

Submission to DEPARTMENT OF CONSERVATION on
“2017 CODE OF CONDUCT FOR MINIMISING ACOUSTIC
DISTURBANCE TO MARINE MAMMALS” (AUGUST 2016)

INTRODUCTION

1. Straterra¹ welcomes the opportunity to submit on the proposed “2017 Code of Conduct for Minimising Acoustic Disturbance to Marine Mammals from Seismic Survey Operations” (the Code). The deadline of 9 September 2016 is noted.
2. This submission is limited to proposed provisions in the Code on engagement, and on scope.
3. In preparing this submission, Straterra has consulted with interested members, and with the Petroleum Exploration and Production Association of New Zealand (PEPANZ). As always, we do so in the interests of achieving benefits for the NZ minerals and mining industry, and for the New Zealand economy as a whole.
4. Straterra submits from the point of view that regulation should be fit for purpose, set in proportion to the matter being regulated, and cost-effective. We welcome further engagement with the Department of Conservation on our submission.

¹ Straterra represents NZ minerals production, exploration, research, services, and support
<http://www.straterra.co.nz/about/>

CONTENTS

INTRODUCTION 1

EXECUTIVE SUMMARY 2

RECOMMENDATIONS 3

DISCUSSION: ENGAGEMENT 4

 Permitted activity..... 4

 Codes of conduct 4

 When engagement is necessary and when it is not 4

 Discussion..... 5

 Notification 6

DISCUSSION: SCOPE 7

 Scope should be limited to marine mammals 7

 Scope should be limited to an industry definition of a seismic survey 7

APPENDIX 1: COMMENT ON SELECTED PROVISIONS 8

 Care with objectives..... 8

 Care with provisions for engagement..... 8

 Care with scope and process 9

 More on engagement 9

EXECUTIVE SUMMARY

5. Seismic surveys are a permitted activity under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012. The Code, therefore, comprises the conditions that operators must meet when conducting seismic surveys, as a permitted activity.
6. Straterra’s and the Government’s guiding principles are that regulation should be set in proportion to the matter being regulated, and should be cost-effective and fit for purpose.
7. On that basis, engagement prior to conducting a seismic survey should be limited to:
 - the regulator, e.g., on developing marine mammal impact assessments and management plans, on compliance, and on variations to arrangements;
 - interested scientists, within the parameters of the Code; and
 - in relation to navigation and maritime safety, via Maritime NZ.
8. Operators do not need to engage with iwi, communities, and environmental interests prior to every seismic survey because the Code embodies society’s expectations on operators.
9. Any requirement for notification to the above interested parties is a Crown responsibility – as a public good - and not that of operators, for whom this is onerous, costly and unnecessary.

10. There is no need for any notice period in respect of the operator's notification to the Department of Conservation of an intention to conduct a seismic survey. The purpose of notifying DOC is to trigger processes for monitoring and compliance with the Code.
11. The scope of the Code should be limited to marine mammals, in consideration of the full title of the Code, and of the Marine Mammals Protection Act 1978, and for the Code to be workable.
12. The definition of "seismic survey" requires amendment to exclude multi-team echo-sounders and other "non-seismic" technologies.

RECOMMENDATIONS

13. Straterra recommends the Department of Conservation to:
 - a) Note Straterra's concerns with the Code as to provisions for engagement, and on scope;
 - b) Agree that regulation should be set in proportion to the matter being regulated, and should be cost-effective and fit for purpose;
 - c) Agree that the purpose of a Code of Conduct, in this context, is to set society's expectations of operators when carrying out a permitted activity, namely, seismic surveys;
 - d) Agree that imposing on operators extensive requirements for engagement fails to meet these principles, and is contrary to the purpose of a code of conduct;
 - e) Agree to limit the requirement on operators for engagement to the regulator, interested scientists within the parameters of the Code, and in relation to navigation / maritime safety;
 - f) Agree that it is unnecessary to require operators to engage with iwi, communities and environmental interests prior to every survey because their interests and concerns have already been considered in developing and promulgating the Code;
 - g) In the event of any notification of seismic surveys being considered necessary to iwi, communities and environmental interests, agree that this is a Crown responsibility, as a matter of public good, and *not* a private sector responsibility;
 - h) Agree that the operator should notify the Department of Conservation of their intention to carry out a seismic survey, and agree that no notification period is necessary, for workability;
 - i) Agree to limit the scope of the Code to marine mammals for workability; and
 - j) Agree to replace the definition of seismic survey with the following text: "*Marine seismic survey means any survey in which the source of energy is created from controlled generation of sound pressure waves, with frequencies falling in the range from 0 to 10,000 Hz, for the purpose of investigating the Earth's properties beneath the seafloor.*"

DISCUSSION: ENGAGEMENT

14. At issue is the requirement for engagement with a wide variety of parties prior to conducting a seismic survey. This requirement is unprincipled, unworkable, undesirable and unnecessary.

