SUBMISSION

STRATERRA™
NATURAL RESOURCES OF NEW ZEALAND

Submission to MINISTRY FOR THE ENVIRONMENT on

"ACTIVITY CLASSIFICATIONS UNDER THE EEZ ACT (SEP 2013)"

INTRODUCTION

1. Straterra[1] welcomes the opportunity to submit on the Ministry for the Environment discussion document "Activity Classifications under the EEZ Act"[2]. We confine our submission to the "discharge of sediments and/or tailings from mineral operations".

2. As submitted previously[3], New Zealand's Exclusive Economic Zone and Continental Shelf – the EEZ – presents major opportunities for the New Zealand economy and the resource sector: in ironsands, rock phosphate, precious and base metal deposits in seabed massive sulphides, as well as oil & gas, metal nodules and crusts, and methane hydrates. While current mining is restricted to oil & gas, there is significant potential in the other areas mentioned.

3. In preparing this submission, Straterra consulted with Chatham Rock Phosphate, Neptune Minerals, Trans-Tasman Resources, and the National Institute of Water and Atmospheric Research. Our membership also includes NZ Steel Mining, Ironsands Offshore Mining, GNS Science, and law firms and consultancies who act for the sector. We also work with other marine resource interests.

4. Straterra submits on the principle that resource management decisions must strive for an appropriate balance between economic, social and environmental objectives, and be based on sound information, where baseline data allows. 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.

5. We appreciate the opportunity during the consultation period to meet with Ministry officials, to share information, and discuss issues of interest and concern to both parties. Straterra welcomes the opportunity for further engagement with officials as the regulations are developed.

[1] Straterra represents more than 90 % by value of NZ minerals production and exploration on land and in the oceans, as well as research, services, and support http://www.straterra.co.nz/About+Straterra
[2] http://www.mfe.govt.nz/publications/oceans/managing-our-oceans/activity-classification-under-the-eez-act.html
[3] http://www.straterra.co.nz/uploads/files/straterra_submission_eez_regulations_june_2012_final.pdf

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EXECUTIVE SUMMARY/DISCUSSION

General

7. When the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 was in development, discharges and dumping were flagged as a subject for regulation. The idea always was that these matters would be transferred from the Maritime Transport Act 1994, and brought into the EEZ regime. That would provide also an opportunity to review the existing arrangements. That is the context for the Minister for the Environment's Supplementary Order Paper to amend the EEZ Act, and the associated discussion document.

8. While industry is satisfied with the existing regime, the transferral of discharges and dumping matters into the EEZ regime is supported, *provided* it leads to further simplifying and streamlining of regulation, while meeting the purpose of the EEZ Act.

9. That said, Straterra does have concerns over the risk of regulatory duplication, inappropriate conditions being placed on permitted activities, the workability of the permitted activities regulations, and over the transitional arrangements. In our view, these are technical and logistical issues, and are capable of straightforward resolution.

Definitions

10. It is proposed to separate out from the definition of "dumping", sediment and tailings from minerals prospecting, exploration and mining, and place this group into the category of "discharges of harmful substances". Leaving to one side for now (refer to paras. 14ff) whether or

not these discharges are in fact "harmful", this classification is acceptable in principle. At issue are the proposed regulatory processes for these discharges.

Discharges in relation to seabed mining

11. Potentially, mineral mining-related discharges for seabed mining are considered already under the EEZ Act (refer to Appendix 1 where excerpts of the Act are reproduced). Section 59 (2) (a) requires the EPA to take into account "*any* effect" of allowing an "activity" (emphasis added). Under section 20 (2) (e) and (g), an activity can include any disturbance of the seabed that is "likely to have an adverse effect" on the seabed or on marine species and habitats, which notionally could include minerals-related discharges.

