SUBMISSION

STRATERRA™
NATURAL RESOURCES OF NEW ZEALAND

Submission to the Ministry for the Environment on

"DISCUSSION DOCUMENT – IMPROVING OUR RESOURCE MANAGEMENT SYSTEM (FEBRUARY 2012)"

INTRODUCTION

1. Straterra[1] welcomes the opportunity to submit on the discussion document entitled "Improving our resource management system". We agree with Environment Minister Hon Amy Adams when she says: "the RMA has become cumbersome, uncertain and highly litigious". The proposed reform package announced on 28 February 2013 is welcome, and we believe goes a long way towards resolving time-consuming, costly, and unsatisfactory planning and consenting processes.

2. In this submission, we focus on the key issues affecting the New Zealand minerals sector. The relevant interests are chiefly quarrying for aggregate and industrial minerals; and opencast or underground mining for gold, coal, and ironsands.

3. A key concern is the future of the quarrying sector in New Zealand, as demand for land use continues to increase, along with demand for gravel and limestone, creating potential conflict over access to land. The RMA system needs to ensure adequate provision for the supply of these minerals into the future. A better planning framework, and streamlined consenting requirements would benefit the sector and New Zealand as a whole.

4. Those reflections apply to the minerals sector more broadly, as a source of inputs for New Zealand industry (coal and ironsand), and for export (coal and gold), and as a source of employment, and support for communities in regions.

5. We make recommendations for improvement of the reform package, and welcome further engagement with the Government on the issues raised, if that would be useful.

[1] Straterra represents by 90 % by value of NZ minerals production, exploration, research, services, and support http://www.straterra.co.nz/About+Straterra

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EXECUTIVE SUMMARY

6. Straterra supports the general direction of the discussion document. The minerals industry wants to maintain high environmental standards, and work within an effective and efficient regulatory framework. The proposals for fewer plans, clear central government direction where appropriate, and improved Environment Court processes are supported.

7. The proposed new sections 6 and 7 are broadly supported, noting that we are not convinced that a change to the RMA principles is strictly necessary.

8. If the Government insists on the new sections 6 and 7, we suggest providing definitions of "environmental compensation, off-setting or similar measures" in section 2 of the RMA, and developing in due course a National Environmental Standard or other instrument to guide implementation of these approaches for managing effects.

9. The drive for greater central government direction in RMA planning needs to be considered carefully. Safeguards will be needed to ensure local or regional decision-making continues to be available for local or regional problems. If there is to be greater national direction, that will entail greater responsibility on central government. For instance, a national approach could be taken to plan for the future extraction and use of New Zealand's remaining aggregate resources.

10. On the proposed planning process, we suggest having a judge or former judge preside over the hearings panel, and classifying council decision-making on the independent hearing panel report as a separate step in the process.

11. The proposals for enabling iwi/Maori participation are sound, provided the evidence provided by Maori is robust, relevant, and open to challenge, as is the case for any other evidence. Maori participation on hearings panels and the like could be provided for in a way that ensures that decision-makers are accountable to New Zealanders.

RECOMMENDATIONS

12. Straterra recommends the Ministry for the Environment to:

    a) Note Straterra's general support for the Ministry for the Environment discussion document "Improving our resource management system";

    b) Note Straterra's view that changes to section 6 and 7 of the RMA are not strictly necessary;

c) Notwithstanding Rec. (b), if the Government insists on changes to sections 6 and 7, note Straterra's general support for the proposed new sections;

d) In relation to Rec. (c), agree to amend proposed new section 6 (e) to say: "the relationship of Maori and their culture and traditions *including kaitiakitanga* with their ancestral lands, waters, sites, waahi tapu, taonga species, and other taonga", for precision and clarity;

e) Agree to amend proposed new section 7 (2) to say: "In the case of policy statements and plans *and rules*: … ", for completeness;

f) Agree to define "mitigation", "environmental compensation" and "offsets" in section 2 of the RMA, to clarify the meanings of these approaches to managing effects;