Permitted activity

15. Seismic surveying is classified as a permitted activity under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 regime. *“Under the EEZ permitted activities regulations, seismic surveying operators are required to comply with the Department of Conservation’s”* code of conduct².

16. The Ministry for the Environment states further on its web site: permitted activities *“can be undertaken provided the operator meets conditions specified in regulations”*.

17. In classifying activities, *“the Government intends that the regulation of activities be proportionate to their likely environmental effect and the effect on existing interests [and] cost effective”*.

18. Straterra contends that the Code fails to meet the principles of proportionality and cost-effectiveness for a permitted activity because of unnecessary and onerous engagement requirements.

Codes of conduct

19. Wikipedia suggests a code of conduct is: *“a set of rules outlining the social norms and rules and responsibilities of, or proper practices for, an individual, party or organisation”*.

20. In its 2007 International Good Practice Guidance, “Defining and Developing an Effective Code of Conduct for Organisations”, the International Federation of Accountants provided a definition: *“Principles, values, standards, or rules of behaviour that guide the decisions, procedures and systems of an organisation in a way that (a) contributes to the welfare of its key stakeholders, and (b) respects the rights of all constituents affected by its operations.”*

21. Therefore, a code of conduct is an agreement that has been reached, in advance, between the users of the code and society on the user’s practice or behaviour.

When engagement is necessary and when it is not

22. Straterra’s and the Government’s guiding principles are that regulation should be set in proportion to the matter being regulated, and should be cost-effective and fit for purpose. As examples:

- A proposal for new legislation, e.g., marine protection – engagement with the public and iwi is a necessary input because legislation is an expression of the values and principles held by society;
- Ditto for statutory instruments under the Resource Management Act 1991, e.g., national and regional policy statements, national environmental standards, and RMA plans;

² <http://www.mfe.govt.nz/marine/legislation/regulations-under-eez-act>

- A proposed seabed mining operation will require resource consents (RMA 1991) or a marine consent (EEZ Act 2012) because adverse effects on the environment are likely to be more than minor – public and iwi participation in application processes is necessary to address public and Maori interests and concerns specific to the application;
- In the case of a whale stranding, the Department of Conservation must engage with iwi on matters of cultural interest and concern, and to ensure the safe transfer of taonga to Maori – in terms of rescuing whales, in which time is of the essence, DOC does not engage with the public and iwi other than with direct participants in rescue work;
- A proposed marine scientific research survey is a permitted activity because adverse effects on the environment are relatively well understood, and are very likely to be no more than minor – engagement with the public and iwi is not necessary for every survey because any issues of public or Maori interest or concern have been already addressed;
- Commercial fishers follow a set of rules in legislation and regulations; their operations are monitored for compliance; and there are penalties for non-compliance – engagement with the public or iwi before every fishing operation is not necessary because Parliament has represented the national interest in deciding how fishers must behave;
- Actions to ensure workplace health and safety on board vessels and in marine operations are subject to statutory requirements via legislation, regulations, and approved codes of conduct – engagement with the public or iwi before any activity is undertaken is not necessary on the same rationale as above.

Discussion

23. On the principles of proportionality, fitness for purpose and cost-effectiveness, the Code fails to distinguish between situations where engagement is necessary and desirable, and where it is not.
24. The proposed requirement for operators to prepare an engagement plan, and engage with iwi, communities and environmental interests every time a seismic survey is to be conducted is unprincipled and unworkable.
25. To press the point, if the proposal were upheld, to be consistent, the Department of Conservation would have to require prior engagement between the operator and iwi, communities and environmental interests every single time:
 - A water taxi, ferry or chartered vessel crosses an area where there are marine mammals;
 - A tourism guide takes clients to visit a seal colony;
 - A whale watching company takes clients to see whales;
 - Journalists film a documentary on marine mammals;
 - Scientists conduct non-invasive research on marine mammals;
 - Scientists conduct marine research in an area where there are marine mammals;
 - A container ship or freighter puts to sea, or arrives in New Zealand waters;
 - The Navy conducts an exercise in New Zealand waters, including the use of sonar;
 - A commercial fishing vessel or other vessel for a commercial purpose puts to sea;

