



20 March 2015

Email: fyi-request-2512-1f066369@requests.fyi.org.nz

Dear A O'Sullivan

Response to Request for Official Information

In your email of 21 February 2015 you requested information about the Chatham Rock Phosphate (CRP) application to the Environmental Protection Authority (EPA) for a marine consent under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 ("EEZ Act"). This request is comprised of 12 questions which primarily concern the first and second EPA staff reports produced in the course of considering CRP's marine consent application.

The EPA response to questions 1 – 12

1. *What are the academic qualifications of the authors of the reports, and how relevant are these qualifications to the subject matter of the application.*

The EPA has an Exclusive Economic Zone (EEZ) applications team comprised of personnel with skills and experience in areas relevant to processing applications for marine consents. The authors of the staff reports on the CRP marine consent application have academic qualifications in marine science, zoology, ecology, law, and public health and Māori environmental resource development. We have listed the highest relevant qualifications of the authors of both reports below:

- Doctor of Philosophy in Marine Science
- Master of Marine Conservation
- Master of Biological Diversity
- Bachelor of Laws
- Post-graduate Diploma in Māori Environmental Resource Development
- Post-graduate Diploma in Public Health

2. *What is the experience of the authors of the reports relevant to the subject matter of the application?*

The authors of the staff reports have worked in the public and private sectors in New Zealand and internationally. They have held positions in the fields of marine science, environmental impact assessment, environmental law, resource management, public and environmental health, and offshore renewable energy generation. Some of the authors have also worked on other marine consent applications including the Trans-Tasman Resources Ltd application to mine iron sand off the coast of Taranaki.

3. *Are any of the EPA staff associated with the Chatham Rock application members of, or affiliated with, the Green Party or have they ever been so in the past.*

The EPA has a Conflicts of Interest policy that sets out the process for identifying and managing actual, potential or perceived conflicts of interest. This policy applies to all EPA employees and contractors regardless of their position in the organisation. Employees are required to disclose any interests that may relate to their role at the EPA.

There is no information in any interest registers or otherwise recorded by the EPA about EPA staff working on the CRP application having any current or past affiliations with the Green Party.

4. *Are any of the EPA staff associated with the Chatham Rock application members affiliated with, any environmental association, group, organisation, or entity, or have they ever been so in the past.*

The interest registers show that:

- One of the EPA staff members associated with the CRP application was affiliated with some environmental groups; however the staff member has never made financial contributions to these groups.
- Another staff member involved with the CRP application made minor monthly donations to an environmental organisation prior to working in the EEZ team at the EPA.

No other EPA staff working on the CRP application registered an interest on the basis they are or once were affiliated with environmental associations, groups, organisations or entities.

5. *Did EPA management compare the qualifications and experience of the EPA staff associated with the Chatham Rock application with that of the environmental experts providing evidence at the hearing? If so, what methodology was used and what were the outcomes of such comparisons. If the qualifications were not compared, what reasons were given for the omission.*

The EPA management did not conduct a comparison of qualifications as it is the role of the Decision-making Committee (DMC) to evaluate and consider the merits and relevance of the information at hand. The EPA staff reports were just one of the inputs into the marine consent process and the DMC had the benefit of information from many parties including the applicant, submitter and environmental experts that provided evidence at the hearing.

6. *What peer review was carried out on the two reports before submission? Who were the reviewers, what are their relevant academic qualifications and experience, and were they external or internal to the EPA. For each reviewer, what are their affiliations past or present, if any, to environmental organisations, including the Green Party?*

The EPA carried out internal reviews of the staff reports. This involved reviewers with the following qualifications:

- Doctor of Philosophy in Marine Science
- Bachelor of Laws
- Bachelor of Resource and Environmental Planning
- Master of Arts

The reviewers have extensive experience in planning, regulatory policy and relationship management both in central and local government, and crown research institutes. One of the reviewers has a background in marine mammal science and has acted as an expert witness in the Environment Court. Some of the reviewers have also worked on other marine consent applications and inputted into previous staff reports. The identity of the reviewers of the reports has been withheld (see below).

The interest registers hold no information about the reviewers' present or past affiliations with any environmental organisations or the Green Party. The EPA also does not hold information relevant to this matter anywhere else.

7. *What risk analysis was conducted prior to these reports being submitted, particularly (but not confined to) in relation to the incomplete status of relevant information at the time.*

It is standard practice to release staff reports prior to the hearing of a marine consent application. The EPA has released a staff report prior to the hearing of each notified marine consent application it has processed under the EEZ Act. In the nationally significant proposal process of the Resource Management Act 1991, administered by the EPA, "planner's reports" are also released prior to a hearing and often prepared in stages to take account of information as it becomes available.

For both CRP staff reports, the applicant was given advance notice of the date at which the reports would be made publicly available.

In relation to the EPA's August 2014 staff report, the applicant requested a two week extension for the release of the report, which was granted by the DMC (DMC Minute 5 – 11 August 2014). This request was to enable the report to take into account further information that had not yet been provided, and to enable CRP to respond to the report in its evidence. Following this request, the scope of the August 2014 report was broadened to take into account further information that was submitted up to 7 August 2014.

The conclusion of the August 2014 report on page 125 acknowledged that "*there is more information to be provided, which may change our view*". At the request of the DMC, the supplementary report issued in October 2014 did not make recommendations or conclusions.

