

## Submission to LOCAL GOVERNMENT & ENVIRONMENT SELECT COMMITTEE on

### “ENVIRONMENTAL PROTECTION AUTHORITY (PROTECTION OF ENVIRONMENT) AMENDMENT BILL” (AUGUST 2015)

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#### INTRODUCTION

1. Straterra<sup>1</sup> welcomes the opportunity to submit on the Environmental Protection Authority (Protection of Environment) Bill<sup>2</sup>. We do so in the interests of ensuring that legislation in New Zealand is clear and logical. We note the submission deadline of 10 September 2015<sup>3</sup>.
2. Straterra has consulted with a number of its members in the preparation of this submission.
3. Straterra wishes to be heard in person on its submission by the Local Government & Environment Select Committee.

#### EXECUTIVE SUMMARY/DISCUSSION

4. Straterra opposes the passage of the Environmental Protection Authority (Protection of Environment) Bill because it introduces confusion into the EPA’s objective that may be unable to be resolved, while providing no benefits, and introducing unnecessary costs.
5. We set out section 12 of the Environmental Protection Authority Act 2011 below:  
**Section 12 Objective of EPA**
  - (1) The objective of the EPA is to undertake its functions in a way that—
    - (a) contributes to the efficient, effective, and transparent management of New Zealand’s environment and natural and physical resources; and
    - (b) enables New Zealand to meet its international obligations.
  - (2) When undertaking its particular functions under an environmental Act, the EPA must also act in a way that furthers any objectives (or purposes) stated in respect of that Act.
6. The concept of “*efficient, effective and transparent management*” encompasses use, development and protection, among possible ways of managing the “*environment and natural and physical resources*”. In explanation, the wording of section 12 (1) is deliberately all-encompassing and general to avoid interference with section 12 (2), whereby the EPA must further the specific objectives and purposes of the legislation it administers, notably:
  - Resource Management Act 1991 – “sustainable management” (section 5 (2), which is defined as “*managing the use, development, and protection of natural and physical*

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<sup>1</sup> Straterra represents NZ minerals production, exploration, research, services, and support.

<http://www.straterra.co.nz/about/>

<sup>2</sup>

[http://www.legislation.govt.nz/bill/member/2015/0011/latest/DLM4684306.html?search=ta\\_bill\\_E\\_bc%40bc%40ur\\_an%40bn%40rn\\_25\\_a&p=1#DLM4684312](http://www.legislation.govt.nz/bill/member/2015/0011/latest/DLM4684306.html?search=ta_bill_E_bc%40bc%40ur_an%40bn%40rn_25_a&p=1#DLM4684312)

<sup>3</sup> [http://www.parliament.nz/en-nz/pb/legislation/bills/00DBHOH\\_BILL62501\\_1/environmental-protection-authority-protection-of-environment](http://www.parliament.nz/en-nz/pb/legislation/bills/00DBHOH_BILL62501_1/environmental-protection-authority-protection-of-environment)

*resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety*” (emphasis added), subject to a number of provisos;

- Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 – “sustainable management” (section 10 (2)), defined as “*managing the **use, development, and protection** of natural resources in a way, or at a rate, that enables people to provide for their economic well-being*” (emphasis added), subject to a number of provisos;
  - Hazardous Substances and New Organisms Act 1996 – section 4 sets out the purpose of the Act, which is “to **protect** the environment, and the health and safety of people and communities, by preventing or managing the adverse effects of hazardous substances and new organisms” (emphasis added).
7. From the above, it is clear that the EPA’s mandate already includes the consideration of “protection” among the range of management options for the environment and natural and physical resources within the statutes that it administers.
8. Turning to the Bill, which states:

**Section 4 Section 12 amended (Objective of EPA)**

- (1)In section 12(1)(b), after “obligations”, insert “; and”.
  - (2)In section 12(1), after paragraph (b), insert:
    - “(c)protects, maintains, and enhances New Zealand's environment.”
9. For the new section 12 (1) (c) to make any sense, the term “manage” in section 12 (1) (a) would have to mean something other than “protects, maintains and enhances”. But section 12 (2), via the legislation that the EPA administers, already provides for “manage” to include “protection” among a range of management options.
10. As to the concepts of “maintains” and “enhances” in the new section 12 (1) (c), these fall logically within the meaning of the term “protection”.
11. Therefore, section 4 of the Bill (introducing a new section 12 (1) (c) into the EPA Act) is a senseless and useless provision because:
- it is redundant – the ideas it contains are already provided for in legislation;
  - it would create confusion for the EPA over the meaning of “manage”; and
  - it would make it impossible for the EPA to further the objectives and purposes of the legislation it administers.
12. The proposed section is, therefore, effectively incapable of meaningful and consistent interpretation, such that it will be left to the courts of the day, and the persuasiveness of individual applicants, to shape the law. That would be an unwarranted risk to take in

consideration of an Environment Court decision earlier this year<sup>4</sup>, and we dwell on this decision in some detail.

13. In *Ngati Kahungunu v. Hawke’s Bay Regional Council*, the Environment Court decided that the section 30 (1) (c) (ii) requirement under the RMA on regional councils on the “maintenance and enhancement” of water quality means exactly that and, furthermore, that a regional council cannot allow any practice in a plan that would lead to any degradation of water quality in any water body within the region. That decision ran counter to the initial implementation guidance to the National Policy Statement for Freshwater Management 2014<sup>5</sup>, which provides for some degradation in water quality, within limits, in a water body, provided that overall the water quality in the region or relevant “management unit” within the region is maintained or improved. (The guidance has since been amended on this aspect to reflect the court decision.)
14. This decision means that, in practice, no new economic development, or expansion of existing economic development can be approved, that would lead to any localised adverse effect on water quality of any magnitude. That could include a minute increase in water temperature at a place, e.g., as a result of hydroelectricity development. This decision is now common law and creates precedent for everywhere in New Zealand. It basically turns all waterways in New Zealand into national parks.
15. To conclude, the implication of the *Ngati Kahungunu v. HBRC* Environment Court decision is that if the EPA (Protection of the Environment) Amendment Bill were to proceed, the new section 12 (c) of the EPA Act would mean that no nationally-significant projects on land could ever be approved by the EPA, and no application for a marine consent could ever be approved in the oceans. That would be contrary to the purpose of the RMA and the EEZ Act.

## RECOMMENDATION

16. Straterra recommends the Local Government & Environment Select Committee to agree to propose that the Environmental Protection Authority (Protection of Environment) Bill proceed no further, on the basis that:
  - a) the proposed amendment to the EPA Act is redundant – the ideas it contains are already provided for in legislation;
  - b) it would create confusion for the EPA over the meaning of “manage”;
  - c) it would make it impossible for the EPA to further the purposes of the legislation it administers; and that
  - d) litigation to resolve the above would not necessarily lead to any resolution.

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<sup>4</sup> *Ngati Kahungunu Iwi Inc v HBRC* (2015 NZEnvC 50)

<sup>5</sup> This is non-statutory guidance that interprets a statutory instrument.