SUBMISSION

STRATERRA™
NATURAL RESOURCES OF NEW ZEALAND

Submission to Ministry for the Environment on

"REPORT OF THE MINISTER FOR THE ENVIRONMENT'S RESOURCE MANAGEMENT ACT 1991 PRINCIPLES TECHNICAL ADVISORY GROUP (JULY 2012)"

INTRODUCTION

1. Straterra Inc[1]. represents 90% by value of New Zealand minerals production, exploration, scientific research, service, and support. A schedule of Straterra members is attached to this submission (Appendix 1).

2. On 19 July 2012 Straterra met Hon Amy Adams. Among issues discussed was the RMA Principles report. As explained on the release of the report, the Minister informed us that the Government is not consulting formally on the report, however, would welcome informal feedback, should we wish to provide it.

3. Subsequently Straterra consulted with the membership, and some members of the TAG, in considering whether or not to provide written feedback. We mention, in particular: Anderson Lloyd Lawyers, Buddle Findlay Lawyers, Minter Ellison Rudd Watts Lawyers, Newmont Waihi Gold, NZ Coal & Carbon, OceanaGold, and Solid Energy.

4. Following that consultation, Straterra decided that the RMA Principles report does raise issues of interest and concern to our sector, and, therefore, that a submission to the Ministry for the Environment is warranted. In that respect, we worked extensively with representatives of the firms listed, via meetings to identify the issues and form views on them, and numerous iterations via email, and phone conversations, including with other sources of advice, and officials.

5. We have had to work quickly to produce this submission, in light of advice from officials that any feedback would be welcome by the end of August, or sooner, noting the Government's intention to introduce the first of potentially more than one RMA-related Bill into Parliament later this year.

6. The RMA is obviously a key statute for our sector, governing the sustainable management of the environmental effects[2] and economic and other benefits of prospecting, exploration and mining activities. The implications of RMA reform for the minerals sector are considerable. Measures

[1] About Straterra http://www.straterra.co.nz/About+Straterra
[2] Green mining case studies http://www.straterra.co.nz/Case%20studies

that shorten the time frames of RMA processes, provide better alignment with other legislation[3], and lead to reduced costs to applicants, while maintaining high standards of regulation, would be all to the good of the nation.

7. It is noted that mineral resources[4] on land, and out to the 12 nautical mile limit of the Territorial Sea, include coal (including lignite), ironsands, aggregates, and industrial minerals (e.g., limestone), which are essential inputs into diverse industries (including dairy and steel), roading, construction, and infrastructure (including the national electricity grid) in New Zealand.

8. Minerals such as gold and silver, and coal dominate New Zealand's minerals exports. In the case of coal, much of this is premium-quality coking coal for steel-making.

9. Straterra welcomes the opportunity to submit on the RMA Principles report. We do so from the perspective that resource management decisions must strive for an appropriate balance between economic, social, cultural, and environmental objectives, and be based on sound information. The mineral sector wants legislation that will stand the test of time, that will be given cross party support and that will underpin the long term investments required in our sector. As well, the New Zealand resource sector may legitimately expect to find clarity, transparency, and certainty, or, failing that, predictability in legislation and regulations. This is necessary for upholding the rule of law, and promoting New Zealand's attractiveness for investment.

EXECUTIVE SUMMARY AND DISCUSSION

Introduction

10. Overall, the RMA Principles report is supported. It provides generally a logical and timely contribution to the RMA reform programme.

General

11. As argued extensively in the report, the "overall broad judgment" approach is now standard when interpreting Part 2 of the RMA, thanks to the large body of case law that has developed since 1991. It is appropriate to make this approach to decision-making explicit in the new s.6.

12. In that context, it is appropriate to remove the terms "protect" and "preserve" from the existing s.6, and replace with the wording, "recognise and provide for", and specifying "no internal

[3] Notably, conservation legislation, and the Historic Places Act 1993 (and draft replacement legislation)
[4] Economic case studies http://www.straterra.co.nz/Economic%20benefits

hierarchy" of the "sustainable management principles". That would enable decision-makers in exercising an overall broad judgment.