g) In relation to Rec. (f), note Straterra's view that mitigation, compensation and offsets have overlapping meanings, with offsets linked to the concept of "no net loss", and the others, not necessarily;

h) In relation to Recs. (f) and (g), agree to consider the development of a National Environmental Standard or other instrument for the implementation of mitigation, compensation and offsets;

i) Note Straterra's general support for sections 3.2.2 and 3.1.3 on central government direction, because criteria for the use of central government powers would remove confusion from current provisions;

j) Notwithstanding Rec. (i), note Straterra's concern that enhanced central government direction should be introduced with safeguards to ensure that regional and local decision-making continues to be applied to regional and local problems or issues;

k) Note Straterra support for reducing the number of plans in New Zealand, on the basis that our country is currently over governed;

l) Note Straterra's support for the proposal to better plan for future needs (section 3.2.2), with New Zealand's aggregate resources furnishing an example;

m) Note Straterra's general support for the proposed new plan-making process;

n) In relation to Rec. (m), agree to provide for the "independent hearings panel" to be presided over by a judge or former judge to ensure robust decisions or recommendations;

o) In relation to Rec. (n), agree to define the council decision-making step as step 4 in the plan-making process, with appeals renamed step 5, for clarity;

p) Note Straterra's support for quicker and cheaper Environment Court and board of inquiry processes;

q) Note Straterra's concern over regulatory complexity under the RMA (resource consents), conservation Act 1987 (concessions), and the Crown Minerals Act 1991 (access arrangements) in relation to public conservation land;

r) In relation to Rec. (q), agree to introduce a new Part to the RMA covering "conservation permits", as a single permit integrating RMA consents, concessions, and access arrangements;

s) Agree to provide for a board of inquiry serviced by the Environmental Protection Authority to hear applications for conservation permits;

t) Agree that hearings of conservation permit applications would be open to public submission, and testing and challenge of evidence presented, as per standard hearings processes;

u) Agree to include in criteria for decision-making on conservation permits, consistency with the purpose of the RMA, and the purpose for which the land is held;

v) Agree that decisions by the board of inquiry on conservation permit applications would be appellable to the High Court on points of law only;

w) Agree to provide in the Bill for an amendment to the Conservation Act to remove Part IIIb, covering concessions;

x) Agree to amend section 6 (e) of the Conservation Act in relation to the Department of Conservation's functions to say: "to the extent that the use of any natural or historic resource for recreation or tourism is not inconsistent with its conservation, to foster the use of natural and historic resources for recreation, and, *generally*, to *enable environmentally-responsible development*;

y) Agree to amend section 6 (b) of the Conservation Act in relation to the Department's functions to say: "advocate the conservation of natural and historic resources generally *on lands and waters other than public conservation lands and waters administered by the Department*";

z) Agree to amend section 61, and related sections of the Crown Minerals Act, or the Crown Minerals (Permitting and Crown Land) Bill, with text to direct applicants for access to public conservation land to the conservation permit provisions in the RMA;

aa) Agree to ensure that evidence provided on Maori values must be based on probative evidence; and

bb) Agree to specify in the Act that all appointees to hearings panels, boards of inquiry and the like are required to operate by the rules of these bodies, and within the scope and purpose of the Act, and not advocate for specific interests, to avoid potential or actual conflicts of interest, and the risk of judicial review of decisions.

DISCUSSION

Changes to sections 6 and 7 of the RMA

13. Straterra provided feedback to the Government on the RMA Principles report in 2012. We confine our discussion to the material presented in the discussion document (**section 3.1.1**).

14. The case for changing sections 6 and 7 is short of compelling. Case law has developed over the years to provide stability of decision-making in relation to these considerations. That said, if the Government insists on making changes to the RMA principles, the proposed new section 6 is broadly supported. It is logical to codify in the RMA the experience of the case law, in which an "overall broad judgment" is exercised. Indeed, it is difficult to imagine any other way of managing for concepts that are by their nature incommensurate – economic, environmental, social, and cultural sustainability.

