt's affidavit gives ample evidence as to the importance of her contribution: counsel for TTR admitted that she pointed out that the maths was bad (Appendix A, page 1); she unearthed other errors (Appendix A, page 2); inconsistencies were found in a wave study report (Appendix A, page 5), and numerous footnotes to the Decision refer to Karen Pratt. This shows that the stated opinions by Mr Mitchell in his affidavit in paragraph 3.3 that (1) submitters need not read referenced technical documents and (2) that the only reason why any person would need to reference the technical documents would be for the purpose of a detailed technical review.
47. Mr Greer in his affidavit shows that the plume was the central issue for the first TTR hearing, that the majority of other experts relied on the plume

¹Decision (Exhibit M to McCabe) at 166.

modelling in their analysis of other effects such as benthic or marine species, and that the key difference is flocculation, and much of the information surrounding flocculation can only be accessed by signing the confidentiality agreement. This means information around that important process cannot be summarised for the public by xperts.

48. Applying the tests, KASM strongly submits that releasing the information will not cause “unreasonable prejudice to the commercial position of” TTR. The prejudice, it seems, is only with respect to any further competitors, and amounts to money theoretical other ironsand minors may save in preparing a similar ironsand mining application: presumably meaning that if both result in successful applications, the costs of the competitor are reduced by some factor of the cost incurred in preparing this information. We submit that any prejudice so theoretical as to be fanciful. If, contrary to this submission, there is any prejudice, then it is reasonable that calculations and engineering going into reducing or mitigating the plume is public information, even if any (unnamed and unknown) competitors who may in the future make a similar information may learn from that exercise and save money accordingly. In fact there may be public benefit in improving environmental mitigation for this reason. Moreover, KASM submits that the public interest in making all information relevant to the plume and its composition, given its central importance to the case, is overwhelming.

Orders and Extension of public submission period

49. Under s 158(6) of the EEZ/CS Act,

(6) Any party to any proceedings or class of proceedings before the EPA may apply to the Environment Court for an order

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under section 279(3)(a) of the Resource Management Act 1991 cancelling or varying any direction given by the EPA.

Under section 279(3) of the RMA,

(3) An Environment Judge sitting alone may, having regard to the matters set out in section 42 and to such other matters as the Environment Judge thinks fit,—(a) on an application made under section 42(4), and on such terms as the Judge thinks fit, make an order *cancelling or varying any order* made by a local authority under that section:

There is no restriction on the jurisdiction of the Environment Court, so the order may be for “cancelling or varying” the direction in Minute 3.

50. Since KASM filed the Application, the DMC extended the application period by a further 20 days.
51. Section 47 of the Act provides that “Submissions must be made not later than 20 working days after public notification of the application under section 45.” Under section 159, the EPA may extend a time period, and under section 160(2), a time period may be extended under section 159 for (a) a time not exceeding twice the maximum time period specified in this Act; or (b) a time exceeding twice the maximum time period specified in this Act if the applicant requests or agrees.”
52. Section 279(3)(a) provides for an order “on such terms as the Judge thinks fit.” That gives the Court a broad discretion. Also, under s 279(1)(b) of RMA the Judge may make an order which is not opposed. Therefore if TTR does not oppose such an order, it can grant an extension.
53. Further, it is within the power of TTR to agree to an extension by the DMC for a further 20 days. If the time period is not extended, that means that even if an

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Order is made by the Environment Court on November 7 varying the DMCs direction, the public will only have a week to review any the newly unredacted information or otherwise take appropriate action. Some members of the public who put in submissions may not have time to read and absorb the information and amend their submissions, and others who were dissuaded from putting in any submission may not make any submission still. On the other hand, those who did put in a submission could use the time going forward to read and apply the new information. For the sake of completeness, this would leave one disadvantaged category: those who signed the Confidentiality Agreement and now wish they had not done so.

54. The Court could therefore (1) make an order “on such terms as the Judge thinks fit”; (2) make an unopposed order if no party opposes it, under s 279(1)(b); (3) direct the DMC to ask TTR to agree to a further extension and (4) direct the DMC to ask TTR to release members of the public and experts who have signed the Agreement from the Agreement.

Respectfully Submitted

Duncan Currie and Ruby Haazen