13. It is noted there may well be situations where it is appropriate to protect or preserve a value, and the overall broad judgment has become the approach to reaching such a decision (or other decisions).

Recognition that some activities can occur only in specific locations

14. We are of the view that the new s.6 (g) and (h) provide an incomplete treatment of natural and physical resources, and that is also the case with the current ss. 6 and 7. Before resources can be used or developed, they must be found, and, in the case of minerals, that usually entails a complex, staged process of discovery and evaluation – prospecting, exploration, and the economic feasibility of extraction including the costs of environmental management. In the end, a mine can only be developed where the minerals are suitably distributed, and this is restricted. *Perhaps some additional explanation is required here, such as;* The legislation needs to reflect the fact the exploration and mining are very different activities. We explore virtually everywhere, and nearly all exploration is non or low impact. In contrast, we mine in very few places, only where we find minerals in concentrations that are economically feasible to mine, and only once we have done the extensive, detailed and expensive analysis and assessment that allows the required investment to be made, and the consents to be granted. BN to discuss

15. Similar considerations apply to other resources such as wind, and geothermal energy resources, a matter addressed in the National Policy Statement on Renewable Energy Generation, Policy C1 (a).

16. The point is this: society can only make well-informed resource management decisions - when developing or reviewing plans, or when making decisions on specific proposals - if good information is to hand. For many resources, that is not always the case. We recommend the addition of the word "identification" to the new s.6 (h) to reflect the need for society to better understand New Zealand's resource endowment, in order to achieve the purpose of the RMA.

17. To an extent, the issue was covered indirectly within the existing s.6, where reference is made to the protection of specified values from "inappropriate subdivision, use and development", the implication being that this consideration does not extend to *appropriate* subdivision, use and development. With the proposed word changes in the new s.6, we believe it is important to

ensure the treatment provided for in the NPA-REG is brought into the new s.6, to include all location-specific resources.

Provide specific mention of industry

18. Pages 46-57 of the report discusses at some length: urban issues, infrastructure, and other matters, however, do not discuss industry in the same way. As a result the new s.6 (j) and (k) recognise and provide for "the reasonable foreseeable availability of land" in relation to urban issues and infrastructure but not for industry, for which land must also be available if there is to be development in this area.

19. As well, industry development relies on foreseeable availability of resources, such as airsheds capable of admitting consented discharges, and freshwater.

20. We believe the insertion of a new sub-section, in the same vein as s.6 (j) and (k), and recognising and providing specifically for industry would be appropriate.

Clarify the new s.7 (c), and move it into the new s.6

21. The report proposes that decision-makers should not be able to demand "environmental compensation, offsetting or similar measure" if these are offered voluntarily, and if they are "not encompassed by section 5 (2) (c)". Rather, regard must be had to such voluntary offerings.

22. The rationale is sound – it is accepted in the case law that "sustainable management" can include economic activities where residual adverse effects may remain unaddressed after application of s.5 (2) (c), namely, actions to avoid, remedy and mitigate effects. Applicants have taken the opportunity in these situations to offer for decision-makers' consideration additional actions to compensate for, offset in a general sense, or mitigate those residual effects in some degree. It is useful, therefore, to enable voluntary proposals where they are warranted and the new s.7 (c) does that.

23. That said, confusion exists over the precise meaning of the terms "environmental compensation", "offsetting", and "mitigation", at least partly because they can mean different things depending on whether they are required under s.5 (2) (c), or are voluntary. The proposed treatment in the new s.7 (c), and the proposed definition of mitigation do not go far enough to resolve the issue.