15. The proposal in new section 6 (1) (a) and (b) to continue to protect resources from "inappropriate subdivision, use and development" is supported because it continues leaves open the possibility of *appropriate* subdivision, use and development. Minerals, for instance, can only be developed where they exist in economically-viable deposits – they are a location-specific resource – and that wording indirectly takes this into account, thereby preserving the status quo.

16. The inclusion of the word "specified" into new section 6 (1) (b) and (c) is supported because it places the onus on councils to specify in advance areas with outstanding natural features and vegetation etc. It is noted this is a big job to do properly, and unless councils are adequately resourced to do it, could lead to determinations that are open to challenge by applicants and

affected parties. We submitted in this vein on the proposed National Policy Statement on indigenous biodiversity.

17. The wording of the new section 6 (e) is supported; however, we query the classification of "kaitiakitanga" as a "taonga". A taonga is a treasured possession, whereas kaitiakitanga is a role or a function, with rights and responsibilities, that may be exercised by iwi/hapu/whānau, in various settings.

18. As an aside, though an important one, kaitiakitanga would normally be exercised in connection with rights under Article 2 of the Treaty, that is, resources owned by kaitiaki. If, however, kaitiakitanga is exercised over resources owned by others or partly owned by others or owned by no one (common pool resources), an issue of accountability to the broader community arises. Arguably, that is a Constitutional issue for New Zealand, and ways could be found to manage that.

19. The existing section 7 (aa) referring to "the ethic of stewardship" is vague and unclear. Its proposed deletion is supported for that reason.

20. In a similar vein, we support the deletions of section 7 (c), (d), (f) and (g), as unclear, or superseded by the new section 6, or difficult to define, or already covered in section 5, as noted in the discussion paper. We elaborate on two aspects below.

21. Arguably, there is no such thing as "intrinsic value" because the term "value" can only make sense if it is held by humans – it is not a stand-alone concept. For example, the value for some people derived from not using nature is still a value held by those people.

22. In the case of a mineral resource, it is very difficult to determine to what extent it is finite because the mineable *reserve* will vary up or down according to changes in prices, or costs of extraction. It is a meaningless or inappropriate juxtaposition of concepts.

23. We support the retention of sections 5 and 8 in their current form, on the basis of the discussion document.

24. The new section 7 is supported, as proposed. It will be useful in the context of policy statements and plans to "include only those matters within the scope of the Act", and suggest that this consideration should extend to including *rules* in plans for completeness.

Offsets, mitigation and compensation

25. We agree with the discussion document's approach, in avoiding definitions of "environmental compensation, off-setting or similar measures", or other terms, in the new section 7, cf. the RMA Principles report recommendations.

26. Nonetheless, clarity is needed around "mitigation", "compensation" and "offsets" because of the inconsistent treatment of these concepts or approaches in the case law. A resolution is unlikely to be straightforward because there are overlaps in meaning between each of these terms, i.e., a Venn diagram of the three terms would display as three partly overlapping circles. Straterra presented last year in that vein as a member of a Government-appointed reference group on freshwater.

27. The issue has become further confused with draft, non-statutory guidance prepared by the Department of Conservation on biodiversity offsets, which introduces a framework with very limited applicability, and with no accompanying guidance on mitigation or compensation. If published in its current form, this guidance will lead to more litigation under the RMA, rather than less. Straterra has been engaging with DOC on this issue, and has offered to help revise and expand the guidelines.

28. In that connection, the discussion paper notes: "These changes [to section 6 and 7] would involve some costs and may increase uncertainty in the short term as they would require the review of plans and render some existing case law obsolete, providing interpretation challenges until new case law emerges." That is fine, as far as it goes, however, we believe the Government bears a responsibility to minimise these risks. A thorough treatment of offsets, mitigation and compensation would go a long way in that direction, and Straterra would welcome participating in that work.

29. One possibility would be to include definitions of offsets, mitigation and compensation in section 2, and to amend other relevant legislation to defer to the RMA when defining these terms. Subsequently an NES or other instrument could be developed, to provide the mechanisms and methodologies to achieve outcomes under these definitions. We have the expertise within Straterra's membership to support such an initiative.

