SUBMISSION

Submission to the MINISTRY FOR THE ENVIRONMENT on

"SETTING A DIRECT REFERRAL THRESHOLD AND RELATED MATTERS (MAY 2014)"

INTRODUCTION

1. Straterra[1] welcomes the opportunity to submit on the Ministry for the Environment discussion document (DD) released on 6 May 2014, that proposes restrictions on access for applicants to direct referral of resource consent applications to the Environment Court. The submission deadline of 30 May 2014 is noted.

2. In preparing this submission, Straterra has consulted with the Aggregate and Quarrying Association, Anderson Lloyd, Atkins Holm Majurey, Bathurst Resources, Golder Associates, Greenwood Roche Chisnall, MERMAN, MOD Resources, OceanaGold, Russell McVeagh, and Tavendale and Partners. In this way we have brought extensive subject matter expertise to bear in preparing our submission.

3. Straterra submits that New Zealand needs to improve the efficiency of the resource management consenting system. As matters stand, the minerals sector thinks the RMA system is a deterrent to minerals investment in New Zealand, and fails to support the Government's Business Growth Agenda.

4. Straterra would welcome direct engagement with MfE officials, if that would be useful, on the matters raised in this submission.

[1] Straterra represents the NZ minerals sector. Our membership comprises minerals producers, explorers, researchers, engineering and geo-technical firms, equipment suppliers, and providers of ancillary services, e.g., legal, financial, environmental. http://www.straterra.co.nz/About+Straterra

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EXECUTIVE SUMMARY

5. It is accepted that a regulation is required under the Resource Management Act 1991 to provide an investment threshold to enable access to direct referral to the Environment Court, and provide for a council to decline such a request if "exceptional circumstances" are found to exist.

6. Straterra notes the Government's policy intent of making direct referral available to proposals of a "significant economic scale".

7. We contend that the tenor of the Ministry for the Environment discussion document is to artificially, and unnecessarily constrain access to that pathway, which is already self-limiting. Not every project proponent will wish to have direct access to the ECt for a range of reasons, discussed later in this submission. Those who are motivated to do so will have compelling reasons for that, and should be enabled, rather than constrained. The safeguard for local government is that it would have a veto right, albeit in a limited and genuinely exceptional range of circumstances (refer to para. 11 of this submission).

8. We support the capital investment valuation method for a project, as straightforward, easily audited or reviewed, routinely carried out by businesses, and cost-effective.

9. We suggest a single threshold value, for simplicity, set at a capital investment value of $20 million. In our view, that threshold would provide for the projects most likely to seek direct referral, while reducing the risk of an overload of the ECt's resources.

10. That said, there is a minority opinion within the Straterra membership in favour of multiple thresholds depending on sector and location. That would entail a significant body of work to develop such a scheme, and complexity in implementing it. The majority view within Straterra is that this option would be all but intractable for that reason.

11. Straterra contends that "exceptional circumstances" - for councils to consider when declining a request for direct referral - should be truly exceptional. The list provided in the discussion document fails to meet that definition because none of these circumstances are exceptional. We propose that "exceptional circumstances" is synonymous with "unique", as is the case in a number of legislative contexts, and that the term remain undefined in the regulation.

RECOMMENDATIONS

12. Straterra recommends the Ministry for the Environment to:

    a) Note Straterra's view that as a general consideration project proponents who wish to have direct access to the ECt should ordinarily have access to that pathway;

    b) Agree that the veto right for local government should be applicable in a very limited and genuinely exceptional range of circumstances;

    c) Agree to adopt the capital investment valuation method as straightforward, easily audited or reviewed, routinely carried out by businesses, and cost-effective;

    d) Agree to adopt a single threshold value of $20 million, as one likely to promote rather than constrain the efficiency of the RMA system; and

    e) Agree to not define "exceptional circumstances", and provide instead guidance in regulation that this term is synonymous with "unique", as is the case in a number of legislative contexts.

DISCUSSION

General comment

13. To elaborate on the DD, the purpose of the proposed regulation is to activate section 87E (6A) of the Resource Management Act 1991:

> "Despite the discretion to grant a request under subsection (5) or (6), if regulations have been made under section 360 (1) (hm) - (a) the consent authority must grant the request if the **value of the investment** in the proposal is likely to meet or exceed a **threshold amount** prescribed by those regulations; but (b) that obligation to grant the request does not apply if the consent authority determines, having regard to any matters prescribed by those regulations, that **exceptional circumstances** exist" (emphasis added).

14. In relation to the above, section 360 (1) (hm) of the RMA says:

> "prescribing, for the purposes of sections 87E, 165ZFE, and 198C, (i) **threshold amounts**, which may differ for proposals of different types or in different locations; and (ii) **matters** to which an authority is required to have regard in determining whether **exceptional circumstances** exist,"(emphasis added).