24. We suggest the straightforward course of not making specific mention of compensation or offsets in the new s.7 (c), and instead focus/ rely on the intent of this provision, which is to enable decision-makers to have regard to voluntary measures, beyond applying s.5 (2) (c).

25. It is noted that voluntary activities should include measures required, agreed or offered under other legislation, of relevance to matters covered under the RMA, e.g., concessions, access arrangements for public conservation land, authorities in heritage legislation, and any environmental conditions negotiated with private land owners. We propose a definition.

26. Doubtless, the issues raised will need to be considered further within the RMA reform programme, and we encourage that, however, we believe the new ss.6 and 7 is not the place to do that.

Address the effects of natural hazards

27. The difficulty with the term "risk" is that this is a broader and more complex concept than "effect", and that the RMA is focused on the management of actual or potential effects. Arguably, the status quo has led to a failure to plan adequately in relation to natural hazards, such as earthquakes, and their effects when they occur.

28. But the proposed solution in the new s.6 (i) goes too far in the other direction. Interpreted to the extreme, this provision could unnecessarily stymie development wherever there are "significant risks" of earthquakes, tsunamis, volcanic eruptions, tornadoes, and any other category of natural disaster.

29. Certainly, a mention of natural hazards is warranted in the new s.6, for the reasons mentioned in the report. Our concern would be addressed by replacing "significant risks" with "effects", on the rationale that s.3 of the RMA currently provides a definition of effect that includes "(f) any potential effect of low probability which has a high potential impact" – which is a standard formulation of the concept of risk.

Process aspects

30. It is noted that the RMA already provides for "timely, efficient and cost-effective resource management processes", e.g., ss.21, 41B, 88B, 101. However, there is no harm, and, indeed, can only be beneficial to applicants and society to have matters of process addressed in a new s.7.

Selected definitions

31. In light of our recommended approach to the new s.7 (c), covered in paras. 21-26, part (c) of the definition of "mitigation" is potentially confusing. We suggest deletion, at this stage. As discussed, further thought will need to be given to the meanings of mitigation, offsets, and compensation, as part of the RMA reform programme, however, ss.6 and 7 may not be the place to do it. It appears to us that a Venn diagram of the three terms would have each circle partly overlapping the others; therefore, we envisage no straightforward solution.

32. We are concerned that the definitions proposed for "archaeological site", "historic place", and "historic areas" are taken straight from the Heritage New Zealand Pouhere Taonga Bill. This is draft legislation, subject to change as it goes through the Parliamentary process. We are aware of submissions to the relevant Select Committee on these definitions; therefore, their wording cannot be considered settled, at this stage. It would make more sense to adopt the definitions that appear in the new Act.

33. The proposed definitions of "outstanding natural features and outstanding natural landscapes", "areas of significant indigenous biodiversity", "areas of significant indigenous terrestrial habitats", and "areas of significant aquatic habitats", are fraught. First of all, no definition is provided. Instead, the report kicks for touch, and basically says that these values mean whatever regional policy statements say they mean, as long as some undefined criteria of "outstanding" or "significance" are met, nationally or regionally. This hardly constitutes guidance for the writers of RPSs, which is surely what definitions in the Act are intended to provide.

34. As matters stand, there is a body of case law in which these values are defined to a greater or lesser degree, and which works reasonably well in the experience of Straterra members. Introducing new definitions could overturn that case law, while not providing any real guidance. Litigation to determine their meanings would be inevitable, and, surely, is best avoided. Indeed, one key purpose of case law is to clarify the law, and reduce the need for litigation.

35. If the report's proposals stand, plans will have to have areas or zones designated in them that are outstanding or significant. Councils are not resourced to do this in any detail, and the inevitable result will be desk-top assignations that later applicants for development will have to litigate at places, via a plan change, where errors have been made in identifying areas containing outstanding or significant values. This is inefficient, from the perspective of achieving sustainable management in an overall broad judgment sense, and must be avoided.