Greater national direction and consistency

30. Criticism has been expressed from various quarters that central government would have too much power of intervention in local government under the proposed changes. The counter argument made in the discussion document is that it is not always clear when the current tools

at the Government's disposal could or should be used, and that "guidelines [for that] would be developed with criteria." On that basis, **Sections 3.1.2** and **3.1.3** are generally supported, with a caveat. This is that care is needed to avoid central government riding roughshod over the wishes of communities – the criteria will need to be carefully drafted. In hindsight, it would have been useful if the discussion document had given more examples of when these powers would be exercised.

Making NPSs and NESs more effective

31. We agree that there is room for improvement with the development and implementation of NPSs and NESs, although it is not obvious to Straterra how to achieve these aims. On the face of it, the suggestions made in **section 3.1.4** look reasonable.

32. In due course, an NES on offsets, mitigation and compensation in relation to the effects of development on the various aspects of sustainability may be a mechanism for resolving confusion in the case law, as discussed earlier in this submission.

Single resource management plans

33. We agree with the direction towards fewer plans (**section 3.2.1**). New Zealand is over-governed compared to other jurisdictions, as the Minister has stated.

34. In terms of the proposal for planning for future needs (**section 3.2.2**), Straterra observes that urban expansion in Auckland has already "sterilised" the city's resources in aggregates, and that for future construction, aggregates will have to be trucked to the city, from the Waikato, at great expense. The Waikato Regional Policy Statement draws attention to the strategic nature of aggregate resources, and that approach is being reflected in other RPSs. This is also a national issue.

35. We broadly support the "key features of the new plan-making process" (**section 3.2.3**), and make a few observations. The design of pre-notification engagement and collaboration (step 2) will need to ensure that stakeholders and iwi/Maori are able to participate effectively, taking into consideration any resourcing constraints.

36. We propose that the "independent hearings panel" (step 3) should have the same standing and resourcing as the Environment Court or a board of inquiry. It should be presided over by a judge or former judge to ensure robust decisions or recommendations.

37. From the material, we assume that the council or councils will decide whether or not to approve the independent hearings panel's findings. That should be clarified, and, if that is the case, this

decision should be set out as step 4. We assume that this council decision would be taken with no external input. That should also be clarified.

38. It is noted that in the context of the Land And Water Forum, Straterra proposed a design for a collaborative process for freshwater planning which is similar to this proposal, however, omits the council decision-making step, as unnecessary because of the collaborative process (refer to our submission on the freshwater reforms). We accept that the circumstance described here is different, that the planning process involves more than one council.

39. The narrowed scope of appeals on draft plans to the Environment Court, and provisions for appeals to the High Court on points of law (now step 5), are supported.

Faster resolution of Environment Court proceedings

40. Any measures that will lead to quicker and cheaper Environment Court and board of inquiry processes is supported (**section 3.2.4**).

Limiting the scope for participation in consent submissions and in appeals

41. **Section 3.3.5** sets out undesirable outcomes that can and do arise in notified resource consent processes, e.g., submissions that are not related to the reasons for applying for the consent. The sense is that this section is aimed at the minor end of the development scale, which comprise the vast bulk of resource consent applications.

42. Nonetheless, the Minister's following comments are noted, that in resource consent processes the "same arguments [are made] by the same people in front of the same judges". She argues that by focusing on better planning, resource consent processes ought to become less onerous.

43. That is correct, with a caveat. In principle, standard conditions could be devised for components of development activities across a sector, where resource consents would not be required. In practice, however, very few National Environmental Standards exist. The concern here is that in attempting to solve one problem – onerous consent process – the NES may be creating another – a blunt instrument in which some applicants get caught out, and find themselves having to apply for a consent anyway. Some industries have opted for "guidance notices", notably the wine industry and the quarrying industry. That has been an attempt to standardise those aspects of industries that are amenable to standardisation, around the country.

The legislative labyrinth

44. We propose the use of boards of inquiry to address a specific problem faced by the minerals industry, and to a slightly lesser extent by other sectors, e.g., electricity generation and transmission, built infrastructure.