12. This introduces confusion as to whether:

    a) Discharges will be considered twice under separate marine consent applications, which raises a risk of double jeopardy, in which consent is gained under one process and not the other, as well as unnecessary and costly regulatory duplication;

    b) Discharges would be considered under its own marine consent application, separate from a marine consent application for all other matters, which, like the above interpretation, raises the risk of the processes not being aligned, increasing costs to the applicant in time and resources, and the investment risk, for no additional benefit to society; or

    c) Discharges would be included within the marine consent process for the mining operation, which would be Straterra's preference, having the attraction of simplicity.

13. If the Government insists on (b), this would be workable if a single environmental impact assessment covered both applications, and if both applications were processed and heard simultaneously. The precedent for that is the Resource Management Act 1991 where multiple applications are commonplace. We recommend amending the EEZ Act to enable the two processes to be dovetailed.

Discharges in relation to permitted activities

14. Returning to the issue of "harm" in relation to discharges, this has to do with the scale, intensity and duration of effects. We contend that discharges in connection with prospecting, exploration and marine scientific research – all of which are agreed to be permitted activities – would have effects that are less than minor.

15. Trans-Tasman Resources will be submitting evidence to that effect, which shows an example where very small turbid discharges[4] from exploration drilling into the seabed in South Taranaki would disperse to a likely level of less than 10 mg/litre within minutes, that cumulative effects are unlikely because of the low density of drill core spacing, and that the level of effect is negligible in its own right and when compared to natural disturbance of the seabed, with effects on the water column, e.g., waves and currents.

16. To conclude, a discharge can only be harmful, by any reasonable definition, if the adverse effects, if unmanaged, are more than minor, or where cumulative effects can be demonstrated. Logically, that may be or would be the case for seabed mining, however, not for permitted activities to do with research, prospecting and exploration. On our reading, that is broadly the approach taken in the discussion document (page 18), whereby such discharges would be treated as part of the related permitted activity, although potentially subject to conditions, which are yet to be determined.

17. The worst-case scenario for industry would be to classify discharges from a permitted activity as a discretionary activity because that would lead to prospecting, exploration and marine scientific research becoming, in effect, discretionary activities that would then require a publicly-notified marine consent process. As submitted previously, that would stymie or prevent investment, as well as discriminate against New Zealand scientists in favour of foreign scientists, because the cost of gaining marine consents would outweigh the projected returns (if there were in fact to be any returns) that could result from these activities, when the risks of gaining a return on investment are considered.

18. Industry would prefer no conditions attached to the permitted activity, or as few as practicable, as being fit for purpose; however, we accept the regulator may adopt a different view. We suggest continued engagement with industry in considering what conditions, if any, should be applied, as officials develop proposals in this area.

Notification and reporting requirements for permitted activities

19. Care in drafting of the regulations will need to be taken to ensure that operators carrying out permitted activities are not landed with a requirement to carry out two sets of notification and reporting, one for the activity, i.e., research, prospecting or exploration, and another to cover any discharges. Our reading of the discussion document (page 18) is that avoidance of regulatory

[4] These discharges would be limited to several cubic metres of turbid seawater, likely to contain less than 100 mg/litre of suspended sediment

duplication is the Ministry's intent. Otherwise, operators will be lumbered with unnecessary paperwork, with no benefit to anyone.

20. Arguably, the current requirements are already cumbersome, in a number of ways, and require review and amendment.

21. In recent research voyages by the National Institute of Water and Atmospheric Research, the EPA required repeated notification to more than 100 iwi and hapu for every voyage. It is legitimate to wonder who benefits from this.

22. This situation also places the small New Zealand research fleet at a substantial unfair disadvantage, compared to foreign research vessel operators undertaking research for "wholly government purposes", in New Zealand waters[5], who are not required to provide notification of their activities to the same degree.

23. Weekly updates of permitted activities are required to be sent from sea to the EPA during research voyages. Given that NIWA undertakes up to 20 research voyages a year within the EEZ, the added workload to all parties outweighs – in our view - any possible benefits of such frequent communication.

Transitional arrangements

24. The Ministry will be aware that Trans-Tasman Resources and Chatham Rock Phosphate, and, perhaps, other companies, may be lodging applications for marine consents before the regulations on discharges enter into force. This possibility is inadequately covered on page 23 of the discussion document. Changes are needed to avoid regulatory duplication, which, unaddressed, would be inefficient and run the risk of inappropriate and unfair outcomes.