RECOMMENDATIONS

General

a) Note Straterra's support of the explicit recognition given in the new s.6 to the "overall broad judgment" approach, as developed in the RMA case law, and, generally, of the RMA Principles report's proposed new ss.6 and 7;

b) Note Straterra's support for the removal of the terms "protect" and "preserve" from s.6, and their replacement in the new s.6 with "recognise and provide", to enable the exercising of an "overall broad judgment" (Rec. (a));

Recognition that some activities can occur only in specific locations

c) Note that the proposal supported in Rec. (b) has the side-effect of removing an internal balancing consideration in s.6 to do with "*inappropriate* subdivision, use and development", which provides for the use and development of in situ resources, that cannot always be used or developed elsewhere, e.g., wind, geothermal resources, minerals;

d) In relation to Rec. (c), agree to insert into the new s.6, below s.6 (k), a sub-section to recognise and provide for: "the need to locate the identification, use and development of resources where the resources are available" - cf. Policy C1 (a) of the National Policy Statement for Renewable Electricity Generation 2011;

Provide specific mention of industry

e) Agree to insert into the new s.6, below s.6 (k), a new sub-section, to say: "the reasonable needs of industry, including the reasonably foreseeable availability of land and other resources for industry", to complement s.6 (j) and (k), and to recognise and provide for the siting of industry strategically in relation to, e.g., airsheds, freshwater, flat land;

Move the new s.7 (c) into the new s.6, and provide clarification

f) Agree to move the new s.7 (c) into the new s.6, below s.6 (h), because this is a substantive matter, and not a process matter, and relates to additional benefits arising from the use and development of natural and physical resources;

g) Agree to amend the new s.7 (c) to say: "*regard to be had* to any *actions volunteered by an applicant* which is not encompassed by section 5 (2) (c)", to avoid unnecessary complication, and to focus on the key issue, of explicit provision for voluntary measures;

h) Agree to define "volunteered" in s.2 of the Act: "in regard to any action, includes a relevant measure that a party is contractually or legally bound to provide otherwise than under this Act", e.g., conservation measures under access arrangements on public conservation land, and measures in relation to authorities under heritage legislation;

i) Agree to amend ss. 104 and 108 of the Act for consistency with the new ss.6 and 7, with proposed amendments;

j) Agree to amend the new s.6 (h) to say: "the significant *inherent and additional* benefits to be derived from the *identification*, use and development of natural and physical resources", to acknowledge that communities and iwi may benefit in indirect ways from development, and that there are benefits to be gained from identifying resources, e.g., wind, geothermal energy resources, minerals;

Address the effects of natural hazards

k) Agree to replace the term "risks" in the new s.6 (i) with "effects", to avoid unnecessarily stymying development where natural hazards are identified, noting that the definition of "effect" in ss.3 (e) and (f) of the Act covers events having a "low probability" of occurrence at places, and having a "high potential impact" when they do occur, inherent in the notion of "risk", in this context;

Process aspects

l) Note Straterra's support of the process aspects of the new s.7 (noting Recs. (f), (g) and (h) in relation to the new s.7 (c));

Definitions

m) Agree to delete item (c) from the definition of mitigation, being unnecessary and unhelpful, in light of Recs. (f) and (g) in relation to the new s. 7 (c);

n) Agree to provide for definitions of "archaeological site", "historic place", and "historic areas", as consistent with definitions provided in the new heritage legislation, when this is settled, rather than referring to a Bill, the contents of which could still be amended before enactment;

o) Agree to delete the proposed definitions of "outstanding natural features and outstanding natural landscapes", "areas of significant indigenous biodiversity", "areas of significant

indigenous terrestrial habitats", and "areas of significant aquatic habitats", because: (1) these definitions fail to define these values, and are, therefore, irrelevant; (2) the process for assessing these values is already well provided for; and (3) that identifying these values at places in the planning process would not eliminate litigation in relation to these values, while increasing the burden on applicants in that respect.