15. We are advised in the DD that: "The Government's intention is that the direct referral pathway is readily available for proposals of a significant economic scale". No definition of "significant economic scale" has been provided in support of this idea, nor any rationale provided for why direct referral should not be available for other projects that may fail to meet such a description.

16. As a general comment, we think the Government may artificially constrain access by way of direct referral to the Environment Court (ECt). The current factors against an applicant seeking direct referral are already considerable, and place a natural limit on that course of action, being for example:

- The ECt process can be relatively expensive for an applicant, especially if a council consent process would not have proceeded to an appeal;
- The applicant may decide that the council process is a more appropriate mechanism, than going straight to the ECt, for engaging with stakeholders on a project proposal and resolving their issues; or
- A council hearing followed by an appeal to the ECt allows an applicant to refine its application over time of evidence.

17. From an industry perspective, the objectives of the regulation should logically be the following:

    - To empower those applicants who believe it would be more efficient to directly refer their application to the ECt, all pros and cons of doing so considered, rather than pursuing a two-stage process; and

    - To provide for a veto from local government to direct referral only in a very limited and genuinely exceptional range of circumstances.

18. We have identified the following factors that would encourage an applicant to seek direct referral to the ECt:

    - A proposal that is very likely to be appealed because it is large-scale, complex, contentious, or could set, in the view of some, an unwelcome precedent;

    - In such a case, there would be time and cost savings in direct referral;

    - Urgency – a direct referral process would be normally completed in less than a year; and

    - As a general consideration, more efficient use of resources at the council level, and by the ECt.

19. To reflect the above, the threshold monetary amount should be set relatively low, and great care is needed if the matters to which a council must have regard (when determining whether exceptional circumstances exist) is to be specified in the legislation.

Value of investment

20. The capital investment value of the project is the logical method of valuation because it is routinely done, the methodology is straightforward, and it is straightforward for the council to assess or audit the "quality" of the valuation (refer also to para. X of this submission).

21. The other methods suggested in the DD can be complex to carry out, are generally more costly and time consuming than the capital investment value method, by an order of magnitude or more, and would not always be carried out as a matter of course by an applicant.

22. Note that the "value" of a proposed investment can be other than directly economic in nature. It may have a range of tangible or intangible social and other benefits for a region or community. On that basis, the capital investment value method would place a lower bound on the "real"

value of the project. We believe that should form an important consideration when setting the threshold amount.

Threshold amount

23. We agree that by definition in the current provision the threshold amount or amounts would be a dollar value.

24. The option is provided of setting more than one threshold amount, i.e., that this amount can vary by economic sector and/or by location. We conclude that this approach is intractable – it would be all but impossible to produce a fair, reasonable, effective and workable outcome.

25. To elaborate, consider this hypothetical question: Would a road bridge across a river in Northland be more significant or less significant than a sport complex in Southland? Obviously, this is a nonsensical question, and that is exactly the situation officials would find themselves in if having to develop such a scheme.

26. On that basis, one nationwide threshold should be set at, say, $20 million (capital investment value), for the reasons set out in paras. 4-10 of this submission. In summary, we believe that direct referrals should be enabled to improve the efficiency of the RMA system, rather than restricted for no good reason.

27. In relation to the above, we consider that the various statistics listed in the DD do not necessarily provide an adequate picture of reality in New Zealand, and, therefore, would not necessarily inform a useful discussion on what an appropriate threshold amount should be. We suggest going back to first principles on the issue, which is: What is New Zealand seeking to achieve by setting a threshold? Does New Zealand wish to enable responsible economic development, or stymie responsible economic development?

Exceptional circumstances

28. As stated in para. 7, exceptional circumstances should be truly exceptional. The list provided in the DD defeats this objective completely. Taking each suggestion in turn:

29. *Treaty settlement legislation*. It is becoming commonplace for iwi to have additional statutory input into decision-making under the RMA through Treaty settlements. As such, this is not an exceptional circumstance unless the Government is seeking to provide settled iwi some substantially greater role and authority in RMA decision-making than councils have, which would be a major departure from existing policy proposals.

30. *Quality of valuation*. This matter is a simple procedural matter, and would be addressed in any event at an early stage. When a council receives an application for direct referral, that will be accompanied by a capital investment valuation (refer to paras. 8-10), prepared by a competent person, using a standard methodology. The council will be able to very easily determine whether or not this is a robust valuation, before considering whether or not exceptional circumstances apply. If the council did not consider that the valuation is robust, then the application would be considered incomplete. The applicant would have to then redo the valuation, or seek judicial review of the council's decision, all of which would be standard procedure, and nothing to do with exceptional circumstances.