25. While the proposed transitional arrangements seek to recognise existing discharge management plans, and pending applications, this does not address the issue for Trans-Tasman Resources or Chatham Rock Phosphate. Their proposed activities are not discharges of harmful substances under the current regime; they will only become such under the new regime because of the proposed extension to cover sediments and tailings from minerals operations. These companies have no ability to apply in the interim.

26. Even if their discharges were covered by the Maritime Transport Act 1994 Marine Protection Rules Part 200 definition of "harmful substance", there is no point in these companies applying

[5] Refer to section 9 (1) (e) of the EEZ Act

for a permit to Maritime New Zealand under the existing regime. This is because a resulting approved discharge management plan only has a term of three years. No investor would invest the required level of capital if the discharges component had such a short life.

27. Also, because of the EEZ Act section 59 (2)'s requirement for any environmental effect to be considered in the EPA's consideration of an application for a marine consent, there is the high risk or likelihood of these companies having all or some of the same matters considered twice during the two marine consenting processes (ie. the discharges associated with their operations will be considered as part of the comprehensive marine consent application, but they will then need to apply again for a marine discharge consent once the new regime comes into effect). In addition to the obvious inefficiency, a risk of double jeopardy arises – of the EPA approving discharges in one application but taking a different view on the other application. This would be obviously unworkable, as well as bad regulation.

28. This places affected companies into a regulatory "limbo land", which is of great concern because of their need to manage investor expectations, and the timing of their projects, which will involve staged commitments of very considerable sums of risk capital.

29. We recommend an amendment to the EEZ Act to address this situation:

    a. To the extent that an application for a marine consent is to be lodged after the changes come into effect, the regime should enable consideration of all matters under a single application process;

    b. Where an application for a marine consent is made before the changes come into effect (and that application covers the effect of discharging), the granting of a marine consent should remove the need for any further marine discharge consent. This would provide certainty for industry participants, result in a workable solution for parties wishing to obtain a marine consent in the interim, and would allay investors' legitimate concerns.

30. The consolation, although a poor one, would be for Cabinet to make a decision on the process to be followed. We have reservations about this because, as matters stand, New Zealand ranks relatively poorly internationally[6] for certainty of environmental regulation, 75th, compared to a ranking of 36th for certainty of regulation generally. As a nation, we need to do better (while acknowledging the Government's efforts to improve resource management and environmental

[6] Fraser Institute 2012 -2013 Survey of Mining Companies
http://www.fraserinstitute.org/uploadedFiles/fraser-ca/Content/research-news/research/publications/mining-survey-2012-2013.pdf

legislation). The need for clear and workable transition arrangements must be seen in this context.

RECOMMENDATIONS

31. Straterra recommends the Ministry for the Environment to:

a) Note Straterra's broad support for the proposed regulatory approach to discharge of sediments and/or tailings from mineral operations, provided it leads to further simplifying and streamlining of regulation, while meeting the purpose of the EEZ Act;

b) Note Straterra's understanding of the Ministry's rationale for exclusion from the definition of "dumping", of sediment and tailings arising from minerals operations, and their inclusion in the definition of discharges of harmful substances, subject to Rec. (g);

c) Agree that section 59 (2) (a) of the EEZ Act requires the EPA to take into account "any effect" of allowing an "activity", which under section 20 (2) (e) and (g) includes disturbance of the seabed and through that on marine species and habitats, which could include minerals-related discharges;

d) In relation to Rec. (c), note Straterra's preference for discharges to be considered within a single marine consent process for a proposed mining operation, to avoid the risk of operators having to apply twice on matters in relation to discharges, under separate marine consent processes;

e) In relation to Recs. (c) and (d), note Straterra's concern that the Government may consider that discharges affecting the water column will need to be considered separately from sections 59 and 20, and would be likely to require a separate marine consent to the rest of the mining operation, in the case of seabed mining;