45. Minerals exploration and mining companies face compliance with up to five separate pieces of legislation covering environment and heritage – RMA 1991 (resource consents), Historic Places Act 1993 (authorities to modify heritage), Conservation Act 1987 (concessions for vehicle access and ancillary infrastructure), Wildlife Act 1953 (permits to move wildlife), and the Crown Minerals Act 1991 (access to Crown land).

46. This has led to the situation where it can take more than a year and cost millions of dollars to gain approvals to drill a dozen exploration holes in a paddock, where the effects of the project are negligible, even non-existent.

47. As a further example, Bathurst Resources Ltd has spent to date millions of dollars and faced lengthy delays in the RMA process for the proposed Escarpment coal mine on the Denniston plateau. The company will have to obtain separately: concessions for road access and ore-crushing infrastructure; an access arrangement for the mine; authorities to modify or destroy former coal workings that have since become heritage; and permits to move individual kiwi and other native animals.

48. While the Ministry for the Environment has been doing work on better aligning RMA processes with the concessions process, no progress has been reported. DOC has considered ways of aligning processes for concessions and access arrangements, and to our knowledge no progress has been made. Perhaps, the lack until now of a legislative programme has been an obstacle to action.

49. Therefore, this RMA reform provides an opportunity to resolve a problem that has arisen unintentionally from the sequential passing of legislation since 1953, covering roughly the same ground, and with no synthesis or integration.

50. The priority is the integration of regulatory approvals processes under the RMA, with the Conservation Act and the Crown Minerals Act, on public conservation land. One option would be to introduce new provisions into the RMA to provide for a new class of “conservation permits”. These would integrate resource consents, concessions, and access arrangements into a single package, similar to marine coastal permits under the RMA. While conservation permits would be

aimed at achieving the purpose of the RMA, statutory tests could be included to reflect the purpose for which the land is held.

51. Logically, a board of inquiry or similar body, serviced by the EPA, would hear applications for conservation permits, and these would be open to public submissions. A single body of information would be presented. The decision would be made with sustainable management, and consistency with the purpose for which the land is held, as the key criteria. Decisions would be appellable to the High Court on points of law only.

Effective and meaningful iwi/Maori participation

52. **Section 3.5** on iwi/Maori (Maori) participation starts by saying that "Maori values are not always effectively recognised" in decision-making, and that Maori face obstacles when participating in RMA processes. Section 3.5.1 proposes solutions without examining these issues. We have two observations.

53. Arguably, Maori values - to the extent that they differ from anyone else's values - are based on myths similar to that of indigenous or earlier peoples over much of the globe. Myths are the expression of the values held by a people at a point in time, and myths change over time in response to new challenges faced by a people. It is reasonable to consider Maori values in this context, and whether or not they are distinct from the values held by New Zealanders generally.

54. Potentially, a tension has arisen between the expectations among Maori that their "values" will be recognised or reflected in decision-making, and, on the other, the decision-making process, which has as a core value that decisions must be based on contestable and relevant evidence. If so, it is not surprising that there are "differing expectations and some confusion about the role of Maori in these processes". New Zealand has to decide whether or not we run our society on the basis of Western rationalism, or on the basis of myth, or a combination of the two approaches to life. Unless this is resolved, the tension will remain, regardless of the institutions developed and mechanisms created to enable Maori participation in RMA processes.

55. That leads to the second issue, which is to do with accountability, and one that we believe can be readily managed, provided the above issue is resolved.

56. The proposal is advanced on page 67 that "at least one member [of the hearings panel in developing plans] would be required to understand tikanga Maori and the perspectives of local iwi, and the council would consult with local iwi when deciding this appointment". However, on page 13: "The judiciary should not have to be placed in the position of having to determine

values or policy – this role should be played by *publicly accountable, elected representatives*" (Straterra's italics).

57. We understand "publicly accountable" in this case to mean that the iwi representative on the hearings panel would be required to participate in a way that is consistent with its governing framework. That is to say that this representative is not on the hearings panel to advocate for iwi but as a servant of the community at large. That could be made explicit in the legislation.