- A vessel leaves or arrives at a marina;
 - A submarine cable is laid; and every time
 - A yacht race, surf life-saving competition, or other marine regatta is held.
26. All of these situations have in common with seismic surveying the fact that operators are running their businesses or commercial activities lawfully, and create noises which can lie within the vocalisation and hearing range of marine mammals. Obviously, it would be extremely impractical for these operators to have to engage with iwi, communities and environmental interests every single time they conducted an activity near or potentially near a marine mammal.
27. The purpose of a code of conduct - in the present context - is for agreement with society to be reached on conducting seismic surveys in a way that manages or minimises the adverse impacts on marine mammals. Engagement is necessary to the preparation of the Code because it encompasses matters of iwi and broader public interest and concern.
28. Once the Code is finalised, that is the Code. It must be adhered to, and if it is not, penalties apply. That is as it should be. There is no rationale for, or purpose in further engagement once the Code is completed and promulgated - the engagement has been done, and / or the interests and concerns of interested parties have been considered.
29. To conclude, Straterra contends that the proposal concerning engagement imposes unnecessary regulatory costs on businesses for no benefit to marine mammals or to society. The exceptions are, of course:
- engagement with the regulator (e.g., on marine mammal impact assessments and management plans, on compliance, and on variations to arrangements);
 - with interested scientists within the parameters of the Code; and
 - in respect of navigation and maritime safety, e.g., coastal shipping, commercial fishing, recreational boating (via Maritime NZ).

Notification

30. This leaves the issue of notification. If it is absolutely necessary to notify iwi, communities and environmental interests who could be said to have an interest in a seismic survey, that should be a Crown responsibility. It is the experience of operators providing notification to iwi of permitted activities (under the EEZ Act) that this is onerous and out of all proportion to the nature, scale, duration and cost of the activity.
31. To press the point, this was our advice when the permitted activity regulations were developed under the EEZ Act, and it was ignored. As a result, the National Institute of Water and Atmospheric research incurs costs of as much as \$30,000 a year in providing to iwi notification for low-impact activities. Under the present draft code, a level 1 seismic survey could cost the operator \$100,000 or more in notification requirements. It is irresponsible of the Crown to impose such obligations on operators, to no useful purpose.

32. It is accepted that the operator should notify DOC, as the regulator, when carrying out seismic surveys. The 90-day requirement may be acceptable in the case of level 1 seismic surveys, noting these are significant undertakings with a focus on petroleum exploration. For other categories of survey, this does not make sense. Such surveys can be opportunistic, e.g., to investigate an accident, and in any case are often planned with less than 90 days' notice.
33. As a general statement, no notice period is required because the only purpose of notification from industry's point of view is to trigger processes of monitoring and compliance. (This is separate from the time taken for the operator to develop with DOC an MMIA or MMMP, and these could cover more than one survey event.)

DISCUSSION: SCOPE

Scope should be limited to marine mammals

34. There has been scope creep beyond marine mammals. Perhaps, the Department is envisaging that the regulatory scope of adverse acoustic effects of seismic surveys should be extended to, e.g., jellyfish, barnacles, and sea anemones. If so, that would be intractable.
35. As Straterra understands it, the rationale underpinning a focus on marine mammals in the Code is the Marine Mammals Protection Act 1978. To be precise, society has a particular and legislated interest and concern in marine mammals (as opposed to hermit crabs or starfish), and there are legitimate reasons for that. The scope of the Code should be restricted to marine mammals, on principle, and for workability.

Scope should be limited to an industry definition of a seismic survey

36. The proposed definition of "seismic survey" is problematic.
37. Consider the text provided: *"Seismic survey means a survey of the geology of the seabed, the structures beneath it, or both, carried out by projecting sound pressure waves into the layers beneath the seabed, and detecting and measuring the reflected signals."*
38. As written, this definition includes multi-beam echo-sounders used for seabed geological surveys, but not echo-sounders used for other purposes, even though the effects on marine mammals are the same. That does not make sense.
39. Note that signals are obtained by both refraction and reflection.
40. We suggest replacing the definition with the following text: *"Marine seismic survey means any survey in which the source of energy is created from controlled generation of sound pressure waves, with frequencies falling in the range from 0 to 10,000 Hz, for the purpose of investigating the Earth's properties beneath the seafloor."*

APPENDIX 1: COMMENT ON SELECTED PROVISIONS

Care with objectives

Objectives

- (1) The primary objectives of the *2017 Code of Conduct for Minimising Acoustic Disturbance to Marine Mammals from Seismic Survey Operations* (the Code) are to:
- (a) Minimise acoustic disturbance to marine mammals and other species from seismic survey activities
 - (b) Minimise noise in the marine environment arising from seismic survey activities
 - (c) Contribute to the body of scientific knowledge on the physical and behavioural impacts of seismic surveys on marine mammals through improved, standardised observation and reporting
 - (d) Provide for the conduct of seismic surveys in New Zealand continental waters in an environmentally responsible and sustainable manner, and
 - (e) Build effective working relationships between government, industry, iwi and research stakeholders.

A code of conduct in this context sets out society's expectations of an operator's activities in relation to acoustic disturbance of marine mammals. Therefore, it should be comprehensive, and that is a fitting description of this document.