f) In the event of two marine consents being required, agree that one process should address discharges, and the other, all matters excluding discharges, to avoid the risk of double jeopardy and unnecessary regulatory duplication, and agree to amend the EEZ Act to provide for the two marine consent applications (refer to Recs. (c), (d) and (e)) to be considered and processed at the same time;

g) Agree that discharges in connection with prospecting, exploration and marine scientific research would be unlikely to be harmful, and/or likely to have adverse effects that are less than minor;

h) In relation to Rec. (g), agree to continue to engage with industry on the nature of any discharges in connection with permitted activities, in assessing whether or not any additional conditions are required for these activities;

i) Agree to ensure that the discharge aspect of a permitted activity will be considered as part of that permitted activity, and not as a separate matter, for workability of the regime;

j) Further to Rec. (i), agree to ensure care when drafting the regulations to ensure that operators carrying out permitted activities will have only one set of requirements for compliance;

k) Agree to continue engaging with industry on the implementation of the permitted activities regulations, with a view to reviewing the regulations to improve workability, with particular attention to timeframes for, and the nature of notification and reporting;

l) Note that Trans-Tasman Resources and Chatham Rock Phosphate may be lodging applications for marine consents before the regulations on discharges enter into force, introducing a requirement for robust and workable transitional provisions;

m) Agree there is no point in TTR and CRP, or any other affected company, applying for a permit to Maritime New Zealand because these matters would be considered again under the EEZ regime, and because MNZ permits have a duration of only three years, which does not provide adequate certainty for investors;

n) In relation to Recs. (l) and (m), agree to amend the EEZ Act to provide specifically that where the effect of discharges has already been dealt with in a marine consent application, and that application is made before the discharge regulations come into force, no subsequent marine discharge consent should be required; and

o) Note Straterra's view that the alternative to Rec. (n) of a Cabinet decision would be better than nothing, however, less than ideal, in terms of answering to legitimate investor expectations.

APPENDIX 1: Excerpts of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012

Section 59 Environmental Protection Authority's consideration of application (2) The EPA must take into account (a) **any effects** on the environment or existing interests of allowing the **activity**, including … " (Emphasis added).

Section 20 Restrictions on activities in exclusive economic zone and in or on continental shelf (1) No person may undertake an activity described in subsection (2) in the exclusive economic zone or in or on the continental shelf unless the activity is a permitted activity, authorised by a marine consent, or authorised by section 21,

(2) The **activities** referred to in subsection (1) are—

(a) the construction, placement, alteration, extension, removal, or demolition of a structure on or under the seabed:

(b) the construction, placement, alteration, extension, removal, or demolition of a submarine pipeline on or under the seabed:

(c) the placement, alteration, extension, or removal of a submarine cable on or from the seabed:

(d) the removal of non-living natural material from the seabed or subsoil:

(e) the disturbance of the seabed or subsoil in a manner that is likely to have an adverse effect on the seabed or subsoil:

(f) the deposit of any thing or organism in, on, or under the seabed:

(g) the destruction, damage, or disturbance of the seabed or subsoil in a manner that is likely to have an adverse effect on marine species or their habitat.

(3) No person may undertake an activity described in subsection (4) in the waters of the exclusive economic zone unless the activity is a permitted activity, authorised by a marine consent, or authorised by section 21, 22, or 23.

(4) The activities referred to in subsection (3) are—

(a) the construction, mooring or anchoring long-term, placement, alteration, extension, removal, or demolition of a structure or part of a structure:

(b) the causing of vibrations (other than vibrations caused by the normal operation of a ship) in a manner that is likely to have an adverse effect on marine life:

(c) the causing of an explosion.

(5) However, this section—

(a) does not apply to lawful fishing for wild fish under the Fisheries Act 1996; and

(b) does not affect the following activities that are regulated or prohibited by the Maritime Transport Act 1994: (i) the dumping or storing of radioactive waste or other radioactive matter; or (ii) the storing of toxic or hazardous waste; or (iii) the dumping of waste or other matter. (Emphasis added.)