31. *Local accountability issues*. This could cover almost anything and could likely be argued to apply in most cases, and by definition is not exceptional.

32. *The importance of the involvement of submitters*. This could also be argued to apply in most cases, especially for any larger projects where an applicant is more likely to seek direct referral. Once more, this situation is not exceptional.

33. An entirely different approach to "exceptional circumstances" is required on the basis that a "shopping list" along the lines proposed in the DD will inevitably lead to circumstances that are not exceptional being included as exceptional.

34. The phrase "exceptional circumstances" has been used in a number of legal contexts so it is perfectly acceptable to allow the matter to be determined on a case-by-case basis without any preconceived limits placed on what is exceptional in any given set of circumstances. "Exceptional" is in simple terms defined commonly as "unique". This commonly understood meaning ought to be sufficient to allow for understanding of the term to be fit for purpose in any given circumstance and to be refined over time.

ANSWERS TO SPECIFIC QUESTIONS

MfE: What other qualities would be useful in the threshold? Please explain why.
Straterra: None. A dollar amount is logical and straightforward and meets the definition of "amount".

MfE: Do you agree that the above options are appropriate measures of investment value?
Straterra: Yes.

MfE: What other options should be considered?

Straterra: None.

MfE: What is your preferred option?
Straterra: Capital investment value.

MfE: Please explain why.
Straterra: The capital investment value method is straightforward, industry-logical, would be carried out in any event, is straightforward to audit and verify, is much cheaper than alternative methods, and is as appropriate as any other method of identifying the economic value of a project.

MfE: Do you support having a single threshold amount for the whole of New Zealand? Please explain why.
Straterra: Yes, for simplicity. Any other approach would be contentious, difficult to develop and implement in any fair or reasonable way. Refer also to the main body of our submission.

MfE: Do you support having different threshold amounts? Please explain your answer.
Straterra: No. Going down this road would be convoluted, and all but impossible to turn into reasonable or effective policy. Refer to the main body of our submission.

MfE: Who do you think gains from the single threshold amount approach? Who misses out?
Straterra: Society gains. No one misses out. All applicants who believe the positives outweigh the negatives in seeking direct referral should be able to immediately gain direct referral, with the council only able to veto that desire if exceptional circumstances are found to exist, and those circumstances should be exceptional. Refer to the main body of our submission.

MfE: Who do you think gains from the different threshold amount approach? Who misses out?
Straterra: No one would gain from this approach because it would be too difficult to develop and implement. The concept belongs in the graveyard of intractable policy proposals.

MfE: For your preferred measure, at what level would you set a single investment threshold amount so that it selects proposals with significant economic scale at a regional level?
Straterra: $20 million. This would capture all reasonable-sized mining and quarrying proposals, and projects generally in New Zealand. We disagree with MfE's rationale for selecting the threshold, and consider that it attempts to solve a non-existent problem, and fails to achieve a worthwhile objective. Refer to the main body of our submission.

MfE: How would you adjust the threshold amount to take different locations into account?
Straterra: Best not to attempt it, as too complicated, and not meeting any useful objective. Any attempt to do so would be doomed to inevitable failure.

MfE: How would you adjust the threshold amount to take different proposal types into account?
Straterra: Ditto.

MfE: Which of the above matters do you agree should be prescribed?

Straterra: None of them, because none are circumstances that can be considered exceptional by any reasonable definition. Refer to the main body of our submission.

MfE: If there are additional reasons why those matters should be prescribed, please provide them.
Straterra: The "shopping list" approach is the wrong one, because it is doomed to result in circumstances that are not exceptional, thus defeating the purpose of having an exceptional circumstances provision in the RMA and in regulation.

MfE: Which of the above matters do you think should not be prescribed? Please explain why.
Straterra: All of the above matters should not be prescribed because none of them are exceptional. On the contrary, each and all of these circumstances are other than exceptional; indeed, they are routine or commonplace. If this proposal is implemented, almost everything that comes before the council would be an exceptional circumstance, which would be a nonsensical outcome. Refer to the main body of our submission.

We draw particular attention to the issue of the quality of the valuation. This is not an exceptional circumstance; this is a standard consideration the council would make in receiving and reviewing the valuation provided by the applicant in seeking direct referral. This is merely a procedural matter that the council would undertake in any event. Refer to the main body of our submission.

MfE: What other matters should a consent authority regard when determining whether exceptional circumstances exist? Please describe what the impact would be if these matters were not prescribed.
Straterra: As set out above, we are strongly of the view that what constitutes "exceptional circumstances" should not be defined in the regulation.