The extension of scope to "other species" is a concern. Which species? The scope should be limited to marine mammals for workability.

We agree that the operation of the Code should contribute to scientific knowledge of the issue under consideration. Continuous improvement of the regime should be a guiding principle. The contributors to increasing the store of knowledge should be explicitly acknowledged.

Given the above, the purpose of "working relationships" would be to enable or provide for the implementation of the Code. The operators will interact with DOC, as the regulator, and with scientific researchers, within the parameters of the Code. There would also be a need for information exchange with some existing interests, from the point of view of navigation and maritime safety, e.g., coastal shipping, commercial fishing, recreational boating.

Care with provisions for engagement

- (a) An engagement plan must list any potential interested party who has been or needs to be contacted, and outline the planned timeline for further engagement (see **Appendix 1**), based upon the potential acoustic footprint of the survey. An interested party may include, but is not limited to:
- (i) iwi entities and other *tangata whenua*;
 - (ii) a person or organisation with existing interests; and
 - (iii) a central government department or agency and any regional authority relevant to the proposed survey.

As stated elsewhere, this provision defeats the purpose and the nature of a code of conduct, and defeats the classification of seismic surveying as a permitted activity.

Maori have been consulted already in the preparation of the Code, or should be aware of the matters contained in the Code - this is not a new code, so no further consultation or engagement is necessary. Ditto for environmental interests and communities.

Engagement will be necessary with the regulator, and for navigational and safety purposes in respect of coastal shipping, commercial fishing and the like.

There will be scientists with an interest in adding to the store of scientific knowledge on the effects of acoustic disturbance on marine mammals, and how those effects can be better mitigated or managed. Operators should engage with these interests. It is the Crown's responsibility to identify who these interests are because there is a strong public good component to this engagement.

Pre-survey planning process (page 14)

- (1) For a Level 2, 2P or 3P survey, a proponent must notify any relevant local iwi entity of the survey at the time of submission of the MMIA, if an engagement plan was not submitted at the time of survey notification to the Director General, as provided by clause **Error! Reference source not found.**

As stated elsewhere, there is no rationale for engagement with iwi ahead of every seismic survey. If the Crown wishes to notify iwi of every seismic survey, it is welcome to do so at its cost.

Care with scope and process

Page 15

- (2) The MMIA, incorporating the MMMP, must be developed by a proponent in a collaborative way that incorporates engagement with any organisation and person with specific interest, as defined in clause **Error! Reference source not found.**0, or with expertise relevant to the proposed survey.
- (3) A proponent must make the MMMP available to any observer personnel as soon as it is finalised.
- (4) While the operation elements of the Code apply primarily to marine mammals, a proponent must consider the impacts of the seismic survey on any other key species (such as fish, crustaceans, turtles, penguins and other seabirds) or any important habitat area in the MMIA. A proponent should then, where practicable, adopt whatever means are available to avoid or mitigate and identified negative effects on such species or habitats.

Preparation of an MMIA and MMMP is a technical process involving experts. The regulator would also have a role, as the approving authority of these documents, and to ensure compliance. To the extent that any "collaboration" is needed, that would occur between the operator's advisers or experts and DOC. In some cases, there may be value in working with interested scientists as well, within the parameters of the Code.

In terms of impacts on "other key species", there is a danger of the scope becoming so broad as to make the Code unimplementable or inoperable, as discussed elsewhere.

More on engagement

Appendix 1: Engagement Plan and Process

- (1) The purpose of an engagement plan is to ensure that a proponent has:
 - (a) identified persons, organisations or *tangata whenua* with specific interests or expertise relevant to the potential impacts on the environment such as, but not limited to, iwi entities,

- regional councils, environmental non-governmental organisations relevant academics and other potentially affected marine users, such as the fishing industry;
- (b) allocated enough time and resources to undertake a meaningful engagement that would represent a reasonable attempt to address the concerns of any such interested party.

The requirement for engagement with various interests ahead of every seismic survey is at odds with the concept of a permitted activity. The proposal fails to meet the principles of proportionality and cost-effectiveness, as discussed elsewhere in this submission.

It is accepted that there is a need for engagement as appropriate with some parties, e.g., on safety matters and navigation (coastal shipping, commercial fishers, recreational boating, via Maritime NZ), interested scientists, within the parameters of the Code, and with the regulator.

In the case of iwi and environmental interests, their concerns will have been met or considered during the development of the Code. Otherwise, a major purpose in developing the Code will have been missed. Having addressed those concerns, no further engagement with these persons is necessary.

There will be engagement with the regulator, e.g., to ensure compliance with the conditions set out in the Code, and these are extensive, and also on MMIA's and MMMPs, and on variations to arrangements.