8. *What, if any, legal advice was sought on the two staff reports before or after submission.*

Details of any legal advice sought regarding the staff reports are withheld (see below).

9. *What is the EPA policy relating to preparation, review and submission of staff reports in relation to an application?*

The EPA has the power to commission advice. In December 2012, the EPA Board agreed on an approach for the EPA staff to provide technical advice to DMCs. The Board agreed that the EPA staff would produce a report that co-ordinated technical reports and provided an overall evaluation of the application, including a recommendation and proposed conditions where appropriate. In May 2013, the EPA Board agreed on an EEZ Decision-making framework for DMCs which outlined that staff reports would be released prior to the hearing and would make recommendations on a decision and associated conditions. Please see attachment 1 which includes a diagram that outlines the process the EPA follows when planning a staff report.

10. *What are EPA procedures relating to preparation, review and submission of staff reports in relation to an application? Were these procedures correctly followed? If not please state the procedures which were not correctly followed and what follow up activities in relation to these have been carried out.*

The EPA Board issued a standing direction in December 2012 that requires the EPA staff to give technical advice to DMCs through the production of a staff report. Attachment 1 provides a diagrammatic overview of the process the EPA goes through when producing a staff report. However, as each application is unique, the information that is considered and the timing of the report may vary on a case-by-case basis. The process is further described below.

Under section 44 of the EEZ Act, the EPA is required to notify an applicant that it intends to commission a review or report or seek advice. In accordance with s 44, CRP was advised of the scope of both reports and the timing of their release.

Depending on the scope and timing of a report, the EPA staff authoring a report consider the information provided by the applicant and other parties including consultants, submitters, government agencies, and

the EPA's Maori Advisory Committee. This information and advice is then used to provide an overall evaluation of an application against the considerations of the EEZ Act.

Prior to its submission a staff report is put through a peer review process by other EPA staff. A DMC can request that the report writers appear at a hearing to answer questions from the applicant and other parties to the process.

The preparation of the first CRP staff report followed this process. However, some of the further information requested from CRP was not provided in time for it to be taken into account for this report.

The CRP DMC requested that the EPA prepare a supplementary staff report "*that takes into account all information available as at the commencement of the hearing, including all further information filed with the EPA, all statements of evidence filed in advance of the hearing and all joint conferencing statements.*" (DMC Minute 15 – 12 September 2015). The DMC later directed that "*the supplementary report is not to include a conclusion or recommendation as to whether the application should be granted*" (DMC Minute 20 – 14 October 2014).

11. For each individual environmental uncertainty in the staff reports, was an assessment of the likelihood or probability carried out by EPA staff. If so, please provide a description of the categorisations applied in assessing the relative magnitude of that likelihood, and the results of the assessment.

Section 6 of the August 2014 EPA staff report identifies uncertainties and inadequacies in the information provided by CRP in relation to the state of the environment and the potential effects of the activities. Comments on uncertainty and inadequacy were followed by the EPA's assessment of the potential effects. Where the EPA had enough information to evaluate the potential effects of the activities, the EPA provided conclusions about the likelihood and magnitude/consequence of effects. These were defined as:

- a. the likelihood (probability) of causing the effect (rare, unlikely, possible, likely, almost certain)
- b. the magnitude of the effect or consequence level (negligible, minor, moderate, serious, major, catastrophic).

Likelihood and magnitude were used to assess environmental risks associated with CRP's proposed activities. You can view the outcome of this assessment in Table 1 on page 119 of the August 2014 staff report. Appendix 3 of the August 2014 staff report also provides a description of the magnitude/consequence levels used in the EPA's assessment.

The supplementary EPA staff report commented on issues and uncertainties identified in the August 2014 staff report but did not provide commentary around the likelihood and magnitude/consequence of effects occurring.

12. With the benefit of hindsight, has any review of the EPA processes relating to staff reports been undertaken. If not, is such a review planned. In either case will the results of such review be made public?

Two of the EPA's strategic intentions are to:

- Embed the regulation of activities in the Exclusive Economic Zone and Continental Shelf; and
- Develop improved business capability through enhanced EPA systems.

To address these intentions, the EPA is considering how it provides technical advice to DMCs appointed to decide marine consent applications. This includes consideration of staff reports produced to date, and whether the format and scope of future reports should be amended. Any decisions made as a result of this review will be reflected in future EPA staff reports that will be made publicly available.

Withheld information

We note that some of the information held that is relevant to your request is being withheld. In particular:

- Question 6: The identity of the persons who peer-reviewed the two staff reports amounts to a request for personal information – as such this information is withheld under s 9(2)(a) of the Official Information Act 1992 (OIA) in order to “protect the privacy of natural persons...”.
- Question 8: Any information about legal advice sought in relation to these reports is legally privileged – as such this information is withheld under s 9(2)(h) of the OIA in order to “maintain legal professional privilege”.

In reaching the decision to withhold the above information under s 9 of the OIA the EPA concluded that the public interest considerations in favour of releasing this information do not outweigh the reasons for withholding it.

In relation to the information that has been withheld you have a right, by way of complaint to an Ombudsman under section 28(3) of the OIA, to seek an investigation and review of the refusal to release all of the requested material.

Yours sincerely



Rob Forlong
Chief Executive
Environmental